NIOH PRESENTATION: 18 MAY 2021

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Source:
Labour Library/Industrial Law Journal/Law Reports/Chronological listing/2020/July/Association of Mineworkers & Construction Union v Minister of Mineral Resources & Energy & Others (2020) 41 ILJ 1705 (LC)

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Association of Mineworkers & Construction Union v Minister of Mineral Resources & Energy & Others (2020) 41 ILJ 1705 (LC)

Citation (2020) 41 ILJ 1705 (LC)

Case No J427/2020

Court Labour Court

Judge Van Niekerk J

Heard April 29, 2019; April 30, 2019; May 1, 2020

Judgment May 4, 2020

Counsel *Adv A Dodson SC* (with *Adv C Bishop*) for the applicant.
Adv M A Wesley (with *Adv N Mabvungua* and *Adv J Chanza*) for the first, second and third respondents.
Adv C D A Loxton SC (with *Adv J L Gildenhuys SC* and *Adv P J Daniell*) for the fourth respondent.
Adv L Siyo (with *Adv L Phasha*) for the amicus curiae.

Annotations No annotations to date

Flynote : Sleutelwoorde

Costs—Labour Court—Section 162 of LRA 1995—Guiding principle—Effect of costs order on ongoing relationship between stakeholders—Where high degree of cooperation necessary for implementation of court order, court not granting costs order that would sour relationship.

Health and safety—Covid-19—Pandemic both occupational health and public health issue—Section 9 of Mine Health and Safety Act 29 of 1996 applicable.

Health and safety—Mine Health and Safety Act 29 of 1996—Covid-19—Decision of Chief Inspector of Mines not to require employers to prepare code of practice on Covid-19 viral pandemic in terms of s 9(2) and not to enact guidelines in terms of s 9(3)—Decision unreasonable—Decision reviewed and set aside.

Health and safety—Mine Health and Safety Act 29 of 1996—Covid-19—Pandemic both occupational health and public health issue—Section 9 applicable to Covid-19 response.

Promotion of Administrative Justice Act 3 of 2000—Administrative action—Decision of Chief Inspector of Mines—Section 6(2)(h)—Test of reasonableness—Decision of chief inspector not to require employers to prepare code of practice on Covid-19 viral pandemic in terms of s 9(2) of Mine Health and Safety Act 29 of 1996 and not to enact guidelines in terms of s 9(3) unreasonable—Decision reviewed and set aside.

Headnote : Kopnota

On 15 March 2020, consequent on the Covid-19 global pandemic, a national state of disaster was declared in terms of the Disaster Management Act 57 of 2002. A number of measures to limit the spread of the Covid-19 virus were put in place by way of regulations issued under the DMA, among them a 21-day national lockdown with effect from 26 March 2020 (later extended to 30 April 2020), during which only essential services (including some mines)

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were permitted to operate. Later amended DMA regulations, enacted on 16 April 2020, in effect exempted all mines from lockdown regulations, subject to certain conditions. On 29 April 2020, a new DMA regulation was issued in terms of regulation 10(8) of the regulations issued in terms of s 27(2) of the DMA, repealing the regulations referred to above, but in respect of the mining industry preserving the concept of reduced operations at a level of no more than 50%, with the Minister of Mineral Resources & Energy (DMRE minister) afforded the right to direct that operations be conducted at greater capacity. It was estimated that some 250,000 mineworkers would return to work (and to communities adjoining the mines in which they were employed) as mining operations resumed and returned to full production. Prior to the declaration of the national disaster, the Mining Occupational Health & Safety Committee (MHSC) met to address the implications presented by Covid-19 for the mining industry. The MHSC resolved to prepare guiding principles, as well as a guidance note through the Mining Occupational Health Advisory Committee. The MHSC, a statutory body established in terms of the Mine Health and Safety Act 29 of 1996, comprised a tripartite board with the Chief Inspector of Mines as chair. The MHSC's main purpose was to advise the minister on occupational health and safety legislation and the improvement and promotion of occupational health and safety in the mining industry. The applicant union, AMCU, a member of the MHSC, was represented at a meeting on 13 March 2020 at which the MHSC appeared to have taken the position that Covid-19 was a public health rather than an occupational health issue as contemplated in the MHSA. On 15 March 2020, the Minerals Council disseminated information to its members and adopted what subsequently became a ten-point plan to manage the spread of the virus responsible for Covid-19.

On 26 March 2020, the DMRE minister issued guiding principles to employers in the industry, which set out the basis for a risk-based approach to limit the spread of Covid-19. Although AMCU stated that it did not receive the guiding principles until 16 April 2020, this was improbable as AMCU had commented on the proposed guiding principles and contributed in writing to the formulation of the draft. AMCU criticised the department for unilaterally drafting a document for public consumption, without prior consultation with AMCU and other stakeholders. It also objected to the department's insistence on holding physical meetings as highly irresponsible. By 12 April 2020, matters became litigious and, despite an invitation by the minister, AMCU refused to participate in a meeting with all other stakeholders in the industry.

On 23 April 2020, and in response to the president's announcement that the country would move to a new phase of lockdown with effect from 1 May 2020, the chief inspector issued a communiqué for distribution to all mines dealing with health and safety issues arising from the restarting of operations after the period of shutdown generally, as well as measures to be taken to prevent the spread of Covid-19. On 29 April 2020, the DMRE minister issued directions on measures to address, prevent and combat the spread of Covid-19 and requiring every employer conducting mining operations and activities in connection therewith to implement appropriate measures to protect the health and safety of workers in respect of Covid-19.

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In proceedings before the Labour Court, AMCU relied on s 6 of the Promotion of Administrative Justice Act 3 of 2000 to contend that the chief inspector's decision not to invoke s 9 of the MHSA failed to meet the test of reasonableness standard established by s 33 of the Constitution, as it found expression in s 6(2)*(h)* of PAJA. Central to the case was AMCU's contention that, despite the raft of regulatory measures at the disposal of the DMRE minister and

the chief inspector, the measures that had been adopted were inadequate to ensure that mineworkers returned to a safe working environment, and that the communities in which they resided were safe. AMCU did not oppose the return to work, nor did it seek to disrupt it. AMCU stated that the purpose of bringing the application was to establish a detailed, national standard to protect the health and safety of its members through binding obligations as opposed to the existing broad regulatory measures, supplemented by voluntary measures adopted by discrete mining operations. AMCU did so by seeking to review and set aside the chief inspector's decisions not to enact guidelines in terms of s 9(3) of the MHSA.

Before the court it was accepted that there were almost half a million mineworkers in South Africa, and it was not seriously disputed that mineworkers were particularly vulnerable to Covid-19 for two reasons — they operated in confined spaces where social distancing was difficult or impossible and they were widely affected by lung diseases, including the hidden pandemics of pulmonary tuberculosis and pneumoconiosis. HIV/AIDS was also more prevalent amongst mineworkers than the general population. These facts rendered mineworkers particularly vulnerable to serious illness or death from Covid-19. The amicus curiae submitted argument in support of the interests of mining affected communities. Again, it was not seriously disputed that the vulnerability of mineworkers in turn rendered the communities in which they lived vulnerable to Covid-19.

All parties agreed that there was a need for urgent, detailed, binding national standards to guide employers and protect mineworkers against the hazards presented by Covid-19 to return to work in the mining industry. AMCU and the DMRE minister and the chief inspector disagreed only about which statutory mechanism should be employed to achieve that purpose.

The court took the view that the distinction that the DMRE sought to draw between public health and occupational health issues was a false dichotomy. In other words, the Covid-19 pandemic presented both a public health concern and an occupational health concern.

The court found further that, without some indication to the contrary, 'any matter affecting the health' of mineworkers included the Covid-19 pandemic and that s 9(2) of the MHSA accordingly applied. The court went on to find that applying s 9(2) and (3) to the circumstances of the Covid-19 pandemic was entirely consistent with the purpose of the MHSA generally and with the particular objects identified in s 1 of the MHSA. A code of practice under s 9 and the enforcement measures established by the MHSA provided an appropriate mechanism to address Covid-19 hazards effectively, with due deference to the position of particular mines and with appropriate degrees of flexibility. The evidence overwhelmingly indicated that a single, national and enforceable standard, with the build-in flexibility that s 9 permitted, was necessary in the current circumstances.

The court accordingly found that the chief inspector's failure to appreciate the concurrence of public and occupational issues presented by Covid-19 in the mining industry, and his decision not to invoke s 9 of the MHSA in the face of the profound threat to occupational health and safety and the inadequacy of the measures designed to address it, led to an unreasonable result or outcome, and his decision thus stood to be reviewed and set aside.

The parties agreed that if the chief inspector's decision was found to fall short of the reasonableness threshold established by s 6 of PAJA, the appropriate remedy was one of substitution, a remedy ordinarily reserved for exceptional circumstances (s 8(1)*(c)*(ii)*(aa)* of PAJA). They also agreed on the terms of the substitution, which formed the basis of the order granted by the court.

In relation to costs, the court examined the provisions of s 162 of the LRA 1995 in the context of the prevailing case law and considered that the factor that was most significant in this case was the prejudice that an order for costs might have on the relationship between the stakeholders. The court found that the degree of cooperation (rather than confrontation) that would be necessary to give effect to the order may well be undermined should relationships between the parties be soured by an order for costs.

In the circumstances the court reviewed and set aside the chief inspector's decisions; granted the draft order agreed by the parties; and ordered that the order be published in the *Government Gazette.* It also ordered each party to pay its own costs.

Case information

Application to the Labour Court for administrative review of decisions by the Chief Inspector of Mines. The facts and further findings appear from the reasons for judgment.

Cases Considered

Annotations:

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others 2004 (4) SA 490 (CC) (applied)

Biowatch Trust v Registrar Genetic Resources & others 2009 (6) SA 232 (CC) (considered)

Long v SA Breweries (Pty) Ltd & others (2019) 40 *ILJ* 965 (CC) (referred to)

Member of the Executive Council for Finance, KwaZulu-Natal & another v Dorkin NO & another (2008) 29 *ILJ* 1707 (LAC) (referred to)

National Union of Mineworkers v East Rand Gold & Uranium Co Ltd 1992 (1) SA 700 (A); (1991) 12 *ILJ* 1221 (A) (referred to)

R v Hugo 1926 AD 268 (referred to)

Zungu v Premier of the Province of KwaZulu-Natal & others (2018) 39 *ILJ* 523 (CC) (referred to)

Statutes Considered

Constitution of the Republic of SA 1996 s 33

Disaster Management Act 57 of 2002 s 27(2)

Labour Relations Act 66 of 1995 s 157(2), s 162

Mine Health and Safety Act 29 of 1996 s 1, s 9, s 9(1), s 9(2), s 9(3), s 9(5), s 49(6), s 55, s 76, s 82, s 91(1B)*(c)*, s 91(1C)

Promotion of Administrative Justice Act 3 of 2000 s 6, s 6(2)*(h)*, s 8(1)*(c)*(ii)*(aa)*, s 33

Adv A Dodson SC (with *Adv C Bishop*) for the applicant.

Adv M A Wesley (with *Adv N Mabvungua* and *Adv J Chanza*) for the first, second and third respondents.

Adv C D A Loxton SC (with *Adv J L Gildenhuys SC* and *Adv P J Daniell*) for the fourth respondent.

Adv L Siyo (with *Adv L Phasha*) for the *amicus curiae*.

Judgment reserved.

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Judgment

Van Niekerk J:

Introduction

[1] On 1 May 2020, I made the following order:

'It is ordered that:

1 The second respondent's decisions not to —

Van Niekerk J

1.1 require employers to prepare and implement a code of practice on the Covid-19 viral pandemic present and spreading in South Africa in terms of s 9(2) of the Mine Health and Safety Act 1996 (MHSA); and

1.2 issue guidelines in terms s 9(3) of the MHSA,

are reviewed and set aside.

2 The second respondent is directed by no later than 18 May 2020 to publish a notice (the notice) in the *Government Gazette* —

2.1 containing guidelines in terms of ss 9(3) and 49(6) of the MHSA; and

2.2 in terms of s 9(2) thereof requiring employers (as defined in the MHSA) to prepare and implement a code or codes of practice, to mitigate the effect of the outbreak of Covid-19 on the health and safety of employees (as defined in the MHSA) and persons who may be directly affected by the disease at the mine.

3 Before publishing the notice in terms of para 2, the second respondent shall —

3.1 consult with the Mine Health & Safety Council, if constituted at the date of the order of this court;

3.2 elicit and consider all available expert advice, including but not limited to the expert opinions of Professors Ehrlich, Murray, Naidoo, Sonnenberg, and Rees contained in the applicant's papers;

3.3 meaningfully engage with the relevant trade unions, including but not limited to the applicant, relevant employer organisations, including but not limited to the fourth respondent, Mining Affected Communities United in Action, and such other interested persons as the second respondent may determine regarding the content of the guidelines;

3.4 consider the directions issued by the first respondent on 29 April 2020 in terms of regulation 10(8) of the regulations issued in terms of s 27(2) of the Disaster Management Act 57 of 2002 (the directions); and

3.5 after having completed the steps in para 3.1 to 3.4, but no later than 11 May 2020, publish the draft guidelines for public comment.

4 Pending the publication of the notice and the lodging of codes of practice with the chief inspector in terms of s 9(5) of the MHSA, and in addition to complying with any regulations and directions issued under s 27(2) of the Disaster Management Act (the regulations) —

4.1 all employers as defined in the MHSA shall, at a minimum, comply with the standard operating procedures, a copy of which is attached hereto marked A, to the extent that it is not inconsistent with the regulations, and as read with, but not limited by —

4.1.1 the directives issued by the second respondent to employers on 26 March 2020, a copy of which is attached marked B; and

4.1.2 paras 1 and 3*(a)* to *(d)* of the directions, a copy of which is attached marked C;

4.2 compliance with para 4.1 will be deemed to constitute compliance with para 2 of the directions.

5 In order to publicise this order, the first respondent shall publish a copy of this order in the *Government Gazette* within five days.* [1]

Van Niekerk J

6 Judgment on the question of costs is reserved.' [2]

[2] The order substantially reflects the terms of a draft order submitted by the parties' representatives after a hearing conducted by video conference using the Zoom platform. I am indebted to all of the parties and their representatives for their perseverance in seeking to narrow the issues in dispute. AMCU and the fourth respondent (the Minerals Council) reached consensus on paras 1 to 5 of the order, with the caveat that the Minerals Council took no position on the reviewability or otherwise of the chief inspector's decision (ie the subject of the ruling in para 1). As between them, the issue of costs is irrelevant, since AMCU sought costs only against the first respondent (the DMRE minister) and the second respondent (the chief inspector). The DMRE minister and chief inspector disputed that the chief inspector's decisions not to require employers to prepare and implement a code of practice and to issue guidelines in terms of s 9(3) of the MHSA are reviewable (ie they remained opposed to the granting of the relief reflected in para 1 of the order). However, the DMRE minister and the chief inspector agreed that if the court finds otherwise, paras 2 to 5 of the order constitute appropriate relief, but they disavow any liability for costs.

[3] The terms of the draft order reduced the issues for determination to first, whether the chief inspector's decisions are reviewable; and secondly, an order for costs that accords with the requirements of the law and fairness, the touchstones established by s 162 of the Labour Relations Act [3] (LRA).

[4] These are my reasons for the ruling reflected above, and my judgment on the issue of costs.

[5] The factual background is not contested, but it is relevant especially to the issue of costs. It was not seriously disputed that mineworkers are particularly vulnerable to Covid-19 for two reasons — they operate in confined spaces where social distancing is difficult or impossible. Whether in moving between entrances or exits to different parts of a mine, in underground cages, in transport to and from mines, or in mine dormitories, it is impossible for mineworkers to avoid contact with others who may be infected. The experts' report draws particular attention to the fact that mineworkers are widely affected by lung diseases, including the hidden pandemics of pulmonary tuberculosis and pneumoconiosis. HIV/AIDS is also more prevalent amongst mineworkers than the general population. Both these facts render mineworkers particularly vulnerable to serious illness or death from Covid-19.

Van Niekerk J

[6] The amicus curiae submitted argument in support of the interests of mining affected communities. Again, it is not seriously disputed that the vulnerability of mineworkers in turn renders the communities in which they live vulnerable to Covid-19. There are almost half a million mineworkers in South Africa. Any Covid-19 infection at a mine is likely to spread to the communities surrounding the mine where the mineworkers live. This risk is not new — mineworkers have long brought tuberculosis and HIV/AIDS from the mines back to their communities. Mining communities are also particularly vulnerable to Covid-19 because they too have a higher burden of lung disease and HIV/AIDS, precisely because they host mineworkers. These communities are often in rural, underserved areas of South Africa or neighbouring countries with poorer access to healthcare than other South Africans enjoy.

[7] Insofar as formal engagement between the parties is concerned, what follows is a brief recordal of events from mid-March to the date of the hearing. On 15 March 2020, consequent on the Covid-19 global pandemic, a national state of disaster was declared in terms of the Disaster Management Act 57 of 2002. A number of measures to limit the spread of the Covid-19 virus were put in place by way of regulations issued under the DMA, among them a 21-day national lockdown with effect from 26 March 2020 (later extended to 30 April 2020), during which only essential services (including some mines) were permitted to operate. Later amended DMA regulations, enacted on 16 April 2020, in effect exempted all mines from lockdown regulations, subject to certain conditions. These included a requirement that all collieries that supply Eskom must continue to operate at full capacity, and that other mining operations operate at a reduced 50% capacity during the lockdown, subject to certain conditions that relate to occupational health and safety. On 29 April 2020, a new DMA regulation was issued in terms of regulation 10(8) of the regulations issued in terms of s 27(2) of the DMA, repealing the regulations referred to above, but in respect of the mining industry

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preserving the concept of reduced operations at a level of no more than 50%, with the DMRE minister afforded the right to direct that operations be conducted at greater capacity. It is estimated that some 250,000 employees will return to work (and to communities adjoining the mines in which they are employed) as mining operations resume and return to full production.

[8] On 29 April 2020, the DMRE minister issued directions on measures to address, prevent and combat the spread of Covid-19. The direction reads as follows:

> '1 In implementing regulation 11K of the Regulations issued in terms of s 27(2) of the Disaster Management Act, and published in *Government Gazette* 43232, Government Notice No. 465 of 16 April 2020, every employer conducting mining operations and activities in connection therewith at a mine, must implement appropriate measures to protect the health and safety of workers in respect of Covid-19.

Van Niekerk J

> 2 The measures contemplated in paragraph 1 must be contained in a standard operating procedure which must be developed in consultation with organised labour or worker representatives at the mine.
>
> 3 In the development of the standard operating procedure contemplated in paragraph 2, the following must be applied:
>
> *(a)* Relevant guidelines issued by the World Health Organisation;
>
> *(b)* Directions and guidelines issued by the National Department of Health;
>
> *(c)* Guidelines issued by the National Institute of Communicable Diseases; and
>
> *(d)* The risk-based approach as embedded in the Guiding Principles of Prevention and Management of COVID 19 in the South African Mining Industry issued by the Chief Inspector of Mines of the Department of Mineral Resources and Energy on 26 March 2020.'

[9] Prior to the declaration of a national disaster, the Mining Occupational Health & Safety Committee (MHSC) met on 13 March 2020 to address the implications presented by Covid-19 for the mining industry. The MHSC resolved to prepare guiding principles, as well as a guidance note through the Mining Occupational Health Advisory Committee (MOHAC). The MHSC is a statutory body established in terms of the MHSA, and comprises a tripartite board with the chief inspector as chair. The MHSC's main purpose is to advise the minister on occupational health and safety legislation and the improvement and promotion of occupational health and safety in the mining industry. AMCU is a member of the MHSC and was represented at the meeting on 13 March 2020. At the meeting, the MHSC appears to have taken the position that Covid-19 is a public health rather than an occupational health issue as contemplated in the MHSA.

[10] On 15 March 2020, the Minerals Council disseminated information to its members and adopted what subsequently became a ten-point plan to manage the spread of the virus responsible for Covid-19. The Minerals Council has supported implementation of appropriate measures to prevent and mitigate the spread of the virus, while at the same time emphasising the significant disruptive effects of a partial or full closure of mining operations and the devastating economic impact that it would have. Indeed, the answering affidavit filed by the Minerals Council in these proceedings was instrumental in laying the foundations for the consensus represented by the draft order.

[11] On 17 March 2020, MOHAC met and began preparing the guiding principles. A representative of AMCU attended the meeting. A copy of the draft guiding principles was sent to AMCU on 19 March 2020. AMCU prepared a response and sent its proposals to the department on 20 March 2020.

[12] On 24 March 2020, AMCU attended a meeting with the DMRE minister. On 25 March 2020, the minister issued remarks in preparation for the lockdown. AMCU wrote to the minister on 26 March 2020 to express concerns regarding the divergence between the remarks and what had been discussed and agreed at the engagement on 24 March 2020.

Van Niekerk J

[13] On 26 March 2020, the DMRE minister issued guiding principles to employers in the industry. These are reflected in annexure B to the order, and set out the basis for a risk-based approach to limit the spread of Covid-19. AMCU states that it did not receive the final guiding principles until 16 April 2020. Given that the guiding principles had been issued some three weeks prior to that date, this is improbable. AMCU had commented on the proposed guiding principles and contributed in writing to the formulation of the draft, and I fail to appreciate why there was no follow-up to what was obviously an important development in the management of the risk presented by Covid-19.

[14] On 3 April 2020, the DMRE minister issued a statement in which he addressed the DMRE's ongoing efforts to ensure adherence to the regulations and the guiding principles and scheduled a further meeting of stakeholders in the industry, to be convened on 7 April 2020. AMCU was invited to the meeting. On 5 April 2020, AMCU's general secretary wrote to the minister recording the union's disappointment in the department's failure to respond particularly to its letter of 26 March 2020. The letter records that AMCU had criticised the department for unilaterally drafting a document for public consumption, without prior consultation with AMCU and other stakeholders. AMCU noted further that a physical meeting at the department's offices was highly irresponsible.

[15] AMCU tendered to attend the meeting remotely to avoid the risks associated with undertaking travel and attending lodge meetings. This was reiterated in a letter addressed to the minister on 8 April 2020. The meeting went ahead without AMCU in attendance on 7 and 8 April 2020. On 8 April 2020, the department responded to AMCU's letter dated 5 April 2020 in which it motivated the partial reopening of the industry, explained which categories of mines would be eligible to reopen and how inspectors would enforce the regulations

[16] By 12 April 2020, matters became litigious. On that date, AMCU instructed attorneys (not its attorneys of record in the present matter) regarding the lawfulness of exemptions to operate. On 13 April 2020, AMCU replied in detail to the department's letter dated 8 April 2020 and amongst other things, complained that the minister had failed to take any measures to stipulate or to make any binding directions.

[17] On 16 April 2020, letters were addressed to the minister by AMCU's current attorneys of record. There was no response to these letters. However, on the same day, the minister invited AMCU to attend a physical meeting on 17 April 2020. AMCU requested remote attendance at the meeting, which was to include the minister, the director-general, the chief inspector, the representatives of the Department of Labour and representatives of the Minerals Council and other trade unions, including NUM, UASA, NUMSA and Solidarity. The chief inspector states in the answering affidavit that AMCU refused to participate in the meeting because it was unwilling to hold discussions in the presence of other parties. AMCU disputes

Van Niekerk J

that it refused to attend the meeting and avers that it was unable to do so because it did not have access to the platform on which the video-conference was conducted. This much was conveyed to the department by way of a letter sent on 22 April 2020.

[18] On 23 April 2020, and in response to the president's announcement on 23 April 2020 that the country would move to a new phase of lockdown with effect from 1 May 2020, the chief inspector issued a communiqué for distribution to all mines dealing with health and safety issues arising from the restarting of operations after the period of shutdown generally, as well as measures to be taken to prevent the spread of Covid-19.

[19] AMCU relies on s 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). to contend that the chief inspector's decision not to invoke s 9 fails to meet the test of reasonableness standard established by s 33 of the Constitution, as it finds expression in s 6(2)*(h)* of PAJA. That standard was given content in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC), at para 44 of the judgment:

> 'Even if it may be thought that the language of s 6(2)*(h)*, if taken literally, might set a standard such that a decision would rarely if ever be found unreasonable, that is not the proper constitutional meaning which should be attached to the subsection. The subsection must be construed

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consistently with the Constitution and in particular s 33 which requires administrative action to be "reasonable". Section 6(2)*(h)* should then be understood to require a simple test, namely that an administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision-maker could not reach.' [4]

[20] In the same judgment, at para 45, the court listed the factors that ought properly to be taken into account in deciding whether a decision is reasonable:

> 'What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant in determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected.'

[21] Central to the present case is AMCU's contention that despite the raft of regulatory measures at the disposal of the DMRE minister and the chief inspector (including the declaration of a health hazard under s 76 of the MHSA and the formulation of a code of practice under s 9(3)), the measures that have been adopted and implemented under the DMA (and other voluntary measures), are inadequate to ensure that mineworkers return to a safe working environment, and

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that the communities in which they reside are safe. AMCU does not oppose the return to work, nor does it seek to disrupt it.

[22] AMCU states that the purpose of bringing this application is to establish a detailed, national standard to protect the health and safety of its members through binding obligations as opposed to the existing broad regulatory measures, supplemented by voluntary measures adopted by discrete mining operations. AMCU does so by seeking to review and set aside the chief inspector's decisions not to enact guidelines in terms of s 9(3) of that Act.

[23] In the result, all parties agree that there is a need for urgent, detailed, binding national standards to guide employers and protect mineworkers against the hazards presented by Covid-19 to return to work in the mining industry. AMCU and the DMRE minister and the chief inspector disagree only about which statutory mechanism should be employed to achieve that purpose.

[24] The parties do not seriously dispute that the chief inspector's decision not to act under s 9 of the MHSA constitutes administrative action. What is at issue (at least between AMCU and the DMRE minister and the chief inspector) is the reasonableness of the decision not to invoke s 9 of the MHSA; more specifically, whether the decision fails to meet the threshold for reasonableness that is set by s 6(2)*(h)* of PAJA.

[25] The DMRE minister and the chief inspector raise two primary grounds to oppose the relief sought. First, they submit that the Covid-19 pandemic is a public health matter rather than an occupational health issue; the fact that Covid-19 poses a risk to mineworkers because it is a communicable disease is not in itself sufficient to render it an occupational health issue. They contend the risk presented by Covid-19 remains best controlled through regulatory measures under the DMA. Secondly, the DMRE minister and the chief inspector contend that AMCU has not established that unless the chief inspector compels employers in the mining industry to implement mandatory codes of practice, employers will not protect the health of workers. Further, it is disputed that there is a need for a single detailed set of national standards, and that AMCU's claim to this effect is undercut by its acknowledgment that necessary measures to be put in place at individual mining operations ought to take into account the different circumstances that apply at each mine and each mining affected communities. Finally, they contend that even if AMCU's assertion that employers ought to be compelled to implement measures under s 9 is correct, the DMRE minister has issued directions requiring every employer carrying out activities to implement appropriate measures to protect the health and safety of workers, which measures must be contained in a standard operating procedure, developed in consultation with organised labour or worker representatives at the mine concerned. In other words, the existing regulatory regime is both sufficient and adequate. [5]

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[26] Section 9(1) of the MHSA provides that any employer may 'prepare and implement a code of practice on any matter affecting the health or safety of employees and other persons who may be directly affected by activities at the mine'. Section 9(2) obliges employers to prepare and implement a code of good practice 'if the Chief Inspector of Mines requires it'. If the chief inspector requires a code of good practice, that code 'must comply with guidelines issued by the Chief Inspector of Mines' (see s 9(3)).

[27] The chief inspector must consult with the Mine Health & Safety Council before issuing the guidelines, and must publish them in the *Government Gazette*. In terms of s 91(1B)*(c)* of the MHSA, read with s 91(1C) and s 55, a contravention of or failure to comply with any standard in any code of practice prepared in terms of s 9(2) also renders the employer liable to an administrative fine. The only time non-compliance with a standard is not an offence is when the standard exceeds the compulsory standards set in the chief inspector's guidelines, and the employer did comply with the compulsory standard in the guideline (see s 91(1C)).

[28] In my view, the distinction that the DMRE seeks to draw between public health and occupational health issues is a false dichotomy. That there is no bright line between public health and occupational health, especially in the context of mining, is confirmed in the further report of the experts. They expressly disagree with the averments made by the chief inspector. In particular, they state there is 'a fundamental overlap between' public health and occupational health. Public health concerns the entire population, and occupational health a subset of that population. Occupational health includes 'concern with the health of not only workers within their specific geographical workplaces, but also persons or populations affected directly or indirectly by operations in a particular worksite or across a particular industry'. In terms of s 9(2), the chief inspector can act with regard to '*any matter* affecting the health or safety of employees and other persons who may be directly affected by activities at the mine'. The medical experts' report makes clear that '[t]here is no clear or separating boundary between public health and occupational health in regard to Covid-19'. In other words, the Covid-19 pandemic presents both a public health concern and an occupational health concern. It is a risk for the entire nation. But it presents particular risks, and requires particular responses in workplaces generally, and in mines in particular. It is the occupational health element of the pandemic that AMCU seeks to compel the chief inspector to address. The fact that other responses are also required to address the other public health aspects of the pandemic, does not exclude the need for an occupational health response to the position on mines.

[29] Secondly, the argument is textually unsustainable. Section 9(2) refers to 'any matter affecting the health or safety of employees'. The word 'any' is, as Innes CJ held in *R v Hugo*, [6] 'upon the face of

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it, a word of wide and unqualified generality. It may be restricted by the subject-matter or the context, but *prima facie* it is unlimited'. Without some indication to the contrary, 'any matter affecting the health' of mineworkers includes the Covid-19 pandemic. The context is provided by the further definitions. 'Health' is defined as 'occupational health at mines'. Occupational health is defined as 'includes occupational hygiene and occupational medicine'. Occupational hygiene is defined as 'the anticipation, recognition, evaluation and control of conditions at the mine, that may cause illness or adverse health effects to persons'. And occupational medicine means: 'the prevention, diagnosis and treatment of illness, injury and adverse health effects associated with a particular type of work'. The state respondents admit that the Covid-19 pandemic poses a particular threat in the context of mining. They admit that the pandemic requires a response from the state and employers to prevent the transmission of the disease in mines, and from mines to mining communities. They therefore admit that the response must 'anticipat[e], recognis[e], evaluat[e] and control conditions at mines that may cause illness to persons', and must 'prevent, diagnos[e] and treat illness associated with mining'. That meets the definition of 'any matter affecting the health' of mineworkers. Section 9(2) applies.

[30] Third, the DMRE's stance is contrary to the purpose of the MHSA generally and s 9 in particular. Applying s 9(2) and (3) to the

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circumstances of the Covid-19 epidemic is entirely consistent with the purpose of the MHSA generally and with the following particular objects identified in s 1 of the MHSA: **6**

'*(a)* to protect the health and safety of persons at mines;
(b) to require employers and employees to identify hazards and eliminate, control and minimise the risks relating to health and safety at mines;
(c) to give effect to the public international law obligations of the Republic that concern health and safety at mines; …
(e) to provide for effective monitoring of health and safety conditions at mines;
(f) to provide for the enforcement of health and safety conditions at mines; …
(h) to promote —
(i) a culture of health and safety in the mining industry;
(ii) training in health and safety in the mining industry; and
(iii) co-operation and consultation in health and safety between the State, employers, employees and their representatives.'

Not applying s 9(2) or (3) (or s 76) will tend to defeat these objects of the MHSA.

[31] The second argument raised by DRME minister and the chief inspector is that AMCU has failed to make out a case on the facts to show that the health of workers is likely to be endangered if the chief inspector does not immediately act under s 9 of the MHSA. In any event, and which the DRME and chief inspector submit is dispositive of AMCU's claim, is that the minister has issued directions under regulation 10(8) that would have precisely the effect that AMCU

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contends will be achieved through the chief inspector acting under s 9.

[32] This submission must necessarily be evaluated by the facts as they fall to be determined from the papers, and the nature and status of the DMRE minister's directions. I deal first with the latter. The directions, which I have reproduced in para 8 above, and in contrast to the terms of the draft order, contemplate only the development of the standard operating procedure (SOP) by every employer at a mine. There is no time-limit for the implementation of the required SOP, and the direction does not establish a mechanism for interim protection, nor is there any provision for review by the chief inspector or any compliance mechanism. In comparison, a code of practice issued under s 9 will have the advantage of a single, national standard in the form of guidelines issued by the chief inspector, a standard that is set after consultation with representatives of employees and workers in the industry. Any code of practice is furthermore subject to review by the chief inspector, who may instruct an employer to review any code of practice within a specified period in the event that the code does not comply with a guideline or is otherwise inadequate to protect the health and safety of employees.

[33] In other words, s 9 provides a flexible method enabling the chief inspector to take measures in the interests of the health and safety of employees and other persons who may be directly affected by the activities of mining operations. It is self-evident that a code of practice under s 9 and the enforcement measures established by the MHSA provide an appropriate mechanism to address Covid-19 hazards effectively, with due deference to the position of particular mines and with appropriate degrees of flexibility. The parties did not seriously dispute that the flexibility embodied in s 9 is wholly appropriate in dealing with a disease about which there are gaps in scientific understanding, both as to its behaviour and as to the most appropriate way to suppress its spread, and which is expected to attenuate over time.

[34] In summary: public health and occupational health are not discrete categories. Covid-19 is both a public health issue, and an occupational health issue. It requires both a public health response, and an occupational health response in the specific context of mines. That is what s 9 is designed to achieve. Textually and purposively, it must apply to the risks posed to mineworkers by Covid-19. Fundamentally, administrative directions in the present circumstances are not meant to be a replacement for legislation and regulation.

[35] Turning then to the factors relevant to deciding whether an administrative decision is reasonable, I should reiterate the requirement that each case is circumstance dependent. There is no dispute that the circumstances of the present case are exceptional. In the face of a global pandemic, the spread of the Covid-19 virus on South Africa's mines has profound implications for the country, neighboring countries and especially for mineworkers and mining affected communities. The containment of the virus, especially in

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the context of a return to work after lockdown, is a matter that ought primarily to be guided by medical opinion. In the present case, the medical experts have made out a compelling case for measures that extend beyond those formulated and implemented by the DMRE. The fact that the Minerals Council, representative of employers in the mining industry, supports statutory intervention in the form of a code of practice issued under s 9 is also significant. The reasons given for the decision not to invoke s 9, as I have found, are based on premises that are unsustainable. The evidence discloses that the impact of the decision on the lives and well-being of those affected by it is profound. To the extent that the chief inspector's decision not to invoke s 9 is premised on the belief that Covid-19 is not an occupational health issue, that belief cannot be sustained. Further, the guidance note issued by the DMRE and the minister's directives issued on 29 April 2020 are not in themselves adequate to meet the defined purposes of the MHSA, which include the protection of the health and safety of patients at mines, the obligation on employers to identify hazards and to eliminate, control and minimise risks relating to health and safety, to provide for the effective monitoring of health and safety conditions at mines and to provide for the enforcement of health and safety measures at mines. While I appreciate that strategies for the management of the risk presented by Covid-19 is necessarily dynamic, the evidence overwhelmingly indicates that a single, national and enforceable standard, with the build-in flexibility that s 9 permits, is necessary in the current circumstances. Proper account ought to have been taken of that evidence.

[36] In my view, for the above reasons, the chief inspector's failure to appreciate the concurrence of public and occupational issues presented by Covid-19 in the mining industry, and his decision not to invoke s 9 of the MHSA in the face of the profound threat to occupational health and safety and the inadequacy of the measures designed to address it, led to an unreasonable result or outcome, and his decision thus stands to be reviewed and set aside.

[37] The parties agreed that if the chief inspector's decision is found to fall short of the reasonableness threshold established by s 6 of PAJA, the appropriate remedy is one of substitution, a remedy ordinarily reserved for exceptional circumstances (see PAJA s 8(1)*(c)*(ii)*(aa)*). They also agreed on the terms of the substitution, those reflected in paras 2 to 5 of the order. Again, the parties are to be commended for their reaching agreement on an appropriate remedy. As AMCU points out, this relief combines the best of both worlds. It provides immediate relief through an existing document already being used as a non-binding guide by many mines, and introduces amendments to the existing document based on the advice of five leading, internationally recognised, experts in the relevant fields. It allows full consultation and participation in developing a final document without sacrificing mineworkers' rights, health, safety and lives and those they live with. It is binding at a national level and based on the consensus of business and labour as to an appropriate section to apply.

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[38] Finally, I should mention that the amicus curiae was also a party to the draft order that was submitted after the hearing. Its submission drew attention to the plight of mining affected communities, and the risks posed by the return of large numbers of mineworkers. The amicus curiae recorded that it was satisfied that its interests had been adequately addressed by the terms of the draft order.

Costs

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[39] Judgment was reserved on the issue of costs. AMCU seeks an order for costs against the DMRE minister and the chief inspector, including the costs of the experts who provided the opinions annexed to the founding affidavit.

[40] In terms of s 162 of the LRA, the court has a broad discretion to make orders for costs according to the requirements of the law and fairness. That discretion must be exercised judicially, having regard to all of the relevant factors.

[41] In *Zungu v Premier of the Province of KwaZulu-Natal & others* (2018) 39 *ILJ* 523 (CC), the Constitutional Court said the following, at para 22 of the judgment:

> 'The correct approach in labour matters in terms of the LRA is that the losing party is not as a norm ordered to pay the successful party's costs.'

In *Long v SA Breweries & others* (2019) 40 *ILJ* 965 (CC); 2019 (5) BCLR 609 (CC), the Constitutional Court affirmed this approach:

> '[27] It is well accepted that in labour matters, the general principle that costs follow the result does not apply. … This principle is based on s 162 of the LRA, which reads:
>
> "(1) The Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness.
>
> (2) When deciding whether or not to order the payment of costs, the Labour Court may take into account —
>
> *(a)* whether the matter referred to the court ought to have been referred to arbitration in terms of this Act and, if so, the extra costs incurred in referring the matter to the court; and
>
> *(b)* the conduct of the parties —
>
> (i) in proceeding with or defending the matter before the court; and
>
> (ii) during the proceedings before the court."
>
> [28] The relationship between the general principle of costs and s 162 was considered and settled by this court in *Zungu*:
>
> "In this matter, there is nothing on the record indicating why the Labour Court and Labour Appeal Court awarded costs against the applicant. Neither court gave reasons for doing so. It seems that both courts simply followed the rule that costs follow the result. This is not correct. "'

[42] The judgment in *Zungu* makes reference to *Member of the Executive Council for Finance, KwaZulu-Natal & another v Dorkin NO & another* (2008) 29 *ILJ* 1707 (LAC) in which Zondo JP (as he then was) said the following:

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> 'The rule of practice that costs follow the result does not govern the making of orders for costs in this court. The relevant statutory provision is to the effect that orders of costs in this court are to be made in accordance with the requirements of the law and fairness. And the norm ought to be that costs orders are not made unless the requirements are met. In making decisions on costs orders this court should seek to strike a fair balance between on the one hand, not unduly discouraging workers, employers, unions and employers' organisations from approaching the Labour Court and this court to have their disputes dealt with, and, on the other, allowing those parties to bring to the Labour Court and this court frivolous cases that should not be brought to court.'

[43] In short, the discretion to be exercised in relation to orders for costs extends beyond the rule that costs follow the result (a rule that does not apply); the norm is that no order for costs should be made unless an order for costs can be justified by reference to the requirements of the law and fairness. This is so regardless of the particular statute under which the court exercises jurisdiction. Although s 162 is located in the LRA, the section concerned regulates the powers and jurisdiction of this court as an institution, irrespective of the particular legislation in terms of which any particular claim is brought. Insofar as a party's success in any proceedings remains a relevant factor, AMCU has achieved partial success in the present application, on the basis of what amounted in broad terms to a negotiated outcome.

[44] AMCU relied in particular on the *Biowatch* principle, established by the Constitutional Court in *Biowatch Trust v Registrar Genetic Resources & others* 2009 (6) SA 232 (CC). In terms of that principle, the general rule for an award of costs in constitutional litigation between a private party and the state is that if the private party is successful, the state should pay its costs, and if unsuccessful, each party should pay its own costs.

[45] While it is correct that the present case raised a constitutional issue (in the form of the right to just administrative action), the matters on which the judgment ultimately turned did not directly invoke the court's constitutional jurisdiction, which in terms of s 157(2) is a concurrent jurisdiction enjoyed with the High Court in respect of any alleged or threatened violation of the fundamental right arising from employment or labour relations and any executive or administrative act or conduct by the state in its capacity as an employer. Although AMCU sought to invoke this court's constitutional jurisdiction in respect of the constitutional validity of the regulations issued under the DMA and the DMRE minister's directions, the matter ultimately proceeded and was decided on the basis of the court's jurisdiction in terms of s 82 of the MHSA, which confers exclusive jurisdiction on this court to determine any dispute about the interpretation or application of any provision of the Act, except where the Act provides otherwise. That is not to say that the *Biowatch* principle is not relevant — rather, it is subsumed under the general requirements relating to the law and fairness as reflected in s 162 of the LRA.

[46] To the extent that the relevant authorities suggest that an order for costs is warranted primarily in cases where a party has acted frivolously or vexatiously in initiating or opposing proceedings in this court,

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the DRME has done neither. The case raises important issues of principle in circumstances where the policy environment continues to shift rapidly as more medical evidence becomes available. Indeed, in the present instance, it is not disputed that as at mid-March 2020, representatives of all of the social partners in the mining industry supported regulation in the form of the guiding principles issued on 26 March 2020, after the DMRE had consulted with them. While it is correct that AMCU was (and remains) a proponent of measures with a higher degree of enforceability, the guidelines represented a position broadly common to employer and worker representatives. To the extent that AMCU suggests that at the heart of its application is a contention that the DMRE has abdicated its responsibility to ensure the safety of mineworkers in the face of the Covid-19 pandemic and that the DMRE minister and departmental officials have acted only in the interests of mining companies, this is not an assertion that is borne out by the facts.

[47] To the extent that AMCU's complaint is that it has been excluded from participating in these processes and that its efforts have been 'rebuffed or ignored' this is not entirely correct. There is no dispute on the papers that the DMRE has been willing to engage with AMCU on the same basis as any other union represented in the industry. Regrettably, AMCU's position appears to be one in which it has declined to attend meetings convened by the minister. For example, in response to an invitation to attend a meeting at the DMRE on 7 April 2020, AMCU's response was, as I have recorded above, that 'we have no reason to believe that this will be a genuine consultative engagement. Rather, we believe, it will be another "rubber stamp" and "tick box" exercise by the DMRE to flout the rights of workers for the sake of the profits of the mining bosses'. This conclusion must necessarily be read in its context, one of increasing frustration at a lack of response to AMCU's demands, but it indicates an attitude that served to undermine the consensus-seeking process that the DMRE has implemented, and the efforts to reach consensus within a tripartite structure. A further meeting was set up on 22 April 2020, specifically to discuss AMCU's concerns. That meeting was attended by all the other representatives of organised labour, including NUM, UASA, Solidarity and NUMSA as well as representatives of the Minerals Council, the minister and senior officials of the department as well as the department of COGTA. AMCU declined to participate in this meeting, legitimately, on account of an insistence on a face to face meeting. But AMCU (which appears to be the only party not willing to attend a physical meeting) did ensure that adequate arrangements were made for its participation by video-conference or some other suitable alternative. Indeed, as early as 12 April 2020, four days after the DMRE had responded to AMCU's letter dated 5 April 2020, lawyer's letters became the preferred means of communication. By that stage, AMCU appears to have elected to refuse to participate in collective, consensus-seeking efforts to address the threat that

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Covid-19 poses to the mining industry and instead to pursue the option of litigation which, by its nature, is an adversarial process.

[48] None of these developments suggest that the DRME acted in an exemplary fashion in the course of its engagement with AMCU. The failure to respond to correspondence addressed to the DMRE by AMCU and its attorneys is inexplicable. In that correspondence, AMCU raised serious issues of concern, and was entitled to the courtesy of a considered response. In short, there were shortcomings on both sides.

[49] The factor that is perhaps more significant than any other in the present instance is that expressed as long ago as 1992, in *National Union of Mineworkers v East Rand Gold & Uranium Co Ltd* 1992 (1) SA 700 (A); (1991) 12 *ILJ* 1221 (A), where what was then the Appellate Division of the Supreme Court considered the prejudice that an order for costs might have on a relationship between collective bargaining partners. The court held that an order that each party pay its own costs was appropriate. The court (per Goldstone JA) said the following at 1243:

> 'Frequently the parties before the Industrial Court will have an on-going relationship that will survive after the dispute has been resolved by the court. A costs order, especially where the dispute has been a bona fide one, may damage that relationship and thereby detrimentally affect industrial peace and the conciliation process.'

[50] Although the present case is not concerned with collective bargaining, it is intimately concerned with the tripartite relationship that exists as between the state, employers and organised labour in the mining industry. The concerns expressed about the effect that an adverse order for costs might have on an ongoing relationship between collective bargaining partners is equally valid to relationships between the social partners. This is particularly so where the order granted in these proceedings, but for the two issues addressed in this judgment, is by and large the product of consensus. The terms of that order anticipate future and ongoing engagement by the DMRE with the social partners and the representatives of mining affected communities. The degree of cooperation (rather than confrontation) that will be necessary to give effect to the order and to the limit may well be undermined should relationships between the parties be soured by an order for costs.

Order

I make the following order: Each party is to pay its own costs.

Applicant's Attorneys: *Richard Spoor Inc.*

First, Second and Third Respondents' Attorney: *The State Attorney.*

Fourth Respondent's Attorneys: *ENS Africa Inc.*

Amicus Curiae's Attorneys: *Centre for Applied Legal Studies.*

1 The order was published in *Gazette* 43282 GenN 253/2020 dated 5 May 2020 — Eds.
2 The annexures are not reflected here. They are attached to the signed order issued on 1 May 2020.
3 66 of 1995.
4 Referring to *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd* [1999] 1 All ER 129.
5 Paragraphs 26 to 30 draw liberally on the applicant's heads of argument.
6 1926 AD 268.

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Edwards v National Coal Board
[1949] 1 All ER 743

Categories:	HEALTH; Health and safety at work: INDUSTRY: TORTS; Statutory Duty
Court:	COURT OF APPEAL
Lord(s):	TUCKER, ASQUITH AND SINGLETON LJJ
Hearing Date(s):	9, 10, 11, 21 MARCH 1949

Mine - Coal mine - Statutory duty - Breach - "Reasonably practicable to avoid or prevent breach" - Test - Coal Mines Act, 1911 (c 50), ss 49, 102(8).

By s 49 of the Coal Mines Act, 1911: "The roof and sides of every travelling road and working place shall be made secure . " and by s 102(8): "The owner of a mine shall not be liable to an action for damages as for breach of statutory duty in respect of any contravention of or non-compliance with any of the provisions of this Act if it is shown that it was not reasonably practicable to avoid or prevent the breach."

While going to his work along a travelling road in a coal mine owned by the defendants, a colliery timberman was killed by a fall of material from the side of the road, caused by a latent defect in the side of the road. Although some propping and lining of the road had been carried out at places where weaknesses appeared, the point at which the accident occurred had no form of artificial support. In a claim by the plaintiff, widow of the deceased man, for damages under s 49, the defendants contended that they were protected by s 102(8) in that it was not reasonably practicable for them to have avoided or prevented the insecurity of the road at the point in question, there being nothing to indicate the

existence of the defect, and to require them to support all roads in the mine would be to impose on them an impossible burden.

Held - (i) in considering whether or not it was "reasonably practicable to avoid or prevent" a breach of the statute within s 102(8) the mineowner must, before the occurrence of an accident, make a computation in which the quantum of risk run by the worker was placed in one scale and the sacrifice of the mineowner involved in the measures necessary to avert the risk (whether in money, time, or trouble) was placed in the other, and, if there were a gross disproportion between them-the risk being insignificant in relation to the sacrifice-the mineowner discharged the onus which was on him.

(ii) in the present case there had been a clear breach of statutory duty and the defendants had failed to discharge the onus which was on them under s 102(8).

Notes

As to civil liability of owner of mine for breach of statutory duty, see *Halsbury* Hailsham Edn, Vol 22, p 824, para 689; and for cases, see *Digest* Supp.

Cases referred to in judgments

Coltness Iron Co Ltd v Sharp [1937] 3 All ER 593, [1938] AC 90, 157 LT 394, *Digest* Supp.
Black v Fife Coal Co Ltd [1912] AC 149, 106 LT 161, 5 BWCC 217, 34 *Digest* 740, *1166*.
Wales v Thomas (1885), 16 QBD 340, 50 JP 516, *sub nom Walls v Thomas*, 55 LT 400.

Appeal

Appeal by the plaintiff from a decision of Hallett J at Monmouth Assizes dated 10 November 1948.

The plaintiff, the widow of a colliery timberman, claimed damages against the defendants under the Fatal Accidents Act, 1846, based on a breach of duty at common law and under s 49 of the Coal Mines Act, 1911, in respect of the death of her husband caused by a fall which occurred from the side of a travelling road at Marine Colliery, South Wales. The learned judge decided both issues in favour of the defendants, but provisionally assessed damages at £984. The Court of Appeal allowed the appeal and entered judgment for the sum as assessed. The facts appear in the judgments of Tucker and Singleton LJJ

Havers KC and *E Ryder Richardson* for the plaintiff.
Gardiner KC and *R G Micklethwait* for the defendants.

Cur adv vult

21 March 1949. The following judgments were delivered.

TUCKER LJ. On 6 November 1947, Joseph Edwards, a colliery timberman, was killed as a result of a fall which occurred from the side of a travelling road called Pitts' Level in No 2 Pit, Marine Colliery, South Wales, owned and occupied by the defendants. The plaintiff, his widow, brought this action claiming damages against the defendants under the Fatal Accidents Act, 1846, based on breach of duty at common law and under s 49 of the Coal Mines Act,

1911. The trial took place before Hallett J at Monmouth Assizes. The learned judge decided both issues in favour of the defendants, but assessed the damages provisionally at £984. He found that the accident was due to a latent defect, known as a glassy slant, in the side of the roadway. This is the name given to material in the strata which is hard, shiny, and slippery, and, therefore, does not bind properly with the adjacent material but is likely to slide off if pressure is put on it. The slant in this case was a fossilised tree. He held on the evidence that the presence of this glassy slant could not have been detected by examination, nor was its existence to be expected. He rejected the evidence tendered on behalf of the plaintiff that the fall was due

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or contributed to by subsidence or shot firing which had been taking place 125 feet below and 300 yards to the side of the scene of the accident. He, accordingly, acquitted the defendants of negligence at common law, and I accept these findings and the conclusion that follows therefrom.

The claim based on breach of statutory duty depends on the proper interpretation of ss 49 and 102(8) of the Coal Mines Act, 1911, read together, and the application thereof to the facts proved and evidence given in the court below. Section 49 of the Act reads as follows:

> "The roof and sides of every travelling road and working place shall be made secure, and a person shall not, unless appointed for the purpose of exploring or repairing, travel on or work in any travelling road or working place which is not so made secure."

Section 102(8) of the Act provides:

> "The owner of a mine shall not be liable to an action for damages as for breach of statutory duty in respect of any contravention of or noncompliance with any of the provisions of this Act if it is shown that it was not reasonably practicable to avoid or prevent the breach."

Hallett J dealt thus with the issue raised by these last words:

> "I get back to the broad question which throughout this case I have felt to be the difficult one, whether, if there is no reason to suppose that the particular place requires propping or lining-and I think lining would be necessary for complete security, though propping might produce security-it can be said that it is reasonably practicable for the National Coal Board to prop or line everywhere in their pits, regardless of whether there is any particular reason for propping or lining at that particular place. It is not a point on which I confess I feel certain, but on the whole I feel that I have been satisfied by the defendants that it is not reasonably practicable for them to prop or line every place in their pits irrespective of whether there is any reason to suppose that propping or lining is necessary at that particular point. I want to make it quite plain. It might be a technical matter, but, as I understand it, a travelling road, as far as falls are concerned, will be made more secure if it is propped and lined. There may be other reasons possibly against it, but, so far as falls are concerned, I think it is plain even to a layman that it will be made more secure, and that in a case where there is some abnormality present which may cause a fall, that fall may be prevented by propping and lining, and it does not seem that it is reasonably practicable for the National Coal Board to deal with eventualities by propping and lining throughout, and I am not at all satisfied on the evidence here that there was any special reason why they should prop or line at that particular point."

There is no dispute that the joint effect of ss 49 and 102(8) is to impose on the mineowner the absolute duty to make the roof and sides of every travelling road secure, and that he can only escape civil liability for breach of this duty if he can prove-the onus is on him-that it was not reasonably practicable to avoid or prevent the breach. It is also conceded that the deceased man's death was caused by the insecurity of the travelling road in which he was working. Consequently, the defendants can only escape liability by proof that it was not reasonably practicable for them to avoid or prevent this insecurity. It is contended by the defendants that it was not reasonably practicable for them to do so because there was nothing to indicate the existence of this latent defect, and that to expect them to prop and/or line every road in every mine would be to impose on them an altogether impossible burden. They concede that, if any travelling road is known to be insecure or if there is reasonable ground to fear insecurity, they cannot escape the consequences of failure to make it secure, save possibly in very exceptional

Page 746 of [1949] 1 All ER 743

circumstances. In short, it is not reasonably practicable to prop or line every roadway including those which are, in fact, perfectly safe in case somewhere there may be some unknown and unascertainable defects. On the other hand, counsel for the plaintiff argues that nothing short of some external interference by some unauthorised third person, or some occurrence which could not reasonably be anticipated, can excuse the breach of the absolute duty. He says matters which are within the control of the mineowner, such as cost, inconvenience and loss of profit are irrelevant. Alternatively, he submits that, if such matters as cost, labour and materials can be considered, the court can only look at the particular roadway in which the accident happened, and that the defendants gave no evidence on this point sufficient to discharge the onus that lay on them.

I cannot accept the submissions of either side in their entirety. The defendants' contention appears to me to leave the miner no better off than he was at common law. In effect, it makes the taking of reasonable care the sole test. On the other hand, though, no doubt, it is necessary to look primarily at the particular part of the particular mine with which the court is concerned, it is, in my opinion, necessary and proper to view it in relation to the totality of obligations resting on the mineowner. For example, vesting day having been 1 January 1947, and an accident taking place the following November due to the insecurity of the sides or roof of a travelling road, it would, I think, be permissible for the defendants to lead evidence that there had been a scheme or plan for rendering all such roads secure, that certain areas had priority, and that it was not reasonably practicable for them to have carried out the remedial work at the particular pit by the time of the accident. Again, they might prove that in some areas, no propping or lining was necessary for some particular reason or that different methods were required. Dealing with the particular latent defect which caused this accident-a glassy slant-it might have been possible to show that such a thing is more common in some formations and areas than it is in others or that it is non-existent in some places, but this is the kind of evidence which, in my opinion, would have been relevant. I do not hold the view that

cost must necessarily always be excluded as an element to be weighed in the balance. In *Coltness Iron Co Ltd v Sharp*, Lord Atkin said ([1937] 3 All ER 593):

> "The time of non-protection is so short, and the time, trouble and expense of any other form of protection is so disproportionate, that I think the defence is proved."

This shows that in every case it is the risk that has to be weighed against the measures necessary to eliminate the risk. The greater the risk, no doubt, the less will be the weight to be given to the factor of cost.

I turn to consider how the defendants in the present case, sought to discharge the onus of proof that lay on them. It was, I think, a heavy burden. They occupied a position between that of an absolute insurer and the ordinary occupier of property, but they start as insurers and have by evidence to divest themselves of this status. They called no witness qualified to assist the court to visualise the situation from the viewpoint of the monopoly owner. We are, therefore, left in ignorance of the practicability or otherwise of the measures which, in the opinion expressed by the inspector of mines appointed by the National Union of Mineworkers, after twelve years' experience of the investigation of fatal accidents, constitutes the only way to ensure security, *viz*, artificially to support all roads in mines. According to his evidence, which stood uncontradicted, more than half of the existing roads are already artificially supported. It is obvious that to give artificial support to the remainder would be a very considerable and expensive operation which could not be carried out all at once, but whether it is reasonably practicable as a long term plan, or should already have been begun, I know not, nor can I

understand how any court can judge of these matters without evidence. I do not, therefore, think the defendants got any distance towards proving that security was not reasonably practicable from the viewpoint of the totality of the defendants' obligations. So far as the situation falls to be considered solely from the local angle, the evidence of the defendants' officials on the spot shows that they had never even applied their minds to the point until questioned in court. Mr Wakeley, the under-manager, said: "I have never gone into the matter." He then proceeded to express the view that the labour involved would make it impracticable to carry out this work, but neither he nor the manager gave the court any figures as to cost or labour necessary to prop and/or line this particular travelling road which was only 400 yards long and had, in fact, been timbered for about half its length and up to within 15 to 30 yards of the spot where this accident occurred.

Although the learned judge has found that the fall was not due to subsidence or shot firing, it is the fact that weaknesses had appeared at places from time to time in the sides of this road and they had been timbered up as they appeared. Furthermore, there was undisputed evidence that glassy slants had been seen in this roadway, though they were rare. The road had only been in existence for some seven years. In truth, the defendants' officials never applied their minds to their absolute obligation under s 49. They were content to rely on the system of inspections and on the observance of the ordinary and usual precautions. That was their whole case as presented in argument, and it was said that that was the true measure of reasonable practicability under s 102(8). In my view, the evidence in the present case falls short of what is required to discharge the burden that lies on a defendant under s 102(8) in a case where there has been a clear breach of statutory duty under s 49. I would allow this appeal and enter judgment for the plaintiff for the sum of £984, the provisional assessment of damages.

ASQUITH LJ. I agree. The onus was on the defendants to establish that it was not reasonably practicable for them to have prevented a breach of s 49. The construction placed by Lord Atkin on the words "reasonably practicable" in the *Coltness* case seems to me, with respect, right. "Reasonably practicable" is a narrower term than "physically possible" and seems to me to imply that a computation must be made by the owner in which the *quantum* of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other, and that, if it be shown that there is a gross disproportion between them-the risk being insignificant in relation to the sacrifice-the defendants discharge the onus on them. Moreover, this computation falls to be made by the owner at a point of time anterior to the accident. The questions he has to answer are: (*a*) What measures are necessary and sufficient to prevent any breach of s 49? (*b*) Are these measures reasonably practicable?

In the particular type of accident caused by a "glassy slant" it is admittedly impossible before the event to foresee at what place or in what roadway or in what mine such an accident is likely to occur. The argument that the owners could and should have made secure the particular roadway in which, as things fell out, the glassy slant declared its presence without having to make secure every other roadway in which it might have done so assumes that by some process of divination they could have predicted that the accident was likely to occur in the roadway in which it did, rather than elsewhere. An owner, however, who is not gifted with second sight can make no such prediction. Without it, security against this peril can only be secured by extending similar security measures to all roadways. Only so can he prevent breaches of s 49 due to glassy slants. So far, I am inclined to agree with the learned judge, but, like my Lord, I do not think any, or any sufficient, evidence was adduced

as to the relative *quantum* of risk and sacrifice involved on the basis either that the mines as a whole (or that this particular roadway) should be taken as the unit-a necessary prerequisite to any decision that the defendants have proved the necessary measures impracticable. For these reasons I think the appeal should be allowed.

SINGLETON LJ [after stating the facts]. The defendants' submission was that if the defective side of this travelling road had to be supported or made secure along the whole of its length, it followed that every roof and every other side of every travelling road in every mine to which the Act of 1911 applies must be similarly supported so as to render it secure, and that that was not reasonably practicable. Hallett J accepted this submission and held that the defendants were not liable to an action for damages by reason of s 102(8). With all respect, I do not think that this is the right test. The sides of this travelling road had not been made secure and Edwards was killed. It was for the

defendants to show that it was not reasonably practicable to make secure the side of the road, a portion of which fell, and, in my judgment, they failed to do that. It can be no answer to an action in which damages are claimed, to say: "We did not do anything at such and such a place because we considered that point secure." Nor can it be an answer to say: "If we do something at this place we shall have to do something in many other places and in many other mines." Nor, again, can it be an answer to say: "We did not expect a fault of this kind, nor a fall, at this place." There is a breach in every case in which the roof and sides of a travelling road have not been made secure. The owners can escape paying damages in a civil action if they bring themselves within the terms of s 102(8). It is true to say that, if the defendants have to make secure the roofs and sides of every travelling road, a heavy burden will be placed on them. Hallett J said it would be a stupendous undertaking. I do not think the court is concerned with that. It seems to have been the practice in some cases in which it has been considered that roof and sides are safe to take the risk of a civil action.

Part II of the Act contains many provisions as to safety. Section 49 places an absolute obligation on the owners. That can only be altered by Parliament. In some sections of that Part of the Act the Secretary of State is empowered to grant relief from certain provisions, and this raises a question whether cost and expense can be used to establish that it is not reasonably practicable to avoid or prevent a breach. *Prima facie*, I should have thought that the words, when applied to the absolute obligation imposed by s 49, were intended to cover a case in which everything reasonably possible had been done to make roof and sides secure, but, through a fault or the like, something happened and an accident took place. In such a case the defendants might well be able to establish that it was not reasonably practicable to comply with the provisions of s 49. Though it is by no means clear how far expense was considered as an element in *Coltness Iron Co Ltd v Sharp*, I think the words of Lord Atkin form a most useful guide when he said ([1937] 3 All ER 593):

> ". I am unable to take the view that it was reasonably practicable by any means to avoid or prevent the breach of s. 55. The time of nonprotection is so short, and the time, trouble and expense of any other form of protection is so disprotionate, that I think the defence is proved."

In the present case, the time, trouble and expense involved must be examined in relation to the road on which the fall took place. The owners had taken steps to secure the sides along one half of its length approximately. I see no reason why the whole length could not have been similarly secured as and when the road was being made. There is no evidence to show that it would not have been reasonably practicable to do this, nor is there any evidence to show that it would not have been reasonably practicable to do it a month before the accident. If the defence now raised had been put forward by a private owner

before the Coal Industry Nationalisation Act, 1946, I do not think that it would have held water for a moment, and I am not satisfied that the defendants can claim to be in a better position than a private owner would have been in regard to the safety provisions of the Act of 1911. Some evidence was given to show the magnitude of the task if the roof and sides of every travelling road everywhere had to be made secure, but no evidence was directed to show what it would mean, or would have meant, in regard to this particular road. The mining engineer who was called on behalf of the defendants, was not asked any question on this subject. He did not visit the colliery until 8 October 1948.

In the course of his judgment, Hallett J said:

> "Upon the whole I feel myself that I am satisfied by the defendants that it is not reasonably practicable for them to prop or line every place in their pits, irrespective of whether there is any reason to suppose the propping or lining is necessary at that particular point."

It seems to me that that approach fails to give effect to the statutory duty imposed by s 49. The owners had done what they thought necessary to secure (or to make secure) the sides of this road in some parts. They failed to show that it was not reasonably practicable for them to do so in other parts, and, in particular, at the point at which the fall took place. In those circumstances they do not come within the terms of s 102(8). I agree that the appeal should be allowed.

Appeal allowed with costs.

Solicitors: *Theodore Goddard & Co* agents for *Edwards (T S) & Son*, Newport, Mon (for the plaintiff); *Preston, Lane-Claypon & O'Kelly* agents for *Colborne, Coulman & Lawrence*, Newport, Mon (for the defendants).

C StJ Nicholson Esq Barrister.

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR1644/20

In the matter between:

ESKORT LIMITED **Applicant**

and

STUURMAN MOGOTSI **First Respondent**

COMMISSIONER SIMPHIWE SAKI NGADA *N.O* **Second Respondent**

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **Third Respondent**

Heard: **18 March 2021(Via Zoom)**

Delivered: **This judgment was handed down electronically by circulation to the parties and/or their legal representatives by email, publication on the Labour Court's website, and released to SAFLII. The date and time for hand-down is deemed to be 28 March 2021 at 16:00**

REASONS FOR ORDER

TLHOTLHALEMAJE, J

Introduction:

[1] This unopposed review application raises a topical issue surrounding the fairness of the dismissal of an employee on account of gross misconduct and gross negligence, related to his failure to follow and/or observe COVID-19 related health and safety protocols put in place at the workplace.

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[2] The facts of this case are indeed extraordinary. They are indicative of the need for more to be done at both the workplace and in our communities, in ensuring that employers, employees, and the general populace are sensitised to the realities of this pandemic, and to further reinforce the obligations of employers and employees in the face of, or event of an exposure to COVID-19.

[3] Following the hearing of the application, the Court had on the same day issued an order reviewing and setting aside the arbitration award issued by the second respondent, and substituting that award with an order that the dismissal of the second respondent by the applicant on 3 September 2020 was substantively fair. What follows are reasons for that order.

Background:

[4] The applicant conducts a butchery business on a national scale, and sells meat and cooked food to the public. The first respondent, (Mr Mokgotsi) was employed as its Assistant Butchery Manager since May 2018. Mogotsi was charged with;

(a) gross misconduct related to his alleged failure to disclose to the employer that he took a COVID-19 test on 5 August 2020 and was waiting for his results;

(b) gross negligence in that after receiving his COVID-19 test results which were positive, he had failed to self-isolate, continued working on 7, 9 and 10 August 2020, and thus put the lives of his colleagues at risk. It was further alleged that during the period he had reported for duty, he failed to follow the health and safety protocols at the workplace, including failing to adhere to social distancing.

The arbitration proceedings and the Commissioner's award:

[5] Following Mogotsi's dismissal and a referral of an alleged unfair dismissal dispute to the third respondent, the Commission for Conciliation Mediation

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and Arbitration (CCMA), the matter came before the second respondent (Commissioner).

[6] The applicant had called two witnesses, viz, its Group Human Resources Manager (Mr Lucas Sithembiso) and the Retail Operations Manager (Mr Pieter Strydom), whilst Mogotsi testified in his case. Most of the essence of the evidence led at the arbitration proceedings, unless pointed out, was not placed in dispute. The evidence is summarised as follows;

6.1 Mogotsi used to travel to and from work daily with a colleague, Mr Philani Mchunu (Mchunu) in a private vehicle. On 1 July 2020, Mchunu did not feel well and had consulted with a medical practitioner on the same date. Mchunu was then booked off sick from 1 to 3 July 2020, and had his sick leave extended on 4 July 2020.He was subsequently admitted to a hospital on 6 July 2020, and was informed on 20 July 2020 that he had tested positive for COVID-19.

6.2 At about the time that Mchunu initially fell ill, Mogotsi also started experiencing chest pains, headaches and coughs. He had consulted a traditional healer, who had booked him off on 6 and 7 July 2020 and also from 9 to 10 July 2020. The traditional healer happened to be his wife.

6.3 Upon being booked off by the traditional healer, Mogotsi was informed by management to stay at home. He nonetheless reported for duty after 10 July 2020. This was even after he became aware from 20 July 2020 of Mchunu's positive results.

6.4 Mogotsi took a COVID-19 test on 5 August 2020, and was informed on 9 August 2020 via 'SMS' that he had tested positive. The concern however raised by the applicant is that despite having taken a COVID test on 5 August 2020 and being informed of his positive results on 9 August 2020, Mogotsi had reported for duty on 7, 9, and 10 August 2020, and personally came to the premises to hand in a copy of his results.

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6.5 The applicant had COVID-19 policies, procedures, rules and protocols in place, and all employees had been constantly reminded of these through memorandum and other various means of communications posted at points of entry and also through emails.

6.6 Of further significance however, is that Mogotsi was also a member of the in-house 'Coronavirus Site Committee', and was responsible for *inter alia*, putting up posters throughout the workplace, informing all employees what and what not to do in the event of exposure or even if they suspected that they may have been exposed to CoVID-19, and the symptoms they must look out for.

6.7 Other than the above, and upon the applicant having conducted its own investigations after Mogotsi' test results were made known, it was discovered that on 10 August 2020, a day after he had received his results, he was observed on a video footage at the workplace, hugging a fellow employee (Ms Milly Kwaieng), who happened to have had a heart operation some five years earlier and had recently experienced post-surgery complications.

6.8 Again, from the video footage on 10 August 2020, Mogotsi was observed walking on the workshop without a mask. Upon Mogotsi's test results being known, and after further investigations and contact tracing, a number of employees who had contact with him had to be sent home to self-isolate, amongst whom were Kwaieng and others who had other comorbidities.

6.9 In the face of this evidence, Mogotsi's main contention was that he was aware of Mchunu's health condition and positive COVID-19 test results, as far back as 20 July 2020, and that he had informed management of his contact with Mchunu. He alleged that he was not given any clear directive as to what to do, but was instead, subjected to victimisation when his medical certificates were questioned, and when he was informed of changes to his job description, and further given other tasks to perform.

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6.10 Despite having seen a traditional healer and being booked off on 6 , 7, 9 and 10 July 2020 due to having experienced headaches, chest pains and coughs, Mogotsi contended that when he consulted with health workers on 5 August 2020, he had informed them that he had no noticeable symptoms, but had undertaken the test, which results he had only obtained on 10 August 2020, and had sent same to management the following day. He had personally handed a copy of the results of his test to the store and acting managers in their offices, and was subsequently sent home. He came back on 28 August 2020 and was informed of the scheduled disciplinary enquiry.

6.11 Mogotsi had nonetheless conceded under cross-examination that he received the test results on 9 August 2020, but alleged that he did not know that he needed to self-isolate. He further conceded having hugged Kwaieng on 10 August 2020, and further having walked on the shop floor without a mask. His excuse was that he was on a phone call at the time and that he needed to remove his mask to have a clearer conversation with his caller. His main contention was that despite asking for a direction after he had reported ill and informed management that he had been in contact with Mchunu, nothing was done, as business had continued as usual when he reported for duty.

[7] Given the above evidence, which was mainly common cause, the Commissioner had in the award, stated that he had regard to 'the provisions of the LRA, CCMA Guidelines, the Code of Good Practice, and relevant case law', and came to the following conclusions;

7.1 Mogotsi's allegations that he was dismissed on account of being victimised ought to be rejected.

7.2 The employer did not have any instructions or rule that expressly compelled its employees to inform it when they had undertaken COVID-19 tests. However there was a rule in place that required employees to inform the employer when they suspected that they had been infected. Implied in that rule was the need for employees to

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inform the employer of their COVID-19 tests. To that end, Mogotsi was therefore required to inform the employer of the test he took, and he was therefore guilty of failing to report his test to the employer.

7.3 The conduct of Mogotsi of having reported for duty in circumstances where he knew of his positive test results on 9 and 10 August 2020 and did not inform the employer of the test; of hugging fellow employees, and walking around the butchery without a mask, was 'extremely irresponsible' in the context of the pandemic, and he was therefore grossly negligent.

7.4 In determining the appropriateness of the sanction, and having had regard to the provisions of paragraph 96 of the CCMA Guidelines, the employer in the light of its own disciplinary code and procedure which called for a final written warning in such cases, failed to justify the sanction of dismissal, and had thus deviated from its own disciplinary code and procedure.

7.5 The sanction of dismissal was therefore not appropriate on account of that deviation, making the dismissal substantively unfair. To this end, Mogotsi was to be reinstated retrospectively, without back-pay, and a final written warning placed on his record.

<u>The grounds of review and evaluation:</u>

[8] The test on review is fairly settled. The principal enquiry is whether the arbitration award sought to be reviewed, can be said to fall within a range of reasonableness[1]. The applicant attacked the Commissioner's award on

[1] See *South African Municipal Workers Union obo Mosomo v Greater Tubatse Local Municipality* (JA 64/2019) [2020] ZALAC 53 (2 December 2020) at para 27, where it was held;

> "The test that the Labour Court is required to apply in a review of an arbitrator's award is this: "Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?" To maintain the distinction between review and appeal, an award of an arbitrator will only be set aside if both the reasons and the result are unreasonable. In determining whether the result of an arbitrator's award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the arbitrator's reasoning is found to be unreasonable, the result is, nevertheless, capable of justification for reasons other than those given by the arbitrator. The result will, however, be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator." (Citations omitted)

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various fronts, including that he failed to properly apply his mind to the evidence placed before him, and made findings that are not those of a reasonable decision maker.

[9] I fully agree with the contentions made on behalf of the Applicant, and further add that the findings and conclusions of the Commissioner on the issue of the appropriateness of the sanction and the relief granted, are entirely disconnected with the evidence that was placed before him, making the award reviewable.

[10] In regard to the grounds of review advanced on behalf of the applicant, I do not deem it necessary to deal with the applicant's contentions that the Commissioner ought not have gone further upon Mogotsi alleging that his dismissal was as a result of victimisation, and that he ought to have declined jurisdiction to deal with the dispute. That issue is neither here nor there to the extent that the Commissioner had rejected that contention.

[11] What however needs to be added is that more often than not, the CCMA is habitually inclined to refuse to determine disputes involving dismissals for ordinary misconduct, simply because the employee (in most times unrepresented and throwing everything in the mix), happened to have alleged that he/she was victimised, harassed, discriminated against, or any other allegation that would divest the CCMA of jurisdiction. Where such allegations are made, a Commissioner is duty bound to look at the real nature of the dispute, irrespective of how the parties label the cause of a dismissal, before deciding whether the CCMA has jurisdiction to determine the dispute or not. The mere mention of 'victimisation', or 'discrimination' by an employee at arbitration proceedings is not a gateway to this Court.

[12] An important consideration in this case is that the Commissioner had decisively concluded that Mogotsi's conduct was 'extremely irresponsible' in the context of the pandemic, and that he was therefore 'grossly negligent'. That conclusion on its own given the facts of this case ought to have been the end of the matter, and the dismissal ought to have been confirmed.

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[13] In these proceedings, despite Mogotsi not having opposed the application, had made an appearance, and his only submission was that he was wanted to be reinstated as per the Commissioner's award. For reasons that are clearly beyond comprehension in that light of that decisive findings, the Commissioner had awarded reinstatement, *albeit* with a sanction of final written warning and without back-pay.

[14] When Commissioners state in their arbitration awards that they had regard to the 'provisions of the LRA, CCMA Guidelines, the Code of Good Practice, and relevant case law', this does not imply merely paying lip-service to these provisions or authorities. Furthermore, merely regurgitating these provisions in an arbitration award without actually applying them to the facts of the case is in my view a meaningless exercise. The Commissioner's approach in this case is on point.

[15] Despite having stated that he had regard to all the provisions he had cited, it had clearly escaped the Commissioner's reasoning that a disciplinary code and procedure, is not prescriptive as correctly pointed out on behalf of the applicant, and that it is merely a guideline, insofar as issues of sanctions are concerned.

[16] Ultimately, irrespective of what the disciplinary code and procedure stipulates, in determining the appropriateness of a sanction of dismissal, the Commissioner is obliged to make an assessment of the nature of the misconduct in question, determine if whether, combined with other factors and the evidence led, the misconduct in question can be said to be of gross nature. Once that assessment is made, and the invariable conclusion to be reached is that the misconduct in question is of such gross nature as to negatively impact on a sustainable employment relationship, then the sanction of dismissal will be appropriate.

[17] In the end, it is apparent that the Commissioner failed to take into account the totality of circumstances as long stated in *Sidumo*[2], when impartially

[2] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (CCT 85/06) [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC) ; (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC), where it was held;

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considering the appropriateness of the sanction of dismissal in this case. To this end, the sanction of dismissal in this case was appropriate given the considerations below;

17.1 Mogotsi had at the very least, from 20 July 2020, been aware that he had been in contact with Mchunu, who had tested positive for COVID-19. On his own version, he had experienced known symptoms associated with COVID-19 as early as 6 July 2020. It cannot therefore be probable for him to allege that he was not aware of the known symptoms, nor did he not know he had those symptoms. Be that as it may, he had over that period until 11 August 2020, recklessly endangered not only the lives of his colleagues, and customers at the workplace, but also those of his close family members and other people he may have been in contact with.

17.2 Mogotsi's conduct came about in circumstances where on the objective facts, and by virtue of being a member of the 'Coronavirus Site Committee', he knew what he ought to have done in an instance where he had been in contact with Mchunu and where on his own version, he had experienced symptoms he ought to have recognised. He nonetheless had continued to report for duty as if everything was normal, despite being told on no less than two occasions to stay at home during July 2020.

17.3 Mogotsi's conduct was not only irresponsible and reckless, but was also inconsiderate and nonchalant in the extreme. He had ignored all health and safety warnings, advice, protocols, policies and procedures put in place at the workplace related to COVID-19, of which he was

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"78. In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list."

fairly aware of given his status not only as a manager but also part of the 'Coronavirus Site Committee'.

17.4 For reasons which are clearly incomprehensible, Mogotsi had through his care-free conduct, placed everyone he had been in contact with whether at the workplace or at his residence at great risks. Even more perplexing is the reason he would go about the workplace mask-less and hugging fellow employees, in circumstances where he knew or ought to have known the consequences of his actions, especially after having become aware of Mchunu's results. There is a COVID-19 term which has been coined for this type of behaviour, which out of respect for Mogotsi's dignity, I will refrain from repeating in this judgment due to its derogatory nature.

17.5 However, the consequences of Mogotsi's conduct were not only dire for the applicant but equally so for all of those employees with whom he had contact with, their own families and communities. In this regard, the applicant's operations were affected in that a number of those employees had to be given time off to quarantine, and whilst in self-isolation, this had obviously impacted on their immediate family members.

17.6 In the midst of all the monumental harm he had caused, and which was clearly foreseen, Mogotsi could only come up with the now often used defence that he was victimised. At no point did he show any form of contrition for his conduct. At most, the evidence presented before the Commissioner pointed out to Mogotsi as an employee who was not only grossly negligent and reckless, but also dishonest. He had failed to disclose his health condition over a period of time, sought to conceal the date upon which he had received his COVID-19 test results, and completely disregarded all existing health and safety protocols put in place not only for his own safety but also the safety of his co-employees, and the applicant's customers.

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17.7 The gross nature of Mogotsi's conduct is such that a trust and working relationship between him, the applicant, and his fellow employees, cannot by all accounts be sustainable. This is especially so in circumstances where on the applicant's version, other employees had been dismissed for similar acts of misconduct, and where Mogotsi had failed to appreciate, let alone acknowledge the monumental harm, anxiety and strain he had caused on his co-employees and their immediate families, but also on the operations of the applicant. It follows that a dismissal was indeed an appropriate sanction.

[18] Mogotsi's care-free conduct however also brings into question the seriousness with which the applicant and its own employees also attaches to the dangers posed by this pandemic at the workplace, and whether the measures it has in place are adhered to, and effective in mitigating the effects of this pandemic. This is particularly so in circumstances where Mchunu had reported ill since 1 July 2020, and particularly after 20 July 2020, when his positive COVID-19 test were made known.

[19] Upon investigating the matter after Mogotsi had tested positive, it was discovered that not only had he hugged Kwaieng who had comorbidities, but that he had also walked around the workplace without a mask. The questions that need to be posed despite the applicant having all of these fancy COVID-19 policies, procedures and protocols in place, is whether more than merely dismissing employees for failing to adhere to the basic health and safety protocols is sufficient in curbing the spread of the pandemic? How can it be, that in the midst of the deadly pandemic, the applicant still allows mask-less 'huggers' walking around on the shop floor? Of further importance is notwithstanding all of these protocols and awareness campaigns about this pandemic, why would any employee in the workplace, especially one with comorbidities, hug or reciprocate hugging in the middle of a pandemic? Does a basic principle such as social distancing mean anything to anyone at the workplace? Furthermore, what is the responsibility of the applicant and its employees when other employees or even customers, are seen roaming the workplace or shopfloor mask-less? Of even critical importance is what steps

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were taken in ensuring the health and safety of all the employees and customers, where at least from 20 July 2020, Mchunu's test results were known? All of these questions need to be addressed in the light of Mogotsi's version that after Mchunu's test results were made known, business at the store had continued as usual, hence he had continued reporting for duty.

[20] It is appreciated that the applicant had as per its evidence, taken disciplinary measures against other employees for violating the health and safety protocols put in place, including dismissals. However, the facts of this case in my view clearly compels the need for serious introspection by the applicant and all other employers in the light of the above questions posed, in regard to whether existing health and safety measures and protocols in place are being taken seriously by everyone affected. It is one thing to have all the health and safety protocols in place and on paper. These are however meaningless if no one, including employers, takes them seriously.

[21] In the end however, in the light of the evidence led at the arbitration proceedings, the egregious nature of Mogotsi's conduct, and its impact on both the applicant and its employees, the arbitration award of the Commissioner completely fell outside the bounds of reasonableness. It was in the light of all of these considerations that an order was made on the hearing date, setting aside that award, and substituting it with an order that the dismissal of Mogotsi was substantively fair.

LABOUR COURT

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Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

Representation:

For the Applicant: Adv L Pillay, instructed by Yusuf Nagdee Attorneys

For the First Respondent: In Person

Horton v London Graving Dock Company Ltd
[1950] 1 All ER 180

Categories:	TORTS; Negligence, Tortious Liability
Court:	COURT OF APPEAL
Lord(s):	TUCKER, SINGLETON AND JENKINS LJJ
Hearing Date(s):	30 NOVEMBER 1, 2, 21 DECEMBER 1949

Negligence - Invitee - Duty of occupier - Protection against "unusual danger" - Workman falling from staging - Workman's knowledge that staging faulty - No contributory negligence - Defence of volenti non fit injuria not available on evidence.

The plaintiff, a welder, was employed by sub-contractors to weld strips of steel on the ribs of a trawler which the defendants, the head contractors, were reconditioning. While working in the fish house (part of the hold), the welders had to work in pairs on a staging, provided by the contractors and comprising four boards, five feet apart, each about twenty feet long, eleven inches wide and three inches deep, supported on iron beams on angle-irons placed across the fish house at a height of five feet five inches from a cement lining at the bottom of the trawler. There were no cross boards to the staging, and the only means of getting from one board to another was by stepping on an angle-iron. The staging was under the exclusive control of the contractors, and the sub-contractors' workmen had no right to interfere with it, but they had complained of its insufficiency to the contractors' charge-hand, who had promised that something would be done to remedy the defect. Nothing, however, had been done. While working on the staging, the welder placed one foot on the middle deal and the other foot on an angle-iron to pass a tool-box to a fellow welder, and, in trying to get both feet on the middle deal, he slipped and was injured. In an action brought by him against the contractors, claiming damages for negligence, it was established that the accident was caused by the insufficiency of the staging, but the judge held that the contractors were not liable in negligence, as their duty to the welder, as an invitee, was only to protect him from an "unusual danger" and, as he was aware of the danger, it could not be an "unusual" one. On appeal:

Held - An "unusual danger" was one which would not normally be expected, and a danger which was unusual did not become other than unusual merely because the person suing knew of it before his accident; the

danger created by the insufficiency of the staging was an unusual one in that it was of a kind not usually encountered, and, as the contractors knew that the staging was to be used by the sub-contractors' workmen, of whom the welder was one, they were under a duty to him, even as they were to their own workmen, to provide proper plant and appliances and to make good any deficiencies, and they were relieved from responsibility by reason of the welder's knowledge of the danger only if they could prove contributory negligence or establish a plea of *volenti non fit injuria* (*Letang v Ottawa Electric Ry Co* ([1926] AC 725), *applied*); on the facts, however, there was no contributory negligence and, as the welder, although not one of the contractors' own servants, was a servant of the sub-contractors and was working alongside the contractors' servants, and had, moreover, complained of the danger, the defence of *volenti non fit injuria* could not apply (*Bowater v Rowley Regis Corpn* ([1944] 1 All ER 465), *applied*), and, therefore, the contractors were liable to the welder for their negligence.

Dictum of Willes J in *Indermaur v Dames* (1866) (LR 1 CP 288), *explained*.

Per Singleton LJ. The defence of *volenti non fit injuria* ought not to prevail against a workman who has complained, but who thinks it right to get on with his work as best he can and as carefully as he can, especially if there be a promise on behalf of the occupiers of the premises on which he is injured to put the matter right or to do "the best I can."

Decision of Lynskey J ([1942] 2 All ER 169), *reversed*.

Notes

As to Duty to Invitees, see *Halsbury*, Hailsham Edn, Vol 23, pp 600-609, paras, 851-858; and for Cases, see *Digest*, vol 36, pp 41, 42, Nos 247-258, and pp 44, 45, Nos *272-281*.

Cases referred to in judgments

Indermaur v Dames (1866) LR 1 CP 274, Har & Ruth 243, 35 LJCP 184, 14 LT 484 *affmd* (1867) LR 2 CP 311, 36 LJCP 181, 16 LT 293, 31 JP 390, 36 *Digest* 35, *208*.

Norman v Great Western Ry Co [1915] 1 KB 584, 84 LJKB 598, 112 LT 266, 38 *Digest* 352, *580*.

Griffths v Smith [1941] 1 All ER 66, [1941] AC 170, 110 LJKB 156, 164 LT 386, 105 JP 63, 2nd *Digest* Supp.

Letang v Ottawa Electric Ry Co [1926] AC 725, 95 LJPC 153, 135 LT 421, *Digest* Supp.

Bowater v Rowley Regis Corpn [1944] 1 All ER 465, [1944] KB 476, 113 LJKB 427, 170 LT 314, 108 JP 163, 2nd *Digest* Supp.

Heaven v Pender (1883) 11 QBD 503, 52 LJQB 702, 49 LT 357, 47 JP 709, 36 *Digest* 8, *9*.

Donoghue v Stevenson [1932] AC 562, 101 LJPC 119, 147 LT 281, *Digest* Supp.

Le Lievre v Gould [1893] 1 QB 491, 62 LJQB 353, 68 LT 626, 57 JP 484, 36 *Digest* 10, *26*.

Addie, R & Sons (Collieries) v Dumbreck [1929] AC 358, 98 LJPC 119, 140 LT 650, *Digest* Supp.

Hillen v ICI (Alkali) Ltd [1934] 1 KB 455, 103 LJKB 163, 150 LT 147; *affd on other grounds, sub nom Hillen & Pettigrew v*

ICI (Alkali) Ltd [1936] AC 65, 104 LJKB 473, 153 LT 403, *Digest* Supp.
Cavalier v Pope [1906] AC 428, 75 LJKB 609, 95 LT 65, 12 *Digest* 49, *273*.
Brackley v Midland Ry Co (1916) 85 LJKB 1596, 114 LT 1150, 80 JP 369, 36 *Digest* 41, *254*.

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Weigall v Westminster Hospital [1936] 1 All ER 232, 2nd *Digest* Supp.
Haseldine v Daw & Son Ltd [1941] 3 All ER 156, [1941] 2 KB 343, 111 LJKB 45, 165 LT 185, 2nd *Digest* Supp.
Harrison v National Coal Board [1950] 1 All ER 171.
Oliver v Saddler & Co [1929] AC 584, 98 LJPC 87, 141 LT 305, *Digest* Supp.

Appeal

Appeal by the plaintiff from a judgment of Lynskey J dated 2 June 1949, and reported [1949] 2 All ER 169, in an action claiming damages for personal injuries arising out of the negligence of the defendants.

The plaintiff, a welder employed by sub-contractors, was injured while working on a staging erected by the defendants, the head contractors, in the hold of a vessel which the defendants were re-converting into a fishing trawler. The accident was due to the fact that the staging was defective in that it was insufficient. The plaintiff and his fellow workmen had complained of the insufficiency to the defendants' charge-hand, but nothing had been done to remedy it. Lynskey J held that the defendants' duty to the plaintiff, as an invitee, was to prevent damage from an unusual danger, and, as the danger was known to the plaintiff, there was no unusual danger, and, therefore, the defendants were not liable in negligence. From this decision the plaintiff now appealed and the Court of Appeal allowed his appeal. The facts appear in the judgment of Singleton LJ.

Edgedale KC and *C J A Doughty* for the plaintiff.
Marven Everett for the defendants.

Cur adv vult

21 December 1949. The following judgments were delivered.

SINGLETON LJ. The trawler Velmont had been used as a naval vessel. In the latter part of 1946 she was being re-converted into a fishing trawler. The defendants were the main contractors for that work and they are to be regarded as the occupiers of the trawler. Thames Welding Co Ltd had a sub-contract with the defendants in respect of certain welding work which had to be done on the trawler. The plaintiff was an electric welder employed by Thames Welding Co Ltd. In December 1946, work was being done in the fish house, part of the hold of the trawler. A staging was necessary for work above a certain level and there were two thwart ship iron beams on angle-irons, and four boards or deals were placed on these fore and aft, two on the starboard side and two on the port side. Each of the deals was about twenty feet long, eleven inches wide and three inches deep. There was a space of about eighteen inches between each of the outermost deals and the skin of the trawler and a space of about five feet between each of the deals. There were no cross boards. The result of this was that, if one of the welders had to go from one of the boards to another, it had to be done by his using one of the angle-irons, and the same kind of thing had to be done if one wished to pass a tool-box to another, or if one working on the staging wished to leave it and to go up or down by the one ladder which was available. In the condition in which it was, the staging was defective, in that it was insufficient. There is no doubt as to that. It could have been made satisfactory by the use of more deals, *eg*, by the use of a couple of cross boards. As it was, it constituted a danger which led to an accident to the plaintiff.

The staging was erected by the defendants, and the sub-contractors' men had no right to interfere with it. The welders worked in pairs, one relieving the other from time to time so as to avoid undue strain on the eyes. The plaintiff worked with a man named Fletcher. They had worked in the fish house for some time before it became necessary for them to use the staging. It is clear that before the date of the accident, 16 December 1946, complaints as to the insufficiency of the staging were made by the plaintiff and by other welders to

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the defendants' charge-hand. One of the witnesses (Death) said that he had complained to his employers' foreman as well as to the defendants' charge-hand. The plaintiff's evidence on this part of the case appears from the following question and answers:

> "*Q*-Had you ever spoken to anybody about the absence of planks across the intervening gap? *A*-About the gap?
>
> *Q*-Yes, about the absence of planks across it? *A*-Yes. The shipwright occasionally used to come to attend to the job. We spoke about there being insufficient boards there, but he said: 'We have not got this, that and the other', or 'I will do the Best I can and I will look round and have a look,' but that was the last we heard of it.
>
> *Q*-They promised to do something, but never did? *A*-No, sir, that's it."

He added that Hewitt, the foreman of his employers Thames Welding Co Ltd, did not come to the trawler, and that appears to be confirmed by the evidence of Hewitt himself. The evidence of Fletcher, which was taken before an examiner, contains this passage:

> "*Q*-Had you yourself complained to anybody about the distance between the planks? *A*-We only asked the shipwrights.
>
> *Q*-What did you say to them? *A*-We asked them if they could give us some more staging.
>
> *Q*-What would have been a safe distance to have those planks from one another? *A*-A safe distance? Safeness would be an extra two deals coming from one to the other. That would be the safe distance so that you could walk from one to the other. But there was none.

In fact, a cement lining had been put into the bottom of the ship and the angle irons were five feet five inches above that.

On 16 December 1946, the plaintiff had been working on the starboard side on one of the middle deals. That deal was five feet away from the deal which was nearest to the skin of the trawler on the starboard side. He had been welding an iron under the deck and had been using the tool-box, which contained hammer, chisels and welding rods and which weighed in all about fourteen pounds. He finished his work for the time being and his fellow welder, Fletcher, climbed up on to the deal nearest to the starboard side, using the strips already welded as a ladder to reach the staging. When Fletcher reached the staging, the plaintiff picked up the tool-box in order to hand it to Fletcher. As there was a space of about five feet between the board on which the plaintiff was and the board on which Fletcher was standing, the plaintiff, having one foot on the starboard middle deal, placed his other foot on to the angle-iron and handed the tool-box to Fletcher, who received it while he had one foot on his deal and the other foot on the angle-iron. Fletcher turned round to put the tool-box on the deal on which he was standing. The plaintiff tried to get both feet on to the middle starboard deal when his foot slipped and he fell astride the angle-iron. He was bruised about the pubic bone and he sustained a rupture.

The plaintiff brought this action against the defendants, alleging that they were negligent in that they were under a duty to supply and erect a staging which was safe to persons using it and/or to provide safe means of access and/or a safe working platform to persons repairing and reconditioning the ship, and in breach of that duty and/or negligently they supplied a staging which was unsafe and/or did not provide a safe means of access and/or a safe working platform. Among the particulars they included an allegation that the defendants ignored complaints by those working on the staging that it was dangerous and inadequate. The defendants denied the plaintiff's allegations and pleaded that

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such injuries as the plaintiff sustained were occasioned by, or, alternatively, were contributed to by, negligence on the part of the plaintiff. There was no plea of *volenti non fit injuria*. Lynskey J gave judgment for the defendants. He was of opinion that there was no unusual danger in so far as the plaintiff was concerned and that there was no breach of duty on the part of the defendants. He added that, if it had been necessary, he would have held that the plaintiff, freely and voluntarily, impliedly agreed to accept the risk of working on the staging with full knowledge of the nature and extent of the risk he ran. Before the learned trial judge, the plaintiff's case was put on the footing of the duty owed by an invitor to an invitee. On the hearing of the appeal counsel for the plaintiff was inclined to put the case on a somewhat wider basis, though his main argument was directed towards showing that Lynskey J was wrong in his statement of the position on the assumption that the defendants were to be regarded as invitors and the plaintiff as an invitee.

I propose to deal first with the arguments based on "invitor" and "invitee." (The judge said that it was clear that the defendants owed to the plaintiff the duties which an invitor owes to an invitee.) This involves a close examination of the nature of the duty as laid down by Willes J (LR 1 CP 285, 287 and 288) in *Indermaur v Dames*. Willies J used these words (*ibid*, 288):

> "And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as a matter of fact."

The rule there stated ends with the words "knows or ought to know." The words which follow are an indication of some of the ways in which a defendant may escape liability, *eg*, by giving notice of the danger, or by lighting, guarding or otherwise, and, of course, contributory negligence was a complete answer at that time. In such circumstances it is a question of fact whether reasonable care has been taken, and notice is an element which has to be taken into consideration

The first difficulty arises from the words "unusual danger." The submission of counsel for the defendants was that "unusual" in this category means "unexpected by the plaintiff" and that, if the danger was known to him, it could not be an unusual danger, from which it would follow that there was no liability on the defendants. This submission met with the approval of Lynskey J who, citing the judgment of Phillimore LJ ([1915] 1 KB 596) in *Norman v Great Western Ry Co*, said ([1949] 2 All ER 170):

> "In my view 'unusual danger' means a danger unusual from the point of view of the particular invitee . It must be, from his point of view, unexpected in the particular circumstances in which he is availing himself of the invitation."

With respect, I do not regard this as the test in every case. "Unusual" may be defined as: "Not usual: uncommon: exceptional." It indicates the kind of thing which would not normally be expected. The danger created by the staging was through its being insufficient, and the danger was an unusual one in that it was of a kind not usually encountered. The plaintiff was an experienced welder, sixty-seven years of age, and he and others complained of the insufficiency of the staging. A danger which is unusual does not become other than unusual merely because the person suing knew of it before his accident. If it were otherwise, notice of an unusual danger might of itself render the rule in *Indermaur v Dames* wholly inapplicable, whereas notice is only

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an element to be considered. In the case of an invitee it is not necessary to show a concealed or a hidden danger, as it is in the case of a licensee. In this respect I think that the reference by Viscount Maugham ([1941] 1 All ER 74) to "a hidden danger" in *Griffiths v Smith*, was a slip, and, in any event, the duty towards an invitee was not being considered in that case.

The next question is whether the plaintiff's knowledge of the danger prevents him from recovering damages. Winfield on the Law of Tort, 4th ed, p 562, refers to the two different interpretations which have been put on the rule in *Indermaur v Dames*, as a result of "an ambiguity in its terms.":

> "(i) The occupier must take reasonable care to make the structure safe. (ii) The occupier need only ascertain the existence of dangers and either remove them or give adequate warning of their existence . "

The submission on behalf of the defendants was that, as the plaintiff knew of the danger, there was no need for them to give him any notice, and he could not recover, for he was in the same position as one to whom notice had been given. I am not sure that there is any ambiguity in the rule as stated by Willes J if, as I think, the rule itself ends with the words "knows or ought to know," and the words which follow are regarded as indicating possible defences. Once there is evidence of neglect-and I think it is clear that there was, on the judge's finding as to the staging-it is a question of fact whether the notice given is sufficient to absolve the occupier from liability. I agree that one who has knowledge of the danger may well be treated as though he had been given notice of it. Whether the notice (or knowledge) is sufficient to absolve the occupier must depend on a variety of circumstances, including the nature of the risk and the position of the injured party. If a veterinary surgeon is called to a farm at night time to attend to a sick animal and the farmer tells him: "Be careful how you go down the yard or you may fall into a tank," and, in spite of every care, the veterinary surgeon meets with an accident through an unusual danger, though of the kind envisaged, he may be entitled to recover, notwithstanding the warning or notice. On the other hand, if a shopkeeper says to a customer: "Do not go to the far side of the shop. There is a hole there and it is dangerous," and the customer disregards the warning and thereby meets with an accident, it is unlikely that he could recover.

The plaintiff was employed to work on this staging. He had pointed out that it was insufficiently constructed. No doubt, he hoped that he would be able to carry on safely and, perhaps, he thought that the defendants would put the staging into a better condition. It was his duty to get on with the work. He was entitled to rely on the promise of the defendants' charge-hand that something would be done. There is no finding of contributory negligence against the plaintiff and it must be taken that at the time of his accident he was taking every care of himself and that the accident took place because of the insufficiency of the staging. Can it be said that reasonable care was taken "by notice . or otherwise," so that the defendants are relieved from responsibility? In fact, they did nothing. I do not regard knowledge on the part of the plaintiff as an answer to the claim, unless it can be shown, not only that he realised the extent of the risk, but also that he freely and voluntarily undertook it-in other words, that the defence of *volenti non fit injuria* applies: see *Letang v Ottawa Electric Ry Co*. I do not know how far *volenti* as a defence was considered in the court of first instance. It was argued on the appeal, and I had not then noticed that it was not raised by the defence as pleaded.

We were referred to *Bowater v Rowley Regis Corpn*, in which it was said that the defence of *volenti* could seldom apply when the plaintiff was a servant of the defendants. It is difficult to see any real difference in principle between that case and this, for, though here the plaintiff was not a servant of the defendants, he was a servant of sub-contractors and was working alongside the defendants' employees. He had complained to the defendants' charge-hand,

who had promised to do the best he could, but who, in fact, did nothing. The defence of *volenti* ought not to prevail against a workman who has complained, but who thinks it right to get on with his work as best he can and as carefully as he can, especially if there be a promise on behalf of the occupiers to put the matter right or to do "the best I can."

It remains for me to deal with the other ground on which the plaintiff's claim is put. It was said that, as the defendants knew that the staging was to be used by the sub-contractors' men, of whom the plaintiff was one, they were under a duty to him to exercise reasonable care in regard to it. It seems to me that this is a much better way of putting the position than to regard it as merely the case of an invitor and an invitee. There has been much criticism of the words of Sir William Brett MR in *Heaven v Pender*, where he said (11 QBD 509):

> "The proposition which these recognised cases suggest, and which is, therefore, to be deduced from them, is that whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."

In *Donoghue v Stevenson*, Lord Atkin, referring to this passage in the judgment of Brett MR, said ([1932] AC 580):

> "As framed, it was demonstrably too wide, though it appears to me, if properly limited, to be capable of affording a valuable practical guide . You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be-persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. This appears to me to be the doctrine of *Heaven* v. *Pender*, as laid down by LORD ESHER (then BRETT, M.R.) when it is limited by the notion of proximity introduced by LORD ESHER himself and A. L. SMITH, L.J., in *Le Lievre* v. *Gould*."

After citing extracts from those judgments Lord Atkin continued (*ibid*, 581):

> "I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act."

The defendants in the case now before us were the main contractors and they were fully aware of the purposes for which they erected the staging, and, in particular, that it was to be used by sub-contractors' workmen. Applying

the words of Sir William Brett MR in *Heaven v Pender*, as explained and modified by him in *Le Lievre v Gould* and by Lord Atkin in *Donoghue v Stevenson*, I consider that the defendants were under a duty towards the plaintiff to use ordinary care and skill in the erection of the staging, and they failed in the performance of that duty. The defendants owed to their own workmen a duty to use due care and skill to provide proper plant and appliances. If an accident had occurred to one of their own men through this defective staging, it seems to me that, apart from questions such as contributory negligence, the defendants would have been responsible in damages, and I fail to see why the position should be different in the case of sub-contractors' men, for whose use also the staging was erected by the defendants.

In truth, there would not appear to be a great deal of difference between this aspect of the case and that of invitor and invitee if the view which I have

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expressed of the rule in *Indermaur v Dames* is correct. In *Robert Addie & Sons (Collieries) Ltd v Dumbreck*, Lord Hailsham LC said of invitees ([1929] AC 365):

> "Towards such persons the occupier has the duty of taking reasonable care that the premises are safe."

That was a shorter way of expressing the law and it omitted that part of the words of Willes J which indicates what may provide a defence when there is evidence of neglect on the part of the occupier. Lynskey J found that the staging was as described by the plaintiff and his witnesses. The defendants' charge-hand shipwright (Wright) admitted that the staging would be dangerous if it was as they had described it. Another of the defendants' witnesses (Atkinson) agreed that the staging was quite unsafe for welders, and he said that there were complaints every day about the staging. Clearly there was evidence of neglect on the part of the defendants, and I do not see anything in the evidence which can excuse them from liability, unless it can be said that the plaintiff freely and voluntarily undertook the risk. For the reasons I have given, I do not think that that avails the defendants in the circumstances of this case. I would allow the appeal and order that judgment be entered for the plaintiff with damages to be assessed.

TUCKER LJ. This case appears to me to require us to decide a matter which has been much debated by the writers of text books, namely, as to the alleged ambiguity of the rule in *Indermaur v Dames*. Does that rule require the occupier to take reasonable care to make the premises or structure reasonably safe for the purposes for which the invitee is invited thereto, or is the occupier's duty confined to taking reasonable care to prevent accidents arising from unusual dangers of which he is or ought to be aware, so that, if the danger is known to the injured person as a result of notice or otherwise, he is precluded from recovering? It does not appear that in the long history of cases concerning invitors and invitees it has ever been necessary to the actual decision to answer this question. There have been numerous *dicta* either way. In *Hillen v ICI (Alkali) Ltd*, Scrutton LJ referred to the conflict of opinion on the point in these words ([1934] 1 KB 465):

> "It is unnecessary in this case to discuss whether that obligation is to use reasonable care to see that the premises are reasonably safe, as was held by the Court of Appeal in *Norman* v. *Great Western Ry. Co.*, or merely to give warning of a trap, the generally accepted view of WILLES, J.'s judgment in *Indermaur* v. *Dames*, as stated by LORD ATKINSON in *Cavalier* v. *Pope*, and held by the Court of Appeal in *Brackley* v. *Midland Ry. Co*. On this point see SALMOND ON TORTS (7th ed.), pp. 462-464, and POLLOCK ON TORTS (13th ed.), p. 533, note (*f*)."

He evidently regarded it as open to this court to adopt either view and nothing has occurred subsequently to alter the position.

In 1929 Lord Hailsham LC in *Addie (Robert) & Sons (Collieries) Ltd v Dumbreck*, had said ([1929] AC 364):

> "The duty which rests upon the occupier of premises towards the persons who come on such premises differs according to the category into which the visitor falls. The highest duty exists towards those persons who fall into the first category, and who are present by the invitation of the occupier. Towards such persons the occupier has the duty of taking reasonable care that the premises are safe."

"The first category," as he had previously indicated, consisted of people who went by invitation, express or implied, of the occupier. Since that date and since the observations of Scrutton LJ in *Hillen's* case, Slesser LJ in *Weigall v Westminster Hospital* cited ([1936] 1 All ER 234) the passage

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from Lord Hailsham's speech which I have just read, and Scott and Goddard LJJ in *Haseldine v Daw* have stated the duty as follows: SCOTT LJ said ([1941] 3 All ER 166):

> "On the scope of the occupier's duty to an invitee at common law, there is to-day general agreement, except on one aspect, and, if the plaintiff was an invitee, as I think that he was, the liability of the landlord in the present case to the plaintiff as his invitee turns on that very point. Is it his duty to provide 'reasonably safe premises,' or only to 'take reasonable care' to ensure that his premises shall be safe? The former standard is higher than the latter, 'a limited duty of insurance, as one may call it,' as was said in POLLOCK ON TORTS, 14th ed., p. 406, and, it has been suggested, may involve responsibility for the act of an independent contractor: see WINFIELD ON TORTS p. 581, note (*d*). There are some judicial expressions to the former effect, but I do not know of any case where the point has been the *ratio decidendi*. In *Indermaur* v. *Dames*, WILLES, J., expressed it as a duty of care only, and I cannot see how, on principle, it can be put any higher."

Goddard LJ used these words (*ibid*, 181):

> "However, even assuming that the plaintiff is to be regarded as an invitee, I think that his claim . must fail. Towards an invitee the occupier has the duty of taking care that the premises are reasonably safe."

In *Halsbury's Laws Of England*, Hailsham ed, vol 23, p 604, para 853, where all the authorities are referred to, the law is summarised as follows:

> "The duty of the occupier of premises on which the invitee comes, is to take reasonable care that the premises

> are safe, and to prevent injury to the invitee from unusual dangers which are more or less hidden, of whose existence the occupier is aware or ought to be aware, or, in other words, to have his premises reasonably safe for the use that is to be made of them."

As this way of stating the duty appears to me to be apt to cover all the infinite variations of facts and circumstances which may exist in these cases and to meet the plain requirements of justice, I would be disposed to adopt it as a correct and comprehensive statement of the duty, unless I am compelled by authority to reject it. The only reason to the contrary of which I am aware is that the precise language of Willes J in *Indermaur v Dames* has so often been quoted as correctly stating the whole duty that is owed by the invitor in such cases that it may be said to have become part of our law. I venture to think, however, that, as in every other case, the precise language used must be considered in relation to the particular facts which required decision. In that case there was a hole in the floor of the premises [which were used as a sugar-refinery], not due to any defect, but necessary to the operations being carried on on the premises. Before going there, the plaintiff had been cautioned in these terms:

> "Now, mind, Indermaur, sugar-houses are very peculiar places: they neither allow candles nor lucifers. We must keep our eyes open. There is a man to go with us with a light. I shall follow the man; and you keep close to me."

The existence of the hole was well known to the regular employees on the premises, but it was unknown to the plaintiff, who was working for a contractor. To him it was an unusual danger; to the regular employees it was a familiar feature of the premises. In directing the jury Erle CJ used this language (LR 1 CP 277):

> "The plaintiff has to establish that there was negligence on the part of the defendant; that the premises of the defendant, to which he was sent in the

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> course of his business as a gas-fitter, were in a dangerous state; and that, as between himself and the defendant, there was a want of due and proper precaution in respect of the hole in the floor. To my mind, there would not be the least symptom of want of due care as between the defendant and a person [permanently] employed on his premises, because the sugar-baking business requires a lift on the premises, which must be as well known to the persons employed there as the top of a staircase in every dwelling-house. But that which may be no negligence towards men ordinarily employed upon the premises, may be negligence towards strangers lawfully coming upon the premises in the course of their business."

It was in this connection that Willes J laid down what he stated was at least the duty owed by the invitors. I do not read it as purporting to be a comprehensive statement covering all cases, and I regard it as a good example of the application of the duty to take reasonable care to make the premises reasonably safe, expressed in terms appropriate to the facts of the case.

It would, I think, be strange and unfortunate if our law allowed an occupier, who has supplied gear or equipment for immediate use by those whom he has invited to his premises without having taken reasonable care to see that such gear or equipment is reasonably safe, to escape liability in whole or in part unless he proves contributory negligence or establishes a plea of *volenti non fit injuria*. In the present case contributory negligence has not been found and on the facts proved was clearly not established. *Volenti non fit injuria* was not pleaded, and, although it depends in every case on questions of fact, I am clearly of opinion that the facts proved in the present case went no further than to establish *scienter*, there being no material distinction between this case and that of master and servant. For these reasons I agree that the appeal succeeds. The observations that I made in *Harrison v National Coal Board*, with regard to the desirability of the assessment of damages in these cases by the trial judge applies equally in the present case.

JENKINS LJ. I agree with the conclusion at which my Lords have arrived. The degree of care owed by the defendants as invitors to the plaintiff as invitee must obviously be assessed with reference to the circumstances of the particular case. The relevant circumstances, as I understand them, were these. The plaintiff's employers, Thames Welding Co, had contracted with the defendants to do certain welding work on the ship, which the defendants were re-conditioning as head contractors. The relevant part of this work involved the use of staging, and the contract was entered into on the customary basis that the defendants would provide the requisite staging, and that Thames Welding Co or its employees would not interfere with the staging so provided, but would report any deficiencies to the defendants' shipwrights for attention. The position, therefore, as regards the welding work in the hold, in the course of which the plaintiff was injured, was that the staging from which Thames Welding Co's employees had to work was provided by the defendants and was under their exclusive control as regards any additions or alterations required to make it adequate for the purpose. I think it follows that, in inviting Thames Welding Co's employees (including the plaintiff) into the hold for the purpose of doing the work contracted for from the staging so provided and controlled by the defendants, the latter assumed a duty towards the former to ensure that the staging was reasonably safe for the purpose for which it was to be used. If one of the planks had been rotten and had broken under the plaintiff, or if the staging had been insecurely supported and had collapsed under him, the plaintiff would clearly have been entitled to recover, both on the narrowest construction of the definition of the duty of invitors to invitees, as stated in *Indermaur v Dames* and applied in so many subsequent cases to an almost infinite variety of facts, and also on the principle that a person who provides

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defective gear for a given purpose is liable to the person for whose use it is provided if the latter sustains injury through the defect, even though the person supplying the gear is not the employer of or otherwise contractually related to the person injured: see *Heaven v Pender* (as explained in *Donoghue v Stevenson*) and *Oliver v Saddler and Co*.

Does it make any difference that the defect actually in question lay, not in any unsoundness or insecurity in the members or construction of the staging, but in its inadequacy in the respects that the four planks provided and the

transverse irons on which they rested were so narrow, and the planks were placed so far apart, that anyone attempting to cross, or to pass tools, from one plank to the next was likely sooner or later to slip and fall? The defendants claim that this does make all the difference. The staging, they say in effect, was plain to see for what it was, and no more and no less dangerous than it actually appeared to be. The danger was obvious, and, if the plaintiff chose to use the staging, he did so at his own risk. I think that this argument involves an undue restriction on the duty owed by the defendants to the plaintiff in the circumstances of the case. It was their business to provide the staging, and, in using it as provided for the purposes of the work contracted for, the plaintiff was doing the very thing they invited him to do. It was also their business (and this I regard as a decisive element in the case) to make good any deficiencies in the staging, which the plaintiff was not entitled to supplement or re-arrange in any way. The staging, to be reasonably safe for the purpose in hand, had to be safe, not merely for a person using reasonable care to walk across or stand on, but for a person using reasonable care to work from and move about on, with his tools and so forth, in the course of welding operations of the kind contracted for. The degree of risk which the use of the staging as provided would be likely to involve in the various situations liable to arise in the course of the work would not be easy to assess in advance. It would, no doubt, have been theoretically possible for the plaintiff to refuse to work from the staging until it had been improved to his satisfaction, but the mere fact that he did not so refuse clearly did not suffice to bring him within the principle of *volenti non fit injuria*: see *Letang v Ottawa Electric Ry Co*. The defendants must obviously be regarded as having known of the inadequacy of the staging as erected by their own employees, but, quite apart from this, the evidence shows that the plaintiff and his workmates complained to the defendants' employees of its inadequacy and that these complaints were ignored.

The defendants' position, therefore, comes to this. It was their business to provide staging for Thames Welding Co's employees to work from. They provided inadequate staging. It was also the defendants' business to make good any deficiencies in the staging. Complaints of the inadequacy of the staging were made to their employees and ignored. The plaintiff, using, in accordance with the defendants' invitation, the only staging which they thought fit to provide, slipped and was injured, without any negligence on his part, owing to the inadequacy of the staging provided. The plaintiff claiming damages, the defendants say in effect: "We are not liable. The accident was your own fault. It is true that the staging we provided and invited you to use was inadequate and that our employees did nothing when complaints about it were made, but, after all, you could have refused to use the staging and stopped work until we provided something better." This position seems to me to be wholly untenable. For these reasons, I agree that the appeal should be allowed.

Appeal allowed with costs. Judgment of the court below set aside and judgment entered for the plaintiff for £275 and costs.

Solicitors: *Shaen, Roscoe & Co* (for the plaintiff); *Carpenters* (for the defendants).

C StJ Nicholson Esq Barrister.

Joubert v Buscor Proprietary Limited
2017 JDR 0106 (GJ)

Citation	2017 JDR 0106 (GJ)
Court	Gauteng Local Division, Johannesburg
Case no	2013/13116
Judge	Siwendu AJ
Heard	September 15, 2016
Judgment	December 09, 2016
Appellant/ Plaintiff	Ilana Cedar Joubert
Respondent/ Defendant	Buscor Proprietary Limited

Summary

Labour — Occupational injuries — Compensation — Applicant's husband, an employee of subcontractor working on respondent's premises, died as result of exposure to hazardous fumes General duty on employers to ensure, as far as reasonably practicable, that persons other than employees are not exposed to hazards in terms of Occupational Health and Safety Act 85 of 1993, s 9(1) — Wording of section broad enough to include third parties — Deceased accordingly covered by s 9(1) — Applicant therefore able to institute proceedings in present case.

Judgment

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INTRODUCTION

[1] The plaintiff seeks the court's leave to amend Particulars of Claim in proceedings instituted against the defendant. She seeks to recover the past and future loss of earnings due to her as well as to her two minor children. The loss follows the death of her husband ('the deceased'). The plaintiff alleges that the defendant requested or permitted or allowed the deceased to enter a sump with a submersible pump.The sump is a confined oxygen-deficient space with oil, toxic, hazardous vapour, dust, and fumes. As a consequence of the exposure, the deceased suffered severe injuries to his central nervous system leading to his death.

[2] At the time, the deceased, held the position of an apprentice with Lira Electrical CC ('the close corporation'). The close corporation was in turn contracted by the defendant to carry out electrical, mechanical repairs and maintenance of equipment owned by the defendant, situated at the defendant's premises and depot.

[3] For convenience, the parties will be referred to as they appear in this application, as 'the applicant' and 'the respondent' through out the judgment.

AMENDMENTS SOUGHT

[4] The applicant seeks leave to effect four amendments to the particulars of claim which are that:

[4.1] the reference to the year 2012 in paragraph 11 of the particulars is deleted and substituted by the year 2011. The amendment is not opposed;

[4.2] the insertion of the word '*alternatively*' between paragraphs 24 and 25 of the particulars of claim the consequence of which is that it will read as follows:

> *'24 In the premise, the defendant owed a statutory duty of care to the deceased and his dependants to comply with its duties in terms of OHSA and the regulations, which duty it breached.*
>
> *Alternatively*

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> *25 The defendant owed the deceased and his dependants a common law duty of care to take reasonable measures to ensure the saftey of persons employed in the work place, which included a duty of ensure that the provisions of the OHSA and regulations were complied with.'*

[4.3] once the amendment in 4.2 has been effected, the addition of the following wording to paragraph 25 of the particulars:

> *'and to take reasonable measures to ensure the safety of persons entering upon the premises of the defendant, and in particular persons who accessed, used, maintained and repaired the defendant's waste run-off removal system, of which the sump forms part, because the system is an inherently dangerous installation and further creates a source of danger';*

[4.4] the amendment of the wording in paragraph 26 of the particulars to read as follows:

> *'26 The defendant is strictly liable for the plaintiff's damages as a result of its breach of its statutory duties, alternatively, the defendant breached its statutory duties and/or common law duty that it owed to the deceased and his dependents, by negligently failing to take the measures set out in paragraph 17, which it could and should reasonably have done'.*

[5] Other than the amendment in respect of the date, the application for amendment was opposed. It merits mention at this stage that the notice of objection filed on record was in respect of the amendment to paragraph 26 of the particulars of claim only. The objection states that:

> *"The defendant's objection is in respect of a portion of paragraph 4 of the proposed amendment where the proposed amendment reads:*
>
> *'the defendant is strictly liable for the plaintiff's damages as a result of its breach of its statutory duties'."*

[6] The main thrust of the amendment is to introduce an alternative plea to the initially pleaded case solely based on a breach of a common law duty of care. The applicant seeks to introduce an amendment which places reliance on the duties

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imposed by section 9(1) of the Occupational Health and Safety Act, 85 of 1993, ('OHSA') [1] read together with the Regulation 5 [2] under OHSA. In this regard, she seeks to plead in the alternative that the respondent must be held strictly liable for what is alleged to be a negligent a breach of a statutory duty.

THE APPLICANT'S ARGUMENT

[7] Mr. Bester for the applicant argued that strict liability is not a novel legal concept in our law. It has found application in numerous cases overtime. He submitted that if I juxtaposed section 9 of the Act with sections 28(1) [3] and 49 of the National Environmental Management Act [4] ('NEMA'), I will find that the provisions of these sections are similar. Given this, based on the decision in *Bareki NO and another v Gencor Ltd and others* [5] , the court in considering the nature of the duty imposed, held that section 28 of NEMA created strict liability on the part of the owner or the possessor of the premises. He submitted that I should adopt a similar approach in interpreting section 9(1) of OHSA. The wording with regards to the measure of the duty is similar in both statutes. Both make reference to the taking of reasonable measures to prevent harm**.**

[8] The second leg of the argument, is that I should apply a holistic approach and follow the principles laid down in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [6] read together with *Bothma- Batho Transport (Edms) Beperk* [7] in interpreting the provisions of OHSA. In doing so, I will find that a breach of section 9 and the regulations result in strict liability on the part of the employer. He further

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submitted that interpretation of the legislation engages matters of policy in the context of all the relevant facts. In this regard, I should consider the dictum in *PMB Armature Winder v Pietermaritzburg City Council* [8], where Didcott J stated that:

> *'as industry and technology spread, as their complexities multiply, as their destructive potential grows, so the case for their absolute liability gains strength'.*

He argued that when the account of the inherent dangers, in this case, is considered, it should be indicative that sometimes it is appropriate to allow for strict liability.

THE RESPONDENT'S OBJECTION AND ARGUMENT

[9] Mr. Redding SC for the respondent argued as the first ground for objection that OHSA does not make provision for the strict liability contended for in the event of a breach of the duties imposed by the Act. He submitted that a pleading based on strict liability would be bad and non-existent in law as it will render the pleadings excipiable if allowed. As a second ground, he submitted that the deceased cannot institute a claim against the respondent as he was not an employee as envisaged in OHSA. Employees are required to act in a manner conducive to safety. [9] It is common cause that the deceased was an employee of a subcontractor engaged by the respondent at the time.

[10] As a third ground, Mr. Redding SC argued that I should distinguish OHSA from NEMA. OHSA's aim is not to give cause for action or compensation as it is a preventative statute. The criminal sanction provided in OHSA is the indicator [10] that the aim of the legislation is not compensation for accidents but is preventative in its prescripts. He argued that where legislation like OHSA imposes a standard of care, it is an indication that strict liability was never intended. He submitted that I should distinguish the *Lascon* and *Bareki* decisions in the interpretation of OHSA.

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[11] On other substantive aspects, Mr.Redding SC submitted that the amendment would create confusion in that, two causes of action, one based on a common law duty and the other based on a breach of statutory duty would result. This would, in turn, create two trials, one based on strict liability and one based on common law. He argued further that the respondent would be prejudiced at the trial stage in that it would be prevented from leading evidence about whether or not it was negligent as negligence would be irrelevant if strict liability is allowed. This would constrain the respondent in mounting a defence to show that it was not negligent, as it would be effectively prevented from leading this evidence.

[12] He argued that it was not the intention and interest of the Legislator to make a defendant liable in spite of them not being negligent. There is no indication that the intention of the legislator was that negligence need not be proved.

ISSUE FOR DETERMINATION

[13] The objection raised engages numerous questions of law. In determining whether a case has been made out for an amendment, I am bound to determine not merely the procedural requirements and the effect of the amendment sought, but also whether the amendment renders the pleadings excipiable if granted. This is linked inextricably with two further issues raised by the respondent. The first is whether OHSA imposes strict liability. The second is whether the applicant is precluded from instituting a claim based on a breach of a duty of care at common law simultaneously with that based on the breach of OHSA, pleaded in the alternative. The latter touches on the claim that the respondent will be prejudiced thereby.

APPLICABLE LEGAL PRINCIPLES

[14] It is essential to refer to the provisions of OHSA as a starting point, to deal with the argument by the respondent, that the deceased in turn his dependents

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cannot institute a claim for compensation against the respondent for want of a direct employment relationship.

Is applicant precluded from instituting a claim against the employer by OHSA?

[15] I am in agreement in part with the respondent that the scheme of OHSA is to ensure preventative measures against health and safety hazards and injuries. OHSA provides for reciprocal obligations by employers and employees as well as joint governance structures for workplace safety through safety committees. [11]

[16] The submission that, the deceased, an erstwhile employee of a subcontractor, is not owed a duty of care derives from a common- law principle evident in *Peri- Urban Areas Health Board v Munarin* [12] . The court in *Peri- Urban* held that a duty of care is not owed to workers of a contractor unless the terms of a contract or other factors create a duty. This common law principle predates OHSA. Consequently, a reference to some of the provisions of OHSA is necessary.

[17] The preamble to the act refers to the protection of persons other than persons at work against hazards to health and safety arising out of or in connection with activities of persons at work. Section 9(1) of OHSA imposes general duties on employers towards other persons other than employees [13] over and above duties of employees at work [14] for workplace health and safety. The section refers to 'persons other than those in his employment' who are owed the general duty and protection. In my view, the wording of section 9(1) is broad enough to include subcontractors like the deceased and the public at large if they may be affected by the employer's activities.

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[18] Regard also is to be had of the recent decision in *Health Resource Group and others v Minister of Labour and others* [15] , dealing with the reach of OHSA to third parties other than employees. The court, in this case, dealt with access to information emanating from inquiries conducted under the act. In interpreting section 32 of OHSA, the court held that reference to 'any person' in the act means that the provisions are not directed at employees only.

[19] Relevant to the case at hand is sections 37(1) and (2) [16] of OHSA. The sections create the rebuttable presumption that the prohibited act or omission, if it occurs, is that of an employer or user. It introduces vicarious liability of an employer or user for workplace health and safety injuries and hazards. In my view, this somewhat alters the common-law position relied upon by the respondent.

[20] For completion, it is also necessary to have regards to section 35 of the Compensation for Occupational Injuries and Diseases Act [17] ('COIDA') for the context and understanding of health and safety regulation. While COIDA is only relevant in so far as the right to compensation for employees and dependents is concerned, it provides a material backdrop against which to view the respondent's interpretation and argument. Section 35 of COIDA specifically precludes any employee or the dependent of any employee from instituting civil proceedings against an employer for recovering a loss flowing from occupational injury or disease in the civil courts.

[21] As a result of the factors above, I part ways with the restricted interpretation argued by the respondent. It is not a tenable one. It would lead to an absurd result

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which precludes not only employees but third parties and the public at large from instituting civil claims for workplace-related health and safety injuries against an employer. Activities of an enterprise extend beyond employees and may include families and surrounding communities where the enterprise operates. OHSA was not only enacted for the benefit of employees but for the benefit of third parties and the public. I am satisfied that the applicant's right of action or that of a third party who is not an employee enjoys protection, and is thus not limited.

[22] I hold that section 9(1) covers the deceased and in turn, the applicant as a person contemplated thereof. Consequently, she can institute proceedings against an employer like the respondent in the present case.

Does OHSA envisage strict liability on the part of the employer?

[23] The hallmark and accepted principles of strict liability is a reference to and a finding of liability or guilt despite the absence of fault. It arises in respect of civil and criminal claims disputes. Strict liability offences are generally of a regulatory nature and where it is particularly important to maximise compliance, for example, public safety or protection of the environment.

[24] The view has prevailed in the past that our courts have demonstrated a reluctance to impose strict liability. On the other hand, legislative developments demonstrate that strict liability is a modern feature of our law. [18]

[25] The first clear indication of acceptance is evident in the *PMB Armature Winders and Bareki NO and another v Gencor Ltd* [19] decisions [20] . In the *PMB Armature Winders* decision Didcott J draws a court faced with such a matter to the basic principles of interpretation of a statute, namely whether the interpretation proffered accords with the intention of the Legislature as opposed to a court's

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predilection and consideration of the concomitants on the matter. The *Bareki NO and Another v Gencor Ltd* decision enjoins a court to have regards to nature of the duty or obligation created by the statute as well as the circumstances under which it arises. The constitutional court in *Cool Ideas 1186 CC v Hubbard and Another* [21] affirms the fundamental tenant and starting point that the words in a statute must be provided with their ordinary grammatical meaning. Where the wording of the section is clear and unambiguous, the Court is obliged to ascertain the intention of the Legislature from the language which it employed [22] . *Cool Ideas* further states that the legislation must be interpreted purposively, having due regards to context, in a manner consistent with and that preserves constitutional validity.

[26] I have placed reliance on these preexisting principles and must as a starting point revisit section 9 (1) which states that:

> *'Every employer **shall conduct** his undertaking in such a manner as **to ensure**, as far as **reasonably practicable**, that persons other than those in his employment who may be directly affected by his activities **are not thereby exposed to hazards to their health or safety** (own emphasis**).'***

Regulation 5 (1) states that:

> *'An employers or user of machinery **shall take steps to ensure** that a confined space is entered by an employee or other person **only** after the air therein has been tested and evaluated by a person who is competent to pronounce of the safety thereof, and who has certified in writing that the confined space is safe and will remain safe while any person is in the confined*

space taking into account the nature and duration of the work to be performed therein' (own emphasis).

[27] In providing context for the interpretation of OHSA, Mr. Redding SC placed reliance on Prof Paul Benjamins commentary on OHSA [23] to argue that the aim of the

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legislation was preventative and was not intended to impose strict liability. Prof Benjamin states that OHSA aims at amongst others;

[27.1] a reorientation of the employer's general duties to a more active approach to the elimination or mitigation of hazards;

[27.2] the extension of the employer's obligations to supply workers, with information on dangers present in the work environment as well as provide; and

[27.3] a more comprehensive protection of the public from safety and health hazards emanating from workplaces.

[28] Mr. Redding's argument placed an over-emphasis on the preventative aspects relating to employer-employee responsibilities. It fails to account for the broader import and protections afforded to third parties and the public already alluded to above. It is incorrect to interpret OHSA in a manner that holds that outsiders who are not connected with the day to day operations of an employer's business and activities have similar obligations to those of employees.

[29] When an account of the ordinary grammatical meaning of the section is considered, it reveals from its plain reading and the language dual components or elements. The first instance is in the use of the words "**shall conduct**" and "**ensure**"(own emphasis). In my view, this indicates the imposition of duty on an employer in imperative terms. The second instance is the legislation of the standard of care through the use of the words as far as '"**reasonably practicable**"(own emphasis). The elements of the standard required of an employer are articulated in the regulation 5.

[30] In my view, the effect is that the section and regulation have not only imposed a duty of care on the employer. They have, also, hard-wired the standard of care. In this regard, the liability of an employer flows directly from the malum prohibitum conduct of the breach of the duty as well as the breach of the prescribed standard imposed by OHSA.

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[31] When an account of section 37(1) in respect of the presumption of acts or omissions by an employer is considered, there is more required of an employer. The section states that the fact that an employer has issued instructions forbidding any act or omission of the kind in question shall not, in itself, be sufficient proof that it took all reasonable steps to prevent the act or omission. In my view, this puts the conduct of the employer under scrutiny beyond the incidence of the onus of proof. To exculpate itself from liability, the employer must show that it met the prescribed standard by demonstrating the actual measures taken to prevent or mitigate the safety risk or hazard created.

[32] In my view, liability flows naturally from the regulation of the foreseeable risk inherent in the employer's hazardous activity and operations as well as the conduct which if proved, is found wanting by falling below the standard of care prescribed for the nature of activity or operations in which it is engaged. In this regard, OHSA imposes both a duty and a standard of care in absolute terms**.** For this reason, on the plain reading of OHSA, and the reasons above, the liability of the employer is a strict one. It is thus not necessary to consider other paralell legislation in this regard.

[33] Other than the intrinsic interpretation of OHSA Mr. Redding's contention against the imposition of strict liability is that negligence will not be a factor and the respondent will be prejudiced by this. I understood this to mean that the respondent will be deprived the opportunity of proving the converse, that is, the absence of negligence on its part. Since I have accepted that the section sanctions and imposes strict liability, this argument must first be evaluated against what the applicant would need to prove to succeed. She would need to show that:

[33.1] the respondent owed a duty of care to the deceased as a foreseeable third party or bystander contemplated in OHSA;

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[33.2] a breach of that duty in that the respondent's conduct fell below the applicable standard of care referred to in Regulation 5 of the activity and operations in which it is engaged;

[33.3] as well as injury to the deceased in turn the applicant that was caused by the breach; and

[33.4] the damages suffered.

[34] The elements above are to be contrasted with the principles to determine the traditional common law test of negligence. These were developed and restated in numerous cases over time. *Kruger v Coetzee* [24] and in *Ngubane v South African Transport Services.* [25] *The assessment is an objective test applied in both criminal and civil cases. The common denominator from case law is that a system of assessment of liability based on a breach of a standard of care expected of a reasonable person has evolved. The decision in Herschel v Mrupe* [26] is emphatic that the test is grounded in the circumstances of the particular case and is not one in the air. I have already held above that OHSA imposes dually, a duty and a standard of care on an employer resulting in a strict liability of an employer. The test of reasonableness of the employer's measures is entrenched.

[35] Given that the standard of care is already hard wired in OHSA together with the regulations, any existing fault (whether dolus or culpa) is inherent and can be inferred from the failure to meet the prescribed standard if it is found to be so from

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the facts. Furthermore, the enacted measure of reasonableness touches squarely on the extent of the employer's negligence or otherwise. I must accept that the effect of section 37 of OHSA is that the onus would be shifted to the respondent to demonstrate the reasonable measures taken. In my view, the absence of negligence on the part of the respondent will be an inherent component of discharging the onus of proving that it took the reasonable measures required of it. Under such circumstances, in a claim based on the breach of the provisions of OHSA, it

would not be necessary to deal with negligence separately. It will be inherent or can be inferred from the failure to meet the prescribed standard should the failure be proved. Thus, an employer would not be deprived of showing an absence of negligence on its part as contended. To hold to the contrary would result in yet another absurdity. The complaint by the respondent is not well founded.

Whether a claim at common law can lie side by side, with an alternative claim of a statutory breach?

[36] The respondent alleges a confusion will result if I were to allow strict liability simultaneously with the alternative common law claim. I have examined the respondent's complaint against the decision in *In Perre v Apand (Pty) Ltd* [27] as well as the decision in *Premier, Western Cape v Fair Cape Property Developers (Pty) Ltd* [28] *. In Perre,* McHugh J held that in most delictual cases, the facts which establish negligence are precisely the same as those which establish wrongfulness even though that characteristic does not detract from the distinction between the legal elements and the necessity for the success of any claim under the aquillian action that both must be established. In *Premier, Western Cape decision,* Lewis JA held the test of reasonableness goes not only to negligence but also to determine the boundaries of lawfulness.'

[37] In *Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as amici curiae),* [29] the constitutional court cautions against confusion. The

court held that what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct (which is part of the element of negligence). Reasonableness in respect of wrongfulness concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct.' In my view, the malum prohibitum conduct has, in the wisdom of the legislature already been regulated.

[38] The question is whether the codification of the duty and standard of care excludes a claim in delict based on common law. In my view, the respondent confuses the nature of the inquiry with regards to wrongfulness to be proved at common law and that flowing from the statutory imposition of the duty in OHSA. It seems to me that an onerous task lies ahead on the applicant who seeks to plead her case in the manner sought than on the respondent. I am of the view that the respondent's claim that it will be prejudiced is not well founded. Nothing in the reading of the provisions of OHSA indicates that the codification of the duties excludes or is intended to exclude or limit a common law claim a party may have. Both actions can lie side by side, pleaded in the alternative as sought.

[39] Given the findings above, the application for the amendment of the particulars of claim constitutes a matter that is deserving of consideration by the courts. There is surprisingly thin case law developed on the question of liability of an employer or user under OHSA. It is a matter that is deserving of proper ventilation. The proceedings are not at an advanced stage that they would prejudice the respondent. The prejudice claimed by the respondent is not well founded and is not one that cannot be cured by a proper narrowing of the issues through an effective pretrial conference.

Costs

[40] The respondent argued substantive points of law some of which fell outside of The Notice of the Objection to the Amendment filed. It was not succesful. Mr. Redding SC called on me to adopt a more flexible approach as these issues were dealt with in the heads of argument. He conceded that if I was not with him, then he is constrained by the terms of notice objection filed.

[41] I am of the view that while the respondent can be criticised for the handling of some of the apsect of the objection, it is not a matter that warrants that punitive costs be awarded. The questions of law were not raised spuriously. Nevertheless, the respondent was not successful. It follows that the applicant should not be deprived of her costs. The costs must follow the result.

[42] In the result, I make the following order:

1. The amendments sought in 4.2, 4.3 and 4.4 above are granted.
2. The respondent is ordered to pay the costs of the applicant except in respect of the amendment with regards to the date which was not opposed.

Siwendu AJ

Acting Judge of the High Court

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Date of hearing:	15 September 2016
Date of judgment:	09 December 2016

Summary Judgment

The applicant sought the leave of the court to amend her pleadings in a common law claim for loss of past and future loss of support brought against the respondent. She alleged that her husband ("the deceased") died due to exposure to toxic vapour and fumes while conducting maintenance at the respondent's premises. The deceased, an apprentice was an employee of a subcontractor contracted by the respondent. The effect of the amendment would be an introduction of an alternative claim based on the breach of statutory duty in Section 9 of the Occupational Health and Safety Act ("OHSA") read together with Regulation 5 of the Act. Also, the plaintiff sought an amendment the effect of which was to hold the respondent strictly liable for the breach of its duties in terms of OHSA

The respondent opposed the application because it submitted that the pleadings would be bad in law and excipiable if allowed. It submitted that the deceased was not owed a duty in terms of the OHSA as he was not an employee. OHSA was a preventative statue and did not impose strict liability. If strict liability were allowed the pleadings would be confusing and the respondent would be prejudiced as it would not be allowed to plead that it was not negligent

After considering the provisions of OHSA, the court held that the general duties on an employer had a wider import which included the protection of "äny other persons" and was not limited to the protection of employees only. OHSA was a departure from the common law position in *Peri-Urban Areas Health Board v Munarin 1965 (3) SA 367 A.* When considered against the Compensation for Occupational Injuries and Diseases Act (COIDA) which precludes employees and dependents from instituting proceedings against employers; it would be absurd also to hold that OHSA limits the rights of third parties. Third parties may have no direct connection with the day to day operations of the employer. To preclude then from instituting civil proceedings against an employer for workplace health and safety injuries would result in an absurdity where neither employees and their dependents or third parties can institute claims against an employer.The applicant had the right to institute proceedings against the respondent.

Siwendu, AJ

In considering whether OHSA created strict liability on an employer, the court found in the affirmative. It noted that strict liability is a modern feature of our law. When the provisions of OHSA are considered as a whole, the act imposed both a duty as well as a standard of care. It regulates the foreseeable risk inherent in an employer's hazardous activity and operations. The obligations of the employer are in absolute terms The employer's liability flows naturally from the malum prohibitum conduct of the breach of the duty and standard of care regulated by OHSA. The presumptions of actions and omission by an employer demonstrate there is more required of an employer as it is required to show that it met the prescribed standards. The employer is required to demonstrate actual measures taken to prevent the harm

The court also considered whether the respondent would be prejudiced in the proceedings based on an alleged inability to prove that it was not negligent. It contrasted the elements of a claim based on strict liability and those based on a common law claim of negligence. The court found that OHSA hard- wired the standard of care by the words "reasonably practicable ." While in a claim based on strict liability negligence, negligence need not be proved separately, any existing fault will be inherent and can be inferred from the failure to meet the standard if proved. In this regard, the employer will is not deprived the opportunity to show an absence of negligence on its part

Dealing with the confusion the respondent claimed would result if both a claim based on strict liability and one based on common law are pleaded in the alternative, the court drew a distinction between the elements of wrongfulness and negligence and how the test of reasonableness applies in respect of each of the elements. The court relied on the decisions in *In Perre v Apand (Pty) Ltd (1999) 198 CLR 180 (H, C,A) para 132,* as well as the *Premier of Western Cape v Fair Cape Property Developers (Pty) Ltd.* It noted that the elements required to prove negligence may overlap with those required to prove wrongfulness but these elements are nonetheless distinct. The common question of reasonableness relates to different aspects. The one concerns the imposition of liability (wrongfulness) while the other concerns the reasonableness of the respondent's conduct (negligence). The respondent had confused this distinction in its argument. The codification of the duty of care and the standard of care did not preclude a claim based on the common law if the plea was

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Siwendu, AJ

in the alternative. The two actions can lie side by side if pleaded in the alternative. The respondent will not be prejudiced thereby.

The court held that given the surprisingly thin case law in the area of employer liability for health and safety injuries in terms of OHSA, the matter is deserving of proper ventilation by the courts. The prejudice claimed was not well founded and was not a matter that cannot be resolved by an effective pretrial conference. The amendment sought was granted with costs awarded against the respondent

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[1] Section 9(1) 'Every employer shall conduct his undertaking in such a manner as to ensure, as far as is reasonably practicable, that persons other than those in his employment who may be directly affected by his activities are not thereby exposed to hazards to their health or safety'.

[2] An employer or a user of machinary shall take steps to ensure that a confined space is entered by an employee or other person only after the air therein has been tested.

[3] Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing, recurring, or in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment

[4] Act 107 0f 1998.

[5] 2006 (1) SA 432 (T) page 8 of 20.

[6] 2012 (4) SA 593 (SCA).

[7] *Bothama-Transport(Edms) Beperk v S Botham & Seun Transport (Edms) Beperk* 2014 (2) SA 494 (SCA)

[8] 1981 (2) SA 129 (N).

[9] Paul Benjamin: Commentary on the Occupational health and Safety Act; Juta's Occupational Health and Safety Library.

[10] Paragraph 26 of the Respondent's Head of Argument.

[11] Sections 17,18,19 and 20 of Occupational Health and Safety Act 85 of 1993.

[12] 1965 (3) SA 367 (A).

[13] Section 9 of the Occupational Health and Safety Act 85 of 1993.

[14] Section 14 of the Occupational Health and Safety Act 85 of 1993.

[15] 2015 (4) ALL SA 78 (GP).

[16] Section 37(1) Whenever an employee does or omits to do any act which it would be an offence in terms of this Act for the employer of such employee or user to do or omit to do, then, unless it is proved that- (a) in doing or omitting to do that act the employee was acting without the connivance or permission of the employer or any such user; (b) it was not under any condition or in any circumstance within the scope of the authority of the employee to do or omit to do an act, whether lawful or unlawful, of the character of the act or omission charged; and (c) all reasonable steps were taken by the employer or any such user to prevent any act or omission of the kind in question, the employer or any such user himself shall be presumed to have done or omitted to do that act, and shall be liable to be convicted and sentenced in respect thereof; and the fact that he issued instructions forbidding any act or omission of the kind in question shall not, in itself, be accepted as sufficient proof that he took all reasonable steps to prevent the act or omission. Section 37 (2) The provisions of subsection (1), shall mutatis mutandis apply in the case of a mandatary of an employer or user, except if the parties have agreed in writing to the arrangements and procedures between them to ensure compliance by the mandatary with the provisions of this Act.

[17] Section 35 of Act 130 of 1993.

[18] See The Consumer Protection Act 68 of 2008; Telkom (SA) v Duncan[1995] 3 All SA 412(W), Ciba-Geigy(Pty)Ltd v Lushof Farms (Pty) Ltd en n'Anders 2002(2)SA 447 (SCA), National Environmental Management Act, 107 of 1996 .

[19] Paragraph 7 supra.

[20] Supra.

[21] 2014 (4) SA 474 (CC)

[22] This is as pointed out by Innes CJ as long ago as 1907 in the well-known case of Venter v R 1907 TS 910 at 913.

[23] Prof Paul Benjamin's Commentary at para 9 supra.

[24] 1966(2) SA 428 A 'For the purposes of liability culpa arises if – (a) a diligens paterfamilias in the position of the defendant – (i) would foresee the reasonable possibility of his conduct injuring another in his person on property and causing him patrimonial loss; and (ii) would take reasonable steps to guard against such occurrence; and (b) the defendant failed to take such steps.'

[25] Kumleben JA, states that 'Once it is established that a reasonable man would have foreseen the possibility of harm, the question arises whether he would have taken measures to prevent the occurrence of the foresseable harm. The answer depends on the circumstances of the case. There are, however, four basic considerations in each case which influence the reaction of the reasonable man in a situation posing a foreseeable risk of harm to others: (a) the degree or extent of the risk created by the actor's conduct; (b) the gravity of the possible consequences if the risk of harm materialises; (c) the utility of the actor's conduct; and (d) the burden of eliminating the risk of harm.'

[26] 1954 (3) SA 464 (A).

[27] (1999) 198 CLR 180 (H C of A), para 132.

[28] 2003 (6) SA 13 (SCA).

[29] 2011 (3) SA 274 (CC) para 122.

Macsteel Service Centres SA (Pty) Ltd v National Union of Metalworkers of South Africa and others [2020] 8 BLLR 772 (LC)

Division: Labour Court, Johannesburg
Date: 03/06/2020
Case No: **J483/20**
Before: C Prinsloo, Judge

Application in terms of section 68(1)(a)(i) of the LRA

State of disaster - Payment of salaries during - Employers obliged to pay employees who resumed work after lockdown during national state of disaster their full salaries - Strike in support of demand for payment of full salaries protected.

Strike - Protected - Employees striking in support of demand that employer guarantee payment of full salaries to all employees, including those not working during resumption of operations after total closure of business due to national lockdown - Strike protected.

Unilateral change to terms and conditions of employment - What constitutes - Reduction of salaries pending payment of claims under national state of disaster relief scheme constituting unilateral change even though possibility remained that employees would eventually receive full salaries.

Sections of the LRA considered

Section 64(1)

Section 64(4)

Section 64(5)

Editor's Summary

After the declaration of a national state of disaster due to the Coronavirus pandemic in March 2020, the government instituted a lockdown, followed by the introduction of measures to support people whose livelihoods would be affected. Among these were a special Temporary Employment Relief Scheme ("TERS") to help employers pay employees during closures or reductions of business. After the lockdown was extended, the government introduced an economic support package of R500 billion, which included support for distressed companies and workers. Restrictions on business were gradually lifted until the country went into "Level 4", which allowed most employers to operate on the basis that they would not return to full production and the workforce would only be allowed to resume work in batches. The entire country moved to "Level 3" on 1 June 2020 and restrictions in place were relaxed significantly. Not being an essential service, the applicant ("Macsteel") ceased operations entirely with the first phase of the lockdown, causing the company severe economic

loss. All its employees were paid their full salaries during March and April 2020 and employees were not required to use their annual leave. The company announced that from 1 May 2020 all employees were required to accept a 20% pay cut for the following three months, to be reviewed from time to time, that no salary increases would be granted and that other allowances and benefits would be scrapped. When Level 4 commenced, Macsteel did not require its entire workforce and 1 458 employees were told to stay at home. The respondent union ("NUMSA") objected to these measures. Macsteel undertook to continue to apply for the TERS benefit for its workers and to pay them as soon as it was received. NUMSA referred a dispute to the bargaining council, requiring the company not to unilaterally change its members' terms and conditions of employment. Macsteel responded by saying that the amendments were aimed at avoiding more drastic measures such as temporary layoffs or retrenchments and that, together with the TERS benefit and the company's contribution to salaries, employees would receive their full remuneration for at least May 2020. NUMSA then gave notice of its intention to call its members out on strike if the company did not revoke the decision to effect the changes. When the strike commenced on 29 May 2020 Macsteel launched an urgent application for orders declaring the strike unprotected and directing the strikers to resume work. The company contended that the strike was unlawful because the employees' salaries would not be reduced; that the union's other demands related to matters that had not yet taken place or been decided upon; and that NUMSA could not rely on sections 64(4) and (5) of the LRA because the company had satisfied the demands.

The Court declined to grant an order directing the employees to resume work as Macsteel had other means of doing so if the strike was indeed unprotected. The only issue was whether the strike was protected. The crux of the matter was whether the employees would receive their full salaries in May, June and July 2020. Macsteel had commendably already paid its workers for the five weeks during which they had not rendered service. When the company was permitted to operate at 50% capacity it had decided on the 20% reduction. The intention was to ensure that all employees would receive salaries, including those who did not return to work so that one group of employees was not treated more favourably than the other. However, despite Macsteel's intention and undertaking, any change to an employee's remuneration constitutes a change to terms and conditions of employment. Neither NUMSA nor any of the employees had agreed to the change. The Court, accordingly, found that the 20% across-the-board reduction of salaries constituted a unilateral change to the employees' terms and conditions of employment.

The Court noted further that during argument Macsteel's Counsel had stated after taking instructions that the company was not prepared to guarantee that its employees would receive their full salaries, which was what

NUMSA demanded whether or not its members were working during the months in question. Furthermore, the company's decision would affect employees who had worked during the months in question. These workers were certainly entitled to their full salaries. Had Macsteel been prepared to give an undertaking that if the TERS payment did not cover its employees' entire salaries, it would make up the shortfall, the outcome might have been different. The Court held that the strike complied with sections 64(4) and (5) read with sections 64(1) of the LRA.

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The Court added in an observation expressly marked "*obiter*" that the circumstances in which all employers and employees found themselves during the Coronavirus pandemic were unprecedented and distressing. Macsteel had expressed its displeasure about NUMSA's calling its employees out on strike while there was a possibility that their salaries would be fully paid and with the union's lack of appreciation of its earlier efforts to pay its employee when it had no obligation to do so. It was ironical that NUMSA members would sacrifice their salaries for the duration of the strike. The best solutions would be reached by common sense.

The application was dismissed.

Judgment

Prinsloo J:

Introduction

[1] The applicant approached this Court on an urgent basis seeking an order declaring the strike action by the respondents unprotected.

[2] The respondent filed an answering affidavit, to which the applicant filed a reply. The applicant seeks an interim order, with a return date. As all the papers are before me, the matter will be finally determined.

The Covid-19 pandemic

[3] Before I deal with the merits of this application, it is necessary to set out the milieu within which this application came before Court.

[4] On 15 March 2020, the coronavirus pandemic was declared a national disaster in the Republic of South Africa and the government announced a package of extraordinary measures to combat this grave public health emergency. On 23 March 2020,1 President Cyril Ramaphosa (the "President") announced a nationwide lockdown for 21 days with effect from midnight on 26 March 2020, which was to be enacted in terms of the Disaster Management Act.2 The three-week lockdown entailed that all South Africans were required to stay at home, except a handful of categories of workers who were regarded as necessary and essential in the response to the pandemic.

[5] The President made it clear that South Africa found itself confronted not only by a virus that has infected millions of people across the globe, but also by the prospects of a very deep economic recession that will cause businesses to close and that will result in many people losing their jobs. As a first phase of the government's economic response, measures were announced and these interventions included support for persons whose livelihoods would be affected.

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[6] The President announced that there would be a special dispensation for companies that are in distress because of Covid-19 and stated that through this proposal, employees would receive wage payment through the Temporary Employee Relief Scheme ("TERS"), which would enable companies to pay employees during this period and avoid retrenchments.

[7] The President called on companies to take care of their workers during this period and called on all South Africans to act in the interest of the nation and not in their own selfish interests. He gave the assurance that lives and livelihoods are prioritised and that the measures he announced would be used to protect people from the economic consequences of this pandemic.

[8] On 26 March 2020, the Minister of Employment and Labour issued a Directive that set out the requirements for the newly established Covid-19 TERS benefits. These benefits were provisioned to alleviate the economic impact of the national pandemic by assisting employers to pay their employees during the closure of their businesses. The said Minister subsequently published amendments to the Covid-19 TERS directives, of which the latest amendments were effective from 26 May 2020.

[9] On 9 April 2020,3 the President announced that the National Coronavirus Command Council decided to extend the nationwide lockdown by a further two weeks beyond the initial 21 days and the lockdown measures remained in force until the end of April 2020. The President made it clear that the aim was to prevent massive loss of life as well as to prevent the economy from collapsing and in pursuing a path that both saves lives and protects livelihoods, government adopted a strategy that was made up of three parts, the second of which was a comprehensive package of economic support measures to assist businesses and individuals affected by the pandemic.

[10] The President announced that additional extraordinary measures would be put in place in the coming weeks and months to absorb the sudden loss of income to both businesses and individuals. He stated that cabinet would be developing a comprehensive package of urgent economic measures to respond to the immediate crisis and to the severe economic challenges that we must confront in the months ahead.

[11] On 21 April 2020,[4] the President announced economic and social measures in response to the Covid-19 epidemic. He confirmed that the coronavirus pandemic has damaged the economy, it resulted in sudden loss of income for businesses and individuals and that it was to continue in months to come. The President announced the second phase of government's economic response to stabilise the economy, to address the extreme decline in supply and demand and to protect jobs. As part of this phase, the President announced a massive social relief and economic

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support package of R500 billion, which included support for companies and workers.

[12] On 23 April 2020,[5] the President announced that the nationwide lockdown could not be sustained indefinitely as people need to earn a living, companies need to be able to produce and trade, they need to generate revenue and keep their employees in employment. A gradual and phased recovery of economic activity was announced to commence after 30 April 2020 when the lockdown restrictions were eased gradually. The President announced that as from 1 May 2020 the country would operate on level 4 alert, which allowed some businesses to resume operations under specific conditions, including that they would not be able to return to full production and the workforce would only be able to return in limited batches. The President called upon South Africans to make sacrifices and to endure hardship and difficulty so that we can enjoy freedom and prosperity into the future.

[13] On 13 May 2020,[6] the President announced that by the end of May 2020 most of the country would be placed on level 3 alert and this was confirmed on 24 May 2020.[7] South Africa indeed moved to level 3 alert on 1 June 2020, and the restrictions that were in place, were relaxed significantly.

[14] It has been said over and over that the Covid-19 crisis presents an unprecedented challenge, unmatched since the Spanish Flu and the Great Depression. It has depressed global economies and a material shrinkage in global trade is expected. Covid-19 landed on our shores at a time when our economy was already under tremendous strain.

[15] In this context, the applicant had to close its operations entirely for the lockdown period from 26 March 2020 until 30 April 2020 and during May 2020 it resumed 50% of its business operations.

Background facts

[16] The nationwide lockdown commenced at midnight on 26 March 2020 and as the applicant is not an essential service, it ceased all operations as from 27 March 2020. This caused a serious economic blow for the applicant as it suffered a total loss of business and turnover.

[17] During the initial period of the lockdown, the applicant placed all its employees on special leave and paid the employees their full salaries and benefits for March and April 2020. The applicant did not require its employees to take their annual leave during this period and their leave credits remain intact, nor did the applicant apply the principle of "no work no pay".

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[18] The applicant's case is that it did not anticipate that the three-week lockdown period would be extended and when that happened, it sent a communication to its employees on 16 April 2020. The same communication was sent to the first respondent ("NUMSA") on 17 April 2020. In the said communication, the applicant indicated that the Covid-19 epidemic had a devastating impact in that the applicant suffered a total loss of business and turnover and that it would suffer substantial losses in 2020. The applicant stated that its cash reserves and monthly cash flow must be managed carefully as the applicant expected a substantial cash shortfall at the end of May 2020. As a result, the applicant announced emergency measures that would come into effect from 1 May 2020 namely:

18.1 All employees will be required to take a 20% reduction in salary, initially for three months (May, June and July 2020) and this will be reviewed on an on-going basis;

18.2 Commission earners will be required to take a 20% reduction on their basic pay, initially for three months (May, June and July 2020) and this will be reviewed on an on-going basis;

18.3 The applicant will not be in a position to pay any salary increases to employees in July 2020;

18.4 No salary increases will be awarded to any employee who is promoted for the remainder of 2020;

18.5 Acting allowances will be paid to those qualifying individuals where applicable, but they will be required to take a 20% reduction in salary, initially for three months (May, June and July 2020) and this will be reviewed on an on-going basis;

18.6 The applicant will not be in a position to pay any bonuses/incentives to non-scheduled employees for the remainder of 2020 and this will be reviewed on an on-going basis;

18.7 The applicant reserved its rights in relation to the MEIBC's Exemption Policy with regard to the leave enhancement pay in relation to scheduled employees as the applicant will not be able to afford the December payment.

[19] It was made clear in the letter that these are extreme measures which will have a negative impact on all employees, but that those are measures aimed at preserving jobs and that the unprecedented times require of everyone to make sacrifices that would ensure the sustainability of the applicant and the protection of livelihoods.

[20] The applicant was able to resume operations during level 4 alert with effect from 1 May 2020, but its operations could only be scaled up to 50%. This meant that approximately 1 458 employees could not return to work until such a time as the lockdown was eased further.

[21] NUMSA has 1 247 members and it represents approximately 41% of the applicant's workforce. NUMSA's members rejected the proposed emergency measures and on 13 May 2020 a meeting was held between the applicant and NUMSA. During the meeting, the NUMSA representatives indicated that their members were not in agreement with the 20% salary

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reduction for all employees and that they did not have a mandate from their members. The applicant pointed out that the effect and consequence of level 4 alert was that it was impossible for all employees to return to work and to tender their services as the applicant could only operate at 50%.

[22] The applicant's case is that the Covid-19 pandemic is an extraordinary event, which was unforeseen and out of the control of the applicant or its employees. As part of assisting employees whilst at the same time balancing the responsibility to ensure the continued operation of the applicant post the lockdown period and the Covid-19 pandemic, the applicant decided to implement the salary reduction for May, June and July 2020.

[23] On 18 May 2020, the applicant sent a communication to its employees, in which it recorded that it would implement the measures set out in the letter of 16 April 2020. It was stated that the applicant was operating at 50% of normal capacity and it remained impossible for the applicant to generate the required revenue to cover all the costs of running the business. Rather than not paying employees who are unable to return to work, the applicant considered how to best assist its employees and at the same time ensure the sustainability and survival of the applicant post the lockdown and Covid-19 pandemic, until such time it can resume full operations. The intention was to treat all staff the same, notwithstanding the fact that some could not return to work.

[24] In the aforesaid letter, the applicant indicated that the Department of Employment and Labour ("the Department") recognised that many companies would be in financial distress as a result of the Covid-19 pandemic and that it had made provision for special relief for employers who are unable to pay salaries. The applicant gave the undertaking that it has and will continue to apply for the Covid-19 TERS benefits on reduced earnings and as soon as the applicant received the relief money from the Department, it would be transferred directly to the employees.

[25] The applicant recognised the fact that the reduction in salaries will have a serious impact on its employees and their families.

[26] On 21 May 2020, NUMSA addressed a letter to the applicant stating that the applicant's unilateral decision to implement a 20% salary reduction, notwithstanding the fact that NUMSA and other employees objected, was unlawful.

[27] The applicant responded to NUMSA on 22 May 2020, confirming that the decision to implement the salary reduction for May, June and July 2020 was taken to balance the interest of employees and ensuring the continued operation of the applicant post lockdown and the Covid-19 pandemic until such a time that it can resume full operations. The applicant further undertook to apply monthly for the TERS benefit on reduced earnings.

[28] The applicant further invited NUMSA to a meeting to discuss the issues of leave enhancement pay, incentives, bonuses and salary increases.

[29] Instead of engaging the applicant further, NUMSA referred a dispute to the MEIBC and the referral was served on the applicant on 25 May 2020. The nature of the dispute is classified as "unilateral change to terms and

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conditions of employment" and the outcome required is for the *status quo* to remain in respect of all the terms and conditions of employment. NUMSA identified four issues in dispute to wit:

> "1. Employer reduced all salaries by 20% for the months of May, June and July 2020;
>
> 2. Intend to suspend the payment of bonuses and incentives to non-scheduled employees;
>
> 3. Intend not to make payments for leave enhancement pay during December 2020;
>
> 4. Amend the pension/provident fund rules to allow for a contribution holiday."

[30] In argument, Mr *Daniels* for the respondents indicated that paragraph 4 of the issues in dispute has been abandoned and is no longer part of the issues in dispute and it is therefore not relevant for purposes of this judgment.

[31] In requiring an outcome for the *status quo* to remain, NUMSA invoked the provisions of section 64(4)(a) and/or 64(4)(b) of the Labour Relations Act[8] ("LRA").

[32] On 25 May 2020, the applicant's attorneys addressed a letter to NUMSA, stating *inter alia*, that salary reduction for May, June and July 2020 was implemented in order to address the devastating financial impact which the lockdown has had on the applicant's business and as a means to avoid more drastic measures such as a section 189 of the LRA retrenchment process or temporary layoff or short time in respect of employees who cannot return to work.

[33] It was re-iterated that the applicant was committed to apply for the Covid-19 TERS benefits but that it could

only do so for May 2020 when the application process for May 2020 is open. When the matter was argued, it was confirmed that the applicant had indeed submitted its application for the TERS benefits. It was stated that as soon as the applicant receives the Covid-19 TERS benefits, it will top up employees' salaries with the funds it may receive from the Department. This means that employees' salaries would be topped up with the Covid-19 TERS benefit as soon as it is paid and based on the salary scale of the UIF benefits, employees are likely to receive 100% of their full remuneration for May 2020.

[34] On 25 May 2020, NUMSA demanded a written undertaking from the applicant that it would refrain from unilaterally implementing changes in the terms and conditions of employment. Absent such a written undertaking, notice was given in terms of sections 64(4) and (5) of the LRA that NUMSA's members would embark on strike action in support of their demand that the applicant refrain from unilaterally changing conditions of service.

[35] On 26 May 2020, the applicant responded to NUMSA and stated that the strike would be unprotected as the applicant has not failed to comply with

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section 64(4) and (5) of the LRA and therefore the provisions of section 64(3)(e) of the LRA do not apply and NUMSA has to comply with the provisions of section 64(1). In the same letter NUMSA was given notice of a defensive lock-out in response to the strike action.

[36] In the letter, NUMSA was requested *inter alia*, to agree that the applicant make payment of 80% of the employees' remuneration for May, June and July 2020 and that the applicant would apply timeously for the Covid-19 TERS benefits each month in order to top up the employees' remuneration to 100% once the benefits have been paid to the applicant.

[37] The strike action commenced as per the strike notice and on 29 May 2020 the applicant approached this Court on an urgent basis for relief.

The relief sought

[38] The applicant seeks an order declaring the strike action that commenced on 28 May 2020 unprotected and for this Court to order the striking employees to return to work.

[39] This Court is not inclined to order employees to return to work in the event that the strike action is declared unlawful. If the strike action is unlawful, the applicant has other remedies available to get its employees back to work and a Court order to that effect is not necessary.

[40] Effectively, the only relief sought is for a declarator that the strike action is unprotected.

The applicant's case

[41] The applicant's case is that the strike action is unprotected for the following reasons.

[42] In the referral to the MEIBC, NUMSA made four demands and in respect of the first issue relating to the 20% reduction of all salaries during May, June and July 2020, the applicant's case is that no such change is being implemented as the Covid-19 TERS benefit will be applied for. NUMSA's members are not being subjected to a salary reduction, but rather a temporary re-arrangement of how they are paid.

[43] In respect of the remainder of the demands, the applicant's case is that they relate to events which have not yet taken place or been decided upon by the applicant.

[44] Section 64(3)(e) of the LRA provides that the requirements of section 64(1) do not apply to a strike if the employer fails to comply with the requirements of section 64(4) and (5), but the applicant has complied with the requirements of section 64(4) of the LRA and thus the strike action, without complying with section 64(1), would be unprotected.

[45] In short: The applicant's case is that it has given an undertaking to apply for the Covid-19 TERS benefits for May 2020 and in giving such undertaking, the applicant has complied with the requirements of section 64(4)

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of the LRA. There is no change to the terms and conditions of employment and at best for the respondents there is a dispute about the payment date of employees and that is not a dispute covered by section 64(3) of the LRA.

The respondents' case

[46] The respondent takes issue with the applicant's undertaking to apply for the Covid-19 TERS benefit for a number of reasons. Firstly, the applicant vacillates between two scenarios namely:

(i) The employees will receive their full remuneration if and when the TERS benefits are received;

(ii) Based on the salary scale, it was most likely that most of the employees will be paid their full remuneration.

[47] The respondents submitted that TERS benefits are calculated on a sliding scale provided by the Unemployment Insurance Fund ("UIF") and an employee will receive remuneration up to a maximum amount, determined by the UIF. The applicant does not guarantee that employees who are working on a full time basis during the months of May, June and July 2020 will receive the full amount of their salary due to them.

[48] The applicant's "undertaking" is that the TERS benefit will probably ensure that employees are paid their full salaries, but the applicant cannot state that its application would be successful or what amount of monies would be received if the application is successful.

[49] The respondent's case is further that the TERS benefits are designed to remunerate employees who are unable to work during the national state of disaster and it does not make provision for employees who work on a full time basis, therefore it is unlikely that the applicant would receive any monies for employees who are working on a full time basis.

[50] The respondents further submitted that the employees' contracts of employment refer to and incorporated the conditions of employment in the MEIBC Main Agreement. The Main Agreement provides for the payment of salaries and the date of payment cannot be unilaterally altered by the applicant. The applicant's conduct in changing the payment date to the date when it receives the TERS money, is a unilateral change in terms and conditions of employment.

[51] In short: The applicant unilaterally reduced the salaries of all its employees by 20% for May, June and July 2020, it has not paid salary increases to scheduled employees and advised that it would not pay acting allowances or increases to promoted employees, incentive bonuses or leave enhancement pay. According to the respondents, all of the aforesaid constituted a unilateral change to terms and conditions of employment.

Analysis

[52] In my view, the crux of this matter is the payment of employees' salaries for May, June and July 2020.

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[53] I accept that the other issues, as set out (*supra*), are also issues in dispute and that they form part of the basis or the trigger for the current strike action. I also accept the applicant's position that incentives, bonuses and leave enhancement pay are not due and payable at this time and would only become due and payable at the end of the year and in the meantime the applicant is entitled to apply for exemption from these provisions of the Main Agreement.

[54] However, and for purposes of this judgment I will focus on the main bone of contention namely the payment of the employees' salaries for May, June and July 2020.

[55] It is common cause that the applicant has paid its employees their full remuneration for March and April 2020, notwithstanding the fact that the applicant's operations shut down from 27 March until 30 April 2020. This conduct of the applicant is commendable and gave effect to the President's plea to employers to look after their employees during the difficult time of the nationwide lockdown and the Covid-19 pandemic.

[56] The applicant's employees were fully paid for a period of five weeks when they rendered no services and for which period the applicant could have implemented the "no work no pay" principle, but decided not to do so in order to assist its employees.

[57] It is understandable that the applicant is facing financial challenges, as are many other employers in this country, who were unable to operate their businesses or produce or sell anything to generate revenue to cover expenses, including salaries of employees for a period of at least five weeks.

[58] The Covid-19 pandemic has hit the world and South Africa without much warning and there was not much time between the declaration of the state of disaster and the announcement of the lockdown for companies to plan or to budget for the most unforeseen event, which transpired to hit even harder and with more brutal force than what was initially expected or anticipated.

[59] As from 1 May 2020, the country moved to level 4 and during the period 1-31 May 2020 the applicant was allowed to operate at 50%. This would have enabled the applicant to start operations, but with a 50% limitation on operations and half of its workforce still at home, the applicant would not have been able to do any better than to limp back to business.

[60] Once again, the applicant decided to pay its entire workforce, including the employees who had to stay at home due to the level 4 lockdown and not to apply the "no work no pay" principle to them. This however, went hand in hand with the decision to implement as 20% reduction in salaries for all employees, which triggered the current strike action and caused the parties to end up before this Court.

[61] A strike initiated in terms of section 64(3)(e) of the LRA can only take place if there is a unilateral change in the terms and conditions of employment rather than a dispute of right and only when the employer has failed to comply with the request not to implement the unilateral change.

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[62] There are two issues that call for consideration. Firstly, whether there was a unilateral change in terms and conditions of employment and secondly whether the applicant restored the *status quo*.

Was there a change in terms and conditions of employment?

[63] It is evident from the communication sent by the applicant to its employees during April and May 2020 that the Covid-19 pandemic and lockdown had a devastating impact on the applicant and due to the difficulties faced by the applicant, emergency measures would come into effect from 1 May 2020, *inter alia*, that all employees would be required to take a 20% reduction in salary for May, June and July 2020. The intention was clearly to pay all employees, even those who did not return to work and to ensure that the impact of the measures would be the same and that one group of employees was not treated more favourably than any other group.

[64] Even in the letter written by the applicant's attorneys it was made clear that a 20% salary reduction for May, June and July 2020 was part of the emergency measures which the applicant had decided to implement in order to manage its cash reserves and monthly cash flow.

[65] The applicant's case is that it has given an undertaking to apply for the Covid-19 TERS benefits for May 2020 and in giving this undertaking, the applicant has complied with the requirements of section 64(4) of the LRA and there is no change to the terms and conditions of employment.

[66] The respondents' answer to this is that the applicant's undertaking that if and when it received the TERS monies, it would top up the employees' salaries, is not sufficient to stop the strike action as there is no guarantee that the employees would be paid 100% of their salaries, regardless of the outcome of the application for the TERS benefits.

[67] The applicant submitted that the question is whether the act of utilising the Covid-19 TERS benefit constitutes a unilateral change to terms and conditions of employment where there is no version proffered by the striking employees that they will not receive their salaries. The applicant's case is that it is not and as such NUMSA and its members may not embark on strike action.

[68] The applicant further submitted that NUMSA's complaint is that it wants to ensure that its members are not short paid and the possibility of short payment is not a unilateral change in terms and conditions of employment. This was confirmed in *Sun International Ltd and another v South African Commercial Catering and Allied Workers and others*[9] where it was held that:

> "For the sake of completeness, though the merits on the protected nature of the strike are no longer in issue and even though it may be *obiter*, I am satisfied that the strike would still not have been protected in any event, because the real reason for the strike concerned alleged short payments arising from

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> the introduction of the new biometric system. Although the union denied that the dispute concerned short payments, the union never disputed the veracity of the exchanges between the Group Human Resources officer and the Deputy President of the union which confirmed that rectification of alleged short payments arising from the Kronos system was the reason for the strike."

[69] In my view the question is whether the 20% salary reduction for May, June and July 2020 implemented by the applicant constitutes a unilateral change in terms and conditions of employment or whether that is simply an issue of potential short payment of salary.

[70] In *Staff Association of the Motor and Related Industries* (*SAMRI*) *v Toyota of SA Motors* (*Pty*) *Ltd*[10] the Court held that section 64(4) and (5) of the LRA is aimed at limiting the managerial prerogative to vary terms and conditions of employment and/or policies unilaterally and found that:

> "To be successful under s 64(4) the employee has to show firstly unilateral changes were effected to the terms and conditions of the employment contract and secondly that there was no consent to the unilateral changes."

[71] As to what forms part of the terms and conditions of employment, the Court held that[11] any variation to an employee's salary, irrespective of whether it is increased or decreased, amounts to a change in terms and conditions of employment and cannot be effected unilaterally. Salary is a *quid pro quo* for work rendered and any change that has the effect of affecting an employee's salary or remuneration package, constitutes a change to terms and conditions of employment.

[72] *In casu*, the applicant announced and implemented a 20% reduction in the salaries of its employees. It is undisputed that NUMSA did not agree to this reduction.

[73] I cannot but find that the 20% reduction in the salaries of its employees across the board constitutes a unilateral change to terms and conditions of employment.

[74] I do not believe that it is for the urgent Court to engage in an investigation or to make a finding as to the reasons why the reduction in the employees' salaries was implemented. The reasons may be well founded and completely reasonable but those would be best aired during conciliation, as the dispute has been referred to the bargaining council and is still pending.

Did the applicant restore the *status quo?*

[75] The applicant's case is that it has given an undertaking to apply for the Covid-19 TERS benefits for May 2020 and in giving this undertaking, it has complied with the requirements of section 64(4) of the LRA.

[76] In my view, the undertaking that the applicant gave to apply for the TERS benefits is not sufficient to rescue the applicant in terms of section 64(4) of the LRA. I say so for a number of reasons.

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[77] During argument, it became clear to me that this was the crux of the case and I asked Mr *Daniels* if the strike action would end in the event that the applicant was to give an undertaking to the effect that it would pay 80% of the employees' salaries on the due date and that the outstanding 20% would be paid later and as soon as the applicant received the TERS monies from the Department. In the event that the TERS monies would not cover the full 20%, the applicant would pay the shortfall to the effect that the employees are paid 100% of their salaries. Mr *Daniels* indicated that it would satisfy the respondents and that the strike action would be called off if such an undertaking were to be given.

[78] I canvassed the same issue with Mr *Lennox*, who requested an opportunity to obtain an instruction. The matter stood down and Mr *Lennox* subsequently submitted that his instruction was that the applicant was

unable to give an undertaking as aforesaid and that in the event that the TERS application is not successful or the monies received not sufficient to cover 20% of the employees' salaries, the applicant would revert to other measures such as short time, layoff or retrenchment.

[79] This accords with the position that the applicant adopted in this application namely that based on the employees' salary scale and the sliding scale provided by UIF, it was most likely that most of the employees will be paid their full remuneration. This is based on an assumption that the applicant's TERS application would succeed and that it would fully cover the outstanding 20% of the employees' salaries.

[80] In the event that the TERS application does not succeed or if the TERS monies are insufficient to top up the employees' salaries, the applicant is not prepared to give an undertaking that the employees who worked full time for May, June and July 2020 would be paid 100% of their salaries. Mr *Lennox* indicated that should the TERS application fail or not cover the outstanding percentage of salaries, the applicant intends to resort to other measures such as retrenchment, layoff etcetera. In short: the applicant is prepared to pay 80% of the employees' salaries and if the 20% shortfall is not covered by the TERS benefits it had applied for, the applicant will resort to other remedies, which do not include payment of the shortfall and the unilateral reduction in the employees' remuneration would be implemented.

[81] Another factor central to the respondents' case which cannot be ignored, is the fact that the applicant failed to distinguish between employees who are working and those who are not in applying the salary reduction to all its employees. The respondent submitted that the employees who are working on a full time basis during May, June and July 2020 are entitled to their full salaries. The salary reduction should have been applied only to the employees who are not working.

[82] In my view, there is merit in this issue. Notwithstanding the applicant's best intentions not to prejudice any of its employees and to treat them the same, the reality is that they are not in the same position. The reality in law is that the employees who rendered no service, albeit to no fault of their own or due to circumstances outside their employer's control, like

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the global Covid-19 pandemic and national state of disaster, are not entitled to remuneration and the applicant could have implemented the principle of "no work no pay".

[83] The converse is however also true. Where employees rendered their full time services, they are entitled to their full salaries and any reduction in their salaries, even for a sound reason to protect the greater good of all employees, would constitute a unilateral change in terms and conditions.

[84] Insofar as the applicant is not prepared to guarantee that the employees who worked full time would receive their full salaries, regardless of the outcome of the application for the TERS benefits, the applicant has not restored the terms and conditions of employment, as contemplated in section 64(4) of the LRA.

[85] Had the applicant provided an undertaking that it would pay its employees 80% of their salaries on the due date and that it would top up the shortfall as soon as the TERS monies were received from the Department, but in the event that the TERS monies did not cover the entire salary, the applicant would cover that shortfall to ensure that employees who worked during the relevant periods, will be paid their full salaries, the outcome of this application would in all probability be different.

Obiter

[86] The circumstances which employers and employees currently find themselves in are unprecedented, distressing and uncertain. Answers are not to be found in precedents, no map exists to show direction and only time will tell the full extent of the disruption and devastation which the economy and all who play a part in it, will suffer.

[87] In my view, the best answers and solutions would be found in applying common sense and seeking common ground to find a solution in a time when problems and challenges overshadow answers and solutions. It is unfortunately true that common sense is not a flower that grows in every garden.

[88] The applicant conveyed its displeasure about the fact that NUMSA has called out its members on strike, notwithstanding the possibility that their salaries would be fully paid by way of the TERS benefit and it expressed its view that NUMSA has no appreciation for the efforts made by the applicant to pay its employees in circumstances where there was no obligation to do so. The applicant's observations in this regard are not without merit. The reality is that NUMSA's members would, for the duration of the strike, forsake their wages, which the applicant ironically had been at pains to pay during difficult times.

[89] *In casu*, the strike action could have been avoided, had the parties applied a pinch of common sense and engaged each other more constructively.

Costs

[90] The last issue to be decided is the issue of costs.

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[91] Insofar as costs are concerned, this Court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness.

[92] In view of the specific facts of this case as well as the ongoing collective bargaining relationship between the applicant and NUMSA, the interest of justice will be best served by making no order as to costs.

[93] In the premises, I make the following order.

Order

1. The application is dismissed.
2. There is no order as to costs.

For the applicant:

Adv *M Lennox* instructed by *Fasken Attorneys*

For the respondents:

Mr *R Daniels* of *Cheadle Thompson & Haysom Incorporated Attorneys*

The following cases were referred to in the above judgment:

Staff Association for the Motor and Related Industries (SAMRI) v Toyota of SA Motors (Pty) Ltd [1998] 6 BLLR 616 ((1997) 18 ILJ 374) (LC)	784
Sun International Ltd and another v South African Commercial, Catering and Allied Workers Union and others [2018] 6 BLLR 624 (LC)	783

Footnotes

1 Statement by President Cyril Ramaphosa on escalation of measures to combat Covid-19 epidemic, Union Buildings, Tshwane, 23 March 2020.
2 Act 57 of 2002.
3 Message by President Cyril Ramaphosa on Covid-19 epidemic, 9 April 2020.
4 Statement by President Cyril Ramaphosa on further economic and social in response to the Covid-19 epidemic, Union Buildings, Tshwane, 21 April 2020.
5 Statement by President Cyril Ramaphosa on South Africa's response to the Coronavirus pandemic, Union Buildings, Tshwane, 23 April 2020.
6 Statement by President Cyril Ramaphosa on South Africa's response to the Coronavirus pandemic, Union Buildings, Tshwane, 13 May 2020.
7 Address by President Cyril Ramaphosa on South Africa's response to the Coronavirus pandemic, Union Buildings, Tshwane, 24 May 2020.
8 Act 66 of 1995 as amended.
9 [2018] 6 BLLR 624 (LC) at para [3].
10 (1997) 18 ILJ 374 (LC) at para A-B on p 379 [also reported at [1998] 6 BLLR 616 (LC) - Ed].
11 At para A-B on p 378.

Media 24 Ltd and another v Grobler
[2005] 3 All SA 297 (SCA)

Division:	Supreme Court of Appeal
Date:	1 June 2005
Case No:	301/04
Before:	IG Farlam, MS Navsa, JH Conradie, JA HEHER and BJ Van Heerden JJA
Sourced by:	PR Cronjé
Summarised by:	D Harris
Parallel Citation:	2005 (6) SA 328 (SCA)

. Editor's Summary . Cases Referred to . Judgment .

[1] Delict - Claim for damages - Sexual harassment at workplace - Employer's vicarious liability - Where employer failed to respond to complaints of harassment, it was in breach of its common-law duty to create and maintain a working environment in which, amongst other things, its employees were not sexually harassed by other employees in their working environment.

[2] Employment - Sexual harassment at workplace - Claim for damages - Employer's vicarious liability - Where employer failed to respond to complaints of harassment, it was in breach of its common-law duty to create and maintain a working environment in which, amongst other things, its employees were not sexually harassed by other employees in their working environment.

Editor's Summary

The first appellant was the employer of the second appellant. In an action against both appellants, the respondent sought damages which she had suffered as a result of sexual harassment to which she alleged she had been subjected by the second appellant, while she had been employed by first appellant as a secretary. The first appellant had been sued in its capacity as second appellant's employer. The court *a quo* held the appellants jointly and severally liable to pay the respondent a total amount of R776 814, vicarious liability having been found to exist on the part of the first appellant.

The first appellant disputed that the second appellant had been acting in the course and scope of his employment in sexually harassing the respondent, and therefore contended that it could not be held vicariously liable. It also pleaded that it had no knowledge of the correctness of the respondent's allegations of sexual harassment. Furthermore, it denied having breached any legal duty owed to the respondent by it as employer.

The second appellant denied having sexually harassed the respondent. Any intimacy between himself and the respondent, were according to him, the result of a consensual relationship between them.

Held - The first question for determination was whether the second appellant had sexually harassed the respondent. The Court had regard to the admissible evidence before it, and concluded that the second appellant's proven conduct did amount to sexual harassment. Such harassment was sufficient to cause the psychiatric injury which the Court accepted the respondent had suffered. Having arrived at these conclusions, the Court had to dismiss the appeal of the second appellant.

Turning to the first appellant's appeal, the Court found that the respondent had succeeded in establishing a negligent breach by the first appellant of a legal duty to its employees to create and maintain a working environment in which, amongst other things, its employees were not sexually harassed by other employees in

their working environment. An employer's common-law duty to take reasonable care in respect of its employees' safety includes protecting them from psychological harm caused, for example, by sexual harassment by co-employees. The failure by the first appellant's management to respond to the respondent's complaints was a clear breach of that duty.

In the premises, the appeals were dismissed.

Notes

For Delict see:

- *LAWSA* Reissue (Vol 8(1), paras 1-120)
- JC van der Walt and JR Midgley *Principles of Delict by Midgley* 3ed Durban LexisNexis Butterworths 2005

Cases referred to in judgment

("**C**" means confirmed; "**D**" means distinguished; "**F**" means followed and "**R**" means reversed. **HN** refers to corresponding headnote number.)

Barnard v Santam Bpk [1998] 4 All SA 403 (1999 (1) SA 202) (SCA) 304

Carmichele v Minister of Safety and Security 2001 (10) BCLR 995 (2001 (4) SA 938) (CC) 304

Fedlife Assurance Ltd v Wolfaardt [2002] 2 All SA 295 (2002 (1) SA 49) (SCA) 317

FF Holtzhausen v Absa Bank [2005] 2 All SA 560 (SCA) 315

Grobler v Naspers Bpk en 'n ander [2004] 2 All SA 160 (2004 (4) SA 220) (C) 299

J v M Ltd (1989) 10 ILJ 755 (IC) 314

Lillicrap Wassenaar and Partners v Pilkington Brothers (SA) Ltd 1985 (1) SA 475 (A) 305

Michael v Linksfield Park Clinic (Pty) Ltd [2002] 1 All SA 384 (2001 (3) SA 1188) (SCA) 312

Minister van Polisie v Ewels 1975 (3) SA 590 (A) 313

Van Deventer v Workman's Compensation Commissioner 1962 (4) SA 28 (T) 313

Van Wyk v Lewis 1924 AD 438 315

Vigario v Afrox Ltd 1996 (3) SA 450 (W) 313

United Kingdom

Dingley v The Chief Constable, Strathclyde Police 2000 77 SC (HL) 312

View Parallel Citation

Judgment

FARLAM JA

Introduction

[1] This is an appeal from a judgment of Nel J, sitting in the Cape High Court, in which the first and second appellants were held jointly and severally liable to pay the respondent a total amount of R776 814. This was the figure at which the trial court quantified the damages which she had suffered as a result of sexual harassment to which it held she had been subjected over a period of approximately five months by the second appellant and for which it held that the first appellant was vicariously liable.

[2] The judgment of the court *a quo* has been reported: see *Grobler v Naspers Bpk en 'n ander* 2004 (4) SA 220 (C). [Also reported at [2004] 2 All SA 160 (C) - Ed.]

Pleadings

[3] At the time when the alleged sexual harassment took place the respondent was a 33-year-old secretary employed by Nasionale Tydskrifte Ltd (to which I shall refer in what follows as "Tydskrifte"), a wholly owned subsidiary of the first appellant. The second appellant was at that time a trainee manager employed by the first appellant. In response to the respondent's averment in her particulars of claim that she was employed by the first appellant, the latter ultimately pleaded that she was in fact employed by Tydskrifte, which had disposed of its undertaking and whose only remaining employee was the respondent. It went on to aver that it had accepted liability for any obligations Tydskrifte might have towards the respondent.

[4] The first appellant thus figured in the case in two capacities. In its first capacity, as the employer of the second appellant, it was alleged to

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be vicariously liable for his actions in subjecting the respondent to sexual harassment. In its second capacity, as the party which had accepted liability for the obligations of Tydskrifte, it faced allegations that Tydskrifte, as the respondent's employer, was under a legal duty to its employees, in particular to the respondent, to create and maintain a working environment in which the dignity of its employees would be respected and, amongst other things, to take all reasonable steps to prevent its employees from being sexually harassed by other employees in their working environment.

[5] The respondent alleged further in paragraph 14 of her particulars of claim that this duty had been breached because there had been a wrongful and negligent failure to prevent the second appellant from sexually harassing her. In this regard it was alleged that the first appellant (in the circumstances, regard being had to the way in which the case was conducted, this allegation must be taken to refer to Tydskrifte), or its management:

> "14.1 failed to come to the assistance of the (respondent) notwithstanding her requests;
>
> 14.2 failed to act against the (second appellant) notwithstanding the fact that it was common knowledge at (Tydskrifte's) premises that the (second appellant) was sexually harassing the (respondent);
>
> 14.3 failed to deal with allegations of sexual harassment against the (second appellant) seriously and expeditiously;
>
> 14.4 permitted the (second appellant) wide latitude in his conduct towards his subordinates, in particular, the (respondent);
>
> 14.5 failed to act against the (second defendant) notwithstanding the fact that (he) had previously sexually harassed female employees of (the first appellant and Tydskrifte) during his employment with the (first appellant) and notwithstanding the fact that this was known to the management of (Tydskrifte);
>
> 14.6 failed to create a climate in the workplace in which the victims of sexual harassment, in particular the (respondent), would not feel that their grievances were being ignored;
>
> 14.7 failed to take all or any reasonable steps to preserve and protect the bodily integrity, psychological well-being, mental tranquillity and dignity of (Tydskrifte's) employees, in particular that of the (respondent); and

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> 14.8 failed to prevent the (second appellant's) sexual harassment of the (respondent) when such could and should have been prevented."

[6] According to the particulars of claim, the persons comprising the management of the first appellant [which again must be taken to be a reference to Tydskrifte] referred to in paragraph 14 were acting in the course of their employment and the scope of their duties as employees.

[7] The respondent also stated that, as a result of the alleged sexual harassment, she suffered severe shock, anger, anguish, fear and anxiety; was humiliated, degraded and disturbed in her mental tranquillity and

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emotional integrity, and suffered severe psychological and psychiatric trauma,[1] manifesting as post-traumatic stress syndrome.

[8] In its plea the first appellant denied that, in sexually harassing the respondent as alleged, the second appellant had been acting in the course and scope of his employment. It pleaded further that neither it nor Tydskrifte had any knowledge of the correctness of the respondent's allegations of sexual harassment and that it made no admissions in respect thereof. With regard to one specific allegation of harassment, which related to an incident which took place near a flat owned by the respondent (described in the evidence as "the flat incident"), the first appellant pleaded as follows:

> "7.3.1 It did not take place at the (respondent's) workplace;
>
> 7.3.2 It did not take place on premises controlled by the (first appellant) or . . . Tydskrifte . . .;
>
> 7.3.3 It did not take place at a time when either the (respondent) or the (second appellant) were performing their services in terms of either of their contracts of employment;
>
> 7.3.4 The event did not take place within the course and scope of the employment of either the (respondent) or the (second appellant);
>
> 7.3.5 The event did not arise out of the (respondent's) employment or that of the (second appellant);
>
> 7.3.6 Neither the (first appellant) nor . . . Tydskrifte . . . is accordingly liable for any of the consequences of the alleged incident."

[9] The first appellant denied being vicariously liable for any sexual harassment for which the second appellant might be liable. As regards the allegation that Tydskrifte or members of its management team had breached a legal duty towards the respondent, it denied that Tydskrifte owed its employees, including the respondent, a general (delictual) duty of care consisting of the obligations on which the respondent relied. It conceded that an employer has moral obligations towards its employees to take all reasonably practicable steps to protect their integrity, dignity and privacy in their working environment but denied that "it has any such legal obligations justiciable" by the High Court. In amplification of this averment it pleaded that an employer's obligations in this regard arose from the provisions of the Labour Relations Act 66 of 1995 (item 2(1)(*a*) of schedule 7) at the time of the claim and now arise from the provisions of section 6 of the Employment Equity Act 55 of 1998, both read with the *Code of Good*

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Practice on the Handling of Sexual Harassment Cases published under section 203 of Act 66 of 1995 and that conduct offending against the relevant provisions of both Acts is justiciable only by the Labour Court. In any event, so it was pleaded, Tydskrifte had fully complied with any such obligations.

[10] The first appellant also denied that the respondent suffered from post-traumatic stress disorder as a result of the second appellant's alleged sexual harassment. It did not, however, deny that she suffered severe psychological and psychiatric trauma, its denial on this part of the case being confined to the respondent's allegation that the psychological and psychiatric trauma she suffered manifested as post-traumatic stress syndrome.

[11] In addition to pleading the jurisdictional defence set out in paragraph [9], the first appellant also pleaded that the respondent's action was one contemplated by section 35(1) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 and that, by virtue of the provisions of this section, the respondent had no claim against Tydskrifte other than in terms of the said Act. The present action, not being an action in terms of that Act, should thus be dismissed.

[12] The second appellant denied that he had been guilty of sexual harassment of the respondent. In particular he denied the incidents particularised in subparagraph [4.10] and [4.12]-[4.14] of her particulars of claim. These incidents, together with that referred to in subparagraph [4.11], were extensively covered in the evidence in the trial court and are dealt with in detail in the trial court's judgment. They were variously described as "the lift incident" (paragraph [4.10]), "the Landbousaal incident" (paragraph [4.11]), "the coffee jar incident" (paragraph [4.12]), "the finger-biting incident" (paragraph [4.13]) and "the flat incident" (paragraph [4.14]).

[13] In respect of the Landbousaal incident, he admitted kissing the respondent in the room in question but averred that she had consented to being kissed and had, as it was put, "been a willing participant and had returned (his) kiss". He alleged that there had been what was called "a relationship" between the respondent and himself. He admitted touching her on occasion, engaging her in conversations of an intimate nature, with her willing participation, and asking her to go out with him. He pleaded no knowledge of her allegations that she suffered psychological and psychiatric trauma and patrimonial loss in consequence thereof, putting the respondent to the proof thereof.

Judgment of court *a quo*

[14] The learned Judge in the trial court rejected the second appellant's version that there had been a romantic relationship between him and the respondent. He also found that the incidents set forth in subparagraphs [4.10]-[4.14] had taken place, save that he was unable to find that, during the so-called "flat incident", the respondent was threatened by the second appellant with a firearm. The judge accordingly found that the second appellant had sexually harassed the respondent.

[15] He found that what he called the respondent's "chronic emotional problems" were the result of the sexual harassment to which she was subjected by the second appellant and which she could not have escaped - despite her efforts to do so - without the possible loss of her job. He accordingly

held the second appellant responsible for the

respondent's condition. He refrained from making a specific finding that her condition could be classified as post-traumatic stress disorder, pointing out that the question to be considered was whether the second appellant was responsible for the respondent's condition and not how her condition would be classified by the American Psychiatric Association (the publishers of the fourth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (*DSM IV*), to which all the psychologists and psychiatrists who testified had referred).

[16] He then proceeded to hold the first appellant, as the employer of the second appellant, vicariously liable for his actions. He came to this conclusion after a comprehensive discussion of the common law as to vicarious liability and recent developments thereof in the United States of America, Canada, the United Kingdom, Australia and New Zealand. He expressed the view that policy considerations justified the conclusion that the first appellant should be held vicariously liable for the sexual harassment of the respondent by the second appellant but that, if the existing rules relating to vicarious liability in our law are not flexible enough or do not make adequate provision for changed circumstances in order to deal with the problem of sexual harassment in the workplace then, he said, the Constitution obliges the courts to develop the common law accordingly.

[17] The trial Judge also held that the two jurisdictional defences raised by the first appellant were without merit. His reasons for this conclusion are set out fully in the reported judgment and accordingly need not be repeated here. So too, in view of the fact that the judgment of the court *a quo* has been reported, it is not necessary to set out in detail all the allegations and counter-allegations dealt with therein.

Academic and professional commentaries on the judgment

[18] The judgment of the trial court, as was to be expected, aroused considerable attention on the part of academic commentators on the law of delict and industrial law.2

[19] We are grateful to counsel for the respondent, Mr Melunsky, who conducted the respondent's case with considerable ability in both the trial court and this Court, for making available to us copies of most of the articles in which this case was discussed.

[20] Mr *Burger*, who appeared with Mr *Duminy* and Mr *Stelzner* for the first appellant, contended that the trial Judge had erred in rejecting the evidence of the witness Leon Africa, who testified on behalf of the second appellant

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at the trial and said that, before the flat incident, the second appellant and the respondent acted like children, one minute having arguments and teasing each other, the next chatting to each, laughing and smiling. He said that it looked to him as if they were having an affair. On one occasion he came into the office he shared with the second appellant and found them kissing. On another occasion the respondent told him she had often kissed the second appellant. He also testified that he saw a letter apparently written by the respondent to the second appellant, which read "Ek het jou lief" and was signed with a drawing of a sun, followed by the letters "ja", this combination standing for "Sonja", the respondent's first name.

[21] Mr *Burger* pointed out that the trial judge gave a very cursory summary of this witness's evidence and later, when considering it, contented himself with remarking that, in so far as Africa's evidence excused the second appellant's conduct, it was in conflict with the evidence of Vanessa Binneman, Nicolene Johnson and the other corroborating evidence to which he had referred and that it was accordingly not accepted. Mr *Burger* submitted that Africa's evidence should have been considered on its merits and not simply rejected because it conflicted with that of other witnesses. He submitted that in the circumstances the trial judge had materially misdirected himself in this regard and that Africa's evidence was of great importance on a key issue in the case as far as it relates to the first appellant, viz, whether any harassment had taken place before the flat incident. As this incident took place away from the workplace, the second appellant having ostensibly gone to inspect the respondent's flat with a view to buying it, it was not possible, counsel contended, to hold the first appellant vicariously liable for the second appellant's conduct on this occasion (even if the extended test for vicarious liability set out in the trial court's judgment were to be upheld). According to counsel, Africa had been a good witness and his evidence as to the nature of the relationship between the second appellant and the respondent, at least prior to the flat incident, should have been accepted.

[22] In support of his contentions in this regard, Mr *Burger* drew attention to a passage in the respondent's evidence where she referred to the period of about three weeks which preceded the flat incident. During this period, which followed on the second appellant's writing a letter to her in which, on her version, he solemnly swore not to touch her again or treat her badly or force his attentions on her, she was, she said, very happy at work. She worked well and she got on well with the other people there. She was experiencing no problems with the second appellant and she could relax. Mr *Burger* submitted that even if the respondent had up to that point been sexually harassed by the second appellant and had not merely been involved in a flirtatious relationship

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with him, it could be accepted that, if the flat incident had not occurred, there would have been no question of the respondent's suffering from a post-traumatic stress disorder. As far as the flat incident was concerned he submitted that it alone, regard being had to the three-week period of quiet which preceded it, is the only possible stressful event which could have precipitated a post-traumatic stress disorder affecting the respondent.

[23] He contended further that the first appellant could only be liable to the respondent on the facts of this case if she could establish that the harassment

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to which she had been subjected had resulted in a recognised psychiatric injury ("erkende psigiatriese letsel") (see *Barnard v Santam Bpk* 1999 (1) SA 202 (SCA) at 216E-F [also reported at [1998] 4 All SA 403 (A) - Ed]). He pointed out that the trial court had refrained from upholding the respondent's contention that she was suffering from a post-traumatic stress disorder and submitted that, as she had specifically pleaded that she had suffered "severe psychological and psychiatric trauma, manifesting as post-traumatic stress-syndrome", she had failed to establish that her condition was of such a nature as to qualify for an order for damages within the ambit of the rule as laid down in *Barnard's* case (*supra*).

[24] Mr *Burger* also argued that the court *a quo* had erred in holding that the essentials for the successful invocation of the principles of vicarious liability were present in this case. Such harassment as was proved to have taken place had not been committed within the course and scope of the second appellant's employment. Furthermore, there was no empirical evidence to establish that the first appellant had created or increased a risk of sexual harassment within the employment relationship. In any event, the first appellant should not be held to be vicariously liable for sexual harassment of one employee by another merely on the basis that the first appellant had created or increased a risk of sexual harassment within the employment relationship. The expansion of the common law as regards vicarious liability was in this case not justified on constitutional grounds. According to counsel, South African cases provide no authority for the trial court's finding of vicarious liability; the Canadian and English decisions were decided in different factual contexts, and the American authority was of doubtful value in our legal system.

[25] As regards the respondent's alternative cause of action against Tydskrifte, namely that Tydskrifte had breached a legal duty *it* owed to the respondent by wrongfully and negligently failing to prevent the second appellant from sexually harassing her, Mr *Burger* submitted that the respondent had to prove that it could reasonably have been expected of Tydskrifte to take positive steps to prevent the injury to her and that

Tydskrifte failed to take such steps. What could reasonably have been expected from Tydskrifte was determined by the factual circumstances and the legal convictions of the community as assessed by the court. Pointing out that a legal duty is something more than a moral, ethical or social duty, counsel contended - with reference to what was said by the Constitutional Court in *Carmichele v Minister of Safety and Security* 2001 (4) SA 938

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(CC) paragraph [43] at 957 - [also reported at 2001 (10) BCLR 995 (CC) - Ed] that the question to be answered was whether Tydskrifte ought reasonably and practically to have prevented harm to the respondent: put differently, was it reasonable to expect Tydskrifte to have taken positive measures to prevent the harm? In his submission, no basis had been laid for any conclusion that the legal convictions of the community required the legal duty alleged to be imposed. Such duties as Tydskrifte had regarding the prevention of harm to the respondent flowing from sexual harassment arose from the contract of employment between it and her, supplemented in some respects by applicable legislation, such as the Labour Relations Act 66 of 1995, the Occupational Health and Safety Act 85 of 1993, the Compensation for Occupational Injuries and Diseases Act 130 of 1993, the Basic Conditions

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of Employment Act 75 of 1997 and the Employment Equity Act 55 of 1998.

[26] Counsel submitted in this regard that there is an important difference in principle between an employer's relationship with his employees, on one hand, and that with the community in general, on the other. Any duty which an employer may have to prevent sexual harassment of its employees cannot be separated from the employment relationship, which is contractual both as to its origin and its nature, with statutory inclusions and additions. In the present case Tydskrifte had no legal duty *qua* employer towards its employee, the respondent, which did not arise from a contract of employment or applicable legislation. Instead of relying on a (delictual) legal duty, the respondent should have relied on a provision in her employment contract, whether express or implied, which she clearly had not done. That, he contended, constituted a complete defence to the respondent's claim against the first appellant in so far as it was being sued as the party which had accepted an obligation to assume any liability that Tydskrifte had towards the respondent in this regard. In support of this submission he relied on the decision of this Court in *Lillicrap Wassenaar and Partners v Pilkington Brothers* (*SA*) *Ltd* 1985 (1) SA 475 (A) at 499H-I.

[27] Even if there were a general legal duty on the part of Tydskrifte which could be enforced in a delictual action, this duty, so counsel submitted, had been discharged: in 1997 already, a sexual harassment policy had been accepted and applied throughout the whole Naspers group of which Tydskrifte formed a part; this policy had been distributed and made known throughout the whole group; a copy thereof had speedily been made available to the respondent as soon as she asked for it; a grievance procedure, supplementary to the procedures which were applicable at all levels in the group in terms of the sexual harassment policy, had been accepted enabling employees to direct and follow up their grievances to a variety of people within and outside Tydskrifte, and the disciplinary procedure had been set in motion expeditiously against the second appellant as soon as the respondent had laid a formal charge against him. Mr *Burger* submitted that the evidence thus showed not only that Tydskrifte had exercised reasonable care to prevent and correct promptly any sexually harassing behaviour but also that any legal duty to which it was subject had been complied with.

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[28] He pointed out that the respondent, who was at all relevant times aware of the disciplinary policy and code and the grievance procedure of her employer, had refrained from taking formal steps of any kind against the second appellant until after the flat incident: that is to say after being subjected, on her version, to approximately six months of harassment. Her failure in this regard was, he submitted, unreasonable, alternatively she had herself to accept responsibility for the fact that steps were only taken against the second appellant after the flat incident.

[29] As regards the first jurisdictional defence raised by the first appellant, as set out in paragraph [9] above, counsel referred to the *Code of Good Practice on the Handling of Sexual Harassment Cases* promulgated in terms of section 203(2) of Act 66 of 1995, read with section 203(3) in terms of which any such code must be taken into account in interpreting and applying the

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Act, and submitted that the elimination of sexual harassment in the workplace was recognised as a labour matter involving the application of Act 66 of 1995 in-so-far-as concerns the relationship between employer and employee. He also pointed out that sexual harassment cases are presently dealt with under Chapter II of the Employment Equity Act 55 of 1998. Section 10 of that Act, which is part of Chapter II, provides that disputes concerning alleged unfair discrimination (of which harassment is a form (see section 6(3)) must be referred for conciliation and, failing resolution, to the Labour Court and, further, that the relevant provisions of Parts C and D of Chapter VII of the Labour Relations Act (which include section 157), with the changes required by the context, apply to such disputes.

[30] Dealing with the trial court's second reason for rejecting this jurisdictional defence (a reason which applies also in respect of the second jurisdictional defence), namely that the respondent's employer was Tydskrifte and not the first appellant, Mr *Burger* submitted that in this regard the trial court overlooked the fact that,

from a practical point of view, the respondent and the second appellant were both working in the same organisation.

[31] He then turned to the second jurisdictional defence (as set out in paragraph [11] above), namely that the High Court was precluded from hearing the respondent's action because of the provisions of section 35(1) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993, which reads as follows:

> "(1) No action shall lie by an employee . . . for the recovery of damages in respect of any occupational injury or disease resulting in the disablement . . . of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement . . ."

[32] The trial court's first reason for rejecting this defence was based on a finding that the Act required a particular incident constituting an "accident" to have taken place before compensation would be payable thereunder and that it made no provision for the consequences of prolonged harassment. Counsel submitted that this was incorrect because the Act was not confined to providing claims for compensation for

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injuries sustained as a result of accidents but also for occupational diseases, many of which can be contracted as a result of prolonged exposure to what he called work-related hazards (arbeidsgevare). In this regard he referred to section 65(1) of the Act, which as far as is material, reads as follows:

> "(1) Subject to the provisions of this Chapter, an employee shall be entitled to the compensation provided for and prescribed in this Act if it is proved to the satisfaction of the Director-General-
>
> (*a*) that the employee has contracted a disease mentioned in the first column of schedule 3 and that such disease has arisen out of and in the course of his or her employment;
>
> or
>
> (*b*) that the employee has contracted a disease other than a disease contemplated in para (*a*) and that such disease has arisen out of and in the course of his or her employment."

In terms of section 66 it is presumed, unless the contrary is proved, that if an employee who has contracted an occupational disease listed in the first column of schedule 3 was employed in any work mentioned in the second

column of the Schedule, the disease so contracted arose out of and in the course of his employment. Thus, to give an example, a hearing impairment suffered by an employee engaged in work involving exposure to excessive noise will be presumed to have arisen out of and in the course of the employment of the employee concerned.

[33] Post-traumatic stress syndrome is not a disease listed in Schedule 3, but, by virtue of the provisions of section 65(1)(*b*) of the Act, if the respondent contracted it in circumstances arising "out of or in the course of her employment", she would be entitled to compensation under the Act and would not be able to institute a civil action against Tydskrifte.

[34] Mr *Burger* accordingly submitted that, if the respondent's condition is correctly to be diagnosed as post-traumatic stress syndrome and she contracted it in her workplace as a result of exposure to sexual harassment by the second appellant, she would be entitled to compensation under section 65 of the Act and would be precluded from instituting a common-law action for damages against Tydskrifte.

Submissions on behalf of the second appellant

[35] Mr *Heunis*, who appeared on behalf of the second appellant, submitted that the trial court erred in finding that it had been proved that the second appellant had sexually harassed the respondent. He associated himself with Mr *Burger*'s submission that the trial judge had been guilty of a misdirection in the summary manner in which he had rejected the evidence of the witness Africa. He contended that Africa had been a good witness who corroborated the second appellant on the pivotal factual issue in the case, namely whether the second appellant had sexually harassed the respondent or was involved in a consensual flirtatious romantic relationship with her. He conceded that the second appellant had not been a satisfactory witness but said that the same applied to the respondent who had given untruthful and dishonest evidence on various points. As both of the two principal role players were unsatisfactory, the evidence of Africa became particularly important.

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On his evidence (the important aspects of which have been summarised in paragraph [20] above), there was no question of harassment: the respondent was clearly involved in a consensual relationship with the second appellant. He submitted further that she was a single witness in respect of many of the incidents relied on.

[36] Furthermore, there was a pattern discernible in her conduct in that she had had an office affair previously with the main person for whom she performed secretarial duties, namely Barend van As (at that time the production manager of Tydskrifte). This affair had terminated some months before her relationship with the second appellant began. He also argued that the trial court had erred in finding that the flat incident had caused the respondent to lay a charge against the second appellant. He referred in this regard to the evidence given by Anchen Pienaar, a social worker employed at the time by the Naspers group, who testified

that the respondent had told her that, before she decided to go to Ulrich Stander (the labour law consultant employed by Naspers) to report what had happened, there had been a telephone call on either the Thursday or the Friday following on the flat incident as a result of which she had had to tell *her* husband of

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what had allegedly happened at work. This, and not the flat incident, he suggested, had precipitated her report to Stander.

[37] Mr *Heunis* submitted that it was significant that, after the so-called Landbousaal incident, the respondent burst into tears only when Nicolene Johnson commented on lipstick marks on the second appellant's collar in the respondent's presence, not when she first came back to her workstation after being in the Landbou room. This was not consistent with the allegation of sexual harassment. The scratchmarks on the second appellant's back, which Nicolene Johnson saw, were not necessarily corroborative of the respondent's story.

[38] He contended that the two female witnesses called to corroborate the respondent by telling of a pattern of similar conduct on the part of the second appellant in the past had not succeeded in proving such similar conduct. Thus, for example, Elsabe van den Berg, who had worked with the second appellant at the premises of Nasionale Boekdrukkery in Goodwood/Parow in 1996, testified that the second respondent had sexually harassed her, essentially by making crude suggestions to her and using sexually offensive language. In addition, Lieza Blom had conceded in cross-examination that it was possible that she had been unduly sensitive regarding proposals and suggestions put to her by the second appellant (as a result of previous experiences she had had at Naspers).

[39] As far as the evidence of Nicolene Johnson was concerned, important aspects in her evidence did not appear from her original written statement or her evidence at the disciplinary enquiry. Mr *Heunis* submitted that her evidence had to be approached with great caution as it was clear that she harboured a grudge against the first appellant because she thought that she had been retrenched as a result of testifying at the disciplinary proceedings against the second appellant, despite the

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fact that she had been promised that the company would look after her and that she would not lose her job.

Submissions on behalf of the respondent

[40] Mr *Melunsky* submitted that the trial court had correctly found that the second appellant had sexually harassed the respondent and that she suffered severe psychological *sequelae* as a result. It was not necessary for the court to find that the respondent suffered from post-traumatic stress disorder in order to impose liability on the appellants: the name to be given to her condition was immaterial for the purposes of a finding that the appellants were liable.

[41] The trial court correctly found, so he contended, that the first appellant was vicariously liable for the acts of sexual harassment found to have been committed by the second appellant. In the alternative he contended that it had been shown that Tydskrifte was under a legal obligation to ensure safe working conditions at its workplace. That obligation included a duty to protect the respondent from sexual harassment. Various persons who were on the managerial staff of Tydskrifte were aware of this sexual harassment. In breach of their duty to prevent a recurrence thereof, they negligently remained passive and permitted the harassment to continue.

[42] According to counsel, the trial court had correctly rejected the jurisdictional defences raised by the first appellant.

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Discussion:

Was the respondent sexually harassed by the second appellant?

[43] It is convenient to deal first with the issue as to whether the respondent succeeded in proving that she was sexually harassed by the second appellant.

[44] In what follows I am prepared to assume, without deciding, that the trial judge may well have misdirected himself in regard to the manner in which he approached the evidence of the witness Africa. I shall accordingly consider whether this Court can be satisfied on the record of the evidence led that the second appellant was indeed guilty of sexual harassment of the respondent.

[45] I do not think that the evidence of Leon Africa can be accepted. On two important aspects, his evidence, if accepted, would corroborate that of the second appellant and undermine that of the respondent on the crucial question as to whether they had a romantic relationship or whether he was guilty of sexually harassing her. The first item of his evidence to which I refer is his statement that on one occasion he entered the office which he shared with the second appellant, the door of which was half open, and found the second appellant and the respondent embracing and kissing one another. The second item was his statement that he saw a note with the words "Ek het jou lief", apparently signed by the respondent with a drawing of the sun followed by the letters "ja". This

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note, which the second appellant kept in a drawer he shared with the witness, was written on a 9cmx9cm yellow sticker.

[46] The difficulty with both these items of evidence is that they are directly in conflict with the evidence of the second appellant. As far as the kissing incident is concerned, the second appellant said that he and the respondent always closed the door of the office before they kissed. As regards the alleged note, the second appellant said it was written on a paper serviette. The conflicts between the second appellant and Africa on these and other issues are of such a nature as to satisfy me that Africa's evidence must be rejected.

[47] As will be seen from what follows I do not rely on the evidence of Elsabe van der Berg and Lieza Blom that the second appellant was also guilty of sexually harassing them. I am prepared to assume that Mr *Heunis*'s submission that it would not be appropriate to do so may well be correct. I have also not relied on the evidence of Nicolene Johnson. Here also I am prepared to assume that Mr *Heunis*'s argument in regard to her evidence should be accepted.

[48] It is true that, in respect of the specific incidents referred to, we are largely dependent on the testimony of the two main protagonists, both of whom were in certain respects unsatisfactory witnesses. It seems to me, however, that there are certain aspects of the evidence, which the second appellant either admits or cannot deny, which indicate unmistakeably where the truth lies. They enable us, as it were, to ascertain in which direction the current is flowing and thus to determine, in my view, with a fair degree of accuracy whether or not there was sexual harassment.

[49] The first aspect to which I refer relates to the respondent's assertion that, after the first incident of harassment relied on (the lift incident), he threatened her with a newspaper article about her husband's previous criminal

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trial. He admitted obtaining the report in question from the Internet and satisfying himself that the respondent, whom he initially did not believe on the point, had been telling him the truth. His evidence that he then downloaded the report from the Internet, held onto it for some time and then suddenly one day handed it to the respondent in an envelope does not make any sense and is inherently improbable unless, as the respondent says, he was using the report to "'blackmail" her into silence about his harassment of her.

[50] It is also significant that the respondent asked Jerome Kalan, a trainee manager in the personnel department, for the Naspers sexual harassment policy at an early stage, ie immediately after the alleged lift incident. This was not denied at the enquiry and Kalan was not called by the second appellant at the trial. In my opinion it can safely be accepted that the respondent did indeed call for the policy at that stage. This was conduct which clearly rebuts any suggestion that her allegations of harassment were a recent fabrication made shortly before the enquiry and is inconsistent with any suggestion that she was not already being harassed at that early stage.

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[51] The next aspect to which I wish to refer is the so-called finger-biting incident. The second appellant initially said that what happened on this occasion was that he put a sweet in the respondent's mouth whereupon she bit his finger "more in a joking sense", resulting in what he described as "a little gash"', "a laughable incident" which was insignificant and not serious. Later on he conceded that the bite had been down to the bone and was not "just a little gash". It was something quite serious. When pressed further and confronted with what he had said at the disciplinary enquiry, he conceded the finger-biting did not take place as a joke but in the context of an argument but claimed that he could not remember what had happened. His evidence on this issue also points strongly in the direction of harassment rather than flirtation.

[52] Another aspect which, in my view, provided a clear indication as to where the truth lies in this case is the incident in the Landbou room. On the second appellant's version all that happened in the Landbou room was that he hugged and kissed the respondent with her consent. During the embrace, he said initially, she could have scratched his back. Later he conceded he had indeed been scratched and later still, that it had been an open wound. It had merely happened "as part of the kissing", not as part of a passionate embrace. In my opinion the fact that he cannot deny that he was scratched on the back by her in the Landbou room is a fairly strong indication that her version of the incident is to be believed instead of his. His admission relating to the scratch wounds certainly corroborates her on the point because it is evidence which renders her version more probable and his less probable. I also can understand her initial reluctance to talk about it and her subsequent embarrassment when it appeared that there was lipstick on his collar. I accordingly do not agree with Mr *Heunis*'s argument on this point.

[53] In my view the admissions the second appellant made in regard to the flat incident indicate that, on this aspect of the case as well, the respondent is to be believed that he harassed her on this occasion also. The trial judge was unable to find that the respondent was threatened with a firearm on this occasion. The second appellant admitted that his primary purpose in

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going to see the flat was not with a view to purchase it but to spend time with the respondent. (In this regard I am satisfied that it is overwhelmingly probable that *her* reason in going there was to show him the flat with a view to his possibly buying it.) His further statement that they had reached the end of their relationship and that he suggested that he make a hotel booking so that they could again spend time

together and discuss matters but not to have sexual intercourse is overwhelmingly improbable. Under cross-examination by counsel for the first appellant he said:

> ". . . the hotel issue doesn't necessarily mean that it would have been a sexual relationship, because that never occurred to any one of the parties . . . That was never, never, ever discussed between the two of us."

She testified, however, that when he said that all he wanted was one night with her, she said she could not go with him that night because she was menstruating. He then said that he would make a reservation for the

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place where he would meet her and give it to her. Her statement that she mentioned the fact that she was menstruating as the reason why she could not go with him that night (a statement not challenged in cross-examination) indicates clearly that she got the impression that he was after a sexual encounter. His acceptance of her reason for not coming with him that night and his action in making a hotel reservation for a night, some twelve days thereafter, indicates that her impression as to what he actually wanted was correct.

[54] He conceded that when he got into the respondent's utility vehicle after having been shown the exterior of the flat, she was shivering and tense and that, after he had asked her why this was so, he said that he was not going to do anything to her. This indicates that he himself thought that the reason for her emotional state was fear that he intended doing something to her. He concedes he had brought his firearm with him, that it was in its holster strapped to his right hip, which would have been the side nearest to her as he sat next to her in the passenger's seat. We know that she saw his firearm.

[55] All this evidence established in my view that she thought (a) that he wanted intercourse with her and (b) that he had brought a firearm with him so as to overcome her resistance if she refused. It is true that her further evidence that he drew the firearm from the holster and handed it to her saying "well shoot yourself" cannot be accepted in the absence of corroboration. This notwithstanding, enough of the detail as to what happened that evening emerge from his own evidence and that part of her evidence that was not denied to enable one to find on the probabilities that he indicated to her that he wanted sexual intercourse; that she temporised by pleading that she was having a period; that he agreed to a postponement of their night together, and that she believed that, if she did not agree, he might use his firearm to achieve his purpose. In the circumstances I am satisfied that what the respondent experienced during the so-called flat incident amounted to sexual harassment and was substantially more serious than anything that had preceded it.

Did the respondent suffer a recognised psychiatric injury?

[56] It was common cause to the parties that the respondent manifested severe psychiatric harm just after the disciplinary enquiry. All the professional

witnesses agreed that she was not malingering and that she was suffering from a recognised psychiatric disorder. The issue debated between the experts was whether the disorder was correctly diagnosed as post-traumatic stress disorder. All the experts accepted the diagnostic features of this disorder as set out in *DSM-IV* at 424, as follows:

> "The essential feature of Post-traumatic Stress Disorder is the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity; or witnessing an event that involves death, injury, or a threat to the physical integrity of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or

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> other close associate (Criterion A1). The person's response to the event must involve intense fear, helplessness, or horror (or in children, the response must involve disorganised or agitated behaviour) (Criterion A2). The characteristic symptoms resulting from the exposure to the extreme trauma include persistent re-experiencing of the traumatic event (Criterion B), persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (Criterion C), and persistent symptoms of increased arousal (Criterion D). The full symptom picture must be present for more than 1 month (Criterion E), and the disturbance must cause clinically significant distress or impairment in social, occupational, or other important areas of functioning (Criterion F)."

[57] It was common cause that Criterion A2 and Criteria B-F were present in the respondent's case. The area of debate related to whether Criterion A1 was present.

[58] Professor Emsley, professor of psychiatry at the University of Stellenbosch and the chairperson of the SA Society of Psychiatrists' task team for disability assessment, originally diagnosed the respondent's condition as post-traumatic stress disorder. However, he subsequently revised his opinion when it was put to him that the respondent's statement to him that a gun was held to her head and an attempt made to rape her was neither consistent with her statement before the disciplinary enquiry, nor with her evidence at the enquiry and during the trial. He regarded the incident - she had described it to him - as what he called an "extreme stressor", which complied with Criterion A1. If, however, that specific traumatic event had not occurred, the most likely diagnosis would in his opinion have been an adjustment disorder.

[59] In my view the traumatic incident which I have found did occur *was* sufficiently severe, on the probabilities, to have complied with Criterion A1. In this regard it is important to bear in mind the distinction between the scientific and the judicial measures of proof highlighted by the House of Lords in *Dingley v The Chief Constable, Strathclyde Police* 2000 SC 77 (HL) at 89D-E (cited with approval by this Court in *Michael v Linksfield Park Clinic*

(*Pty*) *Ltd* 2001 (3) SA 1188 (SCA) paragraph [40] at 1201E-H [also reported at [2002] 1 All SA 384 (A) - Ed]). And to be fair to Professor Emsley, I did not understand him to testify otherwise.

[60] On this part of the case I agree with Mr *Burger*'s submission that, but for the flat incident, the respondent would not have sustained post-traumatic stress disorder or any other psychiatric injury qualifying for legal redress within the rule as expounded by this Court in *Barnard v Santam Bpk (supra)*.

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In my view the respondent's own evidence, as summarised in paragraph [22] above, provides substantial support for such a finding. It may be that the flat incident constituted the proverbial "last straw" that broke the camel's back but, be that as it may, in my view what ultimately caused the respondent's injury and therefore her damages in this case was the sexual harassment which took place during the flat incident.

[61] It follows from what I have said so far that the second appellant's appeal must be dismissed with costs.

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The liability of the first appellant

[62] The next question to be considered is whether the first appellant should have been held liable, jointly and severally with the second appellant, to compensate the respondent for the damage she suffered as a result of the harassment.

Vicarious liability

[63] In view of the fact that I am satisfied that the respondent succeeded in establishing the second cause of action on which she relied against Tydskrifte, it is unnecessary for me to deal with Mr *Burger*'s submissions that Nel J's finding of vicarious liability against the first appellant was inappropriate.

Breach of legal duty

[64] The respondent's second cause of action, it will be recalled, was a negligent breach by Tydskrifte of a legal duty to its employees to create and maintain a working environment in which, amongst other things, its employees were not sexually harassed by other employees in their working environment.

[65] It is well settled that an employer owes a common-law duty to its employees to take reasonable care for their safety (see eg *Van Deventer v Workman's Compensation Commissioner* 1962 (4) SA 28 (T) at 31B-C and *Vigario v Afrox Ltd* 1996 (3) SA 450 (W) at 463F-I). This duty cannot in my view be confined to an obligation to take reasonable steps to protect them from *physical* harm caused by what may be called *physical* hazards. It must also in appropriate circumstances include a duty to protect them from psychological harm caused, for example, by sexual harassment by co-employees.

[66] The test to be applied in this regard was laid down by this Court in *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 597A-B, where Rumpff CJ said:

> "Dit skyn of dié stadium van ontwikkeling bereik is waarin 'n late as onregmatige gedrag beskou word ook wanneer die omstandighede van die geval van so 'n aard is dat die late nie alleen morele verontwaardiging ontlok nie maar ook dat die regsoortuiging van die gemeenskap verlang dat die late as onregmatig beskou behoort te word en dat die gelede skade vergoed behoort te word deur die persoon wat nagelaat het om daadwerklik op te tree. Om te bepaal of daar onregmatigheid is, gaan dit, in 'n gegewe geval van late, dus nie oor die gebruiklike 'nalatigheid' van die *bonus paterfamilias* nie, maar oor die vraag of, na aanleiding van al die feite, daar 'n regsplig was om redelik op te tree."

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[67] In determining the legal convictions of the community in regard to sexual harassment in the workplace it is appropriate to have regard to what was said on the topic by De Kock M in *J v M Ltd* (1989) 10 *ILJ* 755 (IC) at 757G-758D:

> "Unwanted sexual advances in the employment sphere are not a rare occurrence. It appears from the article referred to above (Mowatt 'Sexual Harassment - New Remedy for an Old Wrong' (1986) 7 *ILJ* 637) that studies in America and England have shown that close to 50% of working women have

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> received such advances, that is, sexual harassment in the wider view. It also appears that a survey of 100 women in Johannesburg suggests that some 63% had received unwelcome sexual advances from a male in the office. There is no evidence that the percentage is in fact that high but common experience shows that sexual harassment is by no means uncommon.
>
> Sexual harassment, whether it be between members of the opposite sex or of the same sex is, despite the fact that it is often a subject for uncouth jokes, a serious matter which does require attention from employers. Sexual harassment, depending on the form it takes, will violate that right to integrity of body and personality which belongs to every person and which is protected in our legal system both criminally and civilly. An employer undoubtedly has a duty to ensure that its employees are not subjected to this form of violation within the workplace. The victims of harassment find it embarrassing and humiliating. It creates an intimidating, hostile and offensive work environment. Work performance may suffer and career commitment may be lowered. It is indeed not uncommon for employees to resign rather than subject themselves to further sexual harassment. The

psychological effect on sensitive and immature employees, both male and female, can be severe, substantially affecting the emotional and psychological well-being of the person involved. Inferiors who are subjected to sexual harassment by their superiors in the employment hierarchy are placed in an invidious position. How should they cope with the situation? It is difficult enough for a young girl to deal with advances from a man who is old enough to be her father. When she has to do so in an atmosphere where rejection of advances may lead to dismissal, lost promotions, inadequate pay rises, etc - what is referred to as tangible benefits in American Law - her position is unenviable.

Fear of the consequences of complaining to higher authority whether the complaint is made by the victim or a friend, often compels the victim to suffer in silence. That sexual harassment of an employee in an inferior position is despicable is only fully realized when one has to comfort a young girl crying her heart out in a quiet corner."

[68] It is clear in my opinion that the legal convictions of the community require an employer to take reasonable steps to prevent sexual harassment of its employees in the workplace and to be obliged to compensate the victim for harm caused thereby should it negligently fail to do so. I do not think that the fact that the Legislature has enacted legislation providing a statutory remedy for unfair labour practices involving sexual harassment justifies a holding that, absent the statutory remedy (which presumably was intended to be quicker, cheaper and more convenient than the common-law remedy), the common law is defective in failing to provide a remedy in a situation which cries out for one.

[69] Nor do I think that the argument based on the fact that there was a contractual relationship between the respondent and Tydskrifte can alter the position. There are many instances where the courts have recognised that there can be a concurrence of delictual and contractual actions arising from

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the same set of facts: see eg *Van Wyk v Lewis* 1924 AD 438 and *Lillicrap*, *Wassenaar and Partners v Pilkington Brothers* (*SA*) *Pty Ltd* 1985 (1) SA 475 (A) at 496D-I.

[70] I also am of the view that the first appellant's attempt to rely on the *Lillicrap* decision (*supra*) in this matter cannot avail it. In that case an exception

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was allowed to the respondent's delictual claim because the infringement of duty relied on was an infringement of the appellant's contractual duty to perform specific professional work with due diligence (see the judgment of EM Grosskopf AJA at 499D-E), it not being contended that the appellant would have been under a duty to the respondent to exercise diligence if no contract had been concluded (at 499A-B). (See also *FF Holtzhausen v Absa Bank*, an unreported judgment of this Court delivered on 17 September 2004 [reported at [2005] 2 All SA 560 (SCA) - Ed]. In the present case I am satisfied that the duty allegedly breached in this case was not dependent upon any specific term of the contract of employment between Tydskrifte and the respondent, whether or not supplemented by legislative enactment.

[71] The next question to be considered is whether a negligent breach of that duty by Tydskrifte has been established. In this regard I agree with counsel for the first appellant that, on this part of the case, the respondent had to show a failure by Tydskrifte to take reasonable and practicable steps to prevent the sexual harassment of its employees. I do not agree, however, that the respondent's alleged refusal to lay a charge or even make use of the grievance procedure against the second appellant precluded Tydskrifte from preventing her from being harassed. In my opinion Van As, to whom the respondent had at a very early stage complained of her harassment at the hands of the second appellant, could and should have told Werner Wager (the then chief manager of Tydskrifte) what the respondent had reported to him and that (according to Van As) she had refused to lay a charge or use the grievance procedure and had said that she would deny it if called upon to substantiate the allegations. The key point was that, despite the respondent's attitude in this regard, Van As had no reason *not* to believe that the second appellant was harassing her - on the contrary, according to the evidence - and should have realised (even if he actually did not) that her reluctance to take the matter further in no way cast doubt upon the genuineness of her complaints. In the circumstances his failure to deal with the matter when the respondent reported it to him was culpable. He was in a managerial position and Tydskrifte, his employer, was clearly vicariously liable for his failure to act in this regard.

[72] If Van As had acted earlier in the way I have suggested I am satisfied that Wager should (and on the probabilities would) at least have informed the second appellant that his conduct *vis-à-vis* the respondent had not gone unnoticed and have warned him that, if such conduct persisted, not only his ambition of rising to a senior managerial position in the company would come to nought but there was a very real danger of his being dismissed. I think it overwhelmingly probable, knowing what we do about the personality of the second appellant and his relationship with Wager, that such a warning would in all probability have done the trick and prevented the flat incident from taking place. I have already found that, if the flat incident had not taken place, the respondent would not have suffered the psychological injury on which her claim is based.

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[73] In view of my conclusions in respect of the failure by Van As properly to react to the respondent's complaints and the consequences of

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such failure, it is not necessary to consider whether or not either Lydia Davids (the acting personnel manager of Tydskrifte at the relevant time) or Paul de Bruin (the information technology manager of Tydskrifte and the second appellant's immediate superior at that time) also acted negligently in failing to take steps timeously to curb the second appellant's conduct *vis-à-vis* the respondent, as was argued before us by Mr *Melunsky*.

The first appellant's jurisdictional defences

[74] Because I have found that the respondent has proved a culpable breach of legal duty on the part of Tydskrifte, and have left open the question as to whether the first appellant is vicariously liable for the actions of the second appellant, it is not possible for me to dispose of the two jurisdictional defences on the ground, relied on in part by the trial judge, that the respondent's delictual claim against the first appellant is not excluded by section 157 of Act 66 of 1995 and section 35 of Act 130 of 1993 because she was employed not by the first appellant but by Tydskrifte, and that the first appellant was not able, as it were, to acquire a jurisdictional defence which was not available to Tydskrifte by accepting liability on Tydskrifte's behalf. I do not think, however, that either of the two jurisdictional defences was available to Tydskrifte in this case.

[75] The harassment which forms the subject of the respondent's cause of action occurred before the Employment Equity Act 55 of 1998 came into operation (on 9 August 1999). Sexual harassment in the workplace has since 17 July 1998 been dealt with in the abovementioned *Code of Good Practice on the Handling of Sexual Harassment Cases*, issued by the National Economic, Development and Labour Council in terms of section 203(1) of Act 66 of 1995. As indicated above, section 203(3) provides that any person interpreting or applying Act 66 of 1995 has to take this code into account.

Item 7(6) of the code reads as follows:

> "A victim of sexual assault has the right to press separate criminal and/or civil charges against an alleged perpetrator and the legal rights of the victim are in no way limited by this code."

While the references to "civil charges" and "sexual assault" are not as clear as they might be, I think that one can safely assume that conduct of the kind proved to have been indulged in by the second appellant must be covered by the phrase "sexual assault" and that by a "civil charge" is meant a civil action for damages therefor. It is also unlikely that the framers of the code intended a civil claim for damages such as that brought by the respondent to form the subject of the internal procedures set out therein.

[76] As appears from the summary of this defence as pleaded by the first appellant (set out in paragraphs [9] and [29] above), the first appellant relied upon items 2(1)(*a*) and 3 of schedule 7 to Act 66 of 1995 - which items were then still part of the schedule - for the contention that the present dispute fell within the exclusive jurisdiction of the Labour Court. Item 3 dealt with disputes about unfair labour practices, so that a claim

brought thereunder for harassment would be based on an allegation that the

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harassment constituted an unfair labour practice. But, as this Court pointed out in *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA) paragraph [27] at 261E-H [also reported at [2002] 2 All SA 295 (A) - Ed], a dispute about the unlawfulness of an employer's conduct (in that case a dismissal) as opposed to its unfairness is not a "matter" required to be adjudicated by the Labour Court as contemplated by section 157(1) and accordingly the High Court's jurisdiction is not excluded. By parity of reasoning, a delictual claim such as the present will also not be excluded.

[77] It remains for me to deal with the second jurisdictional defence as set out in paragraphs [11] and [31]-[34] above, *viz* that based on section 35(1), read with section 65(1)(*b*) of Act 130 of 1993. In this case, it will be recalled, I have found that the psychological disorder from which the respondent has been suffering was ultimately contracted because of the harassment which occurred during the flat incident. That incident did not occur in the course of the respondent's employment but rather while she was engaged in her own private activity, namely trying to sell her flat to the second appellant. It may well be that employees who contract psychiatric disorders as a result of acts of sexual harassment to which they are subjected in the course of their employment can claim compensation under section 65 but those are not the facts in this case and I need express no opinion thereon. I am satisfied that the second jurisdictional defence is also without merit.

Conclusion and order

[78] It follows from what I have said that the appeals of both appellants must fail.

[79] The following order is made:

The appeals of both appellants are dismissed with costs.

(Navsa, Conradie, Heher and Van Heerden concurred in the judgment of Farlam JA.)

For the first appellant:

SF Burger SC, *WRE Duminy* SC and *R Stelzer* instructed by *Jan S de Villiers*, Cape Town

For the second appellant:

A Heunis instructed by *Jan S de Villiers*, Cape Town

For the respondent:

D Melunsky instructed by *Pierre Nieuwoudt Prokureurs*, Rondebosch

Footnotes

1 From a linguistic and medical point of view, it is more accurate to speak simply of *psychological trauma*, for which both *psychological* and *psychiatric treatment* may be required. However, as the respondent's pleadings refer in terms to "psychological and psychiatric trauma", I shall utilise this description or a variant thereof where appropriate.

2 It was discussed in a number of articles published and to be published in the *South African Mercantile Law Journal*, the *Tydskrif vir die Suid-Afrikaanse Reg*, the *Industrial Law Journal*, *Contemporary Labour Law and Employment Law*. (See the two articles by J Neethling and JM Potgieter published in (2004) 16 *SA Merc* LJ 488 and to be published in 2005 (3) TSAR; the articles by Alan Rycroft and Devina Perumal, Rochelle le Roux and Benita Whitcher published in (2004) 25 *ILJ* at 1153, 1897 and 1907 respectively, the article by Karin Calitz to be published in 2005 (2) TSAR 215, the article by Carl Mischke published in (2004) 14 *Contemporary Labour Law* 5 and the article by John Grogan published in (2004) 20 (4) *Employment Law* 3.

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

.....
SIGNATURE **DATE: 3 June 2020**

CASE NO: 2020/10556

In the matter between:

MATSHAZI MHLONIPHENI Applicant

and

MEZEPOLI MELROSE ARCH (PTY) LTD First Respondent

THE COMPANIES AND INTELLECTUAL PROPERTY COMISSION Second Respondent

CASE NO: 2020/10555

In the matter between:

NYONI LWAZI Applicant

and

MEZEPOLI NICOLWAY (PTY) LTD First Respondent

THE COMPANIES AND INTELLECTUAL PROPERTY COMISSION Second Respondent

CASE NO: 2020/10955

In the matter between:

MOTO, TONDERAI ROSELYN Applicant

and

PLAKA EASTGATE RESTAURANT CC First Respondent

THE COMPANIES AND INTELLECTUAL PROPERTY COMISSION Second Respondent

CASE NO: 2020/10956

In the matter between:

ABDULLAH MOHSEN First Applicant

AZANIA HOSPITALITY (PTY) LTD Second Applicant

and

BRAND KITCHEN HOSPITALITY (PTY) LTD First Respondent

THE COMPANIES AND INTELLECTUAL PROPERTY COMISSION Second Respondent

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JUDGMENT

Weiner J

[1] The applicants in each of the four applications sought orders placing the first respondent in each application under supervision and commencing business rescue proceedings under s 131(4)(*a*) of the Companies Act 71 of 2008 (the 'Act').[1] The applications were supported by various employees[2] and creditors[3] of each respondent company.

The applicable legislation

[2] Business rescue is defined as follows in s 128(1)*(b)* of the Companies Act:

'"Business rescue" means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for –

(i) a temporary supervision of the company, and of the management of its affairs, business and property;

(ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and

(iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.'

[3] As stated by the Supreme Court of Appeal (the SCA) '…"*business rescue" means to facilitate "rehabilitation", which in turn means the achievement of one of two goals: (a) to return the company to solvency, or (b) to provide a better deal for creditors and shareholders than what they would receive through liquidation*….'[4]

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[1] On 1 June 2020, the order which appears at the end of this judgment was handed down. I stated that reasons would follow. These are the reasons.
[2] In terms of s 144(3)(*b*) of the Act which states: '*During a company's business rescue process, every registered trade union representing any employees of the company, and any employee who is not so represented, is entitled to participate in any court proceedings arising during the business rescue proceedings'*.
[3] In terms of s 145(1)(*b*) of the Act where during a company's business rescue process each creditor is entitled to '*participate in any court proceedings arising during the business rescue proceedings*'.
[4] *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA); (609/2012) [2013] ZASCA 68 (27 May 2013) para 26.

[4] Section 131(4)(*a*) of the Act provides that a court may make an order placing a company under supervision and commencing business rescue proceedings if it is satisfied that –

4.1. the company is financially distressed; or

4.2. the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment related matters; or

4.3. it is otherwise just and equitable to do so for financial reasons; and

4.4. there is a reasonable prospect of rescuing the company.

[5] It is noteworthy that any of the grounds referred to in 4.1, 4.2 and 4.3 above are sufficient to ground an application for business rescue.

Urgency

[6] The respondent companies in each of the matters before the Court submitted that the application was not urgent as none of its creditors were threatening action against them for payments of amounts owing. Business rescue proceedings are, in my view, inherently urgent. As stated by Binns-Ward J in *Koen v Wedgewood Village Golf and Country Estate (Pty) Ltd,*[5]—

'*It is axiomatic that business rescue proceedings, by their very nature, must be conducted with the maximum possible expedition. In most cases a failure to expeditiously implement rescue measures when a company is in financial distress will lessen or entirely negate the prospect of effective rescue.'*

[7] I accordingly find that the matters should be dealt with on an urgent basis.

[5] *Koen & another v Wedgewood Village Golf & Country Estate (Pty) Ltd and others* 2012 (2) SA 378 (WCC) para 10.

The corporate structure

[8] The first respondent in each case is a juristic entity which conducts business in the operation of a group of restaurants in Johannesburg, which trade under the 'Mezepoli' and 'Plaka' brands. They are the following:

8.1. Brand Kitchen Hospitality (Pty) Ltd ('Brand Kitchen'), which conducts business as the management company for the restaurants, and employs the Chief Executive Officer of the associated companies, Mr Adriaan Kruger ('Kruger'), as well as the Operations Manager, Mr Mohsen Abdullah ("Mun Manal"). Brand Kitchen has 5 employees.

8.2. Mezepoli Melrose Arch (Pty) Ltd ('Mezepoli Melrose'), which conducts a 'Mezepoli' restaurant at the Melrose Arch shopping centre and which has 54 employees.

8.3. Mezepoli Nicolway (Pty) Ltd ('Mezepoli Nicolway'), which conducts a 'Mezepoli' restaurant at the Nicolway shopping centre and has 49 employees.

8.4. Plaka Eastgate CC ('Plaka Eastgate'), which conducts a 'Plaka' restaurant at the Eastgate shopping centre and has 50 employees.

[9] The first respondents in each case conduct the restaurant businesses, referred to in paragraphs 8.1 to 8.3 above. They will be referred to as the 'trust companies'. When Brand Kitchen and the trust companies are referred to, they, together will be referred to as the 'respondent companies'.

[10] There is a further entity, Plaka Menlyn (Pty) Ltd ('Plaka Menlyn'), which conducts the business of a 'Plaka' restaurant at the Menlyn shopping centre in Pretoria. It has already been placed under business rescue.

[11] In addition to the respondent companies and Plaka Menlyn, there are two other entities which are involved in the 'Plaka' and 'Mezepoli' businesses, being Mezepoli Holdings (Pty) Ltd ('Mezepoli Holdings') and Plaka Holdings (Pty) Ltd ('Plaka Holdings'). The trust companies pay franchise fees to these entities. All of the income derived by Mezepoli Holdings and Plaka Holdings is thus derived from the fees which they charge the trust companies and Plaka Menlyn.

[12] As the management company for the businesses, Brand Kitchen charges management fees to the trust companies, as well as Plaka Menlyn, Mezepoli Holdings and Plaka Holdings. All of Brand Kitchen's income is derived from the fees which it charges to these entities. It is not a trading entity.

[13] All of the respondent companies are controlled by the KAM Trust ('the Trust'), of which the current trustees are FWC Estate and Related Services (Pty) Ltd ('FWC') – which is represented by Francois Froneman ('Froneman'), Elpida Haitas ("Elpida"), and Konstantinos Haitas ('Kosta'). In addition to being a trustee, Kosta is also the sole income and capital beneficiary of the Trust. Kosta supports the relief sought in these proceedings.

[14] The businesses which are conducted by the respondent companies were founded by Evangelos Haitas ('Angelo') during July 2005. Angelo passed away on 21 October 2018. Kosta is his only child.

[15] Although it is disputed that Angelo's then-wife, Margarita Tsangaris-Scherf ('Margarita') founded the businesses together with Angelo, it is not in dispute that Margarita played an important role in the businesses until at least 2012, shortly before she and Angelo divorced during 2013. Margarita is Kosta's mother.

[16] Shortly after Angelo's passing, Froneman and Elpida were purportedly appointed as directors of the respondent companies, among others (collectively, 'the directors'). The validity of these appointments is contested by Kosta and this and other disputes between the trustees and directors is the subject of proceedings which were decided in this court.[6] An appeal is currently pending before the Supreme Court of Appeal. Whatever the legal position, Froneman and Elpida have been in *de facto* control of the respondent companies and the other entities controlled by the Trust since 23 October 2018.

[17] The applicants are each employed as managers of the respondent companies concerned. In the case of Brand Kitchen, the applicant is Mun Manal, who is an

[6] Unreported judgment of *Haitas, Konstantinos v Froneman, Gabriel Francois van Lingen and others* 2019/13947 ZAGPJHC (11 July 2019).

employee, creditor and shareholder of Brand Kitchen. The second applicant (Azania Hospitality) is a shareholder in Brand Kitchen.[7]

[18] The applicants contended that each of the respondent companies ought to be placed under business rescue because all of the requirements referred to in s 131(4) are met. They submitted that placing the respondent companies under business rescue will allow them reasonable prospects of rescue because:

18.1. the moratorium which ensues will protect the respondent companies from their creditors enforcing claims against them;

18.2. the post-commencement financing ('PCF') which has been secured will provide funding to the companies until they are in a position to resume profitable trade;

18.3. such funding will allow them to trade and pay certain costs and a portion of employees' salaries for at least 14 months; and

18.4. the wide powers of the business rescue practitioner (the 'BRP') will allow for the business as a whole to be streamlined and for the profitable parts of the business to support the unprofitable parts of the business until they are able to return to profitability.

[19] The applicants seek to have Mr Cloete Murray appointed as the interim BRP of the first respondent in each application in terms of s 131(5) of the Act.

[20] The defences raised by the respondent companies are threefold:

20.1. First, as a result of the national lockdown, *force majeure* excuses the respondent companies from their obligations to their employees and their other creditors, who therefore have no *locus standi* to bring these applications.

20.2. Second, other than Plaka Eastgate, the trust companies are not financially distressed.

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[7] Mun Manal explains that his shareholding was transferred to the second applicant. Brand Kitchen acknowledges that Mun Manal as shareholder has *locus standi* but disputes the second applicant's *locus standi qua* shareholder, despite acknowledging that Brand Kitchen's share register 'erroneously reflects the second applicant as shareholder'. The shareholder must be the registered shareholder, even if the entitlement to the shares is disputed. See *Oakdene* (note 4 above) para 6.

20.3. Third, the PCF referred to by Margarita, is not available.

[21] In the case of Plaka Eastgate, its financial distress is conceded. It has adopted the position that there is no point in attempting to rescue it and that, if it is not sold to Kosta,[8] it ought to be would up. The respondent companies referred to a letter in which it is stated that a decision will be made in regard to this possible sale on 30 May 2020.

Background

Common cause facts

[22] The businesses of the respondent companies slowed from 16 March 2020 and they have not traded at all since 26 March 2020. The 158 employees of the respondent companies were last paid their salaries on 28 March 2020. It is not disputed that this has had a devastating impact on them and their families.

[23] None of the respondent companies have traded since the national lockdown was implemented in response to the COVID-19 pandemic on 27 March 2020. They did not trade in food products (which was designated an essential service) during level 5 of the lockdown, and the directors of the respondent companies have taken a decision not to trade on a 'delivery only' or delivery/collection basis under level 4 and level 3 of the national lockdown. They state that the restaurants will only resume operations 'once the lockdown is lifted'.

[24] Prior to the issue of these applications, during April and May 2000, memoranda (the 'memos') were sent by the directors of the respondent companies and/or Kruger to the employees of the respondent companies. These contained the following information:

24.1. The restaurants are small businesses which are in distress. Applications were being made to various entities (the landlords, the Department of Small Business Development, the Small Enterprise Development Agency, the UIF's Temporary Employee Relief Scheme). They would '*continue to find ways and solutions to*

[8] An offer was made by Kosta to purchase the trust's interest in Plaka Eastgate.

do all that we can to keep our Plaka and Mezepoli families supported' (1 April 2020) [Emphasis added].

24.2. Applications had been made to landlords for rental relief '*to assist the cash-flow of the business in support of paying amongst other obligations, salaries and wages'.*

24.3. That the *'UIF applications went in yesterday'* (17 April 2020).

24.4. On 28 April 2020, the day on which staff salaries were to be paid, a memo (the '28 April memo') was sent, stating *inter alia* that: -

'*the company will not be paying you for the month of April 2020 as a direct result of the down-trading and continued losses incurred during the recent months exhausting any historic profits there may have been.'* [Emphasis added]

'The company will remain closed for the duration of the lockdown – we will not be opening for deliveries only at this stage.'

24.5. On 29 April 2020, the directors stated that '*Brand Kitchen will be making a R1,000 advance to all staff members and R3,000 advance to managers to assist our staff until the funds from the UIF arrive. This payment … is an advance payment made in the absence of having received any payment from UIF to date.*'

24.6. On 4 May 2020, a further memo was sent, stating *inter alia* that:

'The company will remain closed for the duration of the lockdown – we will not be opening for deliveries only at this stage.'

'Employees will be notified in due course and with sufficient notice as to when they are required to return to work.' [Emphasis added].

24.7. On 5 May 2020, following receipt of the above memos, a message was sent to Kruger and the directors of the respondent companies by Mun Manal, in his capacity as the nominated employee representative for the trust companies. The memorandum set out the employees' grievances in detail and called on the CEO / directors of the respondent companies to identify the creditors thereof.

24.8. On 8 May 2020, after the launch of this application two memoranda were sent to the employees of the respondent companies by Froneman and Elpida, in response to Mun Manal's message stating, *inter alia* that: -

(a) *'It is with regret that the company has to inform you and confirm that the temporary layoff as of 1 April 2020 continues to be in force.'*

(b) *'The temporary layoff period will continue until the end of lockdown, when each company's circumstances will be reviewed.'*

(c) *'As a result of the company being closed and not being allowed to trade as normal, a "no work no pay" principle will apply.'* [Emphasis added]

The applicants' *locus standi*

[25] Under the Act, both a creditor and an employee have *locus standi* to bring an application for business rescue, both being 'affected persons' in terms of s 131(1) of the Act.[9] The respondent companies challenged the applicants' *locus standi* on the basis that, as a result of *force majeure*, they are neither employees, nor creditors.

[26] In business rescue proceedings, employees have many more rights than they would have under the winding-up provisions of the Act. The term 'creditor' includes employees to the extent that any amounts relating to employment that were not paid to that employee immediately prior to the commencement of those proceedings, became due and payable by a company to that employee. The fact that the employment contract of such a person might be suspended for any reason does not have the effect that the employment contract is terminated.[10]

[27] The employees of the respondent companies have at all times tendered their services, and the respondent companies at all times expected them to remain

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[9] The definition of an 'affected person' is at s 128(1)(*a*) of the Act which provides as follows:
'affected person', in relation to a company, means-
(i) a shareholder or creditor of the company;
(ii) any registered trade union representing employees of the company; and
(iii) if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives;

[10] *Richter v Bloempro CC and Others* 2014 (6) SA 38 (GP) para 13; this decision was overturned on appeal on other grounds.

available to return to work. Their employment contracts were not suspended; the respondent companies took a decision not to operate on any basis during the lockdown and thus did not require their employees to attend to their ordinary functions.

[28] Even if it is accepted that the employment contracts somehow became 'suspended', the effect of that suspension would not impact on the standing of the applicants, as the contracts did not terminate, and they remain employees of the respondent companies. This is clear from the various memoranda sent to the employees. In addition, the trust companies could only apply for UIF/TERS on behalf of employees.

[29] There has never been any indication at all from the respondent companies that the applicants were no longer employed by them. On the contrary, in their memorandum dated 4 May 2020 they expressly stated that '*Employees will be notified in due course and with sufficient notice as to when they are required to return to work.'* [Emphasis added]

[30] The applicants contended that the respondent companies' contention that *force majeure* applies is unsubstantiated both factually and in law. Other than the Mezepoli Nicolway lease agreement and the employment contracts referred to below, the respondent companies have not disclosed other written agreements or the employment contracts, nor have they alleged any term which excuses them from their obligations to make payment to their creditors during the national lockdown. It is clear from the affidavits filed by some of the creditors that they do not consider their contracts with the respondent companies to be unenforceable.

[31] The employment contracts which are attached to the application papers, being those of Mun Manal and Mr Lwazi Nyoni ('Nyoni' – the applicant in the Mezepoli Nicolway application), do not contain any express provisions dealing with *force majeure* and both contain whole agreement clauses, demonstrating that no such provision applies.

[32] The Mezepoli Nicolway lease expressly provides that:

'*Should the LESSEE be prevented from having access to the PREMISES as a result of any fire, riot, organised labour strikes, natural peril disaster. or any other reason whatsoever. then*

the LESSEE shall not have any claim against the LESSOR nor Its agents or employees for any remission in rental or for any other damages, nor any right of cancellation of the agreement of lease.'

[33] The respondent companies sought rental relief from their landlords. The landlord of Mezepoli Melrose indicated that it has granted a level of 'relief' and that a portion of the payment due in respect of May 2020 would be deferred. Plaka Eastgate's landlord addressed a letter to its tenants, in which it sets out the rental relief which it is offering. There would be no need for any rental relief to be requested or granted if *force majeure* applied. No question of force majeure was raised by the respondent companies in relation to these lease agreements. Nor have they raised this defence when payment has been demanded by other creditors.

[34] If the respondent companies were of the view that *force majeure* excused them from their obligations to their employees, it would have been expected that they would have told them as much in late March or early April. Instead, the employees of the respondent companies were only advised that they would not receive payment of their April salaries on the day that they fell due for payment, 28 April 2020.

[35] It thus appears that the respondent companies are only raising *force majeure* in relation to the employment contracts.

Impossibility of performance

[36] If provision is not made contractually by way of a *force majeure* clause, a party will only be able to rely on the very stringent provisions of the common law doctrine of supervening impossibility of performance, for which objective impossibility is a requirement. Performance is not excused in in all cases of *force majeure.*[11] In *MV Snow Crystal*,[12] the Supreme Court of Appeal (per Scott JA) said as follows:

'As a general rule impossibility of performance brought about by vis major or casus fortuitus will excuse performance of a contract. But it will not always do so. In each case it is necessary to "look to the nature of the contract, the relation of the parties, the circumstances of the case,

[11] *Glencore Grain Africa (Pty) Ltd v Du Plessis NO & Others* [2007] JOL 21043 (O); (4621/99) [2002] ZAFSHC 2 (28 March 2002) at 10.
[12] *MV Snow Crystal Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA) para 28 (footnotes omitted).

and the nature of the impossibility invoked by the defendant, to see whether the general rule ought, in the particular circumstances of the case, to be applied". The rule will not avail a defendant if the impossibility is self-created; nor will it avail the defendant if the impossibility is due to his or her fault. Save possibly in circumstances where a plaintiff seeks specific performance, the onus of proving the impossibility will lie upon the defendant.'

[37] In *Unlocked Properties 4 (Pty) Limited v A Commercial Properties CC*,[13] the court, citing *Unibank Savings & Loans Ltd (formerly Community Bank) v Absa Bank* Ltd,[14] stated as follows:

'The impossibility must be absolute or objective as opposed to relative or subjective. Subjective impossibility to receive or to make performance does not terminate the contract or extinguish the obligation.'[15]

[38] In *Unibank* it was held that—

'Impossibility is furthermore not implicit in a change of financial strength or in commercial circumstances which cause compliance with the contractual obligations to be difficult, expensive or unaffordable.'[16]

[39] The obligation which the trust companies owed to their employees, to pay them their salaries, has always been capable of performance and was at no time rendered impossible. It is trite that the duty to pay, and the commensurate right to remuneration, arises not from the actual performance of work, but from the tendering of service.[17] The Regulations which were in force during level 5 of the National Lockdown make it clear that employers are not excused from their obligation to pay their employees' salaries, because it includes in the list as an essential service the 'Implementation of

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[13] *Unlocked Properties 4 (Pty) Limited v A Commercial Properties CC* (18549/2015) [2016] ZAGPJHC 373 (29 July 2016) para 7.
[14] *Unibank Savings & Loans Ltd (formerly Community Bank) v Absa Bank Ltd* 2000 (4) SA 191 (W).
[15] *Unlocked Properties* (note 13 above) para 7. In *Unibank*, the court has stated as follows: 'A contract is … terminated only by objective impossibility (which always or normally has to be total). Subjective impossibility to receive or make performance at most justifies the other party in exercising an election to cancel the contract.'
[16] *Unibank Savings* (note 14 above) at 198D.
[17] *Johannesburg Municipality v O'Sullivan* 1923 AD 201.

payroll systems to the extent that such arrangement has not been made for the lockdown, to ensure timeous payments to workers.'[18]

[40] The applicants contended that the trust companies have also been permitted to trade in some form throughout the entire lockdown.

40.1. During level 5 of the National Lockdown, from 27 March 2020 to 30 April 2020, they were permitted to conduct limited trade (the sale of cold foods, of which there are many on the restaurants' menus).[19]

40.2. The restaurants also operate a deli, which does not sell hot cooked food and was thus permitted to trade throughout the level 5 lockdown period.

40.3. Under level 4, the respondent companies were entitled to trade in any foods on a 'delivery only' basis.[20]

40.4. Under level 3, which came into force on 1 June, the respondent companies will be permitted to sell all food for collection or delivery.[21]

40.5. The respondent companies are not excused from its obligations to its employees because it has decided not to trade in circumstances where it is able to do so, but has elected not to, in anticipation that such trading will not be profitable. Trading may be more burdensome or economically onerous, but economic hardship is not categorised as being a force majeure event;[22] it does not render performance objectively and totally impossible.

[41] In my view, *force majeure* cannot be relied upon by the respondent companies as a defence to their obligations owed to their employees. In any event, the applicants are clearly 'affected persons' as set out in s 131 and s 128(1)(*a*) of the Act, who are

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[18] As per the regulations published in terms of s 27(2) the Disaster Management Act 57 of 2002: GN 318 of 2020 in GG No. 43107 (18 March 2020), as amended by s 6(*e*) of GN R419 in GG No. 43168 (26 March 2020), Annexure B para 32.
[19] See Regulation 11B(1)(*b*) and (*c*) read with Annexure B, Category A, para 1(*i*) and Category B, para 4 of the Regulations (GN 318 of 2020).
[20] See Regulation 28(1), GN R480 of GG 43258 read with Table 1 to the Regulations, Part I, which provides as follows: 'Accommodation and Food Services Activities Permitted: Restaurants only for food delivery services (9H00-19H00) and subject to restriction on movement (no sit down or pick-up allowed).'
[21] Regulation 46(1) read with specific economic exclusions set out in Table 2 of the Regulations, GN 605 of GG 43364 (28 May 2020).
[22] *Unibank Savings* (note 16 above).

entitled to bring these proceedings and participate therein. Thus, they have the necessary *locus standi* required for these applications.

The respondent companies have failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters

[42] Once it is accepted that the defence of *force majeure* is not available to the respondent companies, it follows that, in failing to pay their employees their salaries on 28 April 2020, the respondent companies failed to pay over an amount in terms of an obligation under a contract, with respect to employment related matters.

[43] All that the employees received in respect of April 2020 was either a R3 000 or R1 000 *advance* on funds which the respondent companies hoped to obtain from the UIF relief scheme. The respondent companies remain liable for the payment of the at the employees' salaries from April 2020.

[44] The fact that UIF payments were made to *some* of the employees does not excuse the respondent companies of their obligations to pay employee salaries, particularly in circumstances when, on the respondent companies' own version, cash reserves and other forms of funding are available.

[45] The requirement at section 131(4)(*a*)(iii) of the Act is thus met.

Are the respondent companies financially distressed?

[46] Although the respondent companies strenuously opposed the suggestion that they are financially distressed, this is contrary to what they stated to the employees in the memos:

46.1. On 1 April 2020, it was stated that, '*The restaurants are small businesses which are in distress'.*

43.2 On 28 April 2020, it was stated that, '*as a direct result of the down-trading and continued losses incurred during the recent months [we have exhausted] any historic profits there may have been*.'

[47] ‘Financially distressed’ is defined in s 128(1)(*f*) of the Act to mean that—

(i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months; or

(ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months.

[48] The respondent companies’ admissions in this regard appear to satisfy both these tests. They have provided scant information to demonstrate that they are not financially distressed. They have not disclosed details of all their creditors, showing outstanding balances and age analysis; no financial statements or balance sheets are disclosed. Other than the relief granted by the landlords of Mezepoli Melrose Arch and Plaka Eastgate, there is no evidence that any creditors regard the respondent companies’ obligations as unenforceable. On the contrary, if regard is had to the affidavits from creditors Meze Foods and Golden Coast Fisheries, they regard the debts as overdue.

[49] In regard to the affidavits filed by other employees and creditors, which form part of the proceedings, the respondents contended that an application should have been made for them to be admitted. In *Cape Point Vineyards* (*Pty*) *Ltd v Pinnacle Point Group Ltd*,[23] Rogers AJ intimated that he did not think the Legislature contemplated that an affected person would have to apply for leave to intervene in order to participate in the legal proceedings. He did however state that courts would need to regulate the procedure to be followed, where affected parties wanted to file affidavits relevant to the application, in order to ensure fairness to all the parties involved.

[50] The respondents were offered the opportunity to deal with the affidavits of these affected parties. Having perused the affidavits, the respondent companies accepted the contents thereof, save for the amount allegedly owing by Brand Kitchen to Golden Coast Fisheries, which they disputed.

[51] Brand Kitchen produced a Schedule / Income statement (the ‘Schedule’) for the trust companies. Taking that information into account, Mun Manal contended that,

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[23] *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd & Another (Advantage Projects Managers (Pty) Ltd intervening)* 2011 (5) SA 600 (WCC).

even if one ignores the costs of sales and accepts a reduced liability insofar as salaries and wages are concerned and the rental relief which has been granted, the fixed monthly expenses of the respondent companies amount to approximately R2 million.

[52] Mun Manal prepared various schedules setting out the income and expenditure of each of the respondent companies. As a result of the lockdown and subsequent cessation of trade, the respondent companies have made significant losses, as set out below:

52.1. Brand Kitchen: R238 941.33 for the period January to March 2020;

52.2. Plaka Eastgate: R698 758.10 for the period January to March 2020;

52.3. Mezepoli Melrose Arch: R385 216.98 for the month of March 2020.

52.4. Mezepoli Nicolway: R250 405.82 for the month of March 2020.

52.5. Although not set out in the affidavits, further losses for April and May 2020 must have been incurred in respect of all the respondent companies in at least the amounts referred to for March 2020. Thus, the estimated losses in total from January to May 2020 for the respondent companies are in the region of R3 million.

[53] The respondent companies dealt with this contention dismissively, by stating that the monthly expenses are not relevant because the obligation to pay them is suspended during the national lockdown. As set out above, this contention is both factually and legally untenable.

[54] The applicants contended that whether the expenses which are estimated by Mun Manal or the expenses which are set out in the Schedule are used, the respondent companies are clearly in financial distress because the only funds which they identify as being available to them to meet these ongoing expenses are the following:

54.1. Cash reserves available to Mezepoli Melrose Arch in an investment account in the amount of R592 632.52.

54.2. Funds available from access bonds held by entities which are not involved in the businesses conducted by the trust companies, being Merchant Property (Pty) Ltd, in the amount of R731 060.14, and Masterprops 388 CC, in the amount of R610 649.67.

54.3. Funds which can be borrowed from the KAM Trust. Even though the Trust's financial position is not disclosed, the applicants contended that the Trust would be unable to provide any funding because:

(a) Mezepoli Melrose loaned the Trust R1 832 406.63. Such loan has not been repaid; the inference must be drawn that it is unable to do so;

(b) Froneman stated the following under oath in an affidavit deposed to on 25 March 2020:

'44. The Kam Trust attaches hereto the balance sheet of the Kam Trust as well as its management accounts as annexures GL 2 and GL3.

45. As is evident from the balance sheets the Kam Trust expenses exceed its income. If the properties are not sold the Kam Trust will not be able to meet its financial commitments and the Kam Trust will have to be wound up.' [Emphasis added].

54.4. Even if it is to be accepted that the respondent companies have access to the funds, they are insufficient to service the debts of all the respondent companies, which are set out by Mun Manal.

[55] In the case of Mezepoli Melrose, Froneman has annexed 'a cash flow projection' in which he assumes that normal trading will resume from June, July or August 2020. He also assumes that by December, pre-lockdown sales will be reached. These projections are highly speculative having regard to the present lockdown regulations, the likely contraction of the economy and the extensive financial hardship being experienced by many people.

[56] The decision to remain closed until the end of the lockdown will result in tremendous financial hardship to the respondent companies and their employees,

particularly when there is no indication as to when the lockdown will reach the level at which restaurants will be permitted to resume normal trading.

[57] In respect of Plaka Eastgate, it is common cause that:

57.1. it is running at a loss and is financially distressed;

57.2. it does not have funds available to pay its creditors;

57.3. an offer to purchase the business of Plaka Eastgate (including its liabilities) was made by Kosta on 27 April 2020.

[58] From the Schedule and Mun Munal's estimates, the applicants submitted that:

58.1. If the trust companies trade on a 'delivery' basis they *will* make a gross profit (even if they make a net loss) because all of their costs of sales are variable costs, which together constitute approximately 56% of sales. When trading on a delivery/collection only basis, the trust companies have a gross profit margin in the order of 44%.

58.2. If they trade on any basis, which consequently results in a gross profit, there will be some funds available with which to make payment of their fixed costs – which include employees' salaries and rental. There is accordingly a benefit to the affected persons of the trust companies if trade is conducted on any basis.

58.3. The undertaking to provide PCF should the respondent companies be placed under business rescue is such that the initial funding of R4 million, which has been provided will fund the *net* losses which the respondent companies project they will incur from trading on a 'delivery only' basis for nearly 14 months, such that the respondent companies will not have to rely on their own resources in order to trade. That, the applicants submitted, is the position on the respondent companies' own projected model.

58.4. If they do not trade, as the respondents have decided (until lockdown has been lifted), the trust companies generate no income at all. If *force majeure* does not apply their obligations in respect of their fixed expenses continue to accrue each and every month. This cannot be in the interests of the affected persons or the

trust companies because there is and will be no income from which to pay the fixed costs such as salaries and rental, and their indebtedness thus grows exponentially taking the respondent companies from 'financially distressed' to both commercially and factually insolvent.

[59] The trust companies submitted that they are not able to trade on a 'delivery only' basis, as they would suffer a loss. However, the applicants submitted that not trading at all will result in much greater losses and the ultimate demise of all of the respondent companies.

[60] Despite having the sources of funding which the respondent companies state they have, there is no explanation why these funds have not been used to pay the employees and/or any other creditors, who are demanding payment. It is trite that a debtor proves his solvency by paying his debts.[24]

[61] Another issue which is extremely concerning and which appears from the financial information disclosed to the court, is that Mezepoli Melrose apparently declared or paid a dividend to the Trust in the amount of R7 438 000 between 1 March and 30 April 2020, just prior to or after lockdown had commenced. Mezepoli Melrose moved from a position of net profit to a substantial net loss. There is no explanation for this from the respondent companies.

Just and equitable for financial reasons

[62] A court can in any event order business rescue if, in terms of ss (4)(*a*)(iii), it 'is otherwise just and equitable to do so for financial reasons.'[25] In making this decision, I have considered the PCF provisions contained in s 135 of the Act which make specific provision for employee entitlements (for the period after the business rescue process has commenced) to be treated as part of the PCF. Employees are afforded special protection under Chapter 6 of the Act. They are included in the definition of 'affected persons' who enjoy a wide array of powers and rights. Business rescue has

[24] *Prudential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd and Others* 1976 (2) SA 856 (W) at 869C-D. The applicants do not however have to demonstrate that the respondent companies are either commercially or factually insolvent – just distressed.
[25] *Tyre Corporation Cape Town (Pty) Ltd and Others v GT Logistics (Pty) Ltd (Esterhuizen and Another intervening)* 2017 (3) SA 74 (WCC); [2016] ZAWCHC 124 (21 September 2016) para 17.

no impact on employment. Employees continue to be employed on the same terms and conditions.[26] There is, furthermore, in business rescue a statutory preference for unpaid salary and benefits before all other non-secured creditors.[27] Employees' salaries due and payable during business rescue, but not paid, form part of any PCF provided to the company.[28]

[63] It is undisputed that by not trading at all, the respondent companies will not generate any income from which to pay the salaries and other fixed monthly expenses which they continue to incur.

[64] If the respondent companies are placed in business rescue, the moratorium will allow them to avoid the consequences of their failure to meet these expenses whilst in business rescue, thereby affording them the time required until trading recommences and they are able to trade profitably again.

[65] The BRP will be in a position to independently consider the financial positions of each respondent company, including the decisions taken not to trade on a delivery/collection basis. He will be able to use the moratorium to ensure that whatever funds are available are used fairly, in order to pay employees' salaries (or a portion thereof) and alleviate the hardship being faced by them.

[66] The devastating effect that the failure to pay salaries has had on the employees of the respondent companies cannot be overstated. Employees have been unable to *inter alia* pay their rental, afford basic necessities like food, and pay their children's school fees. This poses a very real threat to the lives and livelihoods of the employees who find themselves in a desperate and destitute situation.

[67] The directors appear to move funds between all the entities which they control and the Trust, without disclosing a complete financial picture, notwithstanding that these are all separate companies that are all financially distressed. Placing the respondent companies under business rescue will allow the BRP to attain a clear and

[26] Section 136(1)(*b*) of the Act.
[27] Section 135(1) and (3) of the Act.
[28] Ibid.

complete understanding of the financial positions of the respondent companies, so that an attempt can be made to rescue them or, if that is not possible, wind them up.

[68] It is thus just and equitable for financial reasons that the respondent companies be placed under business rescue.

Can the companies be rescued?

[69] In April 2020, Margarita ascertained that the trust companies did not intend to pay anything to their staff on 28 April 2020. She procured that payments be made to each employee to the extent of approximately 30% of that employee's salary. Each waiter, who ordinarily only earns commission on sales and no fixed salary, was paid R1 500.

[70] The applicants in their founding affidavit referred to funding which Margarita was willing to provide apparently in her personal capacity. She stated that she was prepared to provide PCF for:

70.1. Payment of 30% of the employees' salaries/wages until no longer required.

70.2. Contributions toward rental obligations.

[71] The detail surrounding the PCF in the founding affidavit was sparse. The availability of such funding from Margarita was challenged in the respondents' answering affidavits. In reply, the applicants contended that having had regard to the financial position of the respondent companies as contained in the answering affidavits (insufficient as it was), they were able to provide more detail of the PCF which would be procured by Margarita, from the Konmar Trust (Konmar) of which she is a beneficiary and trustee.

[72] It was stated that Margarita has now procured, through Konmar, PCF for the respondent companies in the event that they are placed under business rescue. The initial funding available for this purpose is R4 million.

[73] The respondents did not, on receipt of the replying affidavit, seek to strike out these allegations; nor did they request an opportunity to file a further affidavit to deal with the allegations. They did however, in their heads of argument, request that the

Court ignore the allegations. They submitted that the applicant's case must be made out in the founding affidavit.[29]

[74] In *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd*,[30] the court held that the rule was not absolute and that the court has a discretion to permit new material in the replying affidavit.[31] In considering whether to allow new material introduced for the first time in the replying affidavit, the court exercises a judicial discretion. The indulgence of allowing new material in the replying affidavit will generally be allowed when warranted by special circumstances.[32]

[75] The rule does prohibit the applicant from explaining or expanding upon matters contained in the founding affidavit.[33] The court may also, after permitting the use of new material in a replying affidavit, allow for further answering affidavit by the respondent.

[76] The approach to adopt, in considering whether to allow new matter in the replying affidavit, was referred to in *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger*,[34] where the Court held that:

'In consideration of the question whether to permit or to strike out additional facts or grounds for relief raised in the replying affidavit, a distinction must, necessarily, be drawn between a case in which the new material is first brought to light by the applicant who knew of it at the time when his founding affidavit was prepared and a case in which facts alleged in the respondent's answering affidavit reveal the existence or possible existence of a further ground for the relief sought by the applicant. In the latter type of case the Court would obviously more readily allow an applicant in his replying affidavit to utilise and enlarge upon what has been revealed by the respondent and to set up such additional ground for relief as might arise therefrom…'

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[29] In *Poseidon Ships Agencies (Pty) Ltd v African Coaling and Exporting Co (Durban) (Pty) Ltd,*[29] the court upheld the principle that the applicant in motion proceedings has to make out his or her case in the founding affidavit and was not permitted to supplement it in the replying affidavit unless done due to special circumstances

[30] *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* 2013 (2) SA 204 (SCA); (363/2011) [2012] ZASCA 49 (30 March 2012).

[31] *Body Corporate, Shaftesbury Sectional Title Scheme v Rippert's Estate and Others* 2003 (5) SA 1 (C); (4542/02) [2002] ZAWCHC 15 (24 March 2002) at 6D-F.

[32] *Faber v Nazerian* (2012/42735) [2013] ZAGPJHC 65 (15 April 2013).

[33] *Nedbank Ltd v Hoare* 1988 (4) SA 541 (E) at 543E.

[34] *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger* 1976 (2) SA 701 (D) at 705H-B.

[77] In exercising a judicial discretion in this regard, I take into account the wording of s 131(4)(*a*) of the Act which provides that a court should, in deciding whether to place a company under business rescue, have regard to whether it is just and equitable to do so for financial reasons and whether the company can be rescued. The applicants state that only after receipt of the answering affidavits, were they given some detail about the financial position of the companies. They then expanded upon the issue of the PCF in their replying affidavit.

[78] The applications are urgent and by applying the strict rules relied upon by the respondent companies, this Court will be flouting its duties provided for in the Act. This matter concerns, inter alia, the livelihood of some 158 employees. A refusal to take into account the issue of the PCF as set out in the replying affidavit, and dismissing the application for want of details relating to the PCF in the founding affidavit, would be extremely prejudicial to these employees, other creditors and the respondent companies themselves.

[79] This Court must consider the financial implications of the respondent companies not paying any salaries and wages to its employees. If business rescue can assist them and prevent disastrous consequences for them and their families, the Court should indulge the parties in allowing them to deal in detail with whether PCF is available to avoid the consequences of non-payment of the employees' salaries and wages. I therefore offered the respondents the opportunity to deal with the allegations relating to the PCF contained in the replying affidavit. They accepted such offer. The applicants were then granted leave to clarify certain allegations which the respondent companies disputed in their response. Both parties filed further affidavits in this regard. There is no prejudice to any party in this regard.

[80] In the replying affidavit, Margarita, on behalf of Konmar, provided the following undertakings to provide PCF, on condition that the respondent companies are placed in business rescue and Mr Murray is appointed as the BRP:

80.1. To wholly fund the operations of the respondent companies so as to immediately permit that trading may resume on a delivery-only basis, or on any other basis permitted by the regulations which are applicable from time to time during the lockdown, to the extent that such funding is necessary;

80.2. Konmar will fund the fixed and variable costs if trading is resumed on any other basis, to the extent that such funding is necessary;

80.3. If harsher restrictions on trade are instituted in due course, Konmar will continue to make reduced salary payment to the employees of the respondent companies to the same monthly extent as the payments which were made in respect of April 2020, and to pay any reduced fixed costs (save for those due to other entities controlled by the KAM Trust) to ensure that the businesses remain in good standing and the respondent companies are able to reopen for trade, should that be possible.

[81] Margarita stated that:

81.1. Konmar has an amount of approximately R4 million immediately on hand to provide for the above and has access to further funding if necessary.

81.2. A resolution has been passed by the trustees of Konmar resolving *inter alia* to provide the above funding, and each trustee has confirmed these facts.

[82] The respondents, in their further affidavit, challenged the allegation that PCF can be made available from the Konmar Trust. They submitted that:

82.1. No trust deed was attached, from where one can adduce whether the acting trustees are authorised to make this loan.

82.2. No financial information is proffered to determine Konmar's ability to make the funds available and from where these funds will emanate.

82.3. In regard to the PCF, they submitted that Konmar does not have the resources to provide the PCF because on the divorce of Angelo and Margarita, certain distributions were to be made to the Konmar Trust from the Kam Trust namely:

(a) A members' interest in Erf 971 Hurlingham CC, which only asset is an immovable property described as 8 Middelvlei Hurlingham Manor Hurlingham Ext 5.

(b) Zimbali Condominium Suite 114 Sectional Title Development.

(c) 50% of the shares held in Trashcan Kidz Ltd.

82.4. The Zimbali property was transferred to the Trust, which at the time of the transfer was valued at R2 800 000.00.

82.5. To date the Konmar Trust has to date failed to raise the necessary finance to take transfer of the member's interest in Erf 971 Hurlingham CC which at the time of signature of the agreement was valued at R2 389 290.19.

82.6. The Kam Trust is thus still the sole shareholder in Erf 971 Hurlingham CC. Currently the loan over the property (over which a bond is required) is R2 500 000.00.

82.7. As far as the 50% shareholding in Trashcan Kidz, they have not been able to find any information regarding this.

[83] It was thus submitted by the respondent companies that it is highly doubtful that Konmar is in possession of the necessary finance to loan and advance the PCF, and to fund the business rescue on the terms and conditions as set out in Konmar's resolution to the papers.

[84] In response to this, the applicants alleged that:

84.1. Their attorney had received payment on 28 May 2020 of the amount of R4 million from Konmar, which funds were held in trust for the purpose of providing the PCF.

84.2. In addition, Konmar has offered to lend and advance to the first respondent companies such amounts as may be required to fund the rescuing of the companies and to—

'fund the payments of all employees of the companies for the duration of the lockdown and any amended lockdown regulations, and at a minimum at the level of 30% as was previously paid by Margarita. Should employees be permitted to return to work to earn increased salaries, such funding shall be provided as needed and agreed to with the appointed business rescue practitioner'.

84.3. Konmar is permitted to provide the PCF in terms of the provisions of the Konmar Trust Deed, read with the definitions of 'Capital Beneficiary' and 'Income Beneficiary' respectively. That is because Kosta is a beneficiary of both the KAM Trust and Konmar; and

84.4. The Trust Deed and necessary resolutions of the trustees and their confirmatory affidavits were attached to this response.

[85] The question before this Court is whether there is sufficient information before the Court to determine whether the respondent companies can be rescued if the PCF is provided. This issue was succinctly summarised by Brand JA in In *Oakdene Square Properties (Ply) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* where he stated:

'I have indicated my agreement with the statement in Propspec that the applicant is not required to set out a detailed plan. That can be left to the business rescue practitioner after proper investigation in terms of s 141. But the applicant must establish grounds for the reasonable prospect of achieving one of the two goals in s 128(1)(b).'[35]

…

'Self-evidently the development of a plan cannot be a goal in itself. It can only be the means to an end. That end, as I see it, must be either to restore the company to a solvent going concern, or at least to facilitate a better deal for creditors and shareholders than they would secure from a liquidation process.'[36]

[86] In *Nedbank Ltd v Bestvest*,[37] the following was said:

'[It was] *argued that an application for business rescue should, to all intents and purposes, contain a summary of the proposed business rescue plan.* [It was] *contended that only once this had been done could a court decide whether there was a reasonable prospect of the company being saved from insolvency. I do not agree with that submission. In my view, it should be left up to the business rescue practitioner to formulate the rescue package once he/she has had an opportunity to properly assess the company, its prospects going forward and, most importantly, the reasons for its commercial distress.'*

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[35] *Oakdene* (note 4 above) para 31.
[36] Ibid.
[37] *Nedbank Ltd v Bestvest 153 (Pty) Ltd; Essa and Another v Bestvest 153 (Pty) Ltd and others* 2012 (5) SA 497 (WCC) para 40.

[87] The court in *Oakdene* confirmed that the achievement of any one of the two goals referred to in s 128(1)*(b)* of the would qualify as 'business rescue' in terms of s 131(4). Referring to *Oakdene*, the appropriate test was described by Maya JA in *Newcity*[38] as follows:

'It is plain from the wording of these provisions that a court may not grant an application for business rescue unless there is a reasonable prospect for rescuing the company i.e. facilitating its rehabilitation so that it continues on a solvent basis or, if that is not possible, yields a better return for its creditors and shareholders than what they would receive through liquidation. ….

As to what "reasonable prospect" means, Brand JA, in Oakdene Square Properties (Pty) Ltd, properly described it as a yardstick higher than "a mere prima facie case or an arguable possibility" but lesser than a "reasonable probability" – a prospect based on reasonable grounds to be established by a business rescue applicant in accordance with the rules of motion proceedings. He elaborated as follows:

*"*Self-evidently it will be neither practical nor prudent to be prescriptive about the way in which the [applicant] must show a reasonable prospect in every case. Some reported decisions laid down, however, that the applicant must provide a substantial measure of detail about the proposed plan to satisfy this requirement … But in considering these decisions Van der Merwe J commented as follows in Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and another 2013 (1) SA 542 (FB) para 11:

'I agree that vague averments and mere speculative suggestions will not suffice in this regard. There can be no doubt that, in order to succeed in an application for business rescue, the applicant must place before the court a factual foundation for the existence of a reasonable prospect that the desired object can be achieved. But with respect to my learned colleagues, I believe that they place the bar too high.'

And in para 15:

'In my judgment it is not appropriate to attempt to set out general minimum particulars of what would constitute a reasonable prospect in this regard. It also seems to me that to require, as a minimum, concrete and objectively ascertainable details of the likely costs of rendering the company able to commence or resume its business, and the likely availability of the necessary

[38] *Newcity Group (Pty) Limited v Pellow NO* 2014 JDR 2155 (SCA); *Newcity Group (Pty) Limited v Pellow N.O. and Others* (577/2013) [2014] ZASCA 162 (1 October 2014).

cash resource in order to enable the company to meet its day-to-day expenditure, or concrete factual details of the source, nature and extent of the resources that are likely to be available to the company , as well as the basis and terms on which such resources will be available, is tantamount to requiring proof of a probability, and unjustifiably limits the availability of business rescue proceedings.'

"… I agree with these comments in every respect … [Thus] the applicant is not required to set out a detailed plan … but must establish grounds for the reasonable prospect of achieving one or two goals in s 128(1)(b)." [39]

[88] Having regard to this test, I am satisfied that the PCF is sufficiently detailed to achieve either of the two purposes set out in s 128(1)(*b*)(iii).

[89] Placing the respondent companies under business rescue will allow them reasonable prospects of rescue because:

89.1. The moratorium which ensues will protect the respondent companies from their creditors enforcing claims against them.

89.2. The PCF will provide funding to the respondent companies until they are in a position to resume profitable trade.

89.3. The wide powers of the appointed BRP will allow for the business as a whole to be streamlined and for the profitable parts of the business to support the unprofitable parts of the business until they are able to return to profitability.

89.4. The BRP will be able to investigate the financial positions of the respondent companies individually and collectively and restructure the businesses to increase profitability. He will further be able to ascertain the circumstances under which the dividend of some R7 million was paid to the Trust, taking Mezepoli Melrose from the position of a net profit to a net loss of some R5 million.

89.5. The initial PCF of R4 million is sufficient to sustain the trust companies' operations on a delivery and take-away only basis for nearly 14 months. This provides some certainty and relief for creditors and employees. On the basis

[39] Ibid paras 15-16.

of the respondent companies' model, if opened to trade on a 'delivery only' (or take-away and delivery only) basis.

89.6. The restaurants will collectively make a monthly gross profit of at least R490 079.

89.7. This will be available to make payments towards the fixed monthly expenses of the trust companies; as well as to other trade creditors.

89.8. At least 50% of the salaries and wages will continue to be paid. That affords a monthly benefit of R300 000 to the employees of the trust companies.

89.9. The restaurants will incur a collective net monthly loss of approximately R280 000 after fixed expenses (rental, utilities, salaries & wages and operational costs) have been paid.

89.10. The R4 million which Margarita has procured from Konmar as PCF is sufficient to fund the cumulative net trading losses of all the restaurants for almost 14 months.

89.11. This will undoubtedly be to the benefit of creditors and employees since employees are currently not being paid anything at all, which is, literally, a matter of life or death for them.

89.12. The cash reserves that Mezepoli Melrose has will not need to be utilised, nor will the funds of the Trust and the unrelated entities which it controls, need to be accessed.

89.13. Irrespective of what the future holds for these restaurants, there will certainly be a better outcome for creditors, and in particular, the applicants, in the event that the respondent companies are ultimately wound up.

89.14. Due to the fact that Brand Kitchen is solely dependent on the fees that are payable to it from the other respondent companies, directly or via Plaka Holdings and Mezepoli Holdings, any income generated by these restaurants will in turn support Brand Kitchen's viability.

89.15. In the case of Plaka Eastgate, which it is common cause is financially distressed, Froneman alleged that having regard to Plaka Eastgate's 'trading history there is no point in re-opening'. He relies in support of this assertion on the income statement of Plaka Eastgate for the period June 2019 to April 2020.

89.16. The most recent financial statements available as at the date of Angelo's passing are those for the financial year end 31 May 2018. The applicants contended that these financial statements reveal the following:

(a) During 2017 and 2018, Plaka Eastgate was profitable. In 2018, the business made a profit of approximately R300 000.

(b) Since Froneman and Elpida took over as directors, Plaka Eastgate's financial position has deteriorated rapidly, to the point where the directors now allege that it is incapable of being rescued and ought to be liquidated.

(c) Renovations to the Plaka Eastgate restaurant took five months. This had a temporary but material impact on the revenue generated by Plaka Eastgate. Revenue improved once the renovations were complete.

89.17. Placing Plaka Eastgate under business rescue will afford it a reasonable prospect of being able to trade out of its precarious financial position. At the very least, the PCF procured by Margarita will allow Plaka Eastgate to break even for at least 14 months. Much can be achieved in 14 months and, critically, its employees (50 of them) will be able to feed their families. The BRP can also continue the negotiations for Kosta to purchase Plaka Eastgate.

[90] For these reasons, I am of the view that it is reasonably possible that the respondent companies will be returned to solvency; alternatively, there will be a better outcome for shareholders, and creditors, in particular the employees, than that which they would receive through liquidation, thus satisfying the test set out in s 128(1)(*b*)(iii) of the Act.

Ulterior motive

[91] Finally, the respondent companies submitted that these applications have been brought for an ulterior purpose in order to wrest control from the current management and vest control in Kosta, Margarita or Mun Manal. The applicants contended that:

91.1. Business rescue proceedings are a temporary state of affairs which end in the circumstances provided for in s 132(2)(*a*) to (*c*) of the Act.[40]

91.2. Under business rescue, the existing board of directors will remain in place. What changes is that the BRP temporarily has full management control of the company in substitution for its board under s 140(1)(*a*) of the Act.[41]

91.3. The relief sought by the applicants accordingly does not have the effect for which the respondent companies contend.

[92] I agree with these contentions. The BRP satisfies the requirements to be appointed. No dispute was raised in this regard.

For these reasons, on 1 June 2020, the following order was granted:

1. The first respondent in:

    a. **CASE NO: 2020/10556, MEZEPOLI MELROSE ARCH (PTY) LTD;**

    b. **CASE NO: 2020/10555, MEZEPOLI NICOLWAY (PTY) LTD;**

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[40] Section 132(2) of the Act provides:

(2) Business rescue proceedings end when-
- *(a)* the court-
    - (i) sets aside the resolution or order that began those proceedings; or
    - (ii) has converted the proceedings to liquidation proceedings;
- *(b)* the practitioner has filed with the Commission a notice of the termination of business rescue proceedings; or
- *(c)* a business rescue plan has been-
    - (i) proposed and rejected in terms of Part D of this Chapter, and no affected person has acted to extend the proceedings in any manner contemplated in section 153; or
    - (ii) adopted in terms of Part D of this Chapter, and the practitioner has subsequently filed a notice of substantial implementation of that plan.

[41] Section 140(1)(*a*) sets out that, 'During a company's business rescue proceedings, the practitioner, in addition to any other powers and duties set out in this Chapter has full management control of the company in substitution for its board and pre-existing management'.

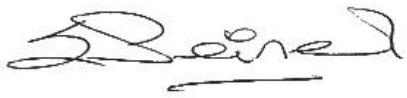
c. **CASE NO: 2020/10955, PLAKA EASTGATE RESTAURANT CC;**

d. **CASE NO: 2020/10956, BRAND KITCHEN HOSPITALITY (PTY) LTD**

is placed under supervision and business rescue proceedings be commenced under section 131(4)(a) of the Companies Act, 2008.

2. Mr Cloete Murray, practising at Sechaba Trust (Pty) Ltd, is appointed as the interim business rescue practitioner of each of the first respondents referred to in paragraph 1 above, subject to ratification by the holders of a majority of the independent creditors' voting interests at the first meeting of creditors, as contemplated in section 147 of the Companies Act.

3. The costs of this application be paid as an expense in the business rescue process of each of the first respondents the first respondents referred to in paragraph 1 above; alternatively, be paid as costs in the administration of the liquidation of each of the first respondent.



S E WEINER
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing:	27 May 2020
Date of order:	1 June 2020
Date of judgment:	3 June 2020

Appearances:

Counsel for the Applicants:	Adv. GW Girdwood SC;
	Adv. A Kolloori; Adv. MFB Clark

Instructing Attorneys:	Christophers & Oosthuizen Inc
Counsel for the First Respondents:	Adv. M Smit
Instructing Attorneys:	Nance-Kivell Attorneys

Also on the test propagated by Paul Pretorius as set out above, it is conceivable that applicants should succeed in view of the fact that no conciliation procedures have been attempted prior to the dismissals, according to the papers before the court. Conciliation further seems to be expedient in the light of the fact that the relationship between applicants and respondent does not seem to have been hostile. It is believed that in these circumstances it is appropriate that the conciliation procedures provided for in the Act could be followed.

[The applicants were accordingly reinstated under s 43(4)(*b*)(i) of the Labour Relations Act 28 of 1956.]

Applicants' Attorneys: *Legal Resources Centre*, Durban.

Respondent's Attorneys: *Garlicke & Bousfield Inc*, Durban.

NATIONAL UNION OF MINEWORKERS & OTHERS v DRIEFONTEIN CONSOLIDATED LTD

INDUSTRIAL COURT

14 and 15 November, 22 November 1983; 10 February 1984

Before LANDMAN, Ad Hoc Member

Dismissal—Unfair—Enquiry before dismissal—Failure to hold does not make dismissal an unfair labour practice.

Dismissal—Unfair—Mineworker refusing to work in area of mine to which assigned, believing it to be unsafe—Employer investigating area in compliance with regulations and finding it safe—Dismissal of employee not unfair.

Reinstatement—Of dismissed employee under s 43(4)(b)(i) of the Labour Relations Act—Factors governing.

Status quo relief—Section 43 of the Labour Relations Act—Relief sought pending conciliation—Object of—To delay unilateral action until statutory conciliation exhausted.

Status quo relief—Section 43 of the Labour Relations Act—Test—Akin to but not identical with that for grant of interim interdicts—Distinctive features.

Unfair labour practice—'Alleged unfair labour practice'—Meaning of in s 43(1)(c) of the Labour Relations Act.

Unfair labour practice—Safety—Employer's duty to assuage employee's fear that working place unsafe—No such duty where employer governed by Mines and Works Act—That Act exhaustive of employer's duties concerning safety.

The primary object of status quo relief pending conciliation is not to maintain or redress the bargaining power between the parties, but to delay the unilateral action of a party until the conciliation machinery provided for in the Labour Relations Act 28 of 1956 has been exhausted.

The civil test for the grant of interim interdicts is not universally applicable to the determination of applications for status quo orders under s 43 of the Labour Relations Act 28 of 1956. There are similarities between the two types of relief, both being temporary and within the discretion of the court to grant or refuse, and the approach to the resolution of disputes of fact in the former may profitably be applied in the latter; but it runs counter to the spirit of the Act to require an applicant who does not have a clear right to relief in the main case to show a well-grounded apprehension of irreparable harm, since an employee who applies for status quo relief will seldom be able to show that the remedy of damages for breach of contract will not suffice, and it can hardly be appropriate to ask whether there is any adequate ordinary remedy when s 43 itself defines the applicable remedy.

The proper approach to status quo applications under s 43 is to determine whether the jurisdictional facts that are the prerequisite to the exercise of the discretion are present and then to make a decision that serves the authorized purpose of the section in the light of the proven facts or circumstances. The applicant must thus show that a dispute exists such as is referred to in s 43(1), ie there must be a dispute concerning an actual or proposed suspension or termination of employment, an actual or proposed change in

conditions of employment that is not related to the implementation of a wage-regulating measure or an alleged unfair labour practice; that the dispute has been referred to an industrial council having jurisdiction or, if there is no such council, that application has been made for the establishment of a conciliation board; that the application has been served on the other parties to the dispute and on the industrial council; and that the time limits specified in the section have been complied with. Thereupon, the court may judge upon the merits of the case, which it must do duly and honestly with regard to the object of the relief and within the limits of the power vested in it.

The court enjoys an unfettered discretion under s 43 of the Act that must be exercised on the basis of what is just and equitable in all the circumstances. It will almost always have to give careful consideration to whether the dispute, if it is the subject of an application for the appointment of a conciliation board, is prima facie suitable for determination by such a board. This involves an independent evaluation and not an attempt to predict the decision of the Minister. It will almost always have also to consider the prejudice that the grant or refusal of relief might entail, and for this can fruitfully consult the decisions dealing with interim interdicts.

The words 'alleged unfair labour practice' in the context of s 43(1) of the Act require an applicant to establish the prima facie existence of an unfair labour practice as a prerequisite to the grant of relief; for it could never have been the legislature's intention that the court should be precluded from deciding whether it was actually seized of an unfair labour practice in deciding an application founded on the alleged commission of such a practice.

The first applicant and seventeen of its members who had been dismissed by the respondent for refusing to work in a particular area of its mine brought application for their interim reinstatement under s 43 of the Labour Relations Act 28 of 1956. Prior to their dismissal, the mineworkers had been part of a gang that had been transferred to the area from another area in the mine that had not been fully worked out. During the transfer a senior team leader who had been working in the area allegedly told them that there had been several accidents there and that it was unsafe. This, they said, made them fear for their safety, a fear that was confirmed when they inspected the area themselves. They accordingly refused to work, and the respondent dismissed them.

At the hearing of the application, the applicants, in the light of the findings of an enquiry held under s 5 of the Mines and Works Act 27 of 1956, abandoned the contention that the area was unsafe. They contended, however, that the dismissals were substantively unfair in that the mineworkers had been entitled to refuse to work until the respondent had discharged the duty, which they said rested upon it, to assuage their fears, and that the dismissals were procedurally unfair because they had not been preceded by a proper enquiry. The dismissals, they submitted, constituted an unfair labour practice, alternatively, a termination of employment, as contemplated by s 43 of the Act, in respect of which the applicants were entitled to the appropriate relief under s 43(4).

The respondent denied that it had any duty so far as the safety of its employees was concerned that went beyond the Mines and Works Act and regulations, or any duty to hold an enquiry. Its alternative contention was that, if it did have such duties, the facts showed that it had properly discharged them.

Regulation 8.3.2 obliges a supervisory miner or ganger to act upon a complaint of danger in the working place by withdrawing all the workmen from the area until it has been inspected and made safe.

Held, that to graft a duty to assuage fears on to that regulation would be to legislate piecemeal in an area in which the legislature had made elaborate provision, that that was a function that the court was neither entitled nor equipped to undertake and that, once reg 8.3.2 had been satisfied (as upon the facts was so in this case), the individual applicants were no longer entitled to refuse to work in the area.

Held, further, that it would be beyond its competence and amount to blatant legislation if the court were to lay down rules of procedure that an employer should follow in dismissing an employee if the dismissal is to be fair.

Metal & Allied Workers Union v Stobar Reinforcing (1983) 4 *ILJ* 84, *Van Zyl v O'Okiep Copper Co* (1983) 4 *ILJ* 125 and *United African Motor & Allied Workers Union v Fodens* (1983) 4 *ILJ* 212 distinguished.

Held, further, that, on the facts, the respondent had in any event held an inquiry with substantially the characteristics envisaged by the applicants.

Held, accordingly, that the applicants had not on a prima facie basis established the jurisdictional facts for the grant of relief in respect of a dispute concerning an unfair labour practice.

Held, however, that the individual applicants should be reinstated in their employment under s 43(4)(*b*)(i) of the Act with retrospective effect since—

* the dispute was no trivial matter but one that concerned every underground worker;
* the individual applicants were, prima facie, motivated in their refusal to work by a bona fide fear for their safety;
* the dismissals might have been avoided if the respondent had not deliberately decided not to tell the applicants of the inspection of the area that the Chief Mining Inspector was to hold at its instance and if the two representatives of the individual applicants who were to accompany an inspection party out of hours had been enabled to do so;
* the polarization between the parties and the emotions generated by the dispute might well have dissipated sufficiently for both parties to benefit from the statutory conciliation procedures;
* the prejudice to the individual applicants from the refusal of relief outweighed that which the respondent would suffer by its grant; and
* the individual applicants no longer had any reason to withhold their labour.

Application for an order under s 43 of the Labour Relations Act 28 of 1956. The facts appear from the reasons for judgment.

Adv M S M Brassey for the applicants.

Adv C Plewman SC (assisted by *Adv W Trengove*) for the respondent.

Judgment reserved.

LANDMAN, Ad Hoc Member: On 22 November 1983 the following order was made in respect of the application:

'1. (*a*) In terms of s 43(4)(*b*)(i) of the Labour Relations Act 28 of 1956, the respondent is ordered to reinstate the seventeen individual applicants (cited as applicants two to eighteen inclusive) in its employ on terms and conditions no less favourable to them than those which governed their employment prior to the termination of their employment on 22 September 1983.

(*b*) The order in paragraph (*a*) shall endure for so long as is contemplated by s 43(6) of the Labour Relations Act 28 of 1956.

(*c*) The order in paragraph (*a*) is made retrospective to 22 September 1983.

2. The prayer sought in terms of paragraph 20.1(*b*) of the application is refused.
3. No order is made as to costs.'

At the hearing of the application it was indicated that the reasons for judgment would follow later. The following are the reasons for judgment.

The National Union of Mineworkers (hereinafter referred to as 'the union') and seventeen mine workers who are members of the union apply for an order in terms of s 43(4)(*b*)(i) and (iii) of the Labour Relations Act 28 of 1956 (hereinafter referred to as 'the Labour Act'). The order is directed against Driefontein Consolidated Ltd (the former employer of the mine workers), which is cited as the respondent. The seventeen mine workers will be referred to as 'the individual applicants'.

The order which the applicants seek is set out in the papers as follows:

'(*a*) in terms of s 43(4)(*b*)(i) of the Labour Relations Act 28 of 1956, requiring the respondent to reinstate the individual applicants in their employ on terms and conditions no less favourable to them than those which governed their employment prior to its termination, and/or

(*b*) in terms of s 43(4)(*b*)(iii) of the Labour Relations Act 28 of 1956, requiring the respondent to restore labour practices which existed prior to the dismissal of the individual applicants, by reinstating the individual applicants in their employment on terms and conditions no less favourable to them than those which governed their employment prior to its termination, to endure for so long as is contemplated by s 43(6) of the Act . . . retrospective to 22 September 1983.'

The application was opposed by the respondent who filed sworn written representations in answer to the application. The applicants thereafter filed a reply.

At the hearing of the application Mr *Plewman* (with him Mr *W H Trengove*) who appeared for the respondent handed in an affidavit by Mr A J Close, to which was annexed two reports by Mr F A L Vorster, a Chief Inspector of Mines, dated 21 September 1983 and 28 October 1983. In addition, an affidavit by respondent's attorney was handed in. Annexed to the lastmentioned affidavit was a 'verbatim transcript of the proceedings at an inquiry convened in terms of s 5(4) of the Mines and Works Act', which was conducted before Mr D Bakker, the Assistant Chief Mining Inspector for the district of Carletonville, on 9 and 10 November 1983. Mr *Brassey*, who appeared for the applicants, agreed to the reception of the new material. Section 43(4)(*b*) of the Labour Relations Act allows this court to take account of 'any other matters which it considers relevant' in considering an application such as the present, and the new material handed in is unquestionably relevant to the application.

It was at this juncture that Mr *Brassey* conceded, for purposes of these proceedings, that at the relevant time the 14.30 stope of the West Driefontein Gold Mine was 'objectively' safe. The relevance of this concession will be explained later.

First Applicant's Locus Standi

Mr *Plewman* announced that he would not argue the issue, raised in the respondent's sworn written representations, that the union has no locus standi in these proceedings. Mr *Plewman*, however, made it clear that he did not abandon the issue. It is therefore necessary to consider this issue.

The union, according to the papers filed, is 'a voluntary association of employees with corporate status'. The union is not a registered trade union in terms of the Labour Act.

In *Metal and Allied Workers Union v A Mauchle* (1980) 1 *ILJ* 227 Parsons DP, as he then was, held that an unregistered trade union had locus standi to institute proceedings on behalf of its members for a determination of an alleged unfair labour practice in terms of s 46(9) of the Labour Act. See also J D van der Vyver 'Die Verskyningsbevoegdheid van Vakverenigings' (1981) 2 *ILJ* 1.

The application presently before the court is brought in terms of s 43(2) of the Labour Act. The section provides that:

'Any party to a dispute who—

. . . .

(*b*) if there is no industrial council having jurisdiction, applies under section 35(1) for the establishment of a conciliation board in respect of the dispute, may at the same time or within seven days of the date of such reference or application apply to the industrial court for an order under subsection (4).'

Section 35(1) of the Labour Act previously required a trade union which was a party to an alleged dispute to be a registered trade union. The requirement that the trade union for the purposes of s 35(1) of the Labour Act should be registered in terms of the Labour Act was deleted by s 3 of the Labour Relations Amendment Act 2 of 1983.

It is common cause that the union is a party to an alleged dispute envisaged by s 35(1) of the Labour Act and has applied to the Minister of Manpower for a conciliation board. The union, however, does not seek any relief for itself in the present application. The union is, however, authorized by the individual applicants to bring this application on their behalf.

In terms of s 45(9) of the Labour Act, which is made mutatis mutandis applicable to these proceedings by virtue of s 43(3)(*c*) of the Labour Act, any party to a dispute shall be entitled to present his case at arbitration proceedings in person or to be represented at those proceedings by, inter alia, 'one or more members, office bearers or officials of a trade union' which is a party to the dispute. The dispute referred to relates, in my opinion, to the dispute in terms of s 35(1). See s 43(3)(*c*) of the Labour Act. Consequently the union was entitled to represent the individual applicants at the proceedings conducted before this court.

As the respondent was legally represented, the union was also entitled to be legally represented. See s 45(9) of the Labour Act. It is therefore unnecessary for me to decide whether the union has locus standi in these proceedings.

Applications in terms of s 43 of the Labour Relations Act

Before proceeding any further it is advisable that I indicate clearly how I intend approaching the present application, particularly as the approach which I intend to adopt differs in certain respects from the approach hitherto followed in this court in considering applications for similar relief. In adopting the approach, which will be explained presently, I have carefully considered the following judgments of this court: *Van Zyl v O'Okiep Copper Co* (1983) 4 *ILJ* 125; *Bleazard v Argus Printing and Publishing Co* (1983) 4 *ILJ* 60; *Wahl v A E C I* (unreported);* *Metal and Allied Workers Union v Barlow Manufacturing Company* (unreported);† *Matshoba v Fry's Metals* (1983) 4 *ILJ* 107; *Metal and Allied Workers Union v Stobar Reinforcing* (1983) 4 *ILJ* 84; *National Union of Textile Workers v Polynit Industries* (unreported).

In the judgments referred to above it has been held that applications in terms of s 43(2) for relief in terms of s 43(4) of the Labour Act are analogous to applications for interim interdicts: cf *Matshoba v Fry's Metals* (1983) 4 *ILJ* 107 at 123. Accordingly the court applied the tests laid down for interdicts pendente lite in the well-known decisions of *Webster v Mitchell* 1948 (1) SA 1186 (W); *Gool v Minister of Justice* 1955 (2) SA 682 (C); *Setlogelo v Setlogelo* 1914 AD 221; *Olympic Passenger Service v Ramlagan* 1957 (2) SA 382 (D) and *Eriksen Motors (Welkom) v Protea Motors Warrenton* 1973 (3) SA 685 (A).

I agree with the general proposition that the relief afforded an applicant in terms of s 43(4) is of a temporary nature in that the relief endures for a limited period. Section 43(6) of the Labour Act provides:

'(6) An order made by the industrial court under sub-section (4) shall prevail over any contrary provisions in any law or wage regulating measure and shall, unless it is withdrawn sooner, remain operative—
(*a*) until the dispute has been settled by the industrial court or the conciliation board concerned or, if it is referred or is required to be referred to arbitration or to the industrial court for determination, by an award or determination, as the case may be; or
(*b*) until the industrial council or conciliation board concerned, as the case may be, informs the industrial court that it failed to settle the dispute and has decided not to refer the dispute to an arbitrator or to arbitrators and an umpire or to the industrial court; or
(*c*) until the expiry of a period of 14 days from the date of the Minister's decision not to approve of the establishment of a conciliation board,
whichever event occurs first: Provided that no such order shall remain operative for longer than 90 days from the date of commencement fixed by the industrial court under subsection (5), unless the industrial court of its own motion or on application extends that period by periods not exceeding 30 days at a time.'

The phrase 'unless it is withdrawn sooner' refers to the concluding part of s 43(4), which reads:

'and the industrial court may at any time, on the application of a party to the dispute, in respect of which application the provisions of subsection (3) shall apply, withdraw or vary such order.'

* (1983) 4 *ILJ* 298.—Eds.
† (1983) 4 *ILJ* 283.—Eds.

Furthermore, in applying the test for interim interdicts this court has correctly recognized that the grant or refusal of relief involves the exercise of a discretion.

I am also of the opinion that the approach adopted, in applications for interim interdicts, towards facts and disputes of fact, where there are conflicting versions, may profitably be applied in considering applications in terms of s 43(2) of the Labour Act.

Nevertheless I have serious misgivings about applying the test for interim interdicts unreservedly in applications in terms of s 43(2) of the Labour Act. It is therefore with great deference, in particular, to the decision of *Bleazard v Argus Printing & Publishing Co* supra, which was heard by a bench consisting of the President, Deputy President and an additional member, that I adopt a different approach.

Section 43(2) of the Labour Act provides that:

'(2) Any party to a dispute who—
(*a*) refers to said dispute to an industrial council having jurisdiction in respect of the dispute; or
(*b*) if there is no industrial council having jurisdiction, applies under section 35(1) for the establishment of a conciliation board in respect of the dispute
may at the same time or within seven days of the date of such reference or application apply to the industrial court for an order under subsection (4).'

A dispute, for the purposes of s 43, is defined in s 43(1) as meaning a dispute concerning:

'(*a*) the suspension or termination of the employment of an employee or employees or the decision or proposal of an employer to suspend or terminate the employment of an employee or employees; or
(*b*) a change or proposed change in the terms or conditions of employment of an employee or employees, except to give effect to any relevant law or wage regulating measure; or
(*c*) an alleged unfair labour practice.'

An unfair labour practice is defined in s 1 of the Labour Act as meaning, unless the context otherwise indicates:

'(*a*) any labour practice or any change in any labour practice, other than a strike or a lockout which has or may have the effect that—
(i) any employee or class of employees is or may be unfairly affected or that his or their employment opportunities, work security or physical, economic, moral or social welfare is or may be prejudiced or jeopardized thereby;
(ii) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby;
(iii) labour unrest is or may be created or promoted thereby;
(iv) the relationship between employer and employee is or may be detrimentally affected thereby; or
(*b*) any other labour practice or any other change in any labour practice which has or may have an effect which is similar or related to any effect mentioned in paragraph (*a*).'

I digress to note that it is common cause that an industrial council for the mining industry does not exist and that the union has applied to the

Minister of Manpower for the establishment of a conciliation board in connection with a dispute such as is referred to in s 43(1)(*a*) and (*c*). The application to this court was also brought timeously.

The order which this court may make on an application in terms of s 43(2) is set out in s 43(4)(*b*) of the Labour Act, which reads:

'(*b*) After considering the application and any representations, submitted to it within the period referred to in subsection (3)(*b*), and any other matters which it considers relevant, the industrial court may make an order requiring the employer or employers or employers' organization or employee or employees or trade union, as the case may be, concerned—

(i) in a case referred to in subsection (1)(*a*), not to suspend or terminate the employment of the employee or employees concerned, or if such employment has been suspended or terminated to cancel the suspension or to reinstate the employee or employees concerned in his employ on terms and conditions not less favourable to him or them than those which governed his or their employment prior to such termination; or

(ii) in a case referred to in subsection (1)(*b*), not to make the proposed change, or if the change has been made to restore the terms and conditions of employment which existed prior to the change; or

(iii) in a case referred to in subsection (1)(*c*), not to introduce the alleged unfair labour practice, or if the practice has been introduced, to restore the labour practices which existed prior to such introduction;

and the industrial court may at any time on the application of a party to the dispute, in respect of which application the provisions of subsection (3) shall apply, withdraw or vary any such order.'

Each type of dispute referred to in s 43(1) has its corresponding relief in s 43(4)(*b*) of the Labour Act. I also agree with Ehlers DP that this court, in the exercise of its discretion, may grant an applicant lesser relief than that provided for in the appropriate paragraph of s 43(4)(*b*) of the Labour Act. At 15* of the typewritten judgment in *Wahl v A E C I* Ehlers DP said:

'Hierdie hof word dus deur art 43(5) gemagtig om 'n bevel terugwerkend te maak na 'n datum wat in casu nie vroeër is nie as dié waarop die diens van die werknemer beëindig is. Dit blyk dus dat die hof deur art 43(5) 'n diskresie gegee word om 'n bevel terugwerkend te maak dog onderhewig aan die beperking reeds genoem. Dit kom dan voor dat die hof nie noodwendig 'n bevel so ver terugwerkend hoef te maak nie, indien dit tevrede is dat die terugwerkendheid van die bevel tot die datum van diensbeëindiging nie geregverdig was nie. Derhalwe blyk dit dat die hof ingevolge art 43(5) geoorloof is om 'n bevel terugwerkend te maak tot 'n datum wat later is as dié waarop die diensbeëindiging plaasgevind het, indien die hof van oordeel is dat die datum so deur hom bepaal 'n meer paslike datum is onder die besondere omstandighede.'

Procedures appertaining to applications for the maintenance of the status quo pending conciliation proceedings date back to s 64(3) of the Industrial Conciliation Act 36 of 1937. In *OK Bazaars (1929) v Madeley NO* 1943 TPD 392 at 397 Millin J explained the import of s 64(3) as follows:

'By sec. 64(3) it is provided that if application is made for a board within 30 days from the date of the alteration, or the notice of alteration, of the conditions of

* (1983) 4 *ILJ* 298 at 307.—Eds.

employment, the employer shall (*a*) if he has not yet made the alteration, refrain from making it; or (*b*) if he has already made it, restore the conditions as they were before the alteration and thereafter refrain from altering them. These requirements remain in force until any board established has reported to the Minister, or has failed to report within thirty days or such longer period as the Minister may allow, or the Minister has failed to deal with the application for 21 days; whichever of these events occurs first. There is no provision for maintaining or restoring the status quo ante if application is made under sec. 35(1). Failure to comply with the provisions of sec. 64(3) is made an offence under the Act.'

Section 64(1) of Act 36 of 1937 dealt with the application for a conciliation board by the individual employees. An application for a conciliation board by a trade union or employers' organization was regulated by s 35(1) of Act 36 of 1937.

Section 64(3) of the 1937 Act became s 43 of the Industrial Conciliation Act 28 of 1956. The operation of the status quo provisions was no longer automatic and depended on the exercise of a discretion by the Minister of Labour. See J F Heyne and M Schaeffer *Nywerheidsreg in Suid-Afrika* (1968) 91–2.

In 1979 s 43(2) of the Labour Relations Act 28 of 1956 was extended to include a reference to 'an alleged unfair labour practice'. See s 13(*b*) of Act 94 of 1979.

In 1982 the discretion to grant a status quo order which vested in the Minister of Manpower was effectively transferred to this court. See s 8 of the Labour Relations Amendment Act 51 of 1982. However, the authority to establish a conciliation board remained in the hands of the Minister of Manpower. As was observed in *Bleazard v Argus Printing & Publishing Co* supra, at 66G–H:

'It has to be borne in mind that where the application for the establishment of conciliation board as well as that for an order had in the past been considered by the same authority, this is no longer the case. The first-mentioned is now considered by the Minister and the latter by this court and they are considered independently of one another, and the granting of an order under s 43(4) is not related to what the Minister may decide in relation to the validity or otherwise of the first-mentioned application. It seems unlikely that it could have been intended that this court should satisfy itself as to the validity of first-mentioned application prior to considering the application for an order';

and at 67B–D:

'Also of significance may be the stipulation embodied in s 43(6)(*c*) to the effect that an order shall remain operative "until the expiry of a period of 14 days from the date of the Minister's decision not to approve of the establishment of a conciliation board". This provision seems to envisage that the order may be made prior to the Minister's decision in respect of the application for the establishment of a conciliation board. It may be argued that the Minister would probably only at the time when considering whether or not to grant a conciliation board consider whether the application therefor is a valid one. If this is correct it follows that this court may not yet have been informed whether the application for the establishment of a conciliation board is a valid one at the time when it considers the making of an order.'

I would add that, in my opinion, if the Minister of Manpower had approved the establishment of a conciliation board before the hearing of an application in terms of s 43(2), it would be a highly relevant factor to which great weight would have been attached. At the hearing the parties indicated that, as far as they were aware, no decision to establish a conciliation board had been taken. The application will be treated on the basis that no decision has been taken by the Minister of Manpower to grant or refuse a conciliation board.

The Minister's decision to establish a conciliation board as well as his decision to grant a status quo order was, under certain circumstances, subject to an appeal to the applicable division of the Supreme Court. See *Cape Town Municipality v Minister of Labour* 1965 (4) SA 770 (C) at 771B.

A decision of the industrial court granting or refusing an application in terms of s 43(2) of the Labour Act is not subject to appeal. The industrial court may of its own motion or at the request of any party reserve a question of law for the decision of the Appellate Division of the Supreme Court. See s 17(21) of the Labour Act and *Metal and Allied Workers Union v Barlows Manufacturing Company* (unreported)*. A decision of this court is however subject to review. See *Vereniging van Bo-Grondse Mynamptenare van Suid-Afrika v President of the Industrial Court* 1983 (1) SA 1143 (T).

In my opinion when this court grants or refuses an application in terms of s 43(2) of the Labour Act it clearly exercises a statutory discretion, There may be certain parallels to be found at common law (see *National Union of Textile Workers v Stag Packings* 1982 (4) SA 151 (T)), which may have not been perceived when the status quo procedure was introduced. However the power to restore the status quo pursuant to an application in terms of s 43 of the Labour Act remains a statutory remedy.

A status quo order is one which may interfere temporarily with the rights of the respondent. Its effect is to defer action pending the settlement of a dispute or the attempted settlement of a dispute or pending the application for a conciliation board. See s 43(6) of the Labour Act.

Mr *Brassey* referred me to an article by Paul Pretorius 'Status Quo Relief and the Industrial Court: The Sacred Cow Tethered' appearing in (1983) 4 *ILJ* 167, which challenges the application of the test for interim interdicts in status quo proceedings. Although I do not agree with every contention in that article, there is much which commends itself. Mr Pretorius points out at 175 that:

> 'In any common-law application for interim relief pending the grant or refusal of an interdict, each party will, if there is a dispute as to the facts, contend for a single correct version of those facts. Likewise, it will contend for a single correct legal interpretation of those facts. The applicant must establish the existence of a legal right in his favour. If there is a dispute as to whether, in fact, the applicant holds the right that he alleges, the degree to which he is able to persuade the court at the interim stage that he is correct will usually affect the outcome of his application for interim relief. There is no doubt that both parties will contend for a single correct legal answer. The court too will proceed both at the interim and the final stage on the assumption that such a single correct legal answer exists.'

* (1983) 4 *ILJ* 283—Eds.

Generally speaking, a court in considering an application for an interdict pendente lite will enquire into the prospects of ultimate success in the main action. See *Olympic Passenger Service v Ramlagan* supra at 383D. It is, however, true that temporary interdicts have been granted by superior courts pending proceedings in other courts and before administrative tribunals.

An applicant who applies for status quo relief pending the outcome of an application for the establishment of a conciliation board will hardly ever be able to show a clear right to that relief. The reason is obvious. The wide discretionary powers which have been conferred upon the Minister of Manpower make it impossible to predict whether the Minister will grant or refuse an application for a conciliation board.

This is borne out by a consideration of s 35 of the Labour Act. The difficulty is compounded by s 35(6) of the Labour Act, which provides that:

> 'Notwithstanding the fact that he is not satisfied in respect of one or more of the matters referred to in subsections (4) and (5), the Minister may approve of the establishment of a conciliation board if he is of the opinion that special circumstances exist which make it desirable that a conciliation board be established in order that the objects of this Act may be achieved.'

Section 35(4) and the concluding part of s 35(4) of the Labour Act makes it clear that unlike other disputes, the question of whether an alleged unfair labour practice exists is not an objective one but lies in the Minister's opinion, notwithstanding the definition of an unfair labour practice in the Labour Act. See *Raad van Mynvakbonde v Minister van Mannekrag* 1983 (4) SA 29 (T) at 34H. See also P A K le Roux 'The Unfair Labour Practice, the Minister and the Industrial Court' 1983 MBL 154–8. In these circumstances it would, in my opinion, be a fruitless exercise to seek a clear right or a right which is prima facie established but open to doubt. See Pretorius at 178–9.

The second point made by Mr Pretorius at 179 is that 'if the legislature had intended the applicant for status quo relief to show further that such application may or ought to succeed, it would have said so'. This argument is borne out in *Bleazard's* case, supra at 66.

Mr Pretorius' third point at 179 is that the Labour Act 'provides a remedy for an employer where a status quo order is granted and the employer has had to pay money pursuant thereto without receiving the benefit of the employee's labour in return. The legislature must therefore have envisaged that status quo relief would be granted in circumstances where the Minister would not later appoint a conciliation board. It has provided its own remedy for this situation.'

In the first place the status quo relief cannot itself be 'undone' in all cases. It is only where the court which hears the action for the recovery of remuneration paid to an employee in terms of a s 43(4)(*b*) order is 'satisfied that the suspension or termination or proposed suspension or termination of the employment of the employee was justified by reason

of misconduct of the employee' that the action will succeed. Although the legislature envisaged the situation adverted to by Mr Pretorius it is unlikely that the legislature would have intended status quo orders to be granted under circumstances which showed that the application for a board was frivolous or otherwise incapable of succeeding.

The fourth point which Mr Pretorius makes at 179 is that the industrial court acts administratively when considering an application for a status quo order. It may be correct to say that this court does not perform a function 'which a court of law may perform' in terms of s 17(11)(*a*) of the Labour Act when hearing an application, but undoubtedly the discretionary power must be exercised judicially: cf *Hack v Venterspost Municipality* 1950 (1) SA 172 (W) at 190, and *R v Lobb* 1937 CPD 177, where Centlivres J (as he then was), Davis J concurring, said at 179:

> 'It is clear that under the Act of 1924, as amended by Act 24 of 1930, the Court has a discretion as to whether it should order the amounts underpaid to be paid into Court by the offending employer, and it is also clear that there is a further discretion which must be exercised—both discretions of course must be exercised judicially—as to whether it will order any portion paid into Court to be paid over to the employee but then it must be satisfied that it is equitable that this should be done.'

In regard to s 43(1)(*a*) and (*b*) of the Labour Act Mr Pretorius suggests that the following general test should govern the exercise of the discretion. At 180 he says:

> 'The test that emerges is therefore as follows: interim relief should be granted in all cases where the original bargaining power of any party to a dispute has been enhanced or prejudiced by the unilateral use of common-law rights or by unilateral action. In all applications under s 43 the status quo order is granted on the premise that the machinery of the Act should be exhausted before the condition of employment giving rise to the dispute is imposed by force.'

Mr Pretorius does admit that various other factors may influence the exercise of the discretion.

I have two main difficulties with the contention quoted above. In the first place the suggestion that 'interim relief should be granted in all cases where the original bargaining power has been enhanced or prejudiced . . .' fails to recognize the true nature of a discretionary power. It seeks to create a rule which should generally be followed. The history of the development of status quo proceedings clearly demonstrates the intention of the legislature to confer a wide and unfettered discretion on this court to grant or refuse status quo applications.

Secondly, in my opinion a general object of the Act and of status quo orders is the preservation of industrial peace by the prevention and settlement of disputes between employers and employees. Furthermore, as it has been expressed, in *Cape Town Municipality v Minister of Labour* 1965 (4) SA 770 (C) at 779G:

> 'The provisions of the Industrial Conciliation Act have been enacted with the object of inter alia channelling disputes between employer and employee into the various procedures of conciliation.'

Reference may also be made to J Piron 'The Theory of Collective Bargaining' 1978 *THRHR* 183; D M Davis 'The Functions of Labour Law' 1980 *CILSA* 212 commenting on Piron's theory; and C R Thompson 'Section 43 of the Labour Relations Act: An End to Unilateralism' (1983) 3 *Journal of the IR Research Unit of the University of Stellenbosch* 18.

In my opinion the maintenance or redress of the bargaining power between the parties is not a primary object of status quo proceedings. The object of status quo proceedings is to delay the unilateral action of a party to that dispute until the conciliation machinery provided for in the Labout Act has been exhausted. This inter alia would be the case if the Minister of Manpower were to refuse the establishment of a conciliation board.

Mr Pretorius treats applications for status quo orders under s 43(1)(*c*) of the Labour Act (ie where an alleged unfair labour practice is concerned) on the same basis as explained above. He draws a distinction, however, in respect of status quo applications based on an unfair labour practice pending its determination by an industrial court. That situation does not arise here. It is unnecessary to deal with the situation envisaged by s 46(6) of the Labour Act.

Two requirements which would ordinarily have to be established by an applicant seeking interim relief at common law, where his case is not founded on a clear right, require consideration. They are: (*a*) a well grounded apprehension of irreparable harm; and (*b*) no adequate ordinary remedy. See *Olympic Passenger Service v Ramlagan* (supra) at 383E–F. If an applicant is required to show a well grounded apprehension of irreparable harm he, if he were an employee, would seldom be able to show that damages for breach of contract would not suffice. There may well be exceptions but this requirement runs counter to the spirit of s 43 of the Labour Act. The requirement that there should be no adequate ordinary remedy can hardly be applicable when a special statutory remedy is available and is sought by the applicant. Cf *Armugan and others v Durban City Council* 1951 (1) SA 373 (N).

The Exercise of the Discretion to Grant or Refuse an Order in terms of s 43

The conclusion which I have reached is that the application for a status quo order involves a statutory discretion in respect of which the common-law requirements for an interim interdict are not universally applicable. The next question is how should the statutory discretion be exercised.

Guidelines on the exercise of discretionary powers have been laid down in a great many decisions. Many of these decisions have been collected and analysed in L A Rose Innes *Judicial Review of Administrative Tribunals in South Africa* (1963), M Wiechers *Administratiefreg* (1973) and L C Steyn *Die Uitleg van Wette* 5 ed (1981). Prof Wiechers at 298 indicates that the exercise of a discretion involve three elements or stages, namely:

(*a*) The determination of jurisdictional facts which are a necessary prerequisite to the exercise of the discretion.

(*b*) The decision or choice of action in the light of the proven facts and circumstances.

(*c*) The tribunal must ensure that the exercise of the choice must serve the authorized purpose.

Jurisdictional Facts

(*a*) The applicant must show that a dispute such as is referred to in s 43(1) of the Labour Act exists. As far as subsection (*a*) is concerned, this means that he must show an actual suspension or termination of employment or that an employer has actually proposed to suspend or terminate the employment of an employee or employees.

(*b*) Similarly the applicant must show that the dispute, if this is his case, concerns a change or proposed change in the terms of conditions of employment. See *Durban City Council v Minister of Labour* 1953 (3) SA 708 (N).

(*c*) The change or proposed change must not be related to an implementation of any relevant law or wage regulating measure. See s 43(1)(*b*) of the Labour Act.

(*d*) In the case of a dispute concerning an alleged unfair labour practice the applicant must establish an 'alleged' unfair labour practice. Section 43(1)(*c*) of the Labour Act. An unfair labour practice is a defined concept. That definition has been set out earlier.

The requirement that an 'alleged' unfair labour practice must be established by an applicant requires consideration. The question is whether there must objectively be an unfair labour practice or is it enough that there be an allegation of an unfair labour practice, ie the objective existence of an unfair labour practice need not be shown.

In *Durban City Council v Minister of Labour* 1953 (3) SA 708 (N) at 713 the court, in dealing with the phrase 'and a dispute exists' in s 35(1) of the Industrial Conciliation Act 36 of 1937, held:

'The expression "whenever a dispute *exists* in that undertaking" relates clearly, in my opinion, . . . to the time at which resort is first had to the machinery of the Act, and I see no justification for interpreting the words "whenever a dispute exists" as being the equivalent of "whenever *it is claimed* that a dispute exists". It seems to me that the existence or non-existence of a dispute at that time is an objective matter, and is something quite distinct from what is *claimed* to exist.'

The requirement that a 'dispute' concerning an alleged unfair labour practice should exist is not qualified and therefore must objectively be in existence. The word 'alleged', in my opinion, qualifies the concept unfair labour practice. It does not, in my view, qualify only the first word of that definition, as had been suggested by Amanda Reichman and Etienne Mureinik in 'Unfair Labour Practices' (1980) 1 *ILJ* at 18–20, who suggest that 'what has to be alleged is not the practice but the unfairness'.

The word 'alleged' was appropriate when an unfair labour practice was defined as meaning 'any labour practice which in the opinion of the industrial court is an unfair labour practice'. See s 1(*f*) of Act 94 of 1979. The subsequent amendments which empowered the Minister of Manpower and thereafter this court to grant a status quo order based on a dispute concerning an alleged unfair labour practice cannot be left out of

account. Nor can the fact that the respondent to an application in terms of s 43(2) of the Act is permitted to submit sworn written representations to this court in regard to the application. See s 43(3)(*b*) of the Labour Act. The representations which a Respondent may make may traverse the allegations both of a dispute and the alleged unfair labour practice.

Mr Pretorius in his article at 181 suggests that:

'A respondent party may admit a dispute but may deny that the dispute concerns what it regards as an unfair labour practice. This denial is, at this stage, irrelevant. It is for the court or the appropriate statutory body to establish the unfair labour practice. It is only [necessary?] at this stage for the applicant to allege such an unfair labour practice.'

This could never have been the intention of the legislature. It would mean that a respondent's representations must be ignored. It would also mean that the court's adjudication on whether it was seized with an unfair labour practice would be excluded. In my opinion, the words 'alleged unfair labour practice' in the context of s 43(1) of the Labour Act require the applicant to establish the prima facie existence of an unfair labour practice.

This was also the view which prevailed in *Bleazard's* case, at 71E–H, where Ehlers DP said:

'Turning to the question of whether the conduct of respondents complained of might in the circumstances be said to be an unfair labour practice it has to be borne in mind that in casu the court is asked to exercise its function under s 17(11)(*b*A) read with s 43(4)(*b*)(iii) and not to make a determination in terms of s 17(11)(*f*) read with s 46(9). It could therefore be argued that it should only be ascertained whether prima facie an alleged unfair labour practice occurred without going into too much detail as it might be expected to do when conducting a determination under s 46(9). This view seems to be accentuated by the temporary nature of an order in contrast with the usually more permanent duration of a determination in terms of s 46(9). In support of this view it may be said that to decide at this stage of the proceedings whether an unfair labour practice exists in fact or not may be tantamount to prejudging a matter which would probably come before it at a later stage in terms of s 46(9). It seems therefore unlikely that it could have been the intention of the legislature that the court should at these proceedings ascertain whether an unfair labour practice has in fact been committed.'

(*e*) Applications in terms of s 43(2) of the Labour Act are usually decided on the sworn representations filed by the parties, including a respondent's answer and the applicant's reply. The court will also hear argument. See s 45(9) read with s 43(3) of the Labour Act. The court may also have regard to other matters which it considers relevant. See s 43(4)(*b*) of the Labour Act. The powers of the court referred to in s 17(17) would also be available, but the court would ordinarily be reluctant to hear oral evidence at this stage.

The standard of proof of the jurisdictional facts laid down in the leading decisions dealing with interim interdicts is eminently suitable for application to status quo proceedings. The relevant passages, in so far as they deal with factual issues, are conveniently collected in *Stobar's* case at 93–5.

(*f*) The court must be satisfied that a party to the dispute has referred the dispute to an industrial council having jurisdiction in respect of that dispute or, if there is no such council, has applied under s 35(1) of the Labour Act for a conciliation board. See s 43(2) of the Labour Act. See also *Bleazard's* case supra at 65–7.

(*g*) The court must be furnished with proof that the applicant has sent by registered post or delivered a copy of the application to the other party or parties to the dispute and, if there is an industrial council having jurisdiction in respect of that dispute, to the secretary of that council. See s 43(3)(*a*) of the Labour Act.

(*h*) The court must have regard to the time limits established by the Labour Act and its powers to condone on good cause shown a failure to comply with the 30-day period in s 43(4)(*a*) of the Labour Act. See also ss (2) and (3)(*b*) of s 43 and the rules of the court.

The Merits and Object of the Discretionary Power

In judging the merits of the application the court is entrusted with an unfettered discretion which must be exercised duly and honestly with regard to the object of the relief and within the limits of the power vested in the court. See *Shidiack v Union Government* 1912 AD 642. The court must exercise the discretion according to justice and reason and not capriciously.

I have mentioned that the discretion to grant or refuse an application is an unfettered discretion. As Prof Wiechers at 299–300 points out, an unfettered discretion is not one which is above the law, but rather it is one where the legislature entrusts a greater latitude of choice than in the case of a fettered discretion. See also *Botha v Stadsklerk van Middelburg NO* 1975 (4) SA 241 (T), where Coetzee J says at 247G–H:

'Tweedens en naas die . . . handelinge wat die uitoefening van 'n eie en selfstandige diskresie noodsaak. In hierdie kategorie moet egter versigtig onderskei word tussen twee sub-kategorieë:

(*a*) waar die gronde of feitlike raamwerk vir diskresie-uitoefening duidelik deur die Wet omskryk word; en

(*b*) waar 'n vryer diskresie binne 'n omlynde gebied bestaan en die orgaan of amptenaar selfs oorweging van doelmatigheid of wenslikheid moet aanwend.'

The discretion entrusted to this court to grant or refuse an application for a status quo order must be exercised in view of what is just and equitable on a consideration of all relevant facts and circumstances. The discretion, even though it is an unfettered discretion, must be exercised judicially. In *Horn v Kroonstad Town Council* 1948 (3) SA 861 (O) Horwitz J indicated in what manner an unfettered discretion should be exercised. At 865 the learned judge said:

'Mnr *De Villiers* het verder aangevoer dat 'n plaaslike bestuur 'n onbeperkte diskresie het om 'n huurmotorlisensie toe te ken of te weier. Selfs as hierdie bewering gegrond is, moet so 'n diskresie nietemin uitgeoefen word "according to the rules of reason and justice, not according to private opinion; according to law and not to humour. It is to be, not arbitrary, vague and fanciful, but legal and regular. And it must be exercised within the limit to which an honest man competent to discharge of his office ought to confine himself": *Sharp v Wakefield* (1891, AC bl. 179) *per* Lord Halsbury LC.'

The exercise of the discretion vested in this court must never be allowed to become rigid and inflexible, nor is it desirable that any fixed policy be followed in considering applications for status quo orders: cf *South Cape Corporation v Engineering Management Services* 1977 (3) SA 534 (A) at 547G–H.

It follows that each application must be judged on its own merits, and it would therefore be invidious to lay down more than a bare guideline as to how the discretion entrusted to this court should be exercised. The following factors, which are by no means exhaustive, will nearly always require careful consideration:

(*a*) *Is the dispute which has been referred to the Minister of Manpower in terms of s 35(1) of the Labour Act* prima facie *suitable for determination by a conciliation board?* This is, in my view, an independent evaluation and is not an attempt to predict the outcome of an application to the Minister of Manpower in terms of s 35 of the Labour Act. In dismissing an appeal against a decision by the Minister of Labour to establish a conciliation board, it was said in *George Divisional Council v Minister of Labour* 1954 (3) SA 300 (C) at 305H, with reference to *SA Association of Municipal Employees v Minister of Labour* 1948 (1) SA 528 (T), by Herbstein J that:

> 'Mr Justice Price (Mr Justice Ramsbottom concurring) in that case further held that *a dispute proper for the determination of a Conciliation Board* could arise between an employer and employee after a lawful termination of the contract of employment, ie where a contract had been terminated in accordance with its own provisions.' (Emphasis supplied).

The dictum by Herbstein J is not authority for the proposition that in considering an application for a status quo order the court should consider the suitability of the dispute for conciliation proceedings, but it does give expression to a factor to be considered.

(*b*) *The element of prejudice.* The decisions dealing with interim interdicts can be fruitfully consulted in this connection.

Prejudice is sometimes seen as the balance of convenience. In *Olympic Passenger Service v Ramlagan*, (supra) at 303, Holmes J (as he then was) said:

> 'I need hardly add that by balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted.'

The element of prejudice, it should be noted, is inherent in the consideration which the Industrial Tribunal (UK) should take into account when considering an order for reinstatement. See M Mead *Unfair Dismissal Handbook* 2 ed, where he says:

> 'In deciding whether it will make an order for reinstatement the industrial tribunal, under s 69(5) of the 1978 Act, has to take into account the following considerations:

(*a*) Does the employee wish to be reinstated?
(*b*) Is it practicable for the employer to comply with an order for reinstatement?
(*c*) Where the employee has caused or contributed to some extent to the dismissal, would it be just to order his reinstatement?'

Previous decisions of this court which have used the test for interim interdicts in considering status quo applications have paid careful attention to the balance of convenience or prejudice to the parties.

Onus

The overall onus of establishing the relief claimed rests upon the applicant. Cf *South Cape Corporation v Engineering Management Services* (supra) at 546C–F. However in considering the application, attention must be paid to the burden of proof which may lie upon a party. See *Stobar's* case (supra) at 91H to 92C and *Sigwebela v Huletts Refineries* (1980) 1 *ILJ* 51.

The Facts

The following constitutes a summary and analysis of the salient facts as they appear from the papers. In the light of the admission made by the Applicants that the stope in question was safe at all relevant times, certain facts will be omitted from the summary.

1. The union is a non-registered trade union having as its principal aim the regulation of relations between employers and employees in the mining industry. The union has entered into an agreement with the Gold Producers' Committee of the Chamber of Mines of South Africa which would provide for the recognition of the union by the respondent (a member of the chamber) once the union achieves sufficient representation for recognition in respect of any occupation or class of workers in terms of the agreement. The union alleges that it has a significant membership, falling short of a majority, on West Driefontein mine (hereinafter refer to as the mine). The union was at all relevant times represented by Cyril Ramaphosa, its general secretary, and Lucas Sigela, an organizer.
2. The individual applicants are all employees of the respondent and are employed in terms of fixed term contracts with various dates of expiry. They are all black persons and are underground workers with varying periods of service. Their underground job classifications range between the following: 'stope team', miner assistant, machine operator and winch driver.

The individual applicants are 'migrant labourers'. The individual contracts of employment which are attached to respondent's sworn statement are identical as far as the general terms of employment are concerned. The educational standards attained by the individual applicants are reflected on their respective contracts in a code, the key to which has not been disclosed. Three of the individual applicants signed their affidavits by means of a mark, the others exhibited varying degrees of competency in signing their affidavits.

Every individual applicant save two had dependants when their contracts were signed. I do not however propose to differentiate between the individual applicants.

3. The respondent is an employer in the gold mining industry and operates inter alia the gold mine in question. The respondent is a public company and a member of the Goldfields Group of Companies.
4. The mine is one of the largest gold mines in South Africa and the largest, in terms of tons milled and gold produced for 1983, in the group. During the year ended 30 June 1983 the mine produced 21,5 per cent of the South African gold output. In the course of the year ended June 1983 a total of 4 040 975 tons was mined at the mine. In 1983 712 whites and 10 986 blacks were employed underground in the mine. The scale of the respondent's operations, it is alleged and which may be accepted as correct, demands careful overall planning and direction. Decisions are made in advance as to precisely where ore is to be excavated, what grade is to be excavated and the extent and rate of excavation. The complex set of facts relating to these decisions are reflected in the papers.
5. All mining activity is regulated in terms of the Mines and Works Act 27 of 1956 (hereinafter referred to as 'the Mines Act') and the regulations made in terms thereof. The scope and purpose of the Mines Act and regulations will be examined later. The respondent avers that its mining operations are conducted as a consequence of and in accordance with careful advance planning and under strict procedures and controls which flow from the Mines Act and regulations. This averment is neither admitted nor denied.
6. The respondent has obtained a partial exemption from certain regulations. The details of the exemption are contained in a letter dated 15 October 1973 addressed to the West Driefontein Gold Mining Company Ltd by the then Chief Inspector of Mines. The amendment has been renewed annually and is said to be still applicable.
7. The respondent has also set out details of certain internal health and safety procedures. These include:
   * internal disciplinary enquiries which impose penalties appropriate to the failure to observe prescribed procedures.
   * details of the Mine Safety Loss Control Department, which resorts under the control of a Mine Safety Officer. The sole function of that department is to enforce the safety regulations and to investigate and recommend safety procedures. The applicants state that, if there is a Safety Officer, he and his assistants played no rôle whatsoever in the events which form the subject matter of these proceedings. There is substance in the reply. I do not take into account a statement made by respondent's council during argument, even though Mr *Brassey* agreed to its reception. The bare allegation that a safety officer

was involved is of no real assistance. His role in the events was not described.

* all disabling injuries are required to be reported to the mine management.

* the mine keeps a proper record of seismic activity by means of a sophisticated network of underground sensors connected to a computerized monitoring and analytical device. It is said that the information obtained is used to compare seismic activity levels for different areas of the mine and to ascertain their contribution to the total seismic energy of the mine. The potential risk attached to mining any particular area is continually assessed and steps are taken to minimize the risk of collapses by designing development and stoping activities in an appropriate fashion. The applicants say they are advised that the system is not capable of recording the falls of ground which occasioned injury to persons in the 14.30 area.

* details are provided of the emphasis which the Gold Fields Group and the respondent places on safety. These details relate to: training programmes; accident and safety statistics; safety codes; practical research; the Group's contribution to industry research projects instituted by the Chamber of Mines; co-operation with government authorities in regard to safety; the Group's subscription to the Chamber of Mines of South Africa Mine Safety Division; medical facilities; rescue facilities; the utilization of the National Occupational Safety Association training schemes, safety targets and rewards; inter-mine safety competitions; the use of the International Mine Safety Rating System.

The respondent states that the 1981 and 1982 Group inter-mine safety competition was won by the mine. Seven gold mines within the Gold Fields Group competed.

8. Both the respondent and applicant quote statistics relating to injuries and fatalities. In view of the applicants' admission as to the safety of the stope at all relevant times it is unnecessary to consider the statistics save to note that injuries and fatalities occur and are a common experience in all gold mines, in spite of elaborate safety precautions.

9. In September 1983 an area of the mine, namely 14.30 stope, was being worked. Stope 14.30 is on the fourteenth level and extends up to the twelfth level. A stope, as explained by respondent, includes a lateral excavation of ore for production purposes. In order to establish a stope area, the first step is the development of a tunnel or 'raise' from the bottom level (here the fourteenth level) to the level above (here the twelfth level; there being no level number thirteen) on the plane of the reef, ie approximately 23 degrees to the horizontal. The raise is approximately two metres high by two metres wide and serves, inter alia, as a travelling way. The stope is excavated laterally from the raise in both the easterly and the

westerly directions. The height of the stope is said to be approximately one metre. The stope on either side of the raise is divided into sections or 'panels'. Each panel is separated from the other by a 'strike gully'. The lower panel is usually excavated ahead of the panel above it. The strike gully is a minimum of 1,8 to two metres wide. The function of a strike gully is to provide a travelling way as well as an ore way. The ore from a particular panel is scraped from the panel into the raise from the strike gully.

Stope 14.30 is some 1 296 metres below surface. Stoping had previously taken place in this area, but in 1981, because low values were encountered, mining ceased in the area. In June 1983 the management decided that it was economical to extract ore from stope 14.30.

10. It appears from the evidence of Klokow, a rock mechanic in the employ of the respondent, given at the enquiry before Mr Bakker, that stope 14.30 at its reopening or within a short period thereafter was declared a 'remnant area' and minuted as such in the 'remnant instruction book'.

In answer to a question whether the reason remnants are given particular attention is that the risk hazard there is greater, Klokow replied:

'It may be somewhat greater—is really a precautionary measure. That is one of the reasons why our definition calls for an area to be declared a remnant, when it is within 30 metres of another area, because it can be considered that the risk is slightly on the increase at that stage. It may be—it may not necessarily be the case, but it is a precautionary measure.'

11. The work face was opened and the area was allocated to a contract miner, one M J Reid. Reid mined the area until mid-September 1983 with a gang of about 65 mine workers (during day shift) and 22 mine workers (during night shift).

12. The pattern followed was in accordance with the overall practice on the mine. Blasting would take place also in stope 14.30 from approximately 16h30, following a pattern of zoned blasting times, and the night shift would thereafter be required to make safe and then clear the area so blasted. Thereafter, fresh drilling would take place.

13. The term 'making safe' requires elucidation. In terms of reg 8.8:

'In every mine other than a coal mine:

8.8.1 Except as provided for in Regulations 8.8.3.1 and 8.8.3.2 every stope which has remained idle for more than 6 hours . . . and every underground working place in which blasting has taken place shall be examined and made safe by a ganger or miner who shall be the holder of a permanent blasting certificate, and work shall not be resumed in any part of such working place until such part has been so examined and made safe.'

Therafter follow exemptions which are not relevant. The sub-regulation ends:

'No person shall enter or remain or cause or permit any other person to enter or remain in any part of such working place until such part

has been examined and made safe, except such persons as are necessary to direct, carry out or assist in carrying out such examination and making safe.

8.8.2 . . . in making safe, the ganger or miner shall remove or cause to be removed all dangerous, loose or loosened rock, mineral or ground. He may be assisted in this work by persons working under his personal supervision and control and, where deemed by him necessary for the safety of such persons, in his actual presence. He shall take all reasonable precautions to prevent persons not required to assist him from entering such working place until he has examined and made safe and until he has given them definite permission to enter.'

The exemption in para 2 of the letter of the Chief Inspector of Mines dated 15 October 1973 is relevant. It reads:

'*Examination and making safe of places in which blasting has taken place—Regulations 8.1, 8.8.1 and 8.8.2:*

Partial exemption is granted to the extent that the certificated ganger or miner in charge may, on arrival at his working place, instruct a competent and experienced Bantu team leader to carry out the examination and making safe of particular places, or parts thereof, and thereafter permit persons to enter and resume work therein, subject to the following conditions:

(*a*) The ganger or miner shall re-examine each such place or part thereof; and where necessary make it safe, within 90 minutes after resumption of work therein.

(*b*) Where such Bantu team leader caries out an examination and in terms of this exemption he shall inform the ganger or miner of any sources of danger found or observed.

(*c*) This exemption shall only apply where the responsible ganger or miner in charge on day shift was also in charge on the preceding day shift and, in the case of a night shift cleaner, he was in charge on the preceding night shift.'

There are also exemptions which apply to the examination and making safe of places by black mineworkers in which blasting has not taken place since last examined by a certificated ganger or miner, and which have not remained idle for more than 48 hours.

At this stage it is necessary to set out separately the applicants' and the respondent's version of events from mid-September to 22 September 1983 and beyond. Where convenient the applicants' and respondent's version of events will be set out seriatim.

Applicants' Case

1. The applicants were all part of a gang of mineworkers called gang 26 F1002. This gang comprised some thirty five to forty persons and worked two shifts from 04h30 to 14h00 and 21h00 to 05h00. Most members of the gang are in the morning shift.

2. The gang had approximately six teams, each led by a 'team leader' or 'special team leader'. There is also a 'senior team leader' who supervises the machine operators.

3. Gang 26 F1002 was working on the 26th level. On 14 September 1983 the gang was instructed to exchange working places with gang working stope 14.30.

4. Prior to 14 September 1983 and on 25 August (respondent's date), Reid, the miner in charge of the gang (gang 28 B1002) working stope 14.30 was injured. It is common cause that Reid suffered a laceration of an arm and received stitches. The applicants allege that the injury was caused by a rock fall, which happened while Reid was busy trying to support the 'tafel' or 'hanging wall' (the roof of the tunnel) with a wooden pole. Respondent's case is that Reid hit a wedge which caused a small rock to be dislodged.

5. The applicants say that on 12 September 1983 three mine workers were seriously injured in the 14.30 area. All three workers were admitted to hospital. Two had not yet been discharged on 26 September 1983.

The respondent says the incident took place on 13 September, and involved two workers. While they were standing on a ladder drilling, some rock broke loose from the face. The ladder fell and the two workers were injured. Dhlamini sustained a laceration of the lip and left shoulder and was off duty for nine shifts. Nguzilwana sustained a slight laceration to the frontal region and was off duty for three shifts. Reid inspected the area and found loose rock and a stone of approximately one metre × twenty cm × fifteen cm. The injured workers were unable to say whether their injuries were caused by the fall or the loose stones. The respondent says the incident does not show the area to be dangerous.

6. The applicants say that some of their gang spoke to members of gang 28 B1002 and were told that the work site to which they were going was unsafe. This made them apprehensive.

In reply, the applicants allege that they had no knowledge of the mine management's reason for changing gangs. From what they were told they took the transfer to be the result of the unwillingness of the other gang to continue working in an area in which so many accidents were occurring. Team leader David Jivas heard these reports on 15 September 1983. (This is strictly new material but in view of the conclusion reached it does not prejudice the respondent.)

7. On 16 September 1983, gang went underground to the waiting place. They waited there for the arrival of Bickford, the shift boss, who according to the regulations has ultimate responsibility for a section (a particular work site) and who, it is alleged by the applicants, may and does delegate the responsibility for a work site to the miner.

The handing over is logged. The gang met one William, a senior team leader, who had not been transferred with gang 28 B1002 and who knew of the accidents in the 14.30 stope. He is alleged to have told the team leaders of Gang 26 B, within earshot of the gang, that the 14.30 area was dangerous and that the previous gang had been transferred because of the accidents that had happened. William is alleged to have said that the squares in that area were dangerous. This made the applicants' gang even more apprehensive. The respondent's case, supported on oath by the said 'William' (Gqinekile Maholwane) consists of an outright denial of each separate allegation.

In reply it is alleged, supported by affidavits, that, in addition to the

applicants, team leaders, Jivas, Chris Mbokwana, Marks Dikola and Aron Mbizu heard and confirm William's report on the area.

8. The gang waited for the arrival of the white miner temporarily assigned to them, one Ivan Jacobs. The applicants originally alleged that Jacobs told them the shift boss' assistant would hand over the new work site. In reply it is said that the sequence of events was wrongly described. The shift boss' assistant arrived and told the gang to meet the shift boss at the 14th level.

At the 14th level they met Bickford (the shift boss), Van Staden (the mine captain) and Jacobs. The team leaders were told to accompany Van Staden's party into the raises of the no 6 gully. The reply continues that they were a considerable distance from the stope face when Bickford told Jacobs that a further line of timber supports was needed in the no 6 gully and that the area generally needed to be cleaned. He then said that they should proceed with work in the other gullies (nos 2–5) and at the respective stope faces of those gullies.

It is alleged that it was apparent to the team leaders that the existing spaces between the packs in no 6 gully were too great. It is now alleged that Bickford was asked to take the team leaders on an inspection of the stope face and to instruct them how to proceed about making the place safe.

Bickford, it is said, was annoyed and said that they were not children who had to be led by the hand. It is alleged that an inspection by the shift boss would be normal when a gang was transferred to a new area, particularly one with hazardous or potentially hazardous features. It is said that Jacobs did not show them where to work and was not experienced in supervising the kind of work required on that day.

The initial allegations continue that the shift boss and the mine captain left. Jacobs told the team leaders he had to hand over the site but did not know the exact location of the squares, ie the ends of the tunnels which were to be extended.

The respondent's case is that Bickford told Jacobs to work panels 5 and 6 of stope 14.30. Bickford instructed Jacobs to make the panels safe as required by regulation and then to remove the broken ore in the stope. Respondent alleges that, after 09h00, Evans showed the team leaders where to work. This dispute of fact is insoluble because Jacobs was unavailable to the respondent and no affidavit has been obtained. Mr *Brassey* indicated that he would make no point of the absence of an affidavit by Jacobs.

9. The applicants allege that, because Jacobs did not know where the work site was, the gang waited for Bickford to return.

10. Bickford returned at 11h00 and the team leaders explained the reason for their inaction. Bickford was angry but left without giving the team leaders any assistance.

The respondent confirms these events. The respondent says that Bickford was accompanied by Van Staden, the mine captain, or overseer. Van Staden then reinstructed Jacobs as to what was to be done. It is not clear whether the team leaders were present at this stage.

11. The applicants allege that thereafter the team leaders went to find the squares off stope 14.30 for themselves. The team leaders judged the area to be hazardous in the following respects:

'(*a*) The gullies, which should have been slightly greater than head-height at most, were in places up to ten to twelve feet high. This was plainly the result of previous rockfalls; its consequence was that it was now very difficult to support them properly and rockfalls were made all the more dangerous by the distance that the rocks could now travel.

(*b*) As the headroom decreased in the gullies and helmets bumped against the "tafel", rocks and stones would be dislodged, which indicated that the "tafel" was unstable.

(*c*) Many of the supports . . . were tilted at an angle, apparently as a consequence of the pressure that they were under.

(*d*) Faint rumbling was heard from time to time, the precursor to rockfalls.

(*e*) In many places there were rocks so wide that a fist could be inserted into them. Cracks open up in the "tafel" as it begins to subside.'

The respondent's answer to those allegations is of such importance that I quote the relevant passages:

'Insofar as the applicants purport in para 8.5 to discuss technical aspects of mining, the respondent disputes that stope 14.30 was "hazardous" and further disputes the contentions in sub-paragraphs (*a*) to (*e*) of the applicants' stated case.

Novices are not in a position to "recognize portents of danger from rockfall" in any sense. The science of rock mechanics is an elaborate one and a great deal of experience has been built up by the mining industry in South Africa.

As already stated, the 14.30 stope is in an area where faulting occurs and the gullies in the 14.30 stope are typical of stopes in any area which has been excavated and where faulting occurs. This normally leads to gullies of a slightly higher nature. However, the higher nature of the gullies is in no sense an indication that the area is unsafe. The minimum height of a gully is approximately head height, but the actual depth is determined, inter alia, by geological conditions in an area. The respondent specifically denies that the depth of gullies has been caused by rockfalls. All the gullies in the 14.30 stope are, and were at the time, well supported.

The respondent further denies that the "tafel" of any of the gullies in the 14.30 stope was unstable.

With regard to the contention in relation to the support packs, the respondent states that the support packs referred to were constructed (correctly) at right angles to the dip of the reef, and not at right angles to the horizontal plane, due to the natures of the stress factors present. While this may give, to the uninitiated, an impression that the packs was leaning improperly, this is not in fact so.

Furthermore, in the case of "sandwich packs" and "matpacks", the dimensions are directly proportional to the height of the areas to be supported. Packs are usually square, and the breadth of a pack is approximately half the height of the excavation being supported. Thus matpacks which are constructed in a raise are bigger than matpacks which are constructed in a stope area. In accordance with well-recognized practices, the mine installs matpacks on the shoulders of the raise and strike gullies, as the stiffer kinds of packs, such as sandwich packs, transfer excessive loads onto the gully shoulders, causing them to fail or break away.

If the gully shoulders fail the packs on the shoulders become unstable, and if sandwich packs are used, for example, bricks start sliding out as a result of low

friction forces and the packs disintegrate and become ineffective. Therefore, the packs in fact used were appropriate to the circumstances and more appropriate than would have been the form of pack suggested in the applicants' stated case.

It should be appreciated that packs are designed to control the sag which inevitably takes place. This sag cannot be arrested, but, by controlling its dangers, is properly minimized. The sag, of course, it should also be understood, is a slow movement. In addition, it must be recorded that packs along raises and strike gullies and close to working faces are kept under close surveillance and are reinforced in any circumstances which suggest that this is necessary.

The respondent therefore states that the packs used in the 14.30 area (and, of course, elsewhere in the mine) are appropriate to the circumstances.

Insofar as the applicants allege that sandwich packs would (*a*) have been more suitable and (*b*) are more expensive and were not used for that reason, the respondent denies this. The matpacks used are neither an out dated nor an inexpensive way of providing the appropriate support.

With regard to the references to "rumbling" and "talking", these are terms used to describe the noise associated with small failures of rock occurring beyond the exposed surface of an excavation and not causing any fall or splitting of rock fragments. This is a common phenomenon in the mines of the Witwatersrand, but it is not indicative of imminent violent unstable releases of energy which could be dangerous to persons.

It is not clear what the applicants refer to when they allege in paragraph 8.5(*b*) of the stated case that "faint rumbling was heard from time to time". Rumbling noises are indeed heard from time to time in underground conditions, and may be as a result of seismic events in another part of the mine or in other mines nearby, the tipping of ore into ore passes or the drilling taking place in other areas. During the period 3 June 1983 to 24 October 1983, no seismic event was detected in the 14.30 stope.

The respondent also denies that there were cracks in the rocks in the 14.30 stope of such a nature as to suggest dangerous or extraordinary circumstances in a stoping area. There are always cracks in rocks in any stope area and, when and where support is needed, it is provided, as was the case in the 14.30 stope. It is now more than a month since the events in issue took place, and mining has continued in the 14.30 stope without any untoward incident.'

12. At the termination of the shift the team leaders went to see Bickford at his office. What was said there is in dispute. The applicants say the team leaders explained what happened after Jacobs had left them on the second occasion. They say Bickford verbally abused them and threatened them with a cut in salary.

Jacobs took the team leaders to Hennings (underground manager) who asked why they were refusing to work. They explained that the site had not been properly handed over. The applicants say Bickford told the underground manager that he had delegated the responsibility to Jacobs. The underground manager threatened to demote the team leaders if they did not work properly and instructed Bickford to hand over the site personally on the next working day, namely Monday 19 September 1983.

The respondent's version is that the team leaders came into Bickford's office and alleged that the work site was 'bad' and referred to the high hanging. Bickford endeavoured to explain that it was due to the faulting of the area. Faulting is explained as a geological displacement of gold

bearing reef by non-mineralized rock. It is said to be not uncommon in a stoping area. Bickford said that he had inspected the area and found it to be safe. Bickford denies that he verbally abused the workers or that he threatened a cut in their pay.

Hennings (the underground manager) summoned all the team leaders of the gang to his office in order to ascertain what the problem had been. It is said 'his understanding [was] that the gang had refused to work without reason'. The team leaders told Hennings that they did not know where to work. Hennings and Van Staden informed them that Bickford would go down with the gang and Jacobs on 19 September and assist Jacobs to explain what work had to be done. Hennings 'advised' the team leaders that if they thereafter refused to work, they would be demoted. It may be noted that, on respondent's version, the question of hazardous working conditions was not mentioned to Hennings.

13. On Monday 19 September 1983, the gang were approached by Bickford and Jacobs. Bickford was allegedly angry and took up the attitude that they ought to have gone to the work site on their own. He is said to have abused them, threatened to assault them and to have accused them of refusing to work. Bickford confirms the meeting but says that the workers again complained about the safety of stope 14.30. Bickford said that the members of the previous gang were quite satisfied with conditions.

It is common cause that Bickford then ordered the team leaders to follow him and Jacobs to stope 14.30 so that he could show them where to work. Unknown to Bickford, the team leaders instructed the rest of the gang to follow them.

The applicants allege that Bickford did not enter the gullies but stood at the entrance while the team leaders went in. They also allege that when the 6th gully was reached Bickford noticed that the whole gang was following him. Bickford says the incident occurred at 2 East Gully.

Bickford's version can be accepted as correct because, according to the evidence of Carlos Samuel given at the s 5(4) inquiry, the inspection party had to retrace its steps at every gully. Gully no 6 was the last gully inspected. Bickford would have noticed the rest of the gang at gully no 2.

The applicants allege that Bickford lost his temper, swore at the gang members and threatened to assault them. He demanded to know why the whole gang had followed him in, and the eighteenth applicant replied that they had come to inspect the squares. Bickford then slapped the eighteenth applicant in the face.

Respondent's version is that, when Bickford noticed the gang following him, he ordered them to return to the twelfth level to collect their equipment. The gang members refused to do so. They were aggressive towards Bickford and insisted on accompanying Bickford, Jacobs and the team leaders into the stope. The respondent says, with reference to reg 8.1.1, that they acted in breach of the regulations. It is also said that the behaviour of the gang members was most unusual, as normally a gang leaves it to its miner and team leaders to do the initial

survey of the area and to satisfy themselves as to the safety of the area before work commences.

When Bickford persisted in his attempts to persuade the gang to stay where they were, two members became particularly aggressive. One picked up a rock and threatened to assault Bickford. A second had a marlin spike, approximately 30 cm in length in his hand. The team leaders physically restrained the two from assaulting Bickford. Bickford admits that at this stage he was angry and used to the effect: 'You are like a dog, you come at a single person in a pack. You, come at me yourself.'

Second applicant retreated. Bickford followed by the gang proceeded through stope 14.30 and passed panels 3, 4, 5 and 6. Bickford explained to Jacobs and the team leaders what had to be done. He showed them a certain new travelling way, escape ways and ore passes.

The applicants allege, however, that the gang could see that the area was unsafe and the winch drivers refused to work saying to Bickford that their lives would be endangered. Bickford is alleged to have said that he did not care if they died there. Bickford was particularly abusive and insulting.

The work down that shift consisted of collecting material and taking it into stope 14.30.

Bickford confirms that the gang members, save for the team leaders, refused to work. The gang members were aggressive. Bickford denies that he abused or assaulted or threatened to assault any of the individual applicants.

14. In reply, the applicants introduce new material. Again, in view of the conclusion to which I have come, the respondent is not prejudiced; besides which, the subsequent inspections by the Chief Mining Inspector on 21 September 1983 and 28 October 1983 and the official inquiry show that the observations made by the individual applicants were not indicative of unsafe mining conditions which could not be made safe.

The gang entered no 2 gully but could not proceed because falls of rock obstructed their passage. They also saw that several packs had fallen out of the raises on the sides of the gully. The support in the area was clearly inadequate.

The gang went back to the raises and moved down to the no 3 gully. Once against they stopped before they reached the face. As they approached the face, the hanging wall (the roof) became higher and it was evident to them, that rocks had fallen from the hanging wall onto the footwall (floor). Once more they saw packs which had fallen out.

The gang went along no 4 gully. They found conditions to be bad here as well. The hanging wall was so high that they could not see how it was to be supported. The hanging wall above no 5 gully appeared dangerous and seemed prone to collapse.

In no 6 gully the individual applicants found that the hanging wall was very high and that the packs were exceptionally wide apart. To them the support in the area appeared inadequate.

They allege generally that the supporting packs had been displaced in several gullies. In certain places poles erected between the last timber

support and the face no longer made contact with the roof because of falls. They remained upright only because they were wedged into the footwall or were supported by the fallen rock itself. The individual applicants estimated that in places the nearest packs were about 5 metres from the face.

15. The applicants allege that a meeting was held underground with the Mine Captain and make reference to a further meeting with the Mine Captain on the surface. The respondent refers only to a metting held on the surface. It will be assumed that the meeting took place on the surface.

16. The applicants allege that on that day a meeting was held between the Mine Captain and the team leaders. The team leaders explained that the gang had refused to work because the area was unsafe. The Mine Captain instructed them that unless they agreed to work they would be stripped of their rank or even dismissed. As a consequence, the team leaders agreed to work.

The respondent says that the meeting with the team leaders was held in Van Staden's (the Mine Captain's) office and was attended by the team leaders, Bickford, Phillips (chief compound manager), and the 'masiza' (the black personnel assistant to the management). The team leaders alleged that the work site was unsafe and that they were not going to work there.

The next event, as was common cause, is that members of the gang were picked to attend the meeting which was in progress. Respondent says that the team leaders each chose two gang members to attend this meeting.

The applicants say that Van Staden inquired of the gang why they would not work. It is common cause that all alleged the work site was unsafe. Van Staden, according to the applicants, said that the site was safe but the gang should meet him at the crush office (ie the check-in point at the shaft where the clock cards are kept) the next morning. The purpose was, according to respondent, that Van Staden personally intended inspecting the work site.

Van Staden denies that he threatened to demote or dimiss the team leaders, and denies that a complaint was made to him by the eighteenth applicant that Bickford had slapped him in the face.

17. On 20 September the gang went underground and waited at the waiting place on the fourteenth level. The team leaders, however, went to the work site but stayed in the raises, because, it is alleged, they feared demotion in rank. The applicants allege that Van Staden and Bickford arrived at 09h00. Van Staden was told that the gang wanted to work but that they were not going to do so because the work site was unsafe.

Van Staden instructed those in the gang who wished to work to stand to one side. No one moved, and Van Staden instructed them to return to the station from which they ascended to the surface.

The respondent says that Van Staden and Bickford went underground early on 20 September to inspect conditions at the 14.30 stope. At 09h45 they met twenty six members of the gang who were not working. They said they were not working because the stope was unsafe. Others in the

gang and the team leaders were working. Van Staden tried to persuade the twenty six gang members to accompany him on inspection of the slope. The twenty six gang members refused to do so and were ordered to return to the surface.

It may be noted that no inspection of the stope was carried out by Bickford or Van Staden.

18. A meeting was held on the surface that day.

The management were represented by Van Staden, Bickford, Close (the underground manager), Botes (a former shift boss), Goosen (a mine overseer), Bailie (an assistant manager) and a 'masiza'. The applicants say that those present were the departmental personnel officer, the mine captain, the shift boss, the underground manager and the assistant manager.

The applicants allege that the gang members were called into the office individually and each replied to questioning by management that he was willing to work but that the new place was unsafe. It is alleged that management adopted a hostile and aggressive attitude towards the applicants.

The respondent's version is not much different. The respondent says that after interviewing fourteen applicants and receiving identical answers the matter was discussed with the balance of the gang as a group. The group insisted that the stope was unsafe.

The applicants allege that the management suggested that the second and eighteenth applicants accompany the assistant manager on an inspection of the area at 19h00. The applicants agreed and were told that they would be paraded at 19h00.

The applicants describe the process of parading as follows. A miner is 'paraded' when he is given permission to go underground outside of his ordinary working hours. A parade form is normally filled in by a white supervisor and countersigned by a shift boss or mine captain. It is then handed to the crush office where they staple a slip of paper onto the clock card, which acts as the permit allowing the worker to enter the mine. It is against the rules to go underground unless paraded.

The respondent confirms the invitation to the second and eighteenth applicants and says that this arrangement met with the approval of the other members. The arrangements were that Bailie and Close would meet the two applicants at 19h00 at the shaft head together with Bickford, Van Staden and two section leaders, Kaboyankoe and Mahlolwane. Botes was to make the necessary arrangements.

At 19h00 the second and eighteenth applicants allege that they checked at the crush office to see if they had been 'paraded'. They found no slips of paper attached to their clock cards entitling them to proceed underground.

They reported this occurrence to the other members of the gang. The gang became all more anxious because of this incident. In their reply the applicants allege that the second and eighteenth applicants returned to their accommodation in the compound because sometimes parading is initiated in the compound area. They were not summoned by the mine

police and the public address system was not used to call them to the crush office.

The respondent alleges that the two applicants did not present themselves at the crush office. The respondent states that the parading procedure outlined by the applicants is incorrect but 'the Respondent has been advised that it is not necessary to deal with the actual procedure for present purposes'. This aspect will enjoy close scrutiny later on.

The respondent alleges that Bickford, Van Staden, Bailie, Close and the two section leaders proceeded underground, investigated stope 14.30 and were satisfied that the area was safe to mine.

On Wednesday 21 September 1983 the gang (only those who were refusing to work, according to respondent) were instructed to go to the mine captain's office. It is common cause that Van Staden addressed those present and told them that the underground manager (and others) had gone down the previous evening and found the work site to be safe. Van Staden, according to the applicants, instructed them to return to work.

The gang wanted to know why the second and eighteenth applicants had not been allowed to go down as promised. Van Staden did not reply. The respondent says the second and eighteenth applicants alleged that the party had not gone underground or if they had they had not inspected stope 14.30 properly. The individual applicants were instructed to go to the underground manager's office.

It is common cause that Close (the underground manager) spoke to the second and eighteenth applicants in his office. It is said that he wanted to know why they had not waited for him at the bank (the waiting place next to the cage) the previous evening. The two applicants told him they had not been paraded. Close sent for the clock cards and it was apparent that no parade permission was attached to the cards. Close became angry, abused the two applicants and threatened to shoot them. He is alleged to have said that they were lucky not to have gone underground the night before because he would have killed them.

The respondent's version of events in Close's office is somewhat different. Close tried to convince the two applicants that he and the rest of the party had been underground, had properly inspected stope 14.30 and found all to be safe. The two applicants insisted that Close was lying. Bailie (the assistant manager) arrived and also told the two applicants that the area had been inspected and found to be safe to mine. When the two applicants failed to believe them they were given an ultimatum to go down the mine at 07h30 or resign.

Close admits to being angry with one of the two applicants and saying he would 'balala' him. Respondent says this means 'get him'. The applicants in reply say it means 'kill him'. The only comment which the respondent offers on the allegation that parade permission had not been attached to the clock cards is to 'reiterate that all the necessary arrangements were made . . .'.

Thereafter follows an incident involving the second and eighteenth applicants, who allege they were sworn at and pushed by the assistant

manager and the deputy personnel officer. The respondent says that the two applicants were ordered not to attend a meeting with the rest of the gang in the quadrangle, but insisted on doing so and were very aggressive and insubordinate.

The applicants say that the underground manager spoke to the rest of the gang and told them that he had gone down the night before and found the place to be safe. The gang asked why the second and eighteenth applicants had not gone down with the inspection party as promised. Close replied that they had been paraded but had failed to attend. The eleventh applicant then requested that the dispute over the safety of the workplace be referred to higher authority. Close lost his temper and told the gang to report immediately to hostel manager for their discharge.

The respondent says that Bailie, an assistant manager, and not the underground manager, addressed the remainder of the gang and informed them that he, Close, Bickford, Van Staden, Kaboyankoe and Mahlolwane had been underground the night before and found stope 14.30 to be safe for mining. He said that the two applicants, who should have accompanied the inspection party, did not do so. Bailie appealed to the group to go back to work. They refused to do so, saying that the area was unsafe. Bailie instructed them to go underground by 07h30 or resign. Four members of the gang agreed to work; the remainder returned to the compound.

22. The union has been informed of the problem on 20 September 1983 and addressed a letter of that date to the personnel manager of Goldfields. Sigela delivered a copy to Spencer, the acting mine manager. Spencer said that he could not discuss the problem with the union because the respondent did not recognize the union.

23. Ramaphosa then telephone Fenton, an executive director in the Goldfields Group of Companies. Fenton arranged a meeting between the mine management and the union for 15h45 on 21 September 1983. The respondent says that the meeting was arranged out of courtesy, as the union does not have sufficient representation to be recognized by respondent. This is common cause.

24. The meeting took place as arranged and was attended by Spencer, Bailie, Van Onslen (senior personnel officer), Phillips, Ramaphosa and Sigela. Soon after the meeting commenced Bailie and Phillips left.

What transpired at the meeting is monstly common cause. The respondent would not allow employees of the respondent to be included in the union delegation. Spencer said that his instructions were to hear the union's complaints. Spencer, according to the applicants, said that the workers were refusing to work and undermining the authority of the shift boss and mine captain. Ramaphosa informed Spencer that the workers were willing to work but that they were afraid to work in the 14.30 stope because they regarded it as dangerous. Spencer pointed out that the area had been inspected and found to be safe.

According to the applicants, Spencer said the production manager had inspected the area. He had several years experience and found nothing

wrong with it. The respondent say that Ramaphosa was also told of the inspection by the shift boss, the mine captain, the underground manager and the assistant manager. The respondent also said that the two gang members invited to attend the inspection had failed to keep the appointment. The respondent alleges that Ramaphosa then said that the men would only go underground if the union representative told them it was safe to do so. This allegation is not dealt with in the reply.

Ramaphosa was told that another gang which had worked in the area had not complained about the safety of the area. Ramaphosa was told that the previous gang was moved to another area not for any reason relating to safety, but for production reasons. The safety policy of the mine was explained to Ramaphosa and Spencer assured him that he would not send a man to work in an area he felt was unsafe.

Ramaphosa suggested that he and one of the union's officials be allowed to inspect the area. He said the workers trusted them and if the union was satisfied, the workers would be convinced and would start work. Spencer rejected this suggestion. Spencer's reasons were that Ramaphosa on his own admission had no experience of mining and that the mine officials who had inspected the area were experienced and well qualified.

According to the respondent, Spencer offered to send senior mine officials with the workers to afford the workers the opportunity of pointing out problems they might have with the area. Ramaphosa's point was that the worker's problem was not whether the area was safe 'but whether the miners reasonably feared that it was unsafe'. It it was [un]safe their fears had to be allayed. Ramaphosa outlined the problems experienced with the shift boss and mine captain and said that as a result of their attitude the workers felt they could no longer rely on the reassurances of these persons.

Ramaphosa proposed that the area be inspected by the government mining inspector. The parties' versions differ on the reaction of this proposal. The applicants say that Spencer rejected the proposal, having earlier given as a reason the fact that the production manager had already inspected the area and that was sufficient. The respondent's case is that Spencer replied that the inspector had every right to inspect any workings in the mine at any time and that the inspector was entitled to inspect the particular work site, if he so desired.

Spencer, according to the applicants, told Ramaphosa he had given the workers an ultimatum to return to work by 06h00 the next morning or face dismissal. Respondent says the ultimatum was made at the meeting.

23. The respondent's management failed to tell Ramaphosa that the Chief Inspector for Mines for the Carletonville area had been informed of the situation and that the Chief Inspector was to conduct an inspection that evening.

24. Ramaphosa and Sigela reported back to the union's shaft stewards and certain of the applicants. Respondent's ultimatum was put to the workers and the gang decided not to work because the area was dangerous. The union advised the gang to prepare for work the next day

but to report first to the union office on the mine property. The union undertook to take the matter further with higher management.

25. As Ramaphosa and Sigela were leaving, Van Onslen approached them for Ramaphosa's telephone number. Ramaphosa was on his way to Welkom and could not supply a number. Ramaphosa suggested that Van Onslen contact Sigela at the union's office at 06h00. The respondent also makes an allegation unsupported by affidavit (Van Onslen was said to be unavailable to depose to an affidavit), that Sigela undertook to phone Van Onslen at 19h30. According to respondent, Sigela did not phone and apologised for not doing so. I propose to ignore the respondent's unsworn allegations.

26. At 19h00 that same evening (unbeknown to the union, Ramaphosa, Sigela and the seventeen individual applicants, and other members of the gang) Bailie, Spencer, Close, Van Staden, Bickford and two section team leaders accompanied Chief Mining Inspector Vorster to Stope 14.30. Vorster inspected the stope and declared it safe.

27. Thursday the 22nd of September 1983 was the day that the individual applicants were dismissed. The applicants admit that their written representation is not entirely accurate concerning those events. The respondent's version may thus be accepted. Between 05h50 and 06h15 Spencer, the mine manager, told all the miners who had refused to go underground that stope 14.30 had been declared to be safe by the Chief Inspector of Mines, Mr Vorster. The workers were asked individually whether or not they were prepared to go underground and resume work as instructed. According to the respondent ten workers decided to resume work. The applicants put this figure at seven. The individual applicants refused to follow suit. The applicants say that they were prepared to work, but the area must be safe.

In reply the applicants allege that they were informed by the mine management early that morning that the inspector had been underground the previous night, but they did not believe the report because the events of the past week had undermined their trust in management.

Spencer terminated the services of the individual applicants with immediate effect. The reason for their dismissal is given that they 'unlawfully' persisted in their refusal to work. I assume that by unlawful is meant wrongful.

The individual applicants were told to vacate the mine premises, to remove their belongings and collect their pay.

28. Sigela arrived after the dismissal of the individual applicants. Ramaphosa phoned Spencer, who said that the individual applicants had refused to work despite the ultimatum and despite the fact that Vorster had inspected the area and passed it as safe in a written report. Spencer refused to give Ramaphosa a copy of the report.

29. Ramaphosa phoned Vorster who confirmed that he had conducted an inspection of the area. He said that the area had not been worked for some time and needed some attention here and there, but he was satisfied that it was safe for the men to work. He had not spoken to the workers

concerned. Vorster said he could not provide Ramaphosa with a copy of his report without the Government Engineer's permission.

30. On Saturday 24 September 1983 one O Myeni, a gang member who elected to return to work in Stope 14.30, was injured while hitting a wedge into position with an 8 lb hammer. It is alleged that the area of rock that fell was three feet × three feet. Pieces of rock hit him on the left side of his back and he sustained a deep cut just below the shoulder, bruises above his buttocks and scratches. He received three stitches for his wound.

31. The applicants applied for a conciliation board on 28 September 1983.

32. On 9 and 10 November 1983 an inquiry in terms of s 5(4) of the Mines and Works Act was held at Carletonville before the Assistant Chief Mining Inspector. The record of those proceedings, comprising some 206 pages, has been handed in.

[The Court here considered, inter alia, the findings of the Assistant Chief Mining Inspector and continued:]

The report of an inspection of the area by Chief Mining Inspector Vorster held on 28 October 1983 concludes: 'The area as a whole has not deteriorated and I found the place to be safe for mining.'

The Alleged Unfair Labour Practice

At the outset I should mention that the respondent in its sworn representations alleged that the actions of the individual applicants amounted to a strike in terms of the Labour Act.

The actions of the individual applicants prima facie do not amount to a strike as defined in the Labour Act. See *Ngewu v Union Co-operative Bark and Sugar Co* 1982 (4) SA 390 (N).*

In spite of a major concession, namely that the 14.30 stope is or was at all relevant times not objectively unsafe for mining, the applicants contend that the dismissal of the individual applicants by the respondent constitutes an alleged unfair labour practice. It is contended that the dismissal of the individual applicants was unfair in that it was neither substantively justified nor procedurally valid. The individual applicants' contention (I quote from the heads of argument provided by Mr *Brassey*) is that:

'. . . their dismissals were substantively invalid since they were by reason of their reasonable apprehension of the hazards in the work place, entitled to refuse the order to work in the 14.30 area; or, to put it another way, that they were entitled not to work in that area for so long as the respondent failed to take reasonable steps to reassure them of the safety of the area through the agency of a person whose credibility was not compromised by reason of his position, involvement or attitude.'

In the context of the definition of an unfair labour practice, the applicants' case is presumably, for it was not specifically coupled to the definition, that the respondent was guilty of an unfair labour practice in that it adopted a labour practice which has or may have the effect that a

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class of employees' physical welfare is or may be prejudiced or jeopardized thereby or any other labour practice which has or may have an effect which is similar or related to such an effect. See s 1 sv 'unfair labour practice', paras (*a*)(i) and (*b*).

A It may also be that the applicants' case is that the respondent's labour practice has or may have the effect that the relationship between employer or employee is or may be detrimentally affected thereby. See s 1 sv 'unfair labour practice' paras (*a*)(iv) and (*b*) of the Labour Act.

In developing his argument, Mr *Brassey* made the submission that at B common law an employer is obliged to provide safe working conditions. He referred to *Browning v Crumlin Valley Collieries* [1926] 1 KB 522, *Van Deventer v Workmen's Compensation Commissioner* 1962 (4) SA 28 (T) at 31, *Nicholson v East Rand Mines* 1910 WLD 235, *Ferrie v Western No 3 District Council* (1973) IRLR 162, *British Aircraft Corporation v Austin* (1978) IRLR C 382.

Mr *Brassey* then referred to the statutory unfair dismissal jurisdiction in English law and quoted the following extract from the *British Aircraft* case:

D 'Employers are under a duty to take reasonable care for the safety of their employees. As part and parcel of their general obligation, employers are also under an obligation under the terms of the contract of employment to act reasonably in dealing with matters of safety or complaints of lack of safety which are drawn to their attention by employees. Unless the matter is drawn to their attention or the complaint is obviously not bona fide or is frivolous, it is only by E investigating individual complaints promptly and sensibly that employers can discharge their general obligations to take reasonable care for the safety of their employees.'

Reference was also made to Drake and Wright *Law of Health and Safety at Work: The New Approach* (1983) 25 et seq, *St Annes Board Mill Co Ltd v* F *Brien* 1973 IRLR 309, *Walmsley v U D E C Refrigeration* 1972 IRLR 80. The ratio which Mr *Brassey* extracted from the *British Aircraft* case was that, if an employer fails to discharge his obligation to investigate and reassure the employee, he may refuse to continue working and complain of an unfair dismissal.

G It is appropriate to note here that the Employment Appeal Tribunal, in the appeal of *Graham Oxley Tool Steels Ltd v Firth* (1980) IRLR 135 (decided subsequently to the *British Aircraft* decision), decided, distinguishing the last mentioned case on the facts, that no complaint was necessary to the employer of a small factory of some fifteen employees, H as the conditions of work were well known to the managing director. The Employment Appeal Tribunal, however, expressly stated: 'We are not saying that in the proper case, as in the *Aircraft Corporation* case, a complaint may not be an important factor to take into account.' (Per Talbot J at 137).

I Mr *Brassey* pointed out that a similar situation has been created by statute in the United States of America and in Canada. He referred to the *Occupational Health and Safety Act* RSO 1980 at 321, *Labour Relations Law: Cases, Materials and Commentary* 3 ed 47 and *Whirlpool Corporation v Ray*

Marshall 445 US 1 (1980). He referred to various enactments in the last two jurisdictions which gave employees, through unions and other agencies, the right to satisfy themselves on safety matters. Mr *Brassey* submitted that the same trend was apparent in South African legislation, and referred to s 9 et seq of the Machinery and Occupational Safety Act 6 A of 1983, which has not yet come into operation.

Having laid this basis, Mr *Brassey* went on to deal with the facts of the dispute in order to show (*a*) that the individual employees had a bona fide apprehension of danger and (*b*) that the respondent failed to reassure the individual applicants that their fears were unfounded. B

The allegations in the applicants' sworn representations is that the individual applicants had a 'reasonable apprehension' that the area in question was not safe and that it was incumbent upon the respondent to take reasonable steps to reassure them of its safety through the agency of a person whose credibility was not compromised by reason of his C position, involvement or attitude. In answer to a question whether he was equating bona fides with reasonableness, Mr *Brassey* was inclined to agree that he was doing so. He regarded reasonableness as a particular state of mind and eschewed reasonableness as meaning an objective D appraisal of the conditions in the mine with the astuteness of an expert.

The dispute in question deals with a weighty matter, namely the safety to life and limb of mine workers working in a carbon leader stope (no 14.30) some 1,3 kilometers below the surface. It is common cause that mining is a hazardous industry in which fatalities and injuries occur. It E may be accepted that the individual applicants' contracts of employment with the respondent incorporated an implied term that the respondent is obliged to take reasonable care for the safety of their employees. See *Barker v Union Government* 1930 TPD 120 at 128–9, where Tindall AJP said: F

'I am not aware of decisions in our courts in which the limits of the master's duty to guard dangerous machinery are laid down. But the following statement of the law in the American case seems to me in accordance with the principles of our law: "It was the unquestioned duty of the defendant to exercise ordinary care and foresight to provide safe machinery and a reasonably safe place in and about G which the helpers and other labourers were required to work. But the question of the fulfilment of his duty must be tested by the experience of employees who are themselve in the exercise of due care and vigilance, and not with reference to those who are themselves either negligent or the unfortunate victims of simple and unaccountable accidents. The fact that a labourer sustains a serious injury in the place of his service has no necessary tendency to prove the machinery unsafe H or the place unsuitable. No machinery can be deemed safe for those who are thoughtless and inattentive or reckless and venturesome. Pure accidents will also continue among the inexplicable factors in the problem of life. Again, the fact that the accident might have been avoided by the exercise of extraordinary precautions on the part of the defendant has no necessary tendency to prove that I the existing conditions did not meet the requirements of reasonable safety. Absolute safety under all circumstances is not guaranteed to the labourer by the contract of employment. The employer is not an insurer. He is not found to furnish the safest machinery, nor to provide the best possible methods for its

operation, in order to relieve himself from responsibility. He is only required to furnish instrumentalities that are reasonably and ordinarily safe and well adapted to the purpose for which they are designed."—See 36 ALR note p 1480.'

Reference may also be made to an article by Adrienne Scott, 'Safety and the Standard of Care' (1980) 1 *ILJ* 161, especially at 182.

The peculiar circumstances of the mining industry must not be left out of account. The conditions underground, more particularly the physical work site at 14.30 stope, are such that the inherent danger in working that area can at best be controlled and seldom eliminated. This does not detract from the obligation to take reasonable precautions. Under certain circumstances the conditions may be so hazardous that an area ought not to be mined at all. In seeking to control the inherent dangers of mining, the legislature has seen fit to provide for the Mines and Works Act 27 of 1956 and the regulations promulgated thereunder. Counsel for both parties were agreed that I could have regard to the Mines Act and regulations, thereby eliminating the difficulty adverted to in *Looyen v Simmer & Jack Mines* 1952 (4) SA 547 (A).

At this stage it is also necessary to state that it is Mr *Plewman's* contention that the regulations promulgated in terms of the Mines and Works Act are incorporated in the individual applicants' contracts of employment. A similar contention relating to the Coal Mines Act 1911 was raised in *Browning v Crumlin Valley Collieries* [1926] 1 KB 522. Greer J dealt with the submission, as 527, as follows:

'It was contended on behalf of the plaintiffs that there was an implied undertaking in the contract with the employers that the defendants would comply with the statutory provisions contained in the sections of the Act above mentioned. In my judgment the contract contained no such implied term. I do not think it would have occurred to any one that it was necessary to make the statutory provisions in question part of the contract. Certain absolute duties and liabilities are expressly imposed on the owners by the statute, and it cannot be assumed that either party, still less both of them, must have intended that they should be part of the contract. It follows that whatever may be the effect of the statute apart from the contract, there was no absolute duty under the contract to comply with the provisions of the sections mentioned in the statement of claim.'

The regulations are, in my view, binding as delegated legislation and not as contractual obligations. If the regulations and the exemptions are examined then it is apparent that it provides authority for the proposition advanced by Mr *Brassey* on the basis of foreign legal systems. Mr *Brassey* did not seek to rely on the regulations as authority for his case; rather he categorized the regulations as a code providing for minimum standards and not appropriate standards. to my mind it is difficult to resist the impression that the regulations provide, at least initially, absolute protection to mine workers such as the individual applicants.

The applicants, it will be recalled, are non-scheduled persons. Regulation 8.3.2 provides:

'If any non-scheduled or other person working under the supervision of a ganger or miner complaines that the part of the working place where he is required to work is dangerous, the ganger or miner shall withdraw all workmen therefrom until he has personally, with such assistance as he may require, made it safe, or

until he has had it examined by another person who shall be the holder of a Blasting Certificate and has obtained the concurrence of such person as to the safety of such part. Until he has complied with this requirement, the ganger or minor shall take all reasonable precautions to prevent the entry of any person to the part complained of, except such persons as are necessary to carry out or assist in carrying out the examination of the making safe.'

All that the non-scheduled miner is required to do is to complain that the part of the working place where he is working is dangerous, and then the ganger is required to withdraw all workmen from that place. There is no need for the workmen to have a 'reasonable apprehension of danger'.

The regulations make no mention of whether a complaint must be bona fide. Presumably a complaint must be bona fide; but it would seem that the complaint must be acted upon and the mala fides of a complainant, if this be the case, may be dealt with after the regulation has been complied with.

However, for the purposes of these proceedings, it is, in my opinion, sufficient that a complaint that a working place is dangerous should be made in order to set the evacuation machinery into operation. In this respect there is a parallel between the regulations and s 7 of the National Labor Relations Act (U S A), which only requires a worker to perceive his working conditions to be unsafe. See K A Gellens 'Resolving Industrial Disputes: To Arbitrate or not to Arbitrate' 1983 *Labor LJ* 149 at 149.

The right referred to in reg 8.3.2 is an individual right. A collective right relating to safety or health is to be found in s 5(4) of the Mines and Works Act, which reads:

'Where any organization of workers at any mine or works or the head of a State department or the mine safety committee submits a request, in writing, setting out the reasons for an inquiry to be held into any occurrence or condition at such mine or works affecting or likely to affect the safety or health of persons, the Government Mining Engineer shall cause such occurrence or condition to be investigated and, if he deems it expedient, he may depute any inspector of mines or machinery or any other Government officer to hold an inquiry into such occurrence or condition.'

It is noteworthy that s 5(4) of the Mines and Works Act obliges the Government Mining Engineer to cause the alleged occurrence or conditions affecting or likely to affect the safety or health of persons to be investigated. Although the complainant must set out in writing the reasons for an inquiry, the Government Mining Engineer is not at liberty to decline to hold an inquiry because he is of the opinion that the complaint is not justified. I leave out of account the possible action available to the Government Mining Engineer where the complaint is patently frivolous. In general see B L S Franklin and M Kaplan *The Mining and Mineral Laws of South Africa* (1982) 548 et seq.

The Mine Safety Committee referred to in s 5(4) of the Mines and Works Act is an industry-wide committee and does not exist for or in respect of a particular mine.

Once a complaint of unsafe working conditions has been made, the ganger or miner is obliged to withdraw all the workmen from the area. It

follows that the workmen are not obliged to work in the area complained of. The right not to work in the area complained of is not necessarily, and will ordinarily not be, for an indefinite period. This is a factual question. The applicants do not dispute this proposition.

In terms of reg 8.3.2 the ganger or miner must take all reasonable precautions to prevent the entry of any person to the part complained of. The exception will be dealt with further on. The ganger or miner is then obliged, with such assistance as he may require, to make it safe or have it examined by another person who shall be the holder of a blasting certificate and obtain the concurrence of that other person as to the safety of the part in question.

It is apparent that, if the other person or persons concur in the safety of the area, the area may be worked. It may also be necessary to 'make safe' the area before it is fit to be worked in. The ganger or miner personally, with such assistance as he may require, is obliged to make the area safe.

The making safe procedure, it is common cause, requires a limited number of workers to enter an area and carry out such operations as may be dictated by the circumstances. In the course of making safe it may be necessary, by way of example, to install or reinstall packs, bar down loose rocks or brows and put in supports. The situation may also be encountered where the area is so unsafe that it would be impermissible even to attempt to make the area safe.

The undisputed facts show that:

(*a*) on 16 September 1983 the individual applicants and others complained that the area in which they were to work namely 14.30 stope was hazardous and unsafe. The complaint was made underground. The area was not worked;

(*b*) the complaint was repeated in Bickford's (the shift boss) office the same day;

(*c*) on the next working day Bickford and the ganger Jacobs, who are each the holders of a blasting certificate; inspected the area together with the team leaders;

Completely contrary to the regulations but no doubt in order to alleviate their fears, the gang, understandably, followed the inspection party. There is an allegation in the applicants' sworn representation that Bickford did not inspect the gullies but stood to one side. The reply seems to indicate that Bickford did in fact enter the gullies. In any event, the gang members, with the exception of the team leaders, refused to accept Bickford's finding that the area was safe to work in. I have not overlooked the considerable amount of acrimony which accompanied the tour of inspection. The gang members did not work in the area that day;

(*d*) that afternoon the gang members repeated their complaint that 14.30 stope was unsafe to Van Staden (the mine captain) and others present at the meeting. Van Staden (the holder of a blasting certificate) undertook to inspect the area with a view to evaluating its safety;

(*e*) Van Staden and Bickford went underground early on 20 September 1983 but did not inspect the area, for reasons set out in the summary;

(*f*) that same day a meeting was held with Close, the underground manager, and other management personnel. The complaint was voiced that the area was unsafe. It was agreed that an inspection would be conducted by Bailie (an assistant manager), Close, Van Staden, Bickford, two section team leaders and the second and eighteenth applicants. The inspection party was to go underground at 19h00 that day;

(*g*) the aforementioned inspection party, excluding the second and eighteenth applicants, proceeded underground and came to the conclusion that the area was safe. Bailie, Close, Van Staden and Bickford were each holders of a blasting certificate;

(*h*) the individual applicants and some other gang members did not accept the finding and were not prepared to work in the area;

(*i*) on 21 September 1983 a further inspection of the area, led by Vorster, the Chief Inspector of Mines for the Carletonville district, was held. He was accompanied by Spencer, Bailie, Close, Van Staden, Bickford, three senior team leaders and a shift boss' assistant. Vorster, save for a few aspects which required making safe, was satisfied with the general safety of the area.

It was at this stage, at the latest, that the complaints of the individual applicants had been properly investigated in terms of the regulations and, once the area had been made safe, the individual applicants would have been obliged to return to work or, put differently, were no long entitled in terms of the regulations to refuse to work in the area. It is common cause that the applicants persisted in their refusal to work in the area.

In terms of their respective contracts of employment the order to return to work could not be construed as an unlawful or unreasonable order which could be disobeyed with impunity.

The respondent accordingly dismissed the individual applicants on 22 September 1983.

The applicants' case can be approached on the basis that the complaint by the individual applicants that the 14.30 stope was unsafe, was made in good faith though clearly mistakenly. The applicants accept that the right to refuse to work in the area could be of a temporary duration. The applicants, however, claim that the circumstances whereunder they would be obliged to return to work in the area are not governed by the regulations, which in argument were said to be minimum and not appropriate standards.

The applicants allege that they were only obliged to return to work when the respondent had taken reasonable steps to reassure employees who feared for their safety that their fears were unfounded. Such reassurance, it is submitted in the applicants' heads of argument

'can only be given by a person

(*aa*) who has and is regarded by the relevant employees as having the requisite expertise and independence to form a valid and unbiassed opinion on matters of safety;

(*bb*) and who with full knowledge of the nature of the employees' complaints, had investigated those complaints and come to his conclusion.'

The submission is made that neither of these requirements were satisfied. I assumed, for it was not framed in this manner, that the contention is that an employer who fails to act in the manner suggested by the applicants is guilty of an unfair labour practice.

I propose to examine this contention because, if it does not prima facie amount to an alleged unfair labour practice in terms of the Labour Act, the applicants will have failed on this leg of their application.

What is essentially in issue here is the interrelationship of the concept of an unfair labour practice and a statutory code providing for health and safety in a particular industry. Mr *Brassey* submitted that there was no need to distinguish between the mining and any other industry. Whether or not he is correct in his submission is irrelevant, because the legislature has seen fit to distinguish between Mines and Works on the one hand and Factories and Works on the other hand.

In seeking to establish the interrelationship between the Labour Relations Act and the Mines and Works Act, it is proper to have regard to the dictum in E p *the Minister of Justice: in re R v Jekela* 1938 AD 370 at 377 where the following passage from Maxwell on *The Interpretation of Statutes* at 136 was approved:

'The work of the legislature is treated in the same manner as that of any other author, and the language of every enactment must be construed as far as possible in accordance with the terms of every other statute which it does not in express terms modify or repeal. The law, therefore, will not allow the revocation or alteration of a statute by construction when the words may be capable of proper operation without it.'

See also L C Steyn *Die Uitleg van Wette* 5 ed (1981) 188–9.

The Mines and Works Act is specifically designed to ensure the health and safety of mine workers. Franklin and Kaplan (supra) at 539 have expressed the aim of the Act as follows:

'Mining is a hazardous occupation. It is therefore not surprising that the legislature has made elaborate provisions for ensuring the safety of personnel engaged in it and for protecting the underground and surface works and installations in the mines. These provisions are contained in the Mines and Works Act 27 of 1956 . . . and the regulations made thereunder. The Act consolidates and amends the laws relating to the operation of mines and works and the machinery used in connection with these activities. The provisions contained in the Act and the regulations have clearly been based upon a vast reservoir of practical knowledge and experience of mining, and the regulations in particular are constantly being amended so as to cater for improvements in mining technology and administrative techniques.'

The Labour Act must therefore be harmonized with the Mines and Works Act and regulations. It is not difficult to conceive of an application of the Labour Act to the field covered by the regulations. A breach of the regulations may, for example, amount to an unfair labour practice if the breach or practice has or may have the effect that any employee or class of employees' physical welfare is prejudiced or jeopardized thereby.

Thus, if a non-scheduled worker were to complain of the existence of an unsafe work place and if the miner or ganger were to refuse or fail to inspect the area and instead compel the worker to work in the alleged unsafe work place, that would amount to an unfair labour practice. It is also conceivable that an unfair labour practice may exist even where there has been compliance with the regulations. However, that is not the case here. The failure by the respondent to allow an independent, unbiased expert who is regarded by the employees as having the abovementioned qualities to investigate the employees' complaints and presumably inspect the area in question does not even prima facie amount to an alleged unfair labour practice in the circumstances of this case.

To graft an obligation of the type contemplated by the applicants onto the existing regulations, which provide that a non-scheduled worker is entitled to withdraw from a working place on complaining that it is unsafe, would be to require this court to legislate piecemeal in an area within which the legislature has made elaborate provision. It is a function which this court is not entitled nor equipped to undertake. An obligation such as contended for by the applicants would seem to be a claim or right 'to challenge, delay or, on occasion, veto management decisions on safety grounds'. See R W L Howells 'Worker Participation in Safety—1. The Development of Legal Rights' (1974) (3) *ILJ (UK)* 87 at 88.

In a sense the applicants' solution is the counterpart to what is viewed as the management's prerogative to decide on matters of health and safety. This argument overlooks the factual and legal situation which was instituted by the legislature, a point which Mr *Plewman* emphasized. It is the legislature which determines who is competent to inquire into the safety of a work place or other area in such circumstances as were present in the instant dispute. The regulations provide that the persons must be a miner or ganger who must personally make the area safe with the necessary assistance of other workers. The miner or ganger may be obliged to have the area examined by the holder of a blasting certificate. Naturally there is a correlation between management personnel and the chain of responsibility for safety in a mine. This must, inevitably, be the case because a mine owner or lessee could not employ management personnel to fulfil statutory duties unless the personnel were qualified in terms of the regulations.

The chain of responsibility is summarized and described by Franklin and Kaplan (supra) at 551 as follows:

'The legislature has created a chain of responsibility for contraventions of the Act and the regulations on the part of persons employed at a mine or works from the manager downwards, but in so doing it has gone out of its way to preserve the personal responsibility of the manager.

A "manager" is defined as the scheduled person appointed to be responsible for the control, management and direction of a mine or a works and includes the term "general manager" (ch 1, definition (15)). Regulation 2.5.1 provides for his appointment by the mine owner. In terms of reg 2.6.1 the manager is empowered to appoint "subordinate managers" to assist him in such control, management and direction. Such subordinate or assistant managers have, to an extent which must be clearly defined in their letters of appointment, the same

responsibilities under the regulations as the manager, provided that their appointment "shall not be taken to relieve the manager of any personal responsibility under the regulations" (proviso to reg 2.6.1). In terms of reg 2.14.1, the manager may appoint mine overseers (underground managers) to assist him, usually in specific sections of the mine. In terms of reg 2.14.3.1 a mine overseer has all the duties and responsibilities of the manager, again subject to the proviso that such appointment shall not be taken to relieve the manager of any personal responsibility under the regulations.'

In view of my conclusion that the applicants have not established on a prima facie basis a jurisdictional fact relating to an alleged unfair labour practice, it is unnecessary to deal with the various categories of reassurance put forward by the applicants. It is significant that the applicants propose that the most satisfactory source of reassurance was the Government Mining Inspector. the inspection was not, however, accepted mainly because of the wide chasm of distrust which opened between the individual applicants and the management.

I turn to the next contention of the applicants, namely that the dismissal of the individual applicants was procedurally unfair. The submission was made that the need for procedural compliance has been recognized in English law since the statutory unfair dismissal jurisdiction was introduced. It was also submitted that procedural compliance had also been recognized in this court as a requirement for the fair dismissal of an employee. Reference was made to *Metal & Allied Workers Union v Stobar Reinforcing* (1983) 4 *ILJ* 84 at 91G and *Van Zyl v O'Okiep Copper Company* (1983) 4 *ILJ* 125 at 135E–H.

It was pointed out that the respondent has procedures for the holding of 'internal disciplinary inquiries which impose penalties appropriate to the failure to observe prescribed procedures'. Prima facie the aforementioned inquiry procedure does not seem designed to conduct an inquiry prior to dismissal, such as was contended for by the applicants. The applicants submitted that if the aforementioned inquiry procedure was unsuitable the respondent ought to have

'held an inquiry into the refusal to work. An important reason for holding an inquiry is to dispel misunderstandings and reconcile differences. At such an inquiry, somebody from the respondent's management could have testified to the safety of the area in question. He could have been questioned by the individual employees, and his answers would have gone far to allay their fears. Once they understood that the work place was safe and retracted their refusal to work, there could have been little if any reason to press for their dismissal' (applicant's heads of argument).

It is important that it be borne in mind that the procedural compliance contended for by the applicants is made under the allegation of an unfair labour practice. The definition does not specifically require 'procedural compliance' or any specific form of inquiry before a dismissal for serious misconduct takes place.

The decisions referred to by Mr *Brassey*, ie *Stobar*, *Fodens** and *O'Okiep*, all made reference to Recommendation 119 (1983) of the

* *UAMAWU v Fodens* (1983) 34 *ILJ* 212.—Eds.

International Labour Organization and particularly to para II(11)(5) which reads:

'Before a decision to dismiss a worker for serious misconduct becomes finally effective, the worker must be given an opportunity to state his case promptly, with assistance where appropriate of a person representing him.'

The question here is, have the applicants prima facie established an alleged unfair labour practice? In other words have the applicants prima facie shown that there was, for example, a change in a labour practice or a refusal to comply with agreed dismissal procedures established by custom, practice, contract or collective agreement.

In *Stobar's* case, at 90A, Van Schalkwyk, presiding, said:

'The court holds the view that in the event of a practice existing as had been the case in the present matter the more the need arises to adhere to such a practice in an attempt to prevent labour unrest.'

In *Fodens* the question of misconduct warranting summary dismissal was not in issue. In *O'Okiep's* case the court was not seized with an application for status quo relief based on an alleged unfair labour practice.

At the hearing, Mr *Brassey* correctly conceded that the definition of an unfair labour practice does not require a specified procedure. It does not lie within the competence of this court to lay down rules of procedure which an employer should follow so that a dismissal will be fair. The performance of such a function would amount to blatant legislation.

In this case the applicants have conceded in effect that the refusal of the individual applicants to work in the 14.30 stope was not objectively justifiable. No real purpose would be served in this case by ordering the restoration of the labour practice which existed prior to its introduction for there is no dismissal procedure which can be restored.

Assuming that it was necessary to hold an inquiry then the following factors are relevant:

(*a*) I L O Recommendation 119 only requires an employee to be represented at an inquiry 'with assistance where appropriate'. Mr *Brassey* expressly disavowed any suggestion that the union should have been entitled to represent the individual applicants at any such inquiry.

(*b*) The I L O Recommendation requires a prompt inquiry. Mr *Brassey* conceded that the inquiry need not be a formal inquiry.

(*c*) Mr *Brassey* argued that the individual employees should have been informed of the charge. The individual employees, however, were left in no doubt that the 'charge' was their refusal to work. The undisputed facts show this. Furthermore the consequences of their refusal to work were brought home to them very forcibly.

(*d*) Mr *Brassey* said that the person presiding at the inquiry should be someone independent and away from the events in question. He suggested this person could be the personnel manager or more senior management. It is inconceivable that a personnel manager would have been competent to preside over an inquiry involving mine safety unless he had some special qualities.

Mr *Brassey* suggested that Mr Spencer, the acting mine manager, may have been an appropriate choice. Mr Spencer did in fact take part in events. He was present at a meeting with the union on 21 September. He offered to allow the workers another opportunity of pointing out their complaints to senior management underground. This was not acceptable to the union for the main reason that the workers no longer had any confidence in the management. The applicants do not explain how the envisaged inquiry could have been conducted without the co-operation of the individual applicants.

(*e*) Prior to the dismissal of the applicants Mr Spencer informed the individual applicants and some other members of the gang that the Chief Mining Inspector had been underground and found the area to be safe. The individual applicants refused to accept that the inspection had taken place. Other members of the gang were, however, satisfied and elected to return to work.

(*f*) It is not without significance that Ramaphosa told Spencer that if the union was satisfied that the area was safe the workers would be satisfied.

The conclusion which I reach is that substantially an inquiry with the characteristics envisaged by the applicants was held. Spencer's offer of a further 'inquiry' was rejected and could not have been held because of the lack of co-operation and absence of confidence in the management by the individual applicants.

The result is that the applicants have not on a prima facie basis established a jurisdictional fact relating to an alleged unfair labour practice. I may add that even if I accepted every contention of the applicants relating to the alleged unfair labour practices, ie the substantive unfairness of the dismissal and the procedural invalidity, in the exercise of the discretion conferred on this court by s 43 of the Labour Act, I would refuse the applicants the relief they seek based on an alleged unfair labour practice.

For these reasons the prayer set out in para 20.1(*b*) of the application was refused.

The Termination of the Individual Applicants' Employment

I turn to the second leg of the application, which is based on a dispute concerning the termination of the employment of the individual applicants. See s 43(1)(*a*) of the Labour Act.

It is common cause that the respondent terminated the employment of the individual applicants on account of their refusal to work on 22 September 1983. The individual applicants wrongfully refused to obey a legitimate order to return to work in 14.30 stope. The gullies in that stope would clearly, as the facts show, have to be made safe before actual working operations could commence. The respondent, in my opinion, lawfully terminated the individual applicant at common law.

However, notwithstanding lawful termination of contract of employment the Minister of Manpower is empowered to establish a conciliation

board to consider and, if possible, settle the dispute, provided the Minister is otherwise satisfied as required by s 35 of the Labour Act. The Minister in respect of the issue under consideration must be satisfied 'that . . . a dispute exists in regard to any matter concerning the relationship between employer and employee'. See s 35(4)(*a*) of the Labour Act. The observations made by Watermeyer J in *Cape Town Municipality v Minister of Labour* (supra) at 779H are relevant. It was said:

'An employer such as a municipality may lawfully dismiss an employee and although the legality of that dismissal is, as in the instant case, not in dispute, the justification for such dismissal and the circumstances and terms upon which it occurred and its correctness, bearing in mind the equities of the case, are matters which can, and in the present case will have to be enquired into and resolved by the conciliation board and/or by arbitration.'

See also *Frankfort Municipality v Minister van Arbeid* 1970 (2) SA 49 (O) at 56H–57B.

The conclusion which must be drawn is that the applicants have satisfied the court in relation to the jurisdictional facts referred to in s 43(1)(*a*) of the Labour Act, namely the existence of a dispute concerning the termination of employment of employees. The other jurisdictional facts which do not relate to the aforementioned dispute are present and need not be mentioned individually.

The question now arises whether the discretionary power to make an order in terms of s 43(4)(*b*)(i) of the Labour Act should be exercised in favour of the individual applicants. In my opinion it would be in accordance with justice and reason to reinstate the seventeen individual applicants in the respondent's employ on terms and conditions no less favourable to them than those which governed their employment prior to the termination of their employment on 22 September 1983. Further in terms of s 43 of the Labour Act the order should be made retrospective to 22 September 1983. The duration of the order is regulated by the relevant subsections of s 43 of the Labour Act.

The exercise of the discretion vested in this court is based on the cumulative effect of the following considerations. The order in which the reasons appear are not necessarily indicative of their importance.

(*a*) The dispute concerning the termination of the employment of the seventeen individual applicants is prima facie suitable for consideration by a conciliation board. The dispute concerns no trivial issue, but one which concerns every underground worker namely safe working conditions. The fact that, objectively, the area in question was found to be safe for mining does not detract from this fact. Moreover the particular area 14.30 stope was a remnant area, ie an area where the risk factor is higher than in other areas of the mine.

(*b*) The individual applicants were prima facie motivated by fear for their safety in refusing to obey a legitimate order to return to work. Mr *Plewman* in argument strongly contended that the individual applicants were mala fide in alleging that conditions in the 14.30 stope were dangerous. Mr *Plewman* said that the applicants had put

forward three different grounds for saying that the area was unsafe. He said that the allegations of the applicants had been proved to be untruthful. Certainly the allegations made by the applicants were not substantiated, but this does not necessarily show that the individual applicants were mala fide. Mr *Plewman* pointed to the fact that the painting on the hanging wall put on some two years previously was still to be seen. This indicated an absence of rock falls and showed mala fides. He argued that this points to the fact that, objectively, there had been no rock falls, save one.

The fact that this phenomenon was only noticed forty days after the event despite numerous inspections in the meanwhile does not make it the clincher it may otherwise have been. To decide credibility on sworn representations alone, which is what is sought when a finding of mala fides is demanded, is difficult if not impossible. In my opinion, which is only a prima facie one, the individual applicants were motivated by fear, so much so that they preferred to believe rumours, which were fuelled by the series of incidents in the area involving injuries, than objective findings by management or even the Chief Inspector of Mines. Certainly considerable friction and mistrust were generated in the space of a few days prior to the dismissal of the individual workers. The fact that the team leaders and other gang members returned to work does not carry much weight in the absence of evidence as to their motives.

(*c*) There is also the strange reticence on the part of the respondent in failing to inform not only the union but, more importantly, the individual applicants about the impending inspection by the Chief Inspector of Mines on 21 September 1983. Had the individual applicants been informed, the dismissals may have been avoided. There is no doubt that a deliberate decision was taken not to inform the union or the individual applicants of the impending inspection.

(*d*) Had the second and eighteenth applicants been paraded so that they could accompany the inspection party on 20 September, events may have turned out differently. The respondent has deliberately elected not to explain the 'parading procedure'. The consequence is that the applicants' version may be accepted as correct.

(*e*) The polarization between the management and the individual applicants and the emotions which were generated may well have dissipated sufficiently to allow both parties the opportunity of utilizing the conciliation machinery provided by the Labour Act.

(*f*) In this particular case the prejudice which the applicants will suffer if an order is refused outweighs the prejudice which the respondent would suffer if an order is granted.

The applicants averments of prejudice went unchallenged. The averments are that the individual applicants were suffering hardship.

* They rely entirely on their remuneration for their support.

* In the current economic climate alternate employment is very difficult to obtain particularly if employment of a temporary nature is sought.
* The individual applicants are all migrant workers whose right to remain in the urban area depends on the continuity of their employment.

The respondent did point out that some contracts of various individual applicants had expired but did not explain why they were still employed on 22 September 1983.

(*g*) Finally I am influenced by the fact that the applicants would be obliged to earn their keep and now have no reason to withhold their labour. The respondent is of course at liberty to pay the individual applicants their remuneration without requiring them to work. See s 43(7) of the Labour Act. If there had been any indication that the individual applicants would continue to withhold their labour at this stage, this factor would have weighed heavily against them.

Costs

Section 43(4)(*c*) of the Labour Act provides:

'The industrial court shall not make any order as to costs in respect of any proceedings brought before it under this section, save on the grounds of unreasonableness or frivolity on the part of a party to a relevant dispute.'

The meaning of frivolous and unreasonableness have been considered in ITC 1316 42 SATC 229 at 234. Although the provision under consideration in that case differs from s 43(4)(*c*) of the Labour Act, the discussion of the concepts by Squires J is extremely helpful. The learned judge said:

'The meaning of "frivolous" in a legal connotation is "manifestly futile", according to the *Shorter Oxford English Dictionary*; and, in the absence of any authority to the contrary, I propose to adopt that meaning of it here. I do so particularly as it seems to me to adequately reflect the converse of "unreasonableness" on the part of the Commissioner in the same section which may also attract an award of costs against him, and for the reason that the legislature must have intended the penalty of costs to attach to the parties on an equal basis of blameworthy conduct. It is, however, equally clear that both words mean something more than merely a case which is eventually lost, and even convincingly lost; and, so far as the appellant is concerned, I think it must at least mean that when he set out to pursue the claim despite the Commissioner's disallowance, he did so on grounds which were quite clearly not going to avail him, not merely that he had a case which might, or even probably, would not succeed.'

Mr *Brassey* left the decision relating to costs in the hands of the court. Mr *Plewman* sought an order for costs against the applicants on the basis of unreasonableness on the part of the applicants.

Where the applicants have been successful it can hardly be said that they have been unreasonable in bringing the application. The respondent's opposition was not, to my mind, frivolous or unreasonable and, moreover, the respondent was successful in its opposition on certain

aspects. I have not overlooked the fact that the 'unreasonableness' need not be only in relation to the application. The conduct of both parties to the dispute do not admit of such a differentiation as to justify a special order of costs as is contemplated by s 43(4)(*c*) of the Labour Act. In the result no order is made as to costs.

Applicants' Attorneys: *Halton Cheadle & Assocs*, Johannesburg.
Respondent's Attorneys: *Bowman, Gilfillan & Blacklock*, Johannesburg.

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NUM & others v Chrober Slate (Pty) Ltd
[2008] 3 BLLR 287 (LC)

Division: Labour Court, Johannesburg
Date: 17/09/2007
Case No: **JS 245/06**
Before: GN Moshoana, Acting Judge

Application in terms of section 191(5)(b)(ii) of the LRA

Strike - Dismissal - Employees claiming that they were not on strike but refusing to work because of unsafe conditions - Unsafe conditions not proved - Strike accordingly unprotected and dismissal of strikers fair.

Editor's Summary

The respondent operates a slate mine and production facility. Raw slate is excavated from a quarry and transported to a factory, where it is cut and polished. On 7 November 2005, the quarry workers refused to release the raw slate until a front-end loader cleaned the quarry. They persisted with their refusal for a full week, resulting in a cessation of production at the factory. On 14 November 2005, the respondent issued an ultimatum to all its workers, and, three hours later, dismissed them. The company conceded that the factory workers had been unfairly dismissed, but maintained that the dismissal of the quarry workers was fair. The applicants denied that any of the employees had engaged in a strike.

The Court held that the quarry workers had continued to excavate slate during the week in question, but merely refused to release the product. However, there was no evidence to support their submission that the mine was unsafe. The applicant could accordingly not rely on section 23 of the Mine Health and Safety Act 29 of 1996, which permits workers to leave an unsafe mine. Since that Act did not apply, the quarry workers could not claim that they were not on strike.

Turning to the fairness of the dismissal of the quarry workers, the Court held that because their conduct was deliberate and contrary to the advice of their own union, and they had also ignored an ultimatum, their dismissal was substantively and procedurally fair. However, the respondent had properly conceded that the factory workers were unfairly dismissed.

As to relief for the factory workers, the Court held that, although it had a discretion to reinstate them retrospectively from any date to the actual date of dismissal, their union had not discharged its duty to assist the respondent to normalise the situation. Had it done so, the strike would not have continued and none of the workers would have been dismissed.

The reinstatement of the factory workers was made retrospective for a period of six months preceding the date of the award.

Judgment

Moshoana AJ:

Introduction

[1] The respondent is a slate mine operated by one Christoffel Johannes Oberholzer in the area of Groot Marico around Zeerust. The respondent operates on two sections, namely the quarry and the factory. At the quarry, the stockmen excavate raw materials ("slate"). At the factory, factory workers cut the slates and polish them. If no slates are produced at the quarry, the production at the factory gets affected by such.

[2] The matter before court relates to dismissal of about 42 employees on the basis of their participation in an unprotected strike action. About 20 of those dismissed were stockmen ("schedule A"), 18 of those were dayshift factory workers ("schedule B") and 4 of those were nightshift factory workers ("schedule C").

[4] The first applicant being the National Union of Mineworkers and the individuals challenged the fairness of the dismissal.

[Editorial note: Paragraph numbering is as per original transcript.]

Facts

[5] It is common cause that, on 7 November 2005, the stockmen refused to release the slates they excavated to the factory. In view of that, Oberholzer, attempted to find out what the problem was. He was informed by the stockmen that they need a front-end loader to be engaged to clean the place to enable them to work. Oberholzer informed them that the loader would be arranged before end of the week. The stockmen did not want to believe that and insisted that, until the loader is brought, they will not release the slate. The evidence of the respondent's witness pointed that the stockmen continued to excavate until 22 November 2005, whereas the applicant's evidence suggest that no work was done by the stockmen after 7 November 2005. I shall return to this fact later.

[6] The refusal to release the slates endured until 14 November 2005 when the stockmen, together with the factory workers, were dismissed.

[7] On 8 November 2005, AP de Jongh, on behalf of the respondent, communicated with the first applicant to intervene on the issue of refusal to release slates. There was communication between Ntlakane of the first applicant and De Jongh whereby an agreement was reached to meet on 17 November 2005. De Jongh wrote to Ntlakane and informed him that the intervention is urgently required; it cannot wait for 17 November 2005 as the respondent was losing business as a result of the actions of the stockmen. There was no reaction to this request. On 11 November 2005, Hatting issued a notice to the first applicant indicating that its members are engaged in a concerted retardation and obstruction of work. In the notice he indicated that should the action continue on Monday, 14 November 2005, an ultimatum shall be issued and its ignorance would lead to summary dismissal.

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[8] On 14 November 2005, the action continued. Ntlakane arrived at the premises of the respondent. An ultimatum was issued to the employees. The first ultimatum was issued at about 9am, the second one was issued at or about 10:05am. At or about 12pm, all the employees were notified of their dismissal.

[9] In so far as the factory workers are concerned, it was the evidence of Oberholzer that, at or about 11am, they had finished work as there was no more work to be done owing to the actions of the stockmen (refusing to release slates). He further testified that he gave instructions to the 10 men at the factory to collect other slates at the nearby quarry to which they refused. He then formed a view that they are also participating in a strike action of the stockmen. He conceded that the factory workers had no demand. He further conceded that there was no reason for the dismissal of the nightshift workers in that they were dismissed long before their shifts could commence.

[10] However, Hatting testified that the factory workers had not finished their work; they stopped working after Ntlakane told them to stop. He then formed a view that they joined the strike in support of the demand of the stockmen. On the issue of the nightshift workers, he testified that their failure to report for duty at 6pm (at which time they were already dismissed) led to the conclusion that they joined the strike of stockmen and factory workers (whom have already been dismissed at that time).

[11] Ntlakane denied ever informing the factory workers to stop working. He testified that, on 8 and 9 November 2005, he spoke to one Tebogo regarding the refusal to release slates. He warned him of their actions but they refused to heed his advise. He could not confirm whether the stockmen stopped working due to the alleged unsafe work conditions. He only responded to the letter of Hatting, dated 11 November 2005, on 14 November 2005, when he returned to the office from the respondent. He confirmed refusal to sign and accept the ultimatum. He testified that he was not there for ultimatums. He was there for the safety issue of the members.

[12] Two of the stockmen testified, both gave different accounts of the stoppage. One testified that it was from the beginning of November, whereas the other testified that it was shortly after 11am on 7 November 2005. One of them took photographs of the quarry in November 2006 and attempted to show that the quarry was unsafe. They all testified that they never left the quarry throughout. One testified that they sat on their slates, whilst the other testified that they were about 11 metres away from the workstation.

[13] On the first day of the trial, the court was asked by the parties to conduct an inspection *in loco*. In the court's view, that was totally unnecessary, in view of the fact that the quarry had changed in the past two years and the alleged unsafe places could not be identified anymore. It was truly a worthless exercise. Nothing was achieved by this exercise.

[14] The photographs entered into evidence were of no assistance at all. They were taken a year after the dismissal. The quarry had changed in form as it incorporated the neighbouring quarry.

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[15] Tsetse testified that the factory workers never supported the demands of the stockmen. They were surprised when they got informed that they were dismissed. She refuted allegations that Ntlakane instructed them to stop working.

Argument

[16] Adv Bekker for the respondent correctly conceded that the dismissal of the factory workers was unfair. He urged the court to grant them less backpay due to the conduct of the first applicant in not assisting to deal with the problem. On the issue of the stockmen, he argued that their dismissal is both substantively and procedurally fair. He contended that, their action to refuse to release slate in itself amounts to a strike action as defined in section 213 of the Labour Relations Act 66 of 1995 ("the Act/LRA"). He further contended that by the stockmen's own admission, they stopped working from 7 November 2005, and that amount to a strike as defined.

[17] He further contended that enough opportunity was given to the first applicant and the stockmen to reflect on their actions and to return to work. They failed to heed the ultimatum. Accordingly, the dismissal is fair.

[18] Adv Malan for the applicants argued that the backpay for factory workers should not affected by the conduct of the first applicant. He, in turn, argued that the stockmen did not engage in a strike. They had a common law right to withdraw labour as they were working in an unsafe environment.

[19] In his argument, refusal to work under those circumstances does not amount to strike. He abandoned his submission that relied on the provisions of section 23 of the Mine Health and Safety Act 29 of 1996, in view of the definition of "working place" in that Act.

[20] He concluded that the dismissal of the stockmen is also substantively unfair as there was no fair reason for their dismissal. He further submitted that the fact that the respondent did not investigate the safety issues renders the dismissal procedurally unfair.

Analysis of facts

[21] Central to this matter lies two factual questions, namely:

1. Did the stockmen work on 7 November-22 November 2005?
2. Was the workplace safe?

[22] Turning to the first question, the evidence of the respondent's witnesses is that the stockmen proceeded to produce slate throughout but held onto it until their demand was met.

[23] The stockmen, as pointed out earlier, gave conflicting versions. Joseph Ratshwene testified that since the 1 November 2005, they stopped excavating slate until their demand of the loader was met. Tebogo Segwabe on the other hand testified that from about 11am on 7 November 2005, they stopped working.

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[24] This evidence does not, in the court's view, assist the stockmen's case. Even if I were to find, which I am not, that they indeed stopped working, that stoppage amounts to strike and it ought to have been proceeded by certain procedural steps before being embarked upon. The evidence of Reyneke that, on 22 November 2005, they had to count number of slates to determine what is due to the stockmen was not sufficiently challenged.

[25] That evidence simply points to the fact that slate was excavated ever since 1 November 2005.

[26] Further, the evidence that the tractor would remove slates almost daily and the stockmen be paid for the month's work was, equally, not sufficiently challenged. That also leaves the court with an indelible impression that slate was indeed excavated. It does appear and, in fact, the court finds it as a fact that, the evidence to suggest that no work was done from November 2005 until dismissal was aimed at attempting to bring their conduct within the ambit of section 23 of the Mine Health and Safety Act 29 of 1996, which I shall deal with later.

[27] The applicants' statement of case leaves much to be desired. It does not attempt to spell out the fact that the stockmen stopped working. All that was alleged was that, on 14 November 2005, some of the applicants were participating in an unprotected strike action by way of a work stoppage. The only time this fact was alluded to was in a pre-trial conference held on 2 November 2006 (paragraph 4.2 under facts in dispute).

[28] In the court's view, the stockmen did, in fact, work for the period 7 November 2005-22 November 2005. The fact that they refused to release the product of their labour is common cause.

[29] Turning to the second question, the evidence of the respondent's witnesses was such that in their view (which view does not matter) the quarry was safe.

[30] On the other hand, the stockmen's evidence was that the quarry was unsafe at the time (this being their view).

[31] The photographs taken a year later do not advance the applicants' case on this point neither does the inspection *in loco*.

[32] The question whether the quarry was safe requires evidence of a technical nature, expert testimony as it were. There is no evidence to show how the working place was in November 2005.

[33] The onus is on the applicants to prove this fact. They allege that the quarry was unsafe, hence they withdrew their labour. He who alleges must prove. It cannot be so as Malan argued that the onus is on the respondent on this aspect. I agree with Bekker that the onus rests on the applicant.

[34] The following facts militate strongly against the fact that the working place was unsafe:

1. The applicants ("the stockmen") remained and continued to work (as it is found) in the unsafe working environment. Joseph testified that they were prepared to sacrifice their safety by guarding the

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slates they had excavated. Surely if the place was that unsafe one would expect them not to remain in the quarry for a period of about 14 days.

2. The issue of unsafe working conditions was raised for the first time in the pre-trial conference (paragraph 4.9). In the letter of 14 November 2005, Ntlakane only refers to working safely. This does not suggest that the place is hazardous and risky as succinctly put in paragraph 4.9 of the minutes. Surprisingly, the statement of case is completely mum about this rather important fact of the stockmen's case. This can only lead to one conclusion. The safety issue was truly an afterthought. I agree with Bekker in his submission that it is indeed an afterthought.

[35] Accordingly, no evidence has been presented to substantiate the fact that the quarry was unsafe. The court is not in a position to find that the quarry was indeed unsafe.

[36] On the contrary, there are sufficient factors referred to earlier which suggest that the quarry was indeed safe. If it was not, then the stockmen could have evacuated the quarry from day one of unsafe conditions.

The law

[37] This matter raises various legal questions. But the central ones relate to:

1. The applicability of section 23 of the Mine Health and Safety Act 29 of 1996.
2. Was there a strike?
3. Was the dismissal of stockmen substantively and procedurally fair?
4. Should the court limit backpay for factory workers?

The applicability of section 23 of the Mine Health and Safety Act 29 of 1996

[38] Other than the applicability of the section, arises the question whether if applicable does it render the strike protected?

[39] Section 23(1) gives an employee a right to leave any working place whenever circumstances arise at that working place which, with reasonable justification, appear to that employee to pose a serious danger to the health or safety of that employee.

[40] Proper reading of the section reveals that once a working place, which is defined as any place at a mine where employees travel or work, appears to that employee to pose a serious danger to the health defined as occupational health at mines, which occupational health is defined as including occupational hygiene and occupational medicine, or safety of that employee, the employee should leave.

[41] "Safety" is defined as safety in the mines.

[42] Mine is defined to mean any other place where a mineral deposit is being exploited, including mine area and all buildings, structures, machines, mine dumps, access roads or objects situated on or in that area that are

used or intended to be used in connection with searching, winning, exploiting or processing of a mineral or for health and safety purposes.

[43] In the circumstances, for the provisions of section 23 to obtain, there must be evidence to suggest that the mine posed serious danger to health and safety. There must also be evidence to show that the employee left the mine due to the danger. In the matter before me, the applicants ("the stockmen") remained in the quarry ("the mine"). This fact immediately raises serious doubts about the serious danger aspect.

[44] Accordingly, in the court's view, section 23 does not apply. In instances where section 23 applies, there could be no mention of a strike in that what will make the employee leave the working place would not be to force acceptance of a demand but for his or her own safety. Since there will be no demand, there will not be a strike as defined.

[45] In *NUM & others v Driefontein Consolidated Ltd* (1984) 5 ILJ 101 (IC), the Industrial Court then dealt with a matter involving the regulation under the Mines and Works Act 27 of 1956, which provided thus:

> "If any . . . person working under the supervision of a ganger or miner complains that the part of the working place where he is required to work is dangerous, *the ganger or miner shall withdraw all workmen therefrom* until he has personally with such assistance as he may require made it safe."

[46] The court found that:

> "All that the non-scheduled miner is required to do is to complain that the part of the working place where he is working is dangerous and then *the ganger is required to withdraw all the workmen from that place* . . ."

[47] AA Landman in his article "A Miner's Right to Leave Dangerous Working Place" (1996, volume 6, no 1, CLL) said:

> "It would not be appropriate to order or permit the employees to remain in a working place which is subjectively perceived to be unsafe."

[48] See, also, E van Kerken "The Right to Stop Work in Dangerous Circumstances" (1997) 18 ILJ 1198.

Was there a strike?

[49] Malan argued that there was no strike as the situation contemplated in section 23 of the Mine Health and Safety Act 29 of 1996 presented itself. I do not agree with him. The situation in section 23 did not arise.

[50] Besides, paragraph 2.3 of the statement of case stated that, on 14 November 2005, some of the applicants were participating in an unprotected strike action by way of a work stoppage.

[51] In paragraph 3.1.1 of the selfsame statement of case, it was alleged that the respondent failed to give sufficient ultimatum or at all to striking employees prior to effecting their dismissal.

[52] In paragraph 4.2 of the pre-trial minutes, it was recorded that the applicant shall contend that the duration of the strike embarked upon by stockmen was for one day only. In paragraph 4.4 of the minutes, it was recorded that the applicants contended that the subject-matter of the strike was a demand made by the second to twenty-second individual applicants to the

effect that the respondent should engage a front-end loader to clear and remove excess soil from the quarry.

[53] In paragraph 4.9 of the selfsame minutes, it is recorded that whilst admitting that it had not complied with the provisions of section 64(1)(a) and (b) of the LRA 66 of 1995, the applicants contended that the individual

applicants were indeed justified in not complying.

[54] Surely if the applicants were not on strike, references referred to above would not have been there. I find an argument that there was no strike rather opportunistic and lame.

[55] Strike is defined as the partial or complete concerted refusal to work, or the retardation or obstruction of work by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to work in this definition includes overtime work, whether it is voluntary or compulsory.

[56] Cleary, the actions of the stockmen fall within the definition of a strike. Even if the court accepted their version that they stopped work on 7 November 2005, that would still bring them within the ambit of the definition. What is clear from the evidence is that they refused to release slates until their demand for a front-end loader is met. That in itself amounts to obstruction and/or retardation of work.

[57] Factory workers could not work due to the actions of the stockmen.

[58] Accordingly, the finding is that the actions of the stockmen amount to strike as defined.

[58] Ntlakane warned the individual applicants ("the stockmen") of their actions and the consequences thereof but his warning was ignored.

Was the dismissal of stockmen substantively and procedurally unfair?

[59] In this judgment, the dismissal of the factory workers shall not be considered in any detail as Bekker has conceded that their dismissal was unfair, both substantively and procedurally.

[60] Suffice to mention that the respondent seems to have been misled by its advisors about the dismissal of the factory workers. Perhaps out of frustration he accepted the advice to dismiss them.

[61] Commencing with the substantive fairness of the dismissal of the stockmen, it is common cause that the strike action that the stockmen participated in did not comply with the provisions of the Act.

[62] In terms of item 6(1) of Schedule 8 of the LRA, participation in a strike action that does not comply with the provisions of Chapter 4 is a misconduct.

[63] In terms of section 188(1)(a)(ii), a dismissal is fair if the reason relates to employee's conduct.

[64] Item 6(1) provides that substantive fairness must be determined in the light of:

(a) Seriousness of the contravention of the Act.

(b) Attempts made to comply with the Act. And,

(c) Whether strike was in response to unjustified conduct by the employer.

[65] In so far as the seriousness of the contravention is concerned, it is the court's view that the action by stockmen was spontaneous and seriously contravened the Act. They ignored an advice from their union official. This makes their contravention more serious. They continued with their action for a period of seven days before dismissal. No attempts were made to comply. This was despite advice from the union and ultimatum by the respondent.

[66] The conduct of the employer in saying to them the front-end loader shall be brought within a week cannot be seen to be unjustified in any manner whatsoever. Oberholzer testified that if the mine was unsafe, as they alleged, he would have taken urgent and swift measures. He did not have the front-end loader on site. It was costly for the respondent to bring one. There were no compelling reasons for the front-end loader to be brought urgently.

[67] The fact that the stockmen participated in the unprotected strike is common cause.

[68] Accordingly, the dismissal of the stockmen is substantively fair.

[69] As for the procedure, item 6(2) provides that prior to dismissal, the employer should, at the earliest opportunity, contact a trade union official to discuss the cause of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it.

[70] The evidence before me suggests that, as early as the second day of the strike, a letter was addressed to the union. It is clear that Ntlakane adopted a recalcitrant and unco-operative attitude. This was so despite what he himself advised the stockmen about. His attitude that he was not there to receive ultimatums is reflective of the recalcitrancy.

[71] The fact that two ultimatums were issued is common cause.

[72] In their statement of case, the applicants suggested that they were not given sufficient ultimatum. What is meant by that is not clear.

[73] However, in argument Adv Malan suggested that the fact that the respondent did not investigate the safety issue rendered the dismissal procedurally unfair. This cannot be.

[74] Accordingly, in the court's view, no evidence was presented to suggest that no sufficient time was allowed to reflect.

[75] On the contrary, Ntlakane adopted the attitude of not even reading the ultimatum.

[76] Accordingly, the dismissal is bound to be procedurally fair (*Modise & others v Steve's Spar Blackheath* [2000] 5 BLLR 496 (LAC)).

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The issue of the relief and the question of limitation of backpay

[77] The stockmen are not entitled to any relief. As conceded by Adv Bekker, the dismissal of the factory workers is both substantively and procedurally unfair. What remains for them is the issue of the relief. Section 193(1) provides that:

> "If the Labour Court . . . finds that a dismissal is unfair, the court . . . may:
>
> (a) order the employer to reinstate the employee from any date not earlier than the date of dismissal;
>
> (b) . . .
>
> (c) . . ."

[78] Subsection (2) provides that:

> "The Labour Court . . . must require the employer to reinstate or re-employ the employee unless:
>
> (a) the employee does not wish to be reinstated or re-employed;
>
> (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
>
> (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or
>
> (d) the dismissal is unfair only because the employer did not follow a fair procedure."

[79] Reinstatement is the primary remedy for unfair dismissal.

[80] In the court's view, it has a discretion in so far as the date of reinstatement.

[81] The only barrier in the section is a date earlier from the dismissal date. In considering which date to reinstate the factory workers, I have taken into account the conduct of the union official. Ntlakane had, in the court's view, a duty to assist the respondent to normalise the situation. This is so, particularly because he shared the same view with the respondent that the actions were unjustified, hence his advice. However, it is clear that he encouraged the action hence his refusal to even read the ultimatum. Had he acted, the strike would not have continued, and the factory employees and even the stockmen may not have been dismissed.

[82] I also took into account the uncontested evidence of instructions to the ten factory workers. All the above considerations do not apply with equal vigour in relation to the four nightshift workers.

[83] Accordingly, the court has a discretion to limit the backpay by moving the reinstatement date forward, from the date of dismissal to some other date after dismissal.

The issue of costs

[84] In applying the principle that costs should follow the results, the court finds itself in a situation where both parties were partially successful. The concession that the dismissal of the factory workers is unfair was made in argument on the last day of trial. In that regard, the applicants were successful in so far as the factory workers are concerned.

[85] In so far as the stockmen are concerned, the respondent was successful.

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Order

[86] In the result, I make the following order:

1. The dismissal of the factory workers ("schedules B and C") is both substantively and procedurally unfair.
2. The dismissal of the stockmen ("schedule A") is both substantively and procedurally fair.
3. The respondent is ordered to reinstate the factory workers ("schedule B") without loss of benefits with effect from 3 March 2007.
4. The respondent is ordered to reinstate the factory workers ("schedule C") without loss of benefits with effect from 3 September 2006.
5. No order as to cost.

For the applicant:
Adv L Malan instructed by KD Maimane Inc

For the respondent:
Adv W Bekker instructed by Hantie Groenewald & Botha Attorneys

The following cases were referred to in the above judgment:

Modise & others v Steve's Spar Blackheath [2000] 5 BLLR 496 (LAC) 295
NUM & others v Driefontein Consolidated Ltd (1984) 5 ILJ 101 (IC) 293

Nkala and others v Harmony Gold Mining Company Ltd and others (Treatment Action Campaign NPC and another as *amici curiae*)

Gauteng Local Division, Johannesburg

Judgment date: 13/05/2016 *Case No*: 48226/12

Before: PM Mojapelo Deputy Judge President, B Vally and L Windell Judges

Delict *– action for damages – bodily injuries – injured person dying before* litis contestatio *reached – rule of common law that claim for compensation for general damages such as pain and suffering, loss of amenities, and the like dies with the injured person and is not transmissible to his estate – common law rule requiring development in accordance with the behests of section 39(2) of the Constitution – common law developed accordingly.*

Mines and minerals *– silicosis – lung diseases contracted through the inhalation of silica dust generated by underground mining activities – class action against gold mining companies – application for certification of a class action against gold mining companies where applicants representing a class of persons consisting of current and former underground mineworkers who had contracted silicosis, and the dependants of underground mineworkers who had died of silicosis, and a second class of persons consisting of current and former underground mineworkers who had contracted pulmonary tuberculosis, and the dependants of deceased underground mineworkers who died of pulmonary tuberculosis – certification granted.*

Practice *– parties – class action – requirements for certification of a class action – considered and applied in case where applicants seeking to represent in a class action against gold mining companies a class of persons consisting of current and former underground mineworkers who had contracted silicosis, and the dependants of underground mineworkers who had died of silicosis, and a second class of persons consisting of current and former underground mineworkers who had contracted pulmonary tuberculosis, and the dependants of deceased underground mineworkers who died of pulmonary tuberculosis – applicants alleging that such lung diseases contracted through the inhalation of silica dust generated by underground mining activities and that the mining companies had failed to take reasonable measures to provide a safe and healthy work environment that was not injurious to mineworkers' health thereby exposing mineworkers to excessive levels of harmful silica dust – certification granted.*

Editor's Summary

Crystalline silica dust is generated by mining activities in underground gold mines. Silicosis is a disease that is contracted through the inhalation of such dust. Pulmonary tuberculosis ("TB") is a bacterial lung disease. Silica dust is a factor that increases the

risk of contracting TB. The mining sector and the authorities have been aware of the relationship between silica dust and lung disease for more than a century. From 1902 onwards various bodies appointed by both the government and the mining industry investigated the causes and prevalence of silicosis and the possibility of measures to eliminate or control dust and dust inhalation.

A number of cases concerning claims for compensation had been brought against mining companies by persons who were either miners who had contracted lung diseases or the dependants of deceased miners who had contracted lung diseases. By the time of the launching of these cases thousands of former mineworkers in the gold mining industry had contracted silicosis or pulmonary tuberculosis. Allegations were made that the mining companies had failed to take reasonable measures to provide a safe and healthy work environment that was not injurious to mineworkers' health and that mineworkers had been exposed to excessive levels of harmful silica dust while employed by mining companies. Five of these cases were consolidated for the hearing of an application for certification of a contemplated class action against some thirty gold mining companies.

There is as yet no legislation governing the bringing of class actions. The Law Commission has recommended that an application for certification of a class action should be granted when the following requirements are met: (a) There is an identifiable class of persons; (b) a cause of action is disclosed; (c) there are issues of fact or law which are common to the class; (d) a suitable representative is available; (e) the interests of justice require that a class action be permitted; and (f) the class action is the appropriate method of proceeding with the action. In *Trustees for the time being of Children's Resource Centre Trust and others v Pioneer Food (Pty) Ltd and other*s 2013 (3) BCLR 279 (2013 (2) SA 213) (SCA) the Supreme Court of Appeal dealt with the requirements for pursuing a class action in the RSA. It held that where a class action is contemplated, the party seeking to represent the class should first apply to court for authority to bring a class action. The court must be asked before issue of summons to certify the action as a class action. This involves the definition of the class; the identification of some common claim or issue that can be determined by way of a class action; some evidence of the existence of a valid cause of action; the court being satisfied that the representative is suitable to represent the members of the class; and the court being satisfied that a class action is the most appropriate procedure to adopt for the adjudication of the underlying claims. A court faced with an application for certification of a class action must consider the following factors and be satisfied that they are present before granting certification: The existence of a class identifiable by objective criteria; a cause of action raising a triable issue; that the right to relief depends upon the determination of issues of fact, or law, or both, common to all members of the class; that the relief sought, or damages claimed, flow from the cause of action and are ascertainable and capable of determination; that where the claim is for damages there is an appropriate procedure for allocating the damages to the members of the class; that the proposed representative is suitable to be permitted to conduct the action and represent the class; whether, given the composition of the class and the nature of the proposed action, a class action is the most appropriate means of determining the claims of class members.

The mineworkers pointed out that in the circumstances *in casu*, for most victims of silicosis and TB to receive satisfaction, there was no realistic alternative to a class action. Most of the victims were impoverished rural people, many of whom were in poor health, who were spread widely across the sub-continent of Africa, and who have limited access to the civil justice system. Many were migrant workers from Mozambique, Malawi, Lesotho and Swaziland. For legal representatives, litigating on behalf of claimants located in remote rural areas and in neighbouring countries was particularly difficult and

expensive, as was communicating with them. The Court found that in the circumstances a class action was the most appropriate way to resolve many of the disputes that arose in the individual cases of each mineworker. It had been established that there were sufficient common issues the determination of which would advance the cases of all individual mineworkers. In such a case it had to be in the interests of justice to certify a class action.

The mining companies had not suggested any process other than a class action which would be suited to receive a substantial amount of very focused evidence of a common nature and the determination of common legal issues. There was a body of relevant and necessary evidence pertaining to the issues of the alleged breach of duties of care by the mining companies and to the fault elements of the delict that the mineworkers complained of. This was evidence common to each mineworker's case. Some of the evidence consisted of highly technical scientific material. It was not feasible for each individual mineworker to adduce that evidence in his own individual case. All of this evidence was applicable to each and every mineworker's case. If the thousands of mineworkers were ever able to, and actually did, proceed to litigate individually, then the same evidence would have to be presented in each case repeatedly.

There were questions of law common to all the cases. These included: Whether the legal convictions of the community justified the imposition of delictual liability upon the mining companies for failing to take the necessary steps to prevent the growth and spread of silicosis and TB; whether the element of causation could be determined by application of the *res ipsa loquitur* rule; whether breaches of the relevant health and safety statutes and regulations constituted grounds for the imposition of strict liability; whether the principle of joint and several liability should apply to multiple mining companies in cases where they employed the same mineworker, though at different times, but all exposing him to excessive levels of silica dust while he was in their respective employ; whether or not the filing of the application for certification interrupted prescription; whether compensatory damages were available to mineworkers under section 12(1)(c) and/or section 24 of the Constitution. These legal questions were general and applicable to the case of each and every mineworker. Their determination would have a final and determinative effect on the claim of each of them.

The fact that the determination of common issues in favour of the mineworkers would not finalise each mineworker's case (or that of his dependants) was no bar to certifying the class action. A certification was not dependent on each case being fully and finally determined once the common issues were determined in favour of the victims. As long as it could be shown that determination of the common issues would advance the cases of the individual victims substantially, a certification of the intended class action would be justified and would be in the interests of justice. At the same time it could not be overlooked that the cases of all mineworkers could very well be finalised if the trial court were to find against the mineworkers on one or more of the common issues. This could happen if, for example, an issue such as prescription were determined in favour of the mining companies. This possibility on its own bore significant weight in favour of certifying the class action.

The Court found that the requirements for a class action were met.

The Court therefore granted the certification needed by Applicants to permit them to have claims against the mining companies determined through a class action. For that purpose the Court declared that the group of persons consisting of current and former underground mineworkers who had contracted silicosis, and the dependants of underground mineworkers who had died of silicosis (whether or not accompanied by any other disease) where such mineworkers work or have worked on one or more of a list of gold

mines after 12 March 1965 (and whose claims were not part of the claims to be determined in a pending arbitration and in certain cases pending in the United Kingdom) constituted a class for the purposes of a class action. This was the "silicosis class". The Court declared that the group of persons consisting of current and former underground mineworkers who had contracted pulmonary tuberculosis, and the dependants of deceased underground mineworkers who died of pulmonary tuberculosis (but excluding silico-tuberculosis), where such mineworkers work or have worked for at least two years on one or more of the listed gold mines after 12 March 1965 constituted a class for the purposes of a class action. This was the "pulmonary tuberculosis class". Certain attorneys of record for Applicants were certified as the legal representatives of the members of the different classes for the further conduct of the class action. Proposed fee arrangements that had been suggested in Applicants' papers were authorised in respect of the legal representatives of the classes. Certain identified applicants (or whomsoever of them would have survived by the time of the class action) were granted leave to act as representatives of the silicosis class. Likewise certain identified applicants were granted leave to act as representatives of the pulmonary tuberculosis class. It was declared that those class representatives had the requisite standing to bring the class action and to represent the members of the silicosis class and the pulmonary tuberculosis class in claims for damages. The Court gave directions as to steps to be taken to give notice of the class action to members of the classes. These included directions as to publication of an advertisement in certain newspapers, radio announcements on various radio stations and in various languages, notices to be placed on notice boards at various offices and institutions, procuring Legal Aid South Africa to assist in circulating the notice to attorneys and candidate attorneys employed in providing legal aid in civil matters, delivering copies of the notice to various advice offices, paralegal offices and community-based organisations, publication of the notice on websites, publication of the notice on prominent notice boards at each mine owned by the respondents and on the homepage of each respondent's website for a period of not less than 180 days. Respondents would be jointly and severally liable for half of the mineworkers' costs of publicising the necessary notices. Applicants' legal representatives were directed to file reports with the Court on a quarterly basis setting out the steps taken to publish the notice and the progress made in identifying the members of the classes, the first such report to be filed 3 months after the date of the order. The Court ordered that the members of the classes would be bound by the judgment or judgments in the first stage of the class action against the mining companies, unless they gave written notice to the attorneys certified as the legal representatives of the classes or the Legal Resources Centre by a certain date that they wished to be excluded as members of any of the classes against each or any of the respondents. Upon conclusion of the first stage of the class action, the members of the silicosis class would be required to give written notice to the certified legal representatives of the silicosis class or the Legal Resources Centre by a date to be determined by the Court at that time stating whether they wished to opt in and be included as members of the silicosis class in the second stage of the class action; and which respondent or respondents they sought to hold liable in the second stage of the class action. Likewise upon conclusion of the first stage of the class action, the members of the pulmonary tuberculosis class were to give written notice to certified legal representatives of the pulmonary tuberculosis class by a date to be determined by the Court at that time of whether they wished to opt in and be included as members of the pulmonary tuberculosis class in the second stage of the class action; and which respondent or respondents they sought to hold liable in the second stage of the class action. Only members who gave such notice timeously would have the benefit of and be bound by the judgments in the second stage of the class action as against the respondent or respondents that were found to be liable to them. Any settlement agreement reached by the parties would be of force and take effect only if approved

by the Court. The conditional counter-application brought by certain of the respondents was dismissed with costs. Respondents were ordered to pay Applicants' costs of the application. The parties were granted leave to approach the Court, on the same papers duly supplemented, for an order varying or amplifying the provisions of the order pertaining to notice and the costs associated with notice, in the event that this was considered necessary.

A further issue that arose in the case was the impact of the common law rule that an action for the recovery of non-patrimonial general damages alleged to arise from the wrongful infliction of bodily or personal injuries is not transmissible before the stage of *litis contestatio* has been reached. If a person who has been wrongfully injured dies before *litis contestatio* has been reached, his or her rights of action pass to the executor of the estate. The executor is entitled to claim for the deceased's medical and hospital expenses and also for funeral expenses. However, the executor has no claim in respect of future loss of earnings to the estate by reason of the deceased's premature death, and cannot claim in respect of pain and suffering and loss of the amenities of life. Applicants pointed out that in the circumstances *in casu* the operation of this rule had the potential to cause immense injustice. This would occur in cases where the general damages that might be found to have been due to a class member who had since died was denied to him simply because he succumbed to his disease before the case he brought or intended to bring had reached the stage of *litis contestatio*. Applicants asked that the common law rule be developed in accordance with the behests of section 39(2) of the Constitution. The rule was outdated and had not kept pace with procedural developments that had occurred over the intervening centuries. The Court held in this regard that the common law should be developed as follows:

> "1. A plaintiff who had commenced suing for general damages but who has died whether arising from harm caused by a wrongful act or omission of a person or otherwise, and whose claim has yet to reach the stage of *litis contestatio*, and who would but for his/her death be entitled to maintain the action and recover the general damages in respect thereof, will be entitled to continue with such action notwithstanding his/her death.
> 2. The person who would have been liable for the general damages if the death of a plaintiff had not ensued remains liable for the said general damages notwithstanding the death of the plaintiff so harmed.
> 3. Such action shall be for the benefit of the estate of the person whose death had been so caused.
> 4. A defendant who dies while an action against him has commenced for general damages arising from harm caused by his wrongful act or omission and whose case has yet to reach the stage of *litis contestatio* remains liable for the said general damages notwithstanding his death, and the estate of the defendant shall continue to bear the liability despite the death of the defendant."

Applicants had asked that, in the event that the Court should declare that their claims for general damages were transmissible to their estates then it should be done on the basis that their claims be regarded as having commenced as from the date when the certification application was launched and not from the date of the judgment being handed down. The Court did include such a provision in its order. The Court declared that any claimant, who had claimed for general damages, and who had died or were to die prior to the finalisation of his case, would have such general damages transmissible to his estate, regardless of whether he had joined the class action or not. The claim of general damages would be transmissible from the date when the certification application was launched in August 2012.

Windell J in a separate judgment dissented from the majority judgment on one issue only, that is, the issue concerning the transmissibility of a claim for general damages prior to *litis contestatio*. Windell J considered that insufficient material had been placed before the Court to enable it to go as far as holding that a claim for general damages was transmissible in all matters in which an injured party had a claim. The facts before the Court were, however, sufficient to justify the development of the common law in relation to class action proceedings. Such development was in the interest of justice. Any further delay would cause an injustice. In the context of a class action, and specifically a class action of the magnitude of the instant case, it would take much longer to reach *litis contestatio*. The Courts had not yet pronounced on the application of the rules relating to close of pleadings and transmissibility in the context of class action proceedings. If the rule were applied strictly, *litis contestatio* could not be reached during the certification proceedings at all. It would be reached only after the finalisation of the certification process, and after the exchange of pleadings. In the view of Lindell J, development of the common law in accordance with the spirit, purport and objects of the Bill of Rights required its incremental development of the common law rule regarding transmissibility in respect of class actions only. This development should extend only to the transmissibility of claims for general damages in those cases where a class member dies after the institution of the certification application and prior to finalisation of a class action. In those instances, such general damages as that class member would have been entitled to claim ought to be transmitted to his or her deceased estate.

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Judgment

Mojapelo DJP and Vally J:

Introduction

Background

[1] Gold mining began on the Witwatersrand in 1886. It has grown over the years spreading to other parts of the country (significantly the Free State). In due course it became a significant contributor to the growth of the

gross domestic product of South Africa and rewarded handsomely those who invested in it. The South African currency was for a long time based to a large extent on the value of this internationally sought precious metal. As this case demonstrates, simultaneous with that growth, the industry left in its trail tens of thousands, if not hundreds of thousands, of current and former underground mineworkers who suffered from debilitating and incurable silicosis and pulmonary tuberculosis ("TB"). Many mineworkers also died from the diseases.

[2] Soon after the commencement of gold mining the risk of underground mineworkers being adversely affected by exposure to silica dust and thus suffering from silicosis, which was initially called "*phthisis*", became manifest. There are other occupational lung diseases in the industry, but silicosis and to a lesser extent TB are the two that are of concern in this case.

[3] From as early as 1902 several Commissions of Enquiry ("Commissions") were appointed by the government to investigate the causes and prevalence of silicosis. These Commissions found the inhalation of excessive silica dust to be the sole cause of silicosis. The Commissions recommended that dust control and dust elimination measures be introduced.[1] There were other studies and investigations, including some by the mining industry itself, which made similar findings. These developments sketch and lay down a wide carpet of information that became available and accessible to those involved in the gold mining industry.

[4] This case is about the attempts by the mineworkers employed in the gold mining industry and their dependants to obtain compensation as a result of the mineworkers having contracted silicosis or TB.

The application

[5] The applicants seek to bring a class action on behalf of current and past underground mineworkers who contracted silicosis or TB, and on behalf of the dependants of mineworkers who died of silicosis or TB contracted while employed in the gold mines.

[6] The applicants seek an order for certification of one consolidated class action comprising of two classes, namely a silicosis class and a TB class, against companies operating in the gold mining industry. It is their proposal that the single class action proceed in two stages, stage one during which issues common to both classes shall be determined and stage two during which individual issues are to be determined. They refer to this as

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1 See for instance the 1902 Weldon Miners' Phthisis Commission; South African Native Affairs Commission of 1903 (Report: 1903–1905), 1994 Leon Commission, Commission of Inquiry into Safety and Health in the Mining Industry; several parliamentary select committees (at least ten) and state industry reports also looked at the incidence of silicosis in the gold mining industry. Several legislative interventions and regulations were promulgated (not less than fifteen Acts of Parliament between 1912 and 1946 followed by the Occupational Diseases in Mines and Works Act 78 of 1973 ("ODIMWA"). Occupational lung diseases (including silicosis) have also been the subject of several national and international conferences and studies.

the bifurcated process. Save for the twenty-ninth respondent, Randgold and Exploration Co Ltd ("Randgold"), the application is strenuously opposed by all the gold mining companies which are cited as respondents. Randgold abides by the decision of this Court.

[7] It is common cause that the potential class members may range in numbers from seventeen thousand (17 000) to approximately five hundred thousand (500 000). The bulk of them belong to the silicosis class. The mining companies, who are all potential defendants, represent almost the entire gold mining industry in South Africa. The scope and magnitude of the proposed silicosis and TB claims is unprecedented in South Africa. The action, if it proceeds, will entail and traverse novel and complex issues of fact and law.

[8] The applicant mineworkers and putative class members are hereafter referred to as "the mineworkers"; the applicants who are widows of former mineworkers will be referred to as "dependant applicants", and the respondents are referred to as "the mining companies". Where there is reference to only the applicants and not to the putative class members, they will be referred to as "applicant mineworkers" and where there is a reference to a particular mining company only it will be referred to by its name, for example, Anglo American South Africa Ltd (the "twenty-seventh respondent") will be referred to as "Anglo American".

Legal representatives and consolidation of application

[9] The application is a consolidated one. Its magnitude and the range of legal representatives involved is unprecedented. It can only be properly appreciated by having regard to its peculiar history. Initially, five separate applications were brought. The first three separate but similar applications commenced in August 2012 by Abrahams Kiewitz Attorneys ("Abrahams"). They were against three mining companies. In December 2012, Richard Spoor Inc Attorneys ("Spoor") commenced with an application against many mining companies. Finally in March 2013 the Legal Resources Centre ("LRC") brought an application against one mining company. All five applications were consolidated into one in August 2013.

[10] The relief sought in the notice of motion was amended on more than one occasion. The relief sought in the five applications was harmonised and is reflected in the consolidated notice of motion. In the light of this history, there is, quite understandably, more than one founding affidavit in the papers. However, the mineworkers' case was neatly crystallised in the replying affidavits. In addition to the answering affidavits, the mining companies filed further affidavits. Some of them were in response to the replying affidavits of the mineworkers. The court thus had to deal with more than the traditional set of affidavits. As a result, the court accepted and dealt with the cases of the parties as made out in all the affidavits. The mining companies had no difficulty with this.

[11] The mineworkers withdrew the entire application for certification against the twentieth respondent, Village Main Reef Ltd ("Village") and the twenty-first respondent, Buffelsfontein Gold Mines Ltd ("Buffelsfontein"). They

also withdrew the application for certification of the TB class against the twenty-fifth respondent, DRDGold Ltd ("DRD") and the twenty-sixth respondent, East Rand Proprietary Mines Ltd ("ERPM").

Silicosis

[12] Silicosis is an occupational lung disease which is contracted by mineworkers who work underground in gold mines. It is caused exclusively by the inhalation of crystalline silica dust. Crystalline silica is a common mineral, also known as quartz, which is found in the gold mines. Silica dust is generated and raised into the air by many of the processes associated with mining, such as blasting, drilling and the handling and transport of rock and soil containing crystalline silica.

[13] The process through which crystalline silica dust causes silicosis may be described briefly as follows: When the smallest particles of crystalline silica are raised into the air as part of dust in the mining process, and mineworkers are exposed to such dust, the mineworkers inhale the crystalline silica particles. Once inhaled the dust particles are deposited in the alveolus region of the lung. Once deposited in the alveolus, the particles attack the lung cells and thus damage the lung tissue resulting in scarring or fibrosis of the lungs.

[14] Silicosis is an irreversible, incurable and painful lung disease. It is characterised by fibrosis of the lungs, which entails the replacement of normal tissue with connective ("collagenous" or "scar") tissue that obstructs and impairs the normal functioning of the lung.[2] It can be a completely disabling disease, and in many cases it is fatal.

[15] Silicosis is a latent and progressive disease. The onset of its symptoms and disability can ensue several years after exposure. A person may be diagnosed with silicosis for the first time long after such person has worked in the gold mines. The most common form of silicosis is "chronic silicosis". This form typically takes more than fifteen (15) years for symptoms to appear. When symptoms of the disease appear within ten years, then silicosis would be regarded as "accelerated silicosis". Recent studies suggest an increase in "accelerated silicosis". Silicosis is described as a progressive disease because its symptoms worsen over time, even after exposure to crystalline silica dust has stopped. Ongoing medical monitoring and treatment of current and former employees of gold mines is thus required to manage and limit the harmful impact of the silicosis disease and its complications.

[16] This has particular significance in the context of a migratory labour system, which served in the South African gold mining industry, where the labour sending areas were far removed from the location of the mines.

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2 Radiologically, silicosis presents as widespread nodules in the lungs, measuring 2–5mm in diameter with predominance in the middle and upper zones. In severe cases large conglomerate nodules are present in the middle and upper lung zones with associated emphysematous lung tissue changes. This severe type of silicosis is also known as Progressive Massive Fibrosis or PMF.

By the time the person is diagnosed, such a person may be living far from the mine where he contracted the disease. Furthermore in those far areas, where medical resources range from poor to non-existent, the condition of the affected former mineworkers will progressively worsen until he eventually succumbs to the disease.

Pulmonary tuberculosis

[17] TB is a bacterial lung disease, which (unlike silicosis) can be treated successfully and cured if detected early. If not cured, it too, can be fatal. It is an infection of the lungs caused by a bacterium known as mycobacterium tuberculosis complex. This is the only cause of TB. The bacterium is spread from person to person by inhaling infected droplets. TB may be present in active or latent form. It is treated with antibiotics. In South Africa 80% of all drug sensitive TB cases are successfully treated.

[18] It is accepted that silica dust does not cause TB. It is further accepted that there is an association between exposure to excessive respirable silica dust and TB. The mineworkers' case on TB is that exposure to silica dust poses a lifelong risk for the development of TB, even if silicosis is not present in the lungs. It is an important distinguishing factor that while the silicosis case rests on the common cause fact that silica dust causes silicosis (and is its only cause), the TB case rests on the contention that the inhalation of silica dust increases the risk of contracting TB. Silica dust is not the only factor that increases the risk, for instance, tobacco smoking, positive HIV status, cramped and poor living conditions are also known factors that increase such a risk.

Amici curiae

[19] Prior to the hearing of the certification application ("main application"), two non-governmental organisations, Treatment Action Campaign ("TAC") and Sonke Gender Justice NPC ("Sonke") applied in terms of rule 16A(5) of the Uniform Rules of Court to be admitted as *amici curiae* in the main application. The application was opposed by some of the mining companies. A separate hearing was held to consider the application of the *amici.* If admitted the *amici* intended to advance legal argument supporting the mineworkers' case for certification of the class action and to introduce evidence relevant to the main application. They also intended to address argument on the issue concerning the transmissibility of general damages to the estates of the deceased mineworkers who died before their cases reached the stage of *litis contestatio*.

[20] The *amici* intended to focus on four legal issues, namely: (1) The framework of class actions; (2) How section 173 of the Constitution of the Republic of South Africa, Act 108 of 1996 ("the Constitution") enables the court to regulate its own process when dealing with class actions;[3] (3) The

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3 S 173 of the Constitution reads:

"The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

nature of the gold mining industry and the role it played in the political economy of South Africa; (4) The necessity for corporate accountability. They submitted that unlike the applicant mineworkers they wish to contend that in a class action suit where a right in a Bill of Rights has been invoked, the class action representative(s) need not apply for certification before they can proceed with a class action. This they said is based on the fact that the Constitution already provides for a class action in those circumstances.

[21] The *amici* sought leave to admit new evidence in the form of an affidavit by Mr Anand Grover ("Grover"), an advocate of the Bar Council of Maharashtra who served as the United Nations Special Rapporteur on the right of persons to enjoy the highest attainable standard of physical and mental health. They also sought leave to admit into evidence the affidavits of Professor Francis Hunter Wilson ("Wilson"), an emeritus Professor of Economics at the University of Cape Town and of Mr Dean John Peacock ("Peacock"), the executive director of Sonke.

[22] The applicant mineworkers addressed the need for a class action and the implications of not certifying the class action. They outlined the history of the gold mining industry, the socio-economic circumstances of the mineworkers and the migrant labour system that predominated for most of the pre-1994 period. It was not apparent from the affidavits of Grover and Wilson whether they would advance new argument or adopt a position different from that already articulated by the applicant mineworkers in the main application and which would be of assistance to the court. Peacock intended to introduce evidence that considers the impact of illness and unemployment on the children and families of former mineworkers, with a particular focus on the gendered implications of occupational lung disease in areas that provide labour to the mines.

[23] After carefully scrutinising the affidavits the *amici* sought to introduce, as well as the arguments raised by them in support of their application for admission and the argument raised by the mining companies in opposition thereto, we concluded that the *amici* have an interest in the main application, and that they raised argument not raised by any other party already before court. However, we found that not all the evidence they wished to introduce was new. Accordingly, in the exercise of our discretion, they were admitted as *amici curiae* and granted leave to file heads of argument and to make oral submissions at the hearing of the main application. The *amici* were also granted leave to introduce the affidavit of Peacock as additional evidence in the main application as this evidence was pertinent and new.[4] All the mining companies as well as the applicant mineworkers were afforded an opportunity to answer to the affidavit of Peacock. Some mining companies took advantage of this opportunity. Their answers, too, were accepted as further evidence in the main application.

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4 See fn 32 for a further explanation as to why Wilson's affidavit was not admitted as evidence.

Class action in South African law

[24] The Roman-Dutch legal system, on which the development of South African law was based, was imported onto these shores sometime during or after the 1650s. That it is resilient is demonstrated by the fact that it still constitutes a substantial part of our law despite the numerous political, economic and social changes this country has historically undergone. However, it had no experience of class actions and therefore had no lessons to offer in this regard. Nevertheless, by the 1990s, when the Constitution of the Republic of South Africa, Act 200 of 1993 ("the Interim Constitution") was adopted as the supreme law of the land, class action had, because of its utility, become an integral and regular part of many modern legal systems. South African law found itself having to confront the utility of the class action process.

[25] The Interim Constitution introduced numerous innovations into our law. One such innovation was section 7(4)(b)(iv), which, in particular, expanded the standing of a person allowed to approach court. It provided for "*a person acting as a member of or in the interest of a group or class of persons*" to approach court for appropriate relief, even if the person had no real or direct interest in the relief.[5] The provision was replicated verbatim in section 38(c) of the Constitution. It allows any person (natural or juristic) to approach a court alleging that a right in the Bill of Rights (Chapter 2 of the Constitution) has been infringed or threatened. Such person may approach the court "*as a member of, or in the interest of a group or class of persons*". The Constitution, therefore, makes special provision for class actions to be brought in cases where there are allegations of a violation of the Bill of Rights: a class action in such a case is now part of "*the supreme law of the Republic*".[6] Against this background, there is no reason, logical or practical, to deprive anyone from bringing a class action in a non-Bill of Rights case. The challenge posed by the Roman-Dutch Law unfamiliarity with the class actions was referred to the South African Law Commission ("SALC") that met it by establishing Project 88 on which it reported in 1998.

[26] Project 88 was an "*investigation into the recognition of class actions and public interest actions*". In the course of undertaking what proved to be a comprehensive investigation, the SALC carefully examined the efficacy, role and place of class actions in South African law, and in doing so it

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5 S 7(4) of the Interim Constitution read:

"(a) When an infringement of or threat to any right entrenched in this chapter (Bill of Rights Chapter) is alleged, any person referred to in para (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights.

(b) The relief referred to in para (a) may be sought by –

(i) a person acting in his or her own interest;

(ii) an association acting in the interest of its members;

(iii) a person acting on behalf of another person who is not in a position to seek such relief in his or her own name;

(iv) a person acting as a member of or in the interest of a group or class of persons; or

(v) a person acting in the public interest."

6 S 2 of the Constitution.

provided us with a definition of the term "class action". The definition it provided reads:

> "'Class action' means an action instituted by a representative on behalf of a class of persons in respect of whom the relief claimed and the issues involved are substantially similar in respect of all members of the class, and which action is certified as a class action in terms of the Act."[7]

[27] The SALC recommended that before a class action is brought the person, or group, intending to bring such an application should first apply to the court for an order certifying the proposed action. A certification application is no more than a request for permission to enter the portal of court *en masse* and for the applicant(s) to be accepted as representative(s) of the entire mass. Absent such an order, the applicant(s) seeking to institute a class action would be precluded from so doing. The need for certification is based on the time-honoured principle that the court alone should be the master of its own process, a principle that has subsequently received the imprimatur of the Constitution.[8]

[28] The SALC called on the Legislature to enact legislation[9] that would direct the court's attention to the following issues when considering whether or not to certify a class action:

(a) whether there is an identifiable class of persons;

(b) whether there is a cause of action disclosed;

(c) whether there are issues of fact or law which are common to the class;

(d) whether there is a suitable representative available;

(e) whether the interests of justice require certification; and

(f) whether a class action is the appropriate method of proceeding with the action.[10]

The Legislature has yet to enact the proposed legislation.

[29] Life in the meantime moved on and the common law was called upon to attend to the vacuum, and give direction as to whether certification is necessary, and what factors must be considered during a certification application. These issues presented themselves in *Ngxuza and others v Permanent Secretary*, *Department of Welfare*, *Eastern Cape and another*,[11] which commenced in the Eastern Cape Division of the High Court and concluded in the Supreme Court of Appeal ("the SCA"). The SCA accepted that certification was a necessary procedural step to be taken by the person(s) intending to launch a class action and then deemed

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7 South African Law Commission, *The recognition of Class Actions and Public Interest Actions in South Africa, Report 88*, August 1998 ("SALC Report"), Recommendation 8.

8 In terms of s 173 of the Constitution.

9 Included in its Report is a proposed statute that comprehensively deals with class actions.

10 SALC Report, Recommendation 11.

11 2001 (2) SA 609 (E) [also reported at 2000 (12) BCLR 1322 (E) – Ed].

it appropriate to compress the six issues identified by the SALC that have to be taken into account into four "*quintessential requisites*". These are:

"(1) the class is so numerous that joinder of all its members is impracticable;

(2) there are questions of law and fact common to the class;

(3) the claims of the applicants representing the class are typical of the claims of the rest; and

(4) the applicants . . . will fairly and adequately protect the interests of the class"[12]

[30] Fifteen years later the SCA was, in the matter of *Children's Resources Centre Trust v Pioneer Foods*,[13] once again, called upon to consider the issues relating to class action. Unlike the previous occasion, this time the SCA was presented with facts and legal issues that were more crystallised for a class action suit. This allowed the SCA to clarify and develop the law on class action. The SCA commenced by adopting the definition of class action presented by the learned author, Rachael Mulheron, who advised that:

"A class action is a legal procedure which enables the claims (or parts of the claims) of a number of persons against the same defendant to be determined in the one suit. In a class action, one or more persons ('representative plaintiff') may sue on his or her own behalf and on behalf of a number of other persons ('the class') who have a claim to a remedy for the same or a similar alleged wrong to that alleged by the representative plaintiff, and who have claims that share questions of law or fact in common with those of the representative plaintiff ('common issues'). Only the representative plaintiff is a party to the action. The class members are not usually identified as individual parties but are merely described. The class members are bound by the outcome of the litigation on the common issues, whether favourable or adverse to the class, although they do not, for the most part, take any active part in that litigation."[14]

[31] In *Children's Trust*, the SCA chose to elevate the issues for consideration referred to in the SALC Report (plus one other) to the status of "*requirements*" that have to be met by an applicant for a certification. It held that an applicant has to demonstrate that the following "*requirements*" are met in order to succeed in the application:

31.1 that a class, objectively identifiable, exists;

31.2 that a triable cause of action exists;

31.3 that there are some issues of fact, law, or both, which are common to the relief claimed by all the potential members of the class that will have to be determined;

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12 *Permanent Secretary*, *Department of Welfare*, *Eastern Cape Provincial Government and another v Ngxuza and others* 2001 (4) SA 1184 (SCA) at [16] [also reported at 2001 (10) BCLR 1039 (SCA) – Ed].

13 2013 (2) SA 213 (SCA) [also reported as *Trustees for the time being of the Children's Resource Centre Trust and others v Pioneer Food* (*Pty*) *Ltd and others* (*Legal Resources Centre as amicus curiae*) at 2013 (3) BCLR 279 (SCA) – Ed].

14 *Id* at [16].

31.4 that the relief sought, or damages claimed, by the potential class members flow from the cause of action and are ascertainable and capable of determination;

31.5 that where the claim is for damages there is an appropriate procedure for allocating the damages to the members of the class;

31.6 that the proposed representative is suitable to represent the class and conduct the litigation; and

31.7 whether in the particular case a class action is the most appropriate means of determining the claims, or issues (factual, legal or both) raised in the claims, of class members.[15]

[32] Concerned about the possibility of these "*requirements*" calcifying into a set of hard rules which if strictly applied could cause grave injustice, the Constitutional Court (CC) in *Mukaddam v Pioneer Foods* (*Pty*) *Ltd and others*[16] intervened and commanded[17] that they be treated as no more than a set of relevant "*factors*" that have to be taken into account when determining whether or not the class action should be certified.[18] These should not be elevated to the status of "*conditions precedent or jurisdictional facts which must be present before an application for certification may succeed*", and the absence of a particular factor "*must not oblige a court to refuse certification.*"[19] Finally, it pronounced that in examining the prevalence or absence of each or all of the factors, the certifying court should always remain mindful of the fundamental principle, which is that the ultimate decision on whether to certify or not must be made on the basis of where the interests of justice lie. Moreover, in its quest to achieve this objective the court is not restricted to examining the factors listed in *Children's Trust*.[20]

[33] To sum up, a class action represents a paradigmatic shift in the South African legal process. It is a process that permits one or more plaintiffs to file and prosecute a lawsuit on behalf of a larger group or "*class*" against one or more defendants. The process is utilised to allow parties and the court to manage a litigation that would be unmanageable or uneconomical if each plaintiff was to bring his/her claim individually. It is normally instituted by a representative on behalf of the relevant class of plaintiffs. The class action process is part of the equity developed law and is designed to cover situations where the parties, particularly plaintiffs, are so numerous that it would be almost impossible to bring them all before the court in one hearing, and where it would not be in the interest of justice for them to come before court individually.

[34] It is not only for the benefit of plaintiffs that the class action process was conceived, it is also designed to protect a defendant(s) from facing a

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15 *Id* at [26] and [28].
16 2013 (5) SA 89 (CC) at [36] and [37] [also reported at 2013 (10) BCLR 1135 (CC) – Ed].
17 By dint of the operation of the *stare decisis* (stand by your earlier decisions) principle.
18 *Mukaddam* at [35] and [37].
19 *Id* at [35].
20 *Id* at [47].

multiplicity of actions resulting in it having to recast or regurgitate its case against each and every individual plaintiff. Furthermore, it enhances judicial economy by protecting courts from having to consider the same issues and evidence in multiple proceedings, which carries with it the possibility of decisions by different courts on the same issue. On the other hand, a class action allows for a single finding on the issue(s), which finding binds all the plaintiffs and all the defendants.

The certification of a class action

[35] Since the pronouncements of the SCA in *Children's Trust*, a class action can only proceed to trial if it has been certified by the court as being an appropriate means of resolving the dispute between the putative class members and the defendant(s). The SCA did not, however, restrict this prerequisite to cases where no right in the Bill of Rights has been invoked.

[36] The SCA stated that certification is necessary for the court to be satisfied that certain conditions (the court as we know referred to them as "*requirements*") are met justifying the burdening of the defendants and the court with a class action, as well as binding the putative class members with a judgment that finally resolves all, or some, of the issues between the parties.

[37] The SCA reasoned its conclusion as follows:

> "Most jurisdictions around the world require certification either before institution of a class action or at an early stage of the proceedings. The exception is Australia. The justifications are various. First, in the absence of certification, the representative has no right to proceed, unlike litigation brought in a person's own interests. Second, in view of the potential impact of the litigation on the rights of others it is necessary for the court to ensure at the outset that those interests are properly protected and represented. Third, certification enables the defendant to show at an early stage why the action should not proceed. This is important in circumstances where the mere threat of lengthy and costly litigation may be used to induce a settlement even though the case lacks merit. Fourth, certification enables the court to oversee the procedural aspects of the litigation, such as notice and discovery, from the outset. Fifth, the literature on class actions suggests that, if the issues surrounding class actions, such as the definition of the class, the existence of a *prima facie* case, the commonality of issues and the appropriateness of the representative are dealt with and disposed of at the certification stage, it facilitates the conduct of the litigation, eliminates the need for interlocutory procedures and may hasten settlement. Lastly, the Australian experience has not proved entirely satisfactory, with numerous interlocutory applications and significant costs and delays being experienced."[21]

[38] Despite this cogent and forceful reasoning, the *amici* contend that certification is unnecessary in a case where a right entrenched in the Bill of Rights is invoked by the class action representative(s). We are unable to agree with them for two simple reasons, namely that: (i) it can lead to an abuse of court process, and (ii) that it can, as has occurred in Australia,

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21 *Children's Trust*, *supra*, at [24].

cause numerous costly and time-consuming interlocutory skirmishes around the very issues that the certification court ought to resolve. The need for the court to protect its own process does not disappear in a matter where a right in the Bill of Rights has been invoked. Section 173 of the Constitution makes it plain that the court has inherent power to protect its own processes.

[39] The SALC recommended that a settlement reached after the class action is certified should be approved by the court for it to be valid. Neither the SCA in *Children's Trust*, nor the CC in *Mukkadam* addressed this issue. In the present case, as appears later in this judgment,[22] such approval is obligatory as the provisions of the Contingency Fees Act 66 of 1997 ("CFA") are applicable. We hold that it is in any event correct that any settlement agreement reached after certification of the class action should be subject to the approval of the court and that it should only be valid once approved by the court. This is to ensure that the settlement reached is fair, reasonable, adequate and that it protects the interests of the class.

The mineworkers' cause of action

The class definitions

[40] The mineworkers seek, primarily, the certification of a single class action comprising two separate and distinct classes; a silicosis class and a TB class. The silicosis class is defined as:

> "Current and former underground mineworkers who have contracted silicosis, and the dependants of underground mineworkers who died of silicosis (whether or not accompanied by any other disease) –
>
> (i) where such mineworkers work or have worked on one or more of the gold mines listed on the attached 'Annexure A' (to this judgment excluding Village and Buffelsfontein), after 12 March 1965; and
>
> (ii) whose claims are not among the claims which, by agreement, are to be determined by arbitration in the matter of *Blom and Others v Anglo American South Africa Limited*; and
>
> (iii) who are not named plaintiffs in the action instituted in the United Kingdom against Anglo American South Africa Limited under case numbers HQ11X03245, HQ11X03246, HQ12X02667 and HQ12X05544."

[41] The TB class is defined as:

> "Current and former underground mineworkers who have or had contracted pulmonary tuberculosis and the dependants of deceased mineworkers who died of pulmonary tuberculosis (but excluding silico-tuberculosis), where such mineworkers worked or have worked for at least two years on one or more of the gold mines listed on the attached 'Annexure A' (to this judgment, excluding Village, Buffelsfontein, DRD and ERPM) after 12 March 1965."

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22 See [145] below.

The classes are objectively determinable

[42] In terms of the definition of the silicosis class any mineworker, or his dependants, would have to show the following if he, or they, wish to benefit from being members of the silicosis class:

42.1 he is a current or former underground mineworker;

42.2 he has contracted silicosis, or has died of silicosis (whether or not accompanied by any other disease);

42.3 he worked after 12 March 1965 on one or more of the specific gold mines listed in annexure "A" attached to this judgment (excluding Village and Buffelsfontein);

42.4 his claim is not among the claims which are to be determined by arbitration in the matter of *Blom and others v Anglo American South Africa Limited*; and

42.5 he is not a plaintiff in the action instituted in the United Kingdom against Anglo American South Africa Limited under case numbers HQ11X03245, HQ11X03246, HQ12X02667 and HQ12X05544.

[43] In terms of the definition of the TB class any mineworker, or his dependants, would have to show the following if he, or they, wish to benefit from being members of the TB class:

43.1 he is a current or former underground mineworker;

43.2 he has contracted TB, or has died of TB but excluding silicosis;

43.3 he works or had worked after 12 March 1965 for at least two years on one or more of the specific gold mines listed in annexure "A" (excluding Village, Buffelsfontein, DRD and ERPM) attached to this judgment.

[44] The criteria used to identify members of the two classes must be objective. In defining the class it is not necessary to identify all the putative class members. The class must, however, be defined with sufficient precision as to allow for a particular individual's membership to be objectively determined. This can be done by applying the criterion contained in the class definition to the individual's situation or circumstances. The class definition must also not be overbroad. If the class is too wide, a class action would be inappropriate.

[45] In the present case, the definitions are clear as well as unambiguous. Any individual who wishes to claim membership of either the silicosis or the TB class would easily know what he has to show in order to qualify for membership of either class. Similarly, this applies to dependants who wish to draw a benefit from the class action. The criterion for membership in our view is objective.

[46] With the exception of African Rainbow Minerals ("ARM") and Randgold and Exploration Company Ltd ("Randgold"), none of the mining companies raised any controversy on this issue. They accepted that at the appropriate moment in the litigation they will be able to scrutinise each and every mineworkers' claim to membership. In fact, one of the mining companies, DRD, explicitly concedes that the criterion for membership is objective.

[47] ARM and Randgold complain that a mineworker who wishes to claim membership of the classes would have to first establish through medical diagnosis that he has contracted either silicosis or TB. This, they say, makes it difficult, if not impossible, for the mineworker to claim any benefits that the membership may offer without first undergoing expert medical examination. Unless this is done his claim to membership, especially of the silicosis class, is based on his subjective belief.

[48] The objection is misconceived for at least two reasons. Firstly, the mineworker's claim to membership is not determinative of his actual membership. His actual membership would have to be proven. To prove his membership he will have to show that he meets the criterion contained in the class definition. His actual membership is determined independently of his subjective belief. We have shown above that the definition does not have any built-in subjective criteria, such as the mineworker's subjective belief, as suggested by ARM and Randgold. Secondly, the mineworkers have consciously elected to ask for a certification that allows for or endorses a two-stage process. They describe it as a bifurcated process.[23] For the moment it bears noting that the first stage involves an opt-out procedure. This means that any mineworker, or dependants of a mineworker, who fails to give notice to opt-out of the class action will be deemed to be part of it. During this stage the mineworker or his dependants need not prove actual membership of either of the classes. Thus, proof of actual membership is not a matter that should concern the trial court in the first stage of the proceedings. It is, therefore, no bar to the certification of the class action based on the class definition outlined above. Once the common issues are determined, and should the case proceed to the second stage, then the individual mineworker, or his dependants, will have to produce cogent evidence demonstrating that he contracted silicosis or TB. If he (or they) fails to do so then he (or they) simply will not have a claim. His, or their, case is no different from any other mineworker, or mineworker's dependants, who fails to prove that he worked on the mines for a period of two years.

[49] In our view, there simply is no need for the entire class membership to be determined before the common issues of fact or law can be determined, or before relevant evidence common to all class members, and which advances the cases of each class member, is entertained. This approach is consistent with the practice adopted in the Australian and Ontario statutes whose practical utility is well captured in the following *dictum* of Cummings J sitting in the Ontario Superior Court:

> "the undoubted complexity of follow-on individual issues does not detract from the merit in resolving a preliminary common issue."[24]

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23 See [116]–[125] below.

24 *Wilson v Servier Canada Inc* 50 OR (3d) 219, 49 CPC (4th) 233 at [135]. See also: *Harrington v Dow Corning Corp* (1996) 22 BCLR (3d) 97 at [22]; *Bright v Femcare Ltd* [2002] FCAFC 243 at [153].

[50] In terms of this approach there is no need to identify individual class members during the first stage of the class action. As the learned author, Professor Mulheron reminds us:

> "It must simply be accepted that the determination of whether each individual member of the class can only properly be made at some stage after the resolution of the common issues. The class most certainly does not have to be built at the very commencement of the proceedings."[25]

The scope of the definition of the two classes

[51] There can be little doubt that the classes are defined in fairly broad terms. This is done to ensure that nobody with a legitimate claim is excluded. The make-up of the classes is restrained by the fact that the definitions only cover those mineworkers who worked underground. This, of course, excludes all those who worked aboveground, but, we are told, the circumstances of the aboveground mineworkers who may have contracted either of the diseases is significantly different from those who worked underground, thus making it necessary to exclude them. The duration of the class period contained in the definition covers a span of fifty or more years. The commencement date is 12 March 1965. This date was chosen because it coincides with the coming into force of a new regulatory regime brought under the Mines and Works Act 27 of 1956. If an underground mineworker had commenced working in 1965 at the age of 17 in one of the mines of the mining companies he would, as at the date of this judgment, be 68 years old and retired a while ago. Any underground mineworker who had left before 1965 and who had contracted either of the diseases would, in all likelihood, have succumbed to the disease. Hence, 12 March 1965 was chosen by the applicant mineworkers as a cut-off point. The mining companies do not object to the need for a cut-off point but contend that it be shortened otherwise, they say, the class definition is overbroad. They also claim that an overbroad definition would produce significant problems of manageability for the trial court.

[52] A lengthy time period does not automatically translate into an overbroad definition. Moreover, by truncating the time period, one risks disqualifying many mineworkers who are still alive and were supposed to have benefited from the introduction of the new regulatory regime (but did not because of the alleged breaches by the mining companies) and from the class action even though they, like every other mineworker, may have legitimate claims against the mining companies. Under these circumstances, their exclusion would either be arbitrary or not rationally justifiable. And, it would involve them having to bring a separate class action in which they would raise exactly the same issues as those raised in the one called for in this case. In short, truncating the time-period would only result in a proliferation of the class action. That would certainly defeat the cause of justice. In sum, once it is found that there are sufficient common issues affecting the entire classes that can be determined at one hearing, or if the

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25 Mulheron, R. *The Class Action in Common Law Legal Systems*: *A Comparative Perspective* (Hart: Portland, 2004) at 337.

hearing is split into stages at the first stage, then it follows as a matter of logic that the class definitions are not overbroad. Concomitantly, it cannot be unmanageable. In other words, once it is established that there are issues, or there is evidence that is either uniform or applicable to every mineworker's claim then the concerns of unmanageability of the class action or over-breadth of the class definition do not feature. What we have here is that the sizes of the two classes may be very large but that does not make the class definition overbroad or the class action trial unmanageable. We agree with the observation of the full Federal Court of Australia, expressed thus:

> "It would be a strange result indeed if an issue which was clearly a substantial issue if litigated by one party ceased to be a substantial issue merely by reason of the fact that it was being litigated by many parties. If that were so, the benefits to be derived from Pt IVA (Australian rules) . . . namely the saving of court time, the saving of parties' costs, the efficient administration of justice and so on, would be available to a small group in a case such as this, but would be lost if the group were very large."[26]

[53] Both silicosis and TB are diseases that can be diagnosed with certainty. This means that a diagnosis of silicosis or TB excludes alternative diagnoses of obstructive lung disease or other pulmonary diseases or conditions. TB and silicosis are therefore diagnosable with a high degree of clinical and scientific certainty. This makes this aspect of the proposed class definition objectively and definitively ascertainable.

[54] The class requirement of two years of underground mine work and the employment history of the underground mineworkers makes it possible to objectively and definitively ascertain the silicosis and TB class members.

[55] The class definition further facilitates self-identification by class members by the listing of the relevant mines.[27] Irrespective of the technical nature of the relationships between the mines and the mining companies concerned, prospective class members are able to identify themselves as class members with reasonable certainty so that they can elect to opt-out of the class action at the first stage, can know whether they are bound by the judgment on common issues, and can elect to opt-in at the second stage for the determination of individual damages.

[56] That the classes are objectively determinable is manifest in four simple questions that would be posed to any mineworker: Do you have TB or silicosis? Did you work for one or more of the mining companies? Did you work for one or more of the mining companies for two years? Did you work for the mining companies during the period set out in the notices?

Claim is one in delict

[57] The mineworkers have attached a draft particulars of claim to the application. The draft reveals that the mineworkers' claim is one in delict. For a

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26 *Johnson Tiles* (*Pty*) *Ltd v Esso Aust Ltd* [1999] FCA 636 at [16]; see also Mulheron, *supra* at 259–260.

27 This is to be found in annexure "A" to this judgment.

delictual action to be successful it will have to be shown by a plaintiff that: (i) the defendant acted or failed to act, and (ii) the defendant's action or omission was wrongful (often dealt with under the rubric "*breach of a legal duty*"), and (iii) the defendant was at fault (often captured under the head "*negligence*"), and (iv) the act or omission of the defendant caused the damage suffered by the plaintiff, and (v) the damage endured by the plaintiff is capable of quantification. These elements of a delictual action would have to be proven with regard to each and every putative class member if that class member was to be awarded any compensation for the damages he suffered. At the outset it bears mentioning that the amount of damages suffered by each class member is, without doubt, unique to that member. This, however, is not the case with regard to the other elements of the delictual action. By their very nature the other elements raise very broad issues. What is important for this Court is to consider whether there are any issues amongst those elements of the delictual action which can be dealt with as part of a class action where a finding on them will be applicable to the case of each and every mineworker.

Alleged breach of duties by the mining companies

[58] The mineworkers aver that the mining companies breached their legal duties owed to the members of the classes arising from:

58.1 the mining companies' common law duty of care owed to the mineworkers employed in the relevant mines to take reasonable measures to provide a safe and healthy work environment that was not injurious to their health and/or to take reasonable care for the safety of persons entering the mines;

58.2 the statutory duty owed by the mining companies, in their capacities as mine owners to comply with the Mines and Works Act 12 of 1911 and the Mine Health and Safety Act 29 of 1996 and the regulations made thereunder; and

58.3 the mining companies' constitutional obligations to the mineworkers who were employed from 1994 onwards, based on the following sections of the Constitution: section 9(4) (the fundamental right against unfair discrimination by private persons), section 10 (fundamental right to human dignity), section 11 (right to life), section 12(1)(c), section 12(2) (right to bodily integrity) and section 24 (right to an environment that is not harmful to the health and well-being of an individual).

[59] The mineworkers claim that the mining companies unlawfully exposed all the mineworkers to excessive levels of harmful silica dust while they were in the employ of the mining companies. They claim further that the mining companies owed the mineworkers a duty of care to ensure that their work and living places were safe. They claim that the respondents breached this duty with regard to each and every mineworker by, amongst others, failing to take reasonable steps to ensure that their work and living

places were safe. This they hope to prove by producing evidence at the trial showing that the mining companies failed, amongst others, to:

59.1 prevent or minimise the escape of dust into the air breathed in by the mineworkers by introducing appropriate engineering controls. The evidence they intend to lead will deal with the available engineering methods to control the escape of dust into the air that mineworkers were forced to breathe while at the workplace;

59.2 dilute the silica dust that the mineworkers were forced to breathe on a daily basis. The evidence, which is highly specialised, will canvass some of the methods that were available to the mining companies to dilute this silica dust;

59.3 introduce proper ventilation systems to evacuate the contaminated dust that was being expelled in the very restricted space that the mineworkers were required to work. The evidence will canvass the ventilation systems that were known and available to the mining companies. Once again, the evidence will be highly specialised and technical in nature;

59.4 provide the mineworkers with suitable respiratory protective equipment in situations where this was absolutely essential;

59.5 monitor the effects of the exposure to the contaminated dust upon the mineworkers; and

59.6 maintain a healthy and safe working environment, and failed to provide healthy and safe working conditions, in their mines and to protect the mineworkers from contracting silicosis and TB, and as a result breached their duty of care towards these mineworkers.

[60] The mineworkers allege that the mining companies' negligence was not a once-off single event or incident. It was an unlawful practice or omission that was on-going, relentless, intense and profound in its impact. They say that the mining companies' neglect was industrial in scale resulting in them ultimately being forced to bear the unbearable. They wish to bring evidence to this effect to the trial action. It is evidence that goes to the heart of the mining companies' legal duty of care towards them as well as the breach of that duty.

The evidence common to every individual mineworker's case which the mineworkers intend to bring to the class actions

[61] The mineworkers intend to bring evidence to the class action trial:

61.1 showing that the mining companies, through the Chamber of Mines ("the Chamber"), acted in concert. This is evidence which each mineworker would want to rely upon in his individual case, hence the need for it to be led once in a class action.[28] It is also evidence that no mineworker is capable of bringing to court on his own, yet it is important, if not crucial, to his case;

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28 It would be evidence that each of the 17 000 mineworkers represented by Spoor would want to lead in his case

61.2 showing that the Chamber, which was formed in 1890 and which is a voluntary employers' organisation to which all the mining companies belong, played a pivotal role in the gold mining industry where the mineworkers were all employed. They contend that the need to canvass the role it played is necessary, for it will attend to the issues of the duty of care owed by each of the mining companies to the mineworkers it employed and to the breach of that duty. In this regard, the mineworkers intend to show in the proposed class action that the Chamber provided services "*over a wide range of technical*, *legal*, *medical*, *social and environmental issues*," so that they may "*co-operate and act in concert.*"[29] They intend to show that the dust levels in all of the mines "*remained roughly the same over a period of 50 years*," until 2003, yet in 1964 they already knew that:

> "Men employed underground on the industry's gold mines are still contracting pneumoconiosis and at a rate which compels us to regard the disease as a significant occupational hazard.
>
> Although the present position is much better than 50 years ago, pneumoconiosis has not yet been eliminated from South African gold mines. During the period 1920 to 1950 the average time taken by certified silicotics to contract first-stage pneumoconiosis increased from some eight years to approximately 22 years, but since 1950 little improvement has taken place and the average time today is, according to general opinion, still of the order of 22 to 24 years. As the 1950 figures relate to dust breathed over the previous 20 years or so, they appear to indicate that there has been only a small improvement in dust conditions in our mines in the past two or three decades."[30]

61.3 showing that the evidence referred to in paragraph 61.1 is supported by the factual averments made by Anglo American in its plea in the Blom arbitration where it is revealed that there was a unified approach by all the mining companies to the problem of dust control. The unified approach was informed by, or occurred through, the work of the Chamber which all the mining companies were a part of and participated in. The unified approach commenced upon the formation of the Chamber in 1890, continues to date and, therefore, covers the entire class period;

61.4 demonstrating that various legislative measures were adopted that at one stroke refined the mining companies' duty of care towards the mineworkers as well as reminded them of that duty of care. Further, the evidence they intend to bring to the trial action will show that there was a general and pervasive disregard by the mining companies of their obligations as spelt out in these legislative

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29 *Report of the Leon Judicial Commission of Inquiry into Mine Health and Safety*, *21 Oct 2003* ("The Leon Commission Report"), (Government Printer, 2005) at 9.

30 FG Hill, *The importance of better dust control in the prevention of Pneumoconiosis*, 20 November 1964, at 1–2. It can be found in *Papers and Discussions 1964–1965*, *Association of Mine Managers of South Africa*, at 69–81, 1965.

measures. In other words, there was pervasive disregard of the statutory breaches of duty of care by all of the mining companies, which breaches, according to the mineworkers, were general in nature and took place throughout the class period;

61.5 of a highly technical nature some of which has been captured in academic studies undertaken many years ago;

61.6 of reports of the various Commissions established by previous political authorities (one of them, "*The Weldon Miners' Phthisis Commission*", goes as far back as 1902), as well as the reports of the Chamber. This fact is relevant to at least one of the elements of the delictual action: that of fault or negligence on the part of the mining companies;

61.7 showing that as far back as the early 1900s the mining companies knew, or should have known, that silicosis and other dust related occupational lung diseases were preventable through, *inter alia*, the effective use of engineering controls and good work practices. Such knowledge is demonstrated by the availability of scientific literature dating back to as early as the 1920s. The mineworkers attach some of this literature to their founding papers and what is clear from a perusal of them is that it is highly technical and not accessible to an individual mineworker;

61.8 of the mining companies' and the Chamber's knowledge of the high incidence of silicosis and TB amongst the mineworkers since 1965;

61.9 showing that as late as 2008 it was found that the serial and pervasive non-compliance with the legislative requirements for dust control by the mining companies continued. Some of this evidence consists of an audit conducted by the Department of Mineral and Energy Affairs, which revealed, *inter alia*:

> ". . . (that) there is a pervasive culture of non-compliance to legislative requirements. Inquiry after inquiry makes findings to the effect that risk assessments are not conducted, training is not done, early morning examinations are not done, equipments (*sic*) not maintained and the list goes on and on;"[31]

61.10 of a technical nature concerning gravimetric sampling and its lack of use by the mining companies;

61.11 of numerous investigations that have identified that exposure to silica dust and a silicosis diagnosis are strong risk factors for TB, as well as of some epidemiological studies focusing on this correlation between silica dust exposure and silicosis and TB;

61.12 of studies that revealed that TB is recognised as an occupational lung disease in mineworkers exposed to silica dust, and that a silicosis diagnosis increases the risk of TB by four times after adjustment for cumulative dust and tobacco. Furthermore, studies have

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31 Report of the Dept. of Mineral and Energy Affairs, 2008, at 51–52.

proven that, even in the absence of silicosis, silica dust exposure increases the risk of TB, and it continues to elevate the risk even after exposure ceases;

61.13 showing that throughout their existence, and most importantly during the fifty year period 1965–2015, all the mining companies sacrificed the health and safety of the mineworkers in order to maximise the profits they could extract from mining operations;

61.14 showing that mineworkers were forced to live in crowded and unsanitary conditions in what has sometimes been referred to as "miners' barracks", "mine hostels", "mining compounds" or "dormitories", which was a major contributing factor to the high rate of TB among these mineworkers;

61.15 showing that black mineworkers' wages were much lower than their white counterparts and that these, at times, were as low as ten percent (10%) of that which white mineworkers were paid, thus compromising the black mineworkers' ability to, firstly combat the negative effects of silica dust exposure and secondly, reduce the pain and suffering they had to endure once they contracted silicosis or TB. This latter consequence is relevant to the determination of the issue of general damages that each of the mineworkers intends to claim from the mining companies but the evidence is general to each mineworker's case;

61.16 showing that the mining companies have over a decade been promising to assist former mineworkers in accessing medical examination facilities in the rural areas and towns from where they were recruited and where they returned to since being retrenched, but have to-date failed to do so. This evidence is general and applicable to all the mining companies;

61.17 showing that while the reports of some mining companies recognised that significant exposure to silica dust posed a grave health risk to the mineworkers, the Chamber, through its officials, has over time attempted to discredit valid medical studies documenting the epidemic rates of occupational lung diseases, such as silicosis and TB, in the mineworkers;

61.18 showing that from their inception, and certainly through a significant part of the class period, the mining companies pursued working practices that discriminated against the black mineworkers in relation to their white counterparts, and that one consequence of this was that black mineworkers have suffered significantly higher rates of silicosis and TB than white mineworkers;

61.19 about international best practices regarding the health and safety of workers exposed to silica dust;

61.20 showing that throughout their employment they had no control at all over the environmental conditions under which they worked; that those environmental conditions were determined and regulated solely by the mining companies, and that this was true for all the mining companies;

61.21 showing that the problems of silicosis and TB were always industry problems and were not restricted to any one mining company. The prevalence of these diseases was common to all the mining companies and that not a single mining company can escape this fact;

61.22 showing that over the last 100 years hundreds of thousands of mineworkers employed on the gold mines of the mining companies have developed silicosis and many thousands have developed TB;

61.23 to show the failure of the mining companies to take the necessary steps to protect them from excessive exposure to silica dust was caused in part by the existence of the migrant labour system that prevailed during their employment with the mining companies. In this regard they wish to bring evidence about the role of the mining companies in establishing, encouraging and bolstering the migrant labour system. One example of this evidence consists of the opinions of academics. The opinions are derived from their extensive research on the subject which is published jointly in a respected academic journal. A taste of this evidence was presented to this Court in order to demonstrate its applicability to the case of each and every mineworker. This is manifested in the following quote from the opinion evidence:

> "The migrant labour system has weakened the incentives to control dust and disease by externalising the cost of disease, moving them away from the gold mining industry to communities and the State . . . Barriers to compensation are considerable and the majority of qualifying claimants have not received awards, thus reducing the substantial financial incentive to control dust that would be brought about by compensation payments and hence increased levies on mines."[32]

[62] Each of the applicant mineworkers in this case represented by Spoor also filed individual affidavits indicating who he is, where he worked and what his medical condition as at the date of the deposition was. The affidavits share a common theme and tell a story so familiar to each of the mineworkers that it is bound to be articulated in the same language. Thus, the

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32 Jill Murray, Tony Davies and David Rees, *Occupational Lung Disease in the South African Mining Industry*, Journal of Public Health Policy 32, 565–579, 2011. In their application for admission as *amici*, TAC and Sonke asked for the evidence of a renowned academic, Wilson, to be admitted as evidence in this (the certification) proceedings as it would enhance the hearing by giving context to the evidence of Murray *et al* that would be brought to the class action trial. The evidence of Wilson that they sought to introduce concerned the alleged collaboration between the mining companies and, what in sociological, social anthropological, developmental studies and political science literature is referred to as, "*the apartheid state*", which collaboration was part of the breach of the duty of care the mining companies owed to the mineworkers. However, TAC and Sonke specifically renounced for the moment, any intention to participate in the class action trial (ie if that trial action were to be certified by this Court) and therefore could not guarantee that the evidence of Wilson would eventually find its way to the trial. The evidence of Wilson may well be relevant for the determination of the issue of breach of duty of care by the mining companies but as there was no guarantee that it would be presented to the trial court we deemed it inappropriate to allow its introduction in this certification proceeding.

following factual narration in the affidavit of Mr Bongani Nkala, the first applicant, is common to many of the affidavits:

> ". . . I was frequently and regularly exposed to silica dust released during day-to-day mining activities. This exposure occurred from working with and near activities such as drilling, blasting and crushing of ore and rock.
>
> The dust levels underground were generally controlled by spraying the walls with water. This was done once in the morning and after each blast that occurred during a shift. Blasting underground created a lot of dust and much of it remained in the workplace, even after the walls were sprayed with water, as we could still see it, as well as taste and smell it. There was no ventilation to control the dust levels in my workplace underground and, as a result, the watering process was the only means of dust control. The dust would remain in the air until the walls were watered, and soon thereafter, when the wall dried, the dust levels would increase again. The watering process was an ineffective means of controlling the dust levels underground.
>
> On a daily basis, I and my co-workers breathed silica dust in the following areas of the mines: in the travelling tunnels and in the worksite.
>
> I was never provided with any respiratory equipment. I inhaled all the dust I was exposed to.
>
> The dust levels were especially high when I would enter the mine at the beginning of my shift. I had to walk eight kilometres through the tunnels underground to get to my workspace. Lots of dust would settle on the equipment that we used and the equipment was not cleaned during or between shifts. The dust would settle on our hair, face and clothes while we worked.
>
> Prior to being permitted to work on the gold mines, I was medically tested for the presence of occupational lung diseases, including silicosis, and was deemed well and fit to work underground. Thereafter, I was examined periodically for the presence of silicosis and other occupational lung diseases.
>
> I was diagnosed to be suffering from TB and Pneumoconiosis during my Exit Medical Examination conducted by my former employer in 1997. . . . As a result of this diagnosis, I was retrenched.
>
> In June 2012 I was diagnosed with silicosis . . . I did not have silicosis prior to working on the mines."

[63] The applicant mineworkers represented by Abrahams also deposed to affidavits in support of the application. Their evidence speaks of a general and pervasive breach of the duties of care by all the mining companies they worked for. One of them, Mr Bangumzi Bennet Balakazi, narrates the following in his affidavit:

> "I intend to institute an action for damages against AngloGold Ashanti Limited, the Respondent in this application ('AngloGold') in respect of lung disease, which I have as a result of my employ with AngloGold, or at least primarily as a result of that employment. The lung disease I have is tuberculosis and silicosis and I am advised that it arose out of my occupation, hence being referred to as an occupational lung disease. I am advised though that tuberculosis and silicosis are of a variety of occupational lung diseases to which mineworkers on South African mines are prone.
>
> I am personally aware of a large number of former mineworkers who used to work for AngloGold and who, like me, are ill. I am advised by my attorneys that there are in fact a very substantial number of former AngloGold mineworkers, running into the thousands, who fall within this category.

In 1974, I started working at Vaal Reefs mine as an underground miner. During that same year I was transferred to Western Deep Levels mine. Thereafter, in 1975, I worked for Western Holdings Welkom and Impala Platinum. However, in 1976, I returned to work at Vaal Reefs mine as an underground mineworker, where I continued to work until 1991. After 1991, I carried on working at Western Areas Gold Mine between 1995 and 1997 and Randfontein Estate Gold Mine in 1999. I attach hereto a copy of my employment record issued by The Employment Bureau of Africa ('TEBA').

Like most other miners, I was recruited by TEBA in 1973 at its Peddie office in the Eastern Cape. TEBA was known in the village where I lived. They'd been recruiting young men from my village. At the time of my recruitment, I was 20 years old and lived with my parents and seven siblings in a mud house in Pikoli Village near Peddie. I had only completed Standard 5 at that time- or, what I understand is now referred to as Grade 7.

Because of my low level of education and the poverty in the village, I'd hoped that by working on the mine I would be able to provide for me and my family. I was a healthy person at the time of my recruitment and when l started out working on the mine.

After being recruited, I left my village in a steam locomotive, known as the '*Madlebe*'. I travelled with fellow miners to Johannesburg. This was my first time travelling to a big city and I felt quite intimidated. From Johannesburg we travelled in a lorry to Orkney in what is now the Northwest Province. It was very painful for me to leave my village to work on a mine far away from home. However, I wanted to provide a better life for me and my family.

Upon arrival in Orkney we were examined and thereafter taken to the Vaal Reefs hostel. I was placed in a dormitory with 15 other men. The dormitories were separated by tribe and I stayed with 15 other Xhosa mineworkers. It was fitted out with 16 cement beds which had the appearance of tomb stones. I hated the mine hostels. The dormitory was dirty and smelly. There was a small coal stove in the dormitory as well.

The showers and toilets were in a different building next to our dormitory. I cannot say exactly how many showers and toilets there were but they were shared by about 20 dormitories. There was no privacy at all in using those facilities and everyone showered and used the toilets in full view of the others.

I underwent a one month training course at the training centre at the mine. I was trained how to use different mine machinery. I also received physical training to improve my abilities to endure the heat down in the underground. The training involved cycling on some machine for 4 hours, completely naked. I found it very humiliating and so did the other miners too. During the training, I cannot remember anything being said about dust and the need at all time to protect oneself against it. As far as I can remember, the training only dealt with how to prevent rock falls.

After the training I started out working as a loader, responsible for picking up the crusted rocks with a spade and then loading it onto a locomotive. I was given an overall, knee caps, a light helmet with a lamp, goggles and a mask.

My daily routine day started at 3:00 a.m. in the morning, when we were woken up by a siren. Everyone would wake up, including those for whom it was an off day. We got up, washed, ate and proceeded to work. We were then transported to the mine on a lorry because the shaft was quite a distance from the hostel. After we've clocked in, the cage took us down the shaft. Once down in the underground, it was hot and humid.

As time went on, I became a miner's assistant. I was required to follow the miner everywhere and performed whatever task he'd required of me. I spent most of my time with drillers and loaders and as a result, my job constantly put me in direct contact with dust and heat. The heat made it impractical to wear masks all the time. The hot conditions underground also made it very difficult for me to breathe with the mask on. Over time, the mask became so dusty that I could no longer use it, as it was impossible to breathe through it.

AngloGold had a system of blasting which took place during shifts. When blasting took place, miners moved to a closed-off chamber. However, soon after the blasting had finished, miners returned to the blasted area almost immediately, whilst the area was still full of dust. Fellow miners sprayed water, but it did not help much. The white miners only returned to the blast area after most of the dust had settled.

I cannot recall mine management, most of whom were white at the time, speaking to me or any of the other miners about the health risk of dust. We just had to work and work. For the majority of my time as a mineworker, I was treated very badly by the white miners and supervisors. Most of them forced us to expose ourselves to dangerous areas and situations. When we refused to carry out their orders, being well aware of the possible harm that it might do to us, they often kicked or beat us with their fists. I was constantly being referred to as a '*kaffir*' and '*doner*'.

An underground shift was normally about 8 hours during which time we worked, with only a short interval to eat, drink water and relieve ourselves. There were no toilets underground and we had to relieve ourselves on a few buckets, placed in a faraway section on our shaft level. The buckets were often full and the stench was unbearable. Before we could use the 'toilet', we first had to ask for permission from the white supervisor. Sometimes my requests were denied.

By the afternoon, after a shift, we emerge from the underground to the surface with our clothes and body full of dust. I returned with my clothes and boots to the hostel. It was common for miners to take their clothes and boots inside the mine hostel since miners were responsible for washing their clothes themselves. This created further dust in the dormitories.

On my off days I further attended to washing my clothes. I went home once a year when my contract came to an end.

Over time and whilst working at Vaal Reefs, I became ill. I started to cough repeatedly, I was very tired and short of breath and I also began to sweat at night. It was subsequently discovered that I had tuberculosis and silicosis. Thereafter, in 1991 I was retrenched.

Notwithstanding my retrenchment, I commenced working for Western Areas Gold Mine between 1995 and 1997 and thereafter for Randfontein Gold Mine in 1999.

However, after I'd stopped working in the mines, I received a letter in 2004 from the Medical Bureau for Occupational Diseases (the 'MBOD'), informing me that I had tuberculosis and silicosis in the second degree. . . .

Subsequent to the MBOD's letter, I received R28 000.00 in what I'm advised of, would have been in all likelihood compensation from the Compensation Commission for Occupational Diseases ('the CCOD').

Since then, I'd been unable to perform work that requires physical labour or effort. I receive R1 200.00 from the government as a disability grant. This is the only income my household lives on, as my wife and four children are all unemployed. I have not received any financial or other support from AngloGold,

since my retrenchment or from the CCOD. Consequently, I want to claim damages from Anglo Gold because of my illness."

[64] Another applicant, Mr Watu Livingstone Dala, testifies as follows:

". . . Upon my arrival, I was taken to Vaal Reefs mine hostel. I was placed in a dormitory with 15 other men. It was fitted out with 16 beds, each with its own sponge mattress. The showers and toilets were in a different building next to the dormitory. There were about 6 showers and 6 toilets, which we shared with a lot of other mineworkers living in the other dormitories. The showers and toilets were not private and miners used it (*sic*) in full view of the others.

My daily routine started at 3:30am, when a mine policeman woke us up, using a loud hailer. There was also a siren to wake us up. Everyone woke up, including those for whom it was an off day. We got up, washed, ate and then proceeded to walk to the mine, which was 5 minutes away from the hostel.

Once at the mine, the cage took us down the shaft. Once underground, one immediately experienced the humidity and dust hanging in the air. During my employment at Western Deep Levels mine . . . We took three cages to get to that level underground. It was extremely hot at that level.

Over time, I became a winch driver. I was responsible for cleaning rocks from underneath slopes and gullies, after rock blasts. As a result, my job constantly put me in direct contact with dust and heat. Because of the rock blasts and heat, it was not practical to wear masks all the time. The hot conditions underground made it very difficult for me to breathe with the mask on. Over time, the mask became so dusty that I could no longer use it, as it was impossible to breathe through it.

During most of my shifts, I was present when rock blasting occurred. The whole place shook when it happened. It was very scary. Thereafter, there was always a lot of dust. Sometimes, you could barely see in front of you. The dust was also suffocating and got stuck in our noses and ears. Though water was used to keep the mine surface wet, it did little to minimize the levels of dust. Mine ventilation also did not do much to reduce the dust. I cannot recall mine management, most of whom were white at the time, speaking to me or any of the other miners about the health risk of dust. In fact, I remember being told by our supervisors that we should only make sure to wear the masks when there were 'safety reps', meaning safety representatives inspecting the mine underground. However, those representatives were seldom visible, as they almost only appeared when there was an underground accident.

Mine management was only concerned with us having to work all the time. We worked like slaves. It was common for us to be referred to as '*kaffirs*', or '*mshunukanyoko*', meaning '*mother fuckers*'. Some mineworkers were regularly kicked under their buttocks by the white supervisors and some were even hit with the fist or with objects. One white supervisor once tried to hit me but I managed to run away and escaped the attempted assault.

. . .

During the course of my employment with the mine, I underwent routine medical check-ups at the mine hospital. During one of those visits, around 1999 I think it was, I was told by the mine doctor that I was quite ill. Nonetheless, I was allowed to continue working underground. In 2004 though I received a letter from the Medical Bureau for Occupational Diseases ('the MBOD') stating that I had tuberculosis and silicosis in the second degree.

Again, notwithstanding that letter from the MBOD, I was allowed to continue working underground until 2006 where after and only then, I was transferred to the surface. I stopped working for AngloGold in 2007 when I was retrenched

due to my illness. I was 45 years old at that time. I returned to the Eastern Cape to my family.

However, in 2001, I received R17 000.00 and subsequent thereto in 2007 I received a further sum of R48 000.00.

Currently, I do odd jobs and receive very little money for it. My wife and I receive two child support grants from the government totalling R560.00. I have not received any financial or other support from AngloGold Ashanti since my retrenchment or any further sums from the CCOD. Consequently, I want to claim damages from AngloGold, because of my illness."

[65] The evidence concerning their working conditions is similar or almost identical in all the affidavits deposed to by the individual mineworkers represented by Spoor and Abrahams. The averments in all the affidavits of the individual mineworkers divulge the same or similar Victorian-era like working conditions regardless of which mine the deponent worked for and during which time-period he worked for these mining companies. Another fact illuminated in many of these affidavits is that the deponent worked on more than one mine during different times of his working life, and yet he testifies to working conditions that were almost identical in each of the mines throughout his tenure as a mineworker.

[66] With remarkable consistency their evidence reveals that the mining companies stripped them of their dignity, and concomitantly compromised their health and safety, with such intensity and ferocity that they were effectively dehumanised.

[67] A further factor illuminated in all the affidavits is that almost every one of the miners was recruited by a company operating under the name and style of TEBA Ltd. ("TEBA"). It was TEBA that placed him with a particular mine and it was TEBA that kept a record of his employment with the mining companies. It appears from these affidavits that TEBA acted for and on behalf of all the mining companies. Its conduct and its omissions were common and universal. Its conduct and its omissions are relevant to the case of each mineworker as they focus upon the issues of breach of the mining companies' duty of care as well as the unlawfulness of their conduct.

[68] Four of the dependant applicants, Ms Maleburu Regina Lebitsa ("Lebitsa"), Ms Mataaso Mable Makone ("Makone"), Ms Matsekelo Cisilia Masupha ("Masupha") and Ms Matisetso Maseipati Jesenta Nong ("Nong") represented by Spoor are the widows of mineworkers. As their circumstances are similar in material respects the affidavits they have filed share common averments. One of them, Lebitsa, testifies as follows:

"My late husband was a former gold mineworker who worked underground (from 1972 to 1998).

My late husband left work on the mines when his former employer found that he was medically incapacitated and that he was no longer able to perform his duties. In early 2005, my husband was certified to be suffering from tuberculosis and silicosis in the second degree by the Medical Bureau for Occupational Diseases (MBOD)

On 30 April 2010, my husband passed away. He was 55 years of age. As per the copy of the attached death certificate . . . the cause of his death was Tuberculosis. I am advised that scientific research shows that the risk of dying from

tuberculosis is three times higher in silicotic mineworkers that those without silicosis.

My husband supported me whilst he was working in the mine. Consequent to working on the mines, he developed silicosis and, as a result, he left work on the mines due to ill health at the age of 42, long before the normal retirement age of 65 years. When he returned home from the mines his health deteriorated and, as he became weaker, his ability to support his family was severely undermined. The support he provided me was fully terminated when he passed away in 2010.

Accordingly, as a result of my late husband contracting silicosis and being retrenched prior to the normal age of retirement due to his ill health, I suffered a reduction of support when he left work on the mines. Thereafter when he died, the support provided by him was completely terminated.

My late husband, along with thousands of other mineworkers, had contracted silicosis as a result of their employment with Respondents' mines."

[69] Broadly speaking the testimonies of Makone, Masupha and Nong are the same as that of Lebitsa. Hence, if individual actions are to be brought they will be repeated in each case.

[70] The evidence referred to in 59, 61–64 and 68 above is relevant and necessary for it pertains to the issues of breach of duties of care as well as to the fault elements of the delict the mineworkers complain of. Some of the evidence consists of highly technical scientific material and each individual mineworker lacks the capacity to bring it to court on his own. However, all this evidence is applicable to each and every mineworker's case and if the thousands of mineworkers were ever able to, and actually did, litigate individually then without doubt, the same evidence would be repeatedly presented to court.

The claim against parent companies

[71] The claim against the parent companies of the respective companies that employed the mineworkers is that they had authority over, advised and guided their respective employing subsidiary company, and were aware that its subsidiary company would accept its direction, guidance or advice and that that direction, guidance or advice materially impacted upon the health of the mineworkers, especially with regard to them contracting silicosis or TB. The evidence they wish to bring against these companies is the same evidence referred to in 59, 61–64 and 68 plus evidence about the active involvement of the respective parent company in the affairs of its subsidiary. The latter evidence is not separate, or insulated, from the former evidence. Parent companies would have to engage with former evidence as much as the subsidiary companies would have to do so. This evidence, too, is general to all the parent companies. It would, therefore, make no logical sense to exclude them from the class action. In addition, they claim that the parent companies knew, and in some cases were part, of the decisions to implement the practices that had a material impact on the environmental conditions to which the mineworkers were exposed, and which had a negative impact upon the health of these workers. In the case of one parent company, Anglo American, the mineworkers intend to lead extensive evidence about its reporting since 1961 on behalf of all its

subsidiaries about the health of their employees as well as about its own knowledge of the correlation between silica dust exposure and the lung diseases of silicosis and TB. They further intend to show that in many respects Anglo American was a trendsetter when it came to advising on the adoption of health and safety equipment, methods and procedures. Its advice, they intend to show with credible evidence, fell woefully short of what is to be expected of a reasonable employer taking seriously its obligations to protect and advance the health and safety of the mineworkers. Parent companies on the whole would have to engage with all this evidence, which the mineworkers intend to lead in one trial action only.

Common questions of law

[72] The mineworkers also intend to plead certain simplified questions of law at the class action trial, some of which are amenable to being dealt with *in limine*, others not so, but they are all common to the case of every mineworker. These, amongst others, are:

72.1 whether the legal convictions of the community justify the imposition of delictual liability upon the mining companies for failing to take the necessary steps to prevent the growth and spread of silicosis and TB. Some of the evidence referred to in 61 above would, no doubt, be relevant to this issue;

72.2 whether the element of causation can be determined by application of the *res ipsa loquitor* rule;

72.3 whether breaches of the relevant health and safety statutes and regulations constitute grounds for the imposition of strict liability;

72.4 whether the principle of joint and several liability should apply to multiple mining companies in cases where they employed the same mineworker, though at different times, but all exposing him to excessive levels of silica dust while he was in their respective employ;

72.5 whether or not the filing of the application for certification interrupts prescription;

72.6 whether the breach of one or more of the constitutional rights captured in sections 9(4), 10, 11, 12(1)(c), 12(2) and 24 of the Constitution automatically gives cause for a delictual action; and

72.7 whether compensatory damages are available to mineworkers under sections 12(1)(c) and/or 24 of the Constitution.

[73] These legal questions are general and applicable to the case of each and every mineworker, and their determination will have a final and determinative effect on the claim of each of them.

The claims of dependants

[74] As is the case with the mineworkers, at this stage the dependant applicants are unable to provide the court with a precise number of dependants that will join in the action, save to say that the number is realistically expected to be in the tens of thousands. These dependants would have to

establish the same five elements of the delict as the mineworkers, and they intend to rely on the same evidence as that on which the mineworkers rely to prove some of those elements.

Issues concerning pulmonary tuberculosis

[75] The mineworkers contend that there is a correlation between the exposure to high levels of silica dust and the development of TB. The question of whether the dust control measures, or whether the lack thereof, were wrongful and negligent is therefore a question that concerns both the silicosis and TB classes, as well as all the mining companies. The evidence referred to in 59, 61–64 and 68 is evidence the entire TB class intends to rely on. Some of the evidence will be presented by members of the TB class.

[76] However, it is common cause that TB is caused by a mycobacterium and not by inhaling silica dust and because of this the mining companies claim that the mineworkers would have great difficulty in proving with certainty that they contracted TB as a result of their exposure to silica dust during their employment at the mines. The mineworkers will not be able to show that "but for" their employment at the mines where they were exposed to excessive levels of silica dust they would not have contracted TB. For this reason they claim that there is no triable issue between them and the mineworkers that can be resolved at a class action. The problem with this contention is that it ignores altogether the unassailable fact that before this question of causation can be raised there are other factual issues that have to be considered, and those factual issues are identical to some of the issues raised in the determination of the case of the silicosis class. It is this that inseparably conjoins the two classes and would allow for a single class action. It is no doubt true that once these common issues are dispensed with the cases of the two classes may diverge. But when and how that is to be done is a matter only the trial court can determine. It alone can determine how best the interest of justice can be served. The mineworkers have acknowledged that the issue of causation for the TB mineworkers is not an easy one. But, they rely on two recent cases where there was evidential uncertainty as to the direct or actual cause of the harm suffered, and where the courts developed the law by finding that the "but for" test is not the only method of determining the issue of causation. The two cases are *Fairchild v Glenhaven Funeral Services Ltd*,[33] and *Lee v Minister for Correctional Services*.[34] The majority judgment in *Lee* held that there was nothing in our law that prevented the court from approaching the question of causation by asking whether the facts proven by the plaintiff show that they were the more probable cause of the harm she suffered. By doing so the CC has expanded our perceptions of causation. What is clear from this development of the law is that the mineworkers are not incapable of proving that there is an inseparable causative link between their contracting TB and the unlawful exposure to excessive levels

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33 [2002] 3 All ER 305 (HL).

34 2013 (2) SA 144 (CC) [also reported as *Lee v Minister for Correctional Services* (*Treatment Action Campaign and others as amici curiae*) at 2013 (2) BCLR 129 (CC) – Ed].

of silica dust while working on the mines. Their claim is that exposure to high levels of silica dust undermines the immune system which increases the risk of developing TB. The mining companies do not dispute that silicosis is associated with an increased risk of TB. In the light of the development of the law and the common cause facts, the mineworkers have more than a fair chance of discharging their onus in this regard. Thus, as this issue of unlawful exposure to excessive levels of silica dust is common to that of the silicosis mineworkers there is no logical or practical reason to deprive the TB mineworkers from being part of the same class action. Accordingly, we find that the mining companies' resistance to combining the TB mineworkers' case with that of the silicosis mineworkers is without merit.

Are there conflicts of interests on the common issues?

[77] In any class action it is inevitable that there will be conflicts of interests between class members. This is borne out by the fact that ultimately each class member must prove his claim in its entirety if he is to succeed. However we have not been alerted to any, nor can it be said that the aforementioned general factual evidence, or the general questions of law, embody any conflicts of interest between the individual class members. Hence, a certification of the class action would translate into the following: once the common issues are determined, and assuming they favour the mineworkers' case, then each mineworker would have to develop the rest of his case on its own facts. In other words, even after the common issues are dealt with and finalised there nevertheless remains the issue of each mineworker having to prove his own case. It follows axiomatically that the stage when each mineworker would have to prove any outstanding aspects of his case, particularly those aspects peculiar to his own case, such as for example, the amount of the damages he sustained, would have to be the final stage of the class action.

[78] It is also conceivable that before that stage is reached, and after the issues common to all the mineworkers have been dealt with, there remain certain issues common to only some mineworkers. This would best be described as issues pertaining to a sub-class. Depending on how the overall general common issues are determined there could be more than one sub-class that may be identified by the trial court. Whether it will be necessary to determine the issues pertaining to each sub-class before the final stage (of each individual mineworker proving his loss) are reached is a matter for the trial court. The presiding judge would be completely at liberty to determine how best to conduct the trial once the overall common issues had been determined.

[79] The mining companies, in particular Harmony[35] and AngloGold, point out that to the extent that conditions in one mine may have been worse than

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35 The reference to Harmony includes Harmony Gold Mining Company Ltd (the "first respondent") as well as its subsidiaries, which are: Evander Gold Mines Ltd ("second respondent"), Randfontein Estates Ltd ("fourth respondent"), Armgold/Harmony Freegold Joint Venture (Pty) Ltd ("fifth respondent"), Avgold Ltd ("sixth respondent"), Unisel Gold Mines Ltd ("seventh respondent"), Lorraine Gold Mines Ltd ("eighth respondent") and African Rainbow Minerals Gold Ltd ("thirty-second respondent").

those in other mines the interests of the mineworkers employed in the former mine may conflict with those of the other mines. The fact that conditions in one mine may have been better or worse than in other mines does not detract and distract from the fact that there are sufficient common issues of fact and law that allow for, at least at the first stage, a single proceeding to be held where evidence and argument common to all the mines is entertained. In our view, there can be no significant conflict of interest while these common issues and evidence are being dealt with.

[80] AngloGold also points out that since a single mineworker is bound by the processes that would be set in motion in the class action trial he would, until the final stage is reached, be precluded from settling his case on his own. Accordingly, AngloGold contends that his interest conflicts with that of the rest of the mineworkers. This contention forgets that the mineworkers are calling for the class action to be held over two stages or conducted in two phases.[36]

[81] The first would be an opt-out stage and the second one an opt-in one. During the first stage, all the common issues can be addressed and assuming the findings on these issues are favourable to the mineworkers then only would the opt-in phase take effect. As this opt-in phase commences the individual mineworker would have an opportunity to refuse to be part of the class action. Hence, the potential conflict of interest AngloGold draws attention to is mitigated by this election afforded to the mineworker. Of course, once he opts-in then he would have to accept that any settlement that is concluded would be one that includes all the mineworkers, including himself. This is the price he pays, or the benefit he receives, by being part of the class action.

[82] In any event, should there be any conflicts of interest that have not been catered for or addressed in the settlement reached these can be brought to the attention of the court which will make a determination on the issue. In terms of the contingency fee agreements, which we address later in this judgment, any settlement reached on behalf of the mineworkers will have to be approved by the court. Even if the contingency fee agreements were silent on this issue, we hold that all class actions that are certified should be on the condition that any settlement agreement reached by the class representatives on behalf of the entire class must be approved by the court in order to be valid. This provides a moment for any conflicts of interest issues to be dealt with by the court before the settlement agreement is approved and implemented.

[83] Furthermore, as we show below, the evidence demonstrates that the large majority of the mineworkers are incapable of litigating on their own.[37] Until they are able to do so, there is nothing for them to settle. Accordingly, we are unconvinced by the arguments that the class action should not be certified because it inherently bears scope for conflicts of interest between mineworkers who want to settle and those who don't.

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36 See [116]–[125] below.
37 See [100]–[108] below.

The common issues in the class actions may not finally determine each mineworker's case

[84] It is obvious that not all the elements of the delictual action will be finalised once the common issues have been determined. We know for instance that as each mineworker's damages are unique to that mineworker, these will have to be individually determined. The same applies to the mineworkers' dependants' cases. The mineworkers are acutely aware of this reality.

[85] This fact was repeatedly highlighted by the mining companies in their written and their oral submissions. At one stage during the oral submissions there was a confusion as to whether this meant that even if the common issues were determined in favour of the mineworkers there would, nevertheless, be a need for a summons to be served by each individual mineworker against a respective mining company, or mining companies if more than one is to be held accountable. We believe that this perception of what might happen to the individual claims once the common evidence on some of the disputed facts is received and an appropriate finding is made, and once the common issues are determined, is misconceived. It is based on speculation, which no doubt is premature. We have no clue as to what facts will be disputed and what will be agreed upon after the pleadings and the pre-trial processes are complete. What we know, thus far, is that there are sufficient disputed facts common to the claims of all the mineworkers, and that the determination of these disputed facts can only be enhanced by a single hearing of the evidence common to all the claims. We also know that there are issues common to all the claims that can be determined at a single hearing, and this can be done at the initial stage of the proceedings. That is all we know.

[86] The rest will have to be left to the trial court as that court would not be hamstrung by the same information deficit that besets this Court. The trial court will, no doubt, be tasked with managing the process once the class action is certified. Importantly, while the trial court is seized with the matter the mining companies will have pleaded their cases, the pre-trial processes that are available in terms of the rules of court will be finalised and that court, using its powers in terms of section 173 of the Constitution, the various rules of court and practice directives, will be able to decide on the route(s) best suited to resolve the manifold disputes that are bound to surface. It can only do that once the issues have been crystallised by the pleadings. That court has significant powers to manage the proceedings in the interests of justice. It is, furthermore, within the wit of that court to determine whether sub-classes should be formed and for the proceedings to be arranged in such a manner so as to do justice between the parties. It would be inappropriate, if not impossible, for this Court, which is only concerned with certification of the class action, to plot the best route forward for the trial court, or to identify any possible sub-classes for the trial court. This Court does not have the benefit of the pleas of the parties or the outcome of the pre-trial processes. Sight must never be lost of the fact that a certifying court cannot pre-determine for the trial court what should happen at the trial. In our view, a certifying court doing so would be exceeding its remit.

[87] A very important consideration to be taken into account is that even before the pre-trial processes are finalised, the practice directives of this Court allow for the case to be judicially managed so that it is trial-ready. If required and if it is in the interests of justice, there is no reason why a relevant paragraph in the practice directive should not be invoked.

[88] It must not be forgotten that the mineworkers have asked for a certification that allows for the adoption of a bifurcated process. While we discuss this in more detail below, we note here that the second stage of this bifurcated process involves the invocation of the opt-in method of identifying the total number of mineworkers who form part of the class action. This means that at the conclusion of the opt-in process the names and details of all the mineworkers who claim rights of membership to the classes will be known. There will be no need for them to issue summonses. The mining companies are already before court. All they will then need to know is who exactly the plaintiffs are. The trial court will have to fashion a process for this information to be relayed to all of them. As we say above, the trial court is more than capable of doing so.

[89] Hence, the fact that the determination of common issues in favour of the mineworkers will not finalise each mineworker's case (or that of his dependant(s)) is no bar to certifying the class action. A certification is not dependent on each mineworker's case being fully and finally determined once the common issues are determined in favour of the mineworkers. As long as it can be shown that determination of the common issues will advance the cases of the individual mineworkers substantially, a certification of the intended class action would be justified and would be in the interests of justice. At the same time it cannot be overlooked that the cases of all mineworkers could very well be finalised if the trial court were to find against the mineworkers on one or more of the common issues. This could happen if, for example, an issue such as prescription is determined in favour of the mining companies. In this scenario, the entire cases of all the mineworkers, or of a substantial number of mineworkers, could be finalised. This possibility on its own bears significant weight in favour of certifying the class action.

Conclusion on commonality

[90] All the mining companies are accused of having committed the same wrongs – failing in their duties to protect the health of their employees, the mineworkers, when they were legally bound to do so, and as a result thereof causing them to suffer the same harm – contracting the disease of silicosis or TB. However, sight must not be lost of the fact that this case is different from the usual class action where numerous persons have the same or similar claim against a single defendant arising from a single wrong committed by the defendant. In this case, numerous mineworkers have the same claim against one or more of the mining companies simultaneously, and while all their claims are attributable to a single cause, the harm nevertheless occurred at different times and in different circumstances. The mining companies placed heavy emphasis on this latter fact in their opposition to the certification of the class action.

[91] What the mining companies do not gainsay is that all the mineworkers have a similar, albeit not the same, case: that they have all worked in the mines owned, controlled or advised by one or more of the mining companies; they have all contracted silicosis or TB; that the exposure to silica dust was the sole cause of them contracting silicosis and a major contributing factor to them contracting TB. In other words, all the silicosis mineworkers have a claim (harm suffered at the hands of one or more of the mining companies) attributable to a single cause, even though the harm they are alleged to have suffered may have occurred at different times, in different circumstances and in different mines. At the same time all the TB suffering mineworkers claim that a major, if not sole, cause of their contraction of TB lies in their exposure to silica dust which was prevalent at the mines they worked in.

[92] The mineworkers correctly point out that should the class action not be certified the evidence referred to in 59, 61–64 and 68 above would have to be presented in each individual case that may be brought, resulting in it being presented many times over. And, it would be presented by the same witnesses in each of the cases. On the contrary, if the class action were to be certified it would be presented only once. Hence, that constellation of evidence can only be presented in a class action trial. It is neither economical, nor in the case of any individual mineworker affordable, for him to bring it to his trial action were he to sue in his individual capacity.[38] In a class action trial the mining companies will be able to challenge all this evidence once and to the extent that they will bring direct contra evidence this, too, can be done once. The class action trial court will deal with all the evidence once and for all and will make a single finding on the issues arising from this evidence as opposed to many trial courts sitting and hearing the same evidence. It has to be borne in mind that if individual trials were ever to be held and evidence repeatedly presented in each of the cases, the findings on each case remain case-specific and are not binding on any subsequent case, even though the subsequent case draws on much of the same evidence as the previous one. It goes without saying that there is always the problem of different courts hearing the same evidence but coming to different conclusions or, to put it differently, making different and even mutually contradictory findings. This is as untenable as it is uneconomical. Thus, if jurisprudential coherence and integrity are to be maintained, which in the interests of the rule of law they must be, then the evidence can only be presented in a class action hearing. In other words, the evidence is only truly digestible in a class action hearing.

[93] Simultaneously, most, if not all, the mining companies indicate that they intend to raise the same defences, such as for example, the voluntary acceptance of risk by the mineworkers, and/or the claims by the mineworkers on the whole have prescribed. These, therefore, raise common issues or pose common questions best dealt with in a class action hearing.

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38 See [100]–[108] below.

[94] The approach adopted by the Canadian Supreme Court in *Vivendi Canada Inc v Michel Dell' Aniello* is instructive. There the court held:

> "the common question may require nuanced and varied answers based on the situations of individual members. The commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent. It is enough that the answer to the question does not give rise to conflicting interests among the members."[39]

[95] This is particularly so because:

> "the underlying (commonality) question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be 'common' only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated *vis-à-vis* the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit.[40]

[96] In *Vivendi* the court noted with reference to similar cases that an issue will be considered common if addressing it enables all the claims to move forward. It need not be determinative of the final resolution of the case. It is sufficient that it allows the claims to move forward without duplication of the judicial analysis. This, however, does not preclude a class action suit.

[97] The approach in *Vivendi*, in our view, is correct for it ensures that the interests of justice predominate.

[98] Thus, in our case the class action would not only be to the benefit of the mineworkers but also to that of the mining companies which raise defences that are common to all or most of the mineworkers. These defences would be determined once and would enjoy the status of finality. At the same time, the court would be saved the inconvenience of dealing with more than one case and hearing the same evidence on the same issue. Thus, it would enhance judicial economy. Further, it would prevent the potential harm to judicial integrity caused by various courts hearing the same evidence and producing conflicting decisions from that evidence.

[99] Thus, we reiterate that in our judgment the receipt of the above evidence common to all the claims of the mineworkers and the determination of the issues identified above will most certainly move the litigation forward. It is, accordingly, in the interests of justice that they be dealt with in a single class action hearing.

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39 [2014] RCS 1 at [46].

40 *Western Canadian Shopping Centres Inc v Dutton* [2001] 2 RCS 534, at [39]; see also, *Rumley v British Columbia* [2001] 3 RCS 184 at [32].

There is no realistic alternative to class action

[100] The mineworkers have urged the court to consider that, in the context of this case, there is, for most victims of silicosis and TB, no realistic alternative to class action. For them, it is said, it is class action or no action at all. Class action is the only realistic option open to the mineworkers and their dependants. It is the only way they would be able to realise their constitutional right of access to court bearing in mind that they are poor, lack the sophistication necessary to litigate individually, have no access to legal representatives and are continually battling the effects of two extremely debilitating diseases. This is manifest in the following uncontested evidence of Spoor:

> ". . . It is not disputed that the majority of the class members are impoverished rural people, many of whom are in poor health, who are spread across the subcontinent and who have very limited access to the civil justice system. The very large proportion of class members who were migrant workers from Mozambique, Malawi, Lesotho and Swaziland, probably have no access to the South African justice system at all.
>
> Litigating on behalf of claimants located in remote rural areas and in neighbouring countries is particularly difficult and expensive. Communication is difficult and expensive. In many instances letters and notices must be delivered by hand, travel to and from these remote areas is slow, expensive and often unreliable. There are few if any local correspondent attorneys to rely upon and either the attorney must travel to see the client or *vice versa*. A simple matter such as arranging for a medical examination can take days to organize and involve claimants travelling hundreds of kilometres. All of these costs must be borne by the client (which is impossible), or they must be borne by the attorney."

[101] While the factual matrix of the position of most mineworkers is not seriously disputed by any of the mining companies, they simply deny that class action is the only viable option. They do so without advancing an alternative option that will guarantee access to justice for the mineworkers. The mining companies argue, in the main, that the class action of the magnitude sought by the mineworkers will be unmanageable.

[102] The mineworkers accuse the mining companies of not acting in good faith. They also accuse them of doing all to escape justice. The mining companies failed to dispute the claim, or present credible evidence to doubt it.

[103] They know, claim the mineworkers, that if the class action is not authorised that most of the mineworkers and their families will not be able to access justice. It was not disputed that the majority of mineworkers have little to no access to the South African justice system as they are all impoverished or indigent and are living in the rural areas of South Africa, Mozambique, Malawi, Lesotho and Swaziland, and are in poor health. They form part of the "(*m*)*illions of people* (*that*) *are living in deplorable conditions and in great poverty*"[41] in this country and in the neighbouring states.

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41 *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) at [8] [also reported at [1998] 1 All SA 268 (CC) – Ed]. This fact is forcefully reiterated in *Moise v Greater Germiston TLC*: *Minister of Justice and Constitutional Development intervening* (*Women's Legal Centre as amicus curiae*) 2001 (4) SA 491 (CC) at [14] [also reported as *Moise v Greater Germiston Transitional Local Council of Greater Germiston and others* at 2001 (8) BCLR 765 (CC) – Ed].

[104] We have to assume, for present purposes, that the mining companies violated their constitutional, statutory and common law rights as at this stage the mineworkers have made out a *prima facie* case in this regard. That being so, the vast majority of them who cannot sue individually would have to live with the fact that the law, with all its promises, affords them no remedy for the pain and suffering endured while battling the growth of fibrotic forests in their ever depleting lungs. If the legal system is inaccessible to them then the constitutional gift of a right of access to court,[42] is illusory. It is only through access to courts and other independent tribunals that justiciable disputes can lawfully be adjudicated. This makes the right of access to courts one of cardinal importance in our constitutional democracy.[43] If access to court is denied to them because the court refuses to allow them to follow a particular process, such as class action when no other is available, then the rule of law, in our view, is ruptured. Access to court is an ingredient in the making of the rule of law.

[105] This Court has already addressed the issue of access to court, albeit in a different context, in a judgment concerning an interlocutory dispute between the mineworkers and one group of mining companies, Gold Fields.[44] There is no need to repeat what is said there save to say that it enjoys the full confidence of the entire court. We know, too, access to courts is fundamental to the survival of our democratic order as well as for the protection of the Constitution itself.[45] It follows that the court should be very careful not to close its doors in the face of the indigent, the weak and the meek, seeking to access justice.

[106] Correspondingly, the mineworkers challenged the mining companies to deny that their vehement opposition to the application for certification is indicative of a determination to prevent the mineworkers from receiving justice, and that they have been single-minded in their desire to escape liability for their alleged pervasive, relentless and intense neglect of the health and safety of the mineworkers. The mining companies failed to meet the challenge. For them there was only one route open to the mineworkers and that was individual trials for each and every mineworker who claims to have a cause of action.

[107] The mining companies persisted with this submission even though they were not able to deny that this route is only theoretically available to the large majority of the mineworkers. In effect, they do not deny that the mineworkers' right of access to court would be materially limited, if not actually denied, should the class action be refused. No justifiable reason

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42 S 34 of the Constitution which provides:
"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

43 *Beinash and another v Ernst and Young and others* 1999 (2) SA 116 (CC) at [17] [also reported at 1999 (2) BCLR 125 (CC) – Ed].

44 *Gold Fields Ltd v Motley Rice LCC* 2015 (4) SA 299 (GJ) [also reported as *Gold Fields Limited and others v Motley Rice LLC*; *In re*: *Nkala and others v Harmony Gold Mining Company Limited and others* at [2015] 2 All SA 686 (GJ) – Ed].

45 *Mukkadam*, *supra* at [29].

to materially limit or deny the mineworkers their right of access to court in this way was presented to us. We find none.

[108] We hold the view that in the context of this case class action is the only realistic option through which most mineworkers can assert their claims effectively against the mining companies. This is the only avenue to realise the right of access to the courts which is guaranteed for them by the Constitution.

Class action is the most appropriate way to resolve many of the disputes that arise in the case of each mineworker

[109] This issue was raised by the mining companies, particularly Anglo American, which say that even if there are questions of fact and law which are common to claims of all the mineworkers, it is still necessary to ask if these outweigh the non-common issues of fact or law to warrant a certification of the proposed class action. Anglo American refers to this as the "*superiority*" requirement. It was argued by Anglo American that this issue of the most appropriate way to proceed was introduced into our law by *Children's Trust* as a "*requirement*" to be met for a certification application to be successful. As we have stated, according to the CC in *Mukkadam* any "*requirements*" laid down by *Children's Trust* are no more than factors to be considered by the court in its consideration of what is in the interests of justice.

[110] In any event, we hold that once it has been established that there are sufficient common issues whose determination would advance the cases of all individual mineworkers, then there is no need for the court to engage in the exercise of examining whether these common issues outweigh the non-common ones. In such a case it has to be in the interests of justice that a class action be certified. Articulated differently, once the determination on whether there are sufficient common issues to warrant a class action is made, the question of the most appropriate way to proceed would almost certainly fall away.

[111] Furthermore, we do not read *Children's Trust* to be saying that the court must compare a class action to other available forms of litigation and be satisfied that the most appropriate way to proceed is a class action before it can certify the class action, even though it has found that there are common issues whose determination will advance the case of all individual class members. The SCA only said that there is overlap in these "*requirements*" such that "(f)*or example the composition of the class cannot be determined without considering the nature of the claim. The fact that there are issues common to a number of potential claimants may dictate that a class action is the most appropriate manner in which to proceed, but that is not necessarily the case*"[46], and left it at that. In our view, this does not mean that the SCA found that "*the most appropriate manner in which to proceed*" is a requirement that must be satisfied before the application for certification succeeds.

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46 *Children's Trust*, *supra* at [26].

[112] However, to the extent that it may be of benefit to the parties that we address the issue of what the most appropriate way to receive the common evidence and to resolve the common issues identified above is, we now do so.

[113] There was no suggestion by the mining companies of a process other than a class action which would be best suited for the receipt of a substantial amount of very focussed evidence of a common nature and the determination of common legal issues referred to in this judgment.

[114] At the hearing a question was addressed to the mining companies (though posed only when lead Counsel for AngloGold was on his feet), as to whether, if there were many individual claims against them, they contemplated bringing any evidence that would be common to all of them. An answer was promised, but never provided. The fact of the matter is that they do not disown the possibility that they would bring evidence common to all the claims of the mineworkers whether in a class action or in numerous individual actions. At the same time, they are unable to say what process is best suited to entertain this evidence, or the common evidence the mineworkers intend to bring to a trial court.

[115] Accordingly, in our view, the institution of hundreds of thousands of separate individual hearings is not more appropriate than the proposed class action to resolve the disputes between the mineworkers and the mining companies. This is so even if the proposed class action only resolves some of the disputes between them. Accordingly, we conclude that the proposed class action is the most appropriate way for this matter to proceed.

The bifurcated process

[116] The notice of motion envisages a bifurcated process involving two stages. The first stage will involve a hearing on all the common issues. The second stage will deal with all the individual issues.

[117] The first stage may, depending on what is revealed by the pleadings and the pre-trial processes, result in the formation of sub-groups of the two classes and the issues common to those sub-groups would have to be determined before the second stage can commence. With this approach the first stage would not necessarily be a single proceeding and would take some time to complete.

[118] Apart from dividing the class action into two main stages, the mineworkers ask that they be allowed to adopt an opt-out process for the first stage and an opt-in process for the second stage. Should we sanction this, it would mean that the mineworkers would be required to issue two notices to the putative class members – an opt-out notice and an opt-in notice.

[119] The first one would concentrate on alerting the putative class members of the class action, and would give each of them an opportunity to opt-out. The opportunity to opt-out would only be available for a limited time-period. At the end of this period the total number of class members would not be known. It is important to note that any mineworker who does not opt-out will be bound by the findings made by the court during the first

stage. Should the mineworkers be blessed with any success at the first stage, they would then issue a second notice informing the mineworkers of the outcome of the first stage, and would offer each of them the opportunity to opt-in to the class action. Again, the time-period affording the individual mineworker this opportunity would be limited. At the end of this period, the total number of class members would be revealed. Any mineworker who fails or refuses to opt-in, will not be bound by the outcome of the second stage. He will still have the right to pursue his claims on his own without losing any of the benefits that would have accrued to him by virtue of the success(es) achieved by the mineworkers as a whole in the first stage. The obvious attraction of this double-barrelled approach is that it ensures that the individual mineworkers are afforded the widest possible choice.

[120] AngloGold opposes the bifurcated approach because, it claims, that it was introduced by the mineworkers to overcome the problems they had with the class action as a whole, which is that there is insufficient commonality between the mineworkers to determine any of the elements of the delictual action.

[121] This complaint is really not directed at the bifurcated process but at the claim of the mineworkers that there is sufficient common evidence and common issues to justify the certification of the class action. AngloGold, like all the other mining companies, is adamant that there is not. It is important not to conflate the issue of commonality with the adoption of a bifurcated process. Once it is found that there are sufficient common issues to warrant a certification then the option of adopting either a single process or a bifurcated one presents itself. The mineworkers have chosen the bifurcated process because they wish to take advantage of the benefits offered by both the opt-in and opt-out options. They claim that it affords the individual mineworker the widest choice possible when confronted with the question of whether to join the class action or not. And, to the extent that it achieves this, it serves the interests of justice. The claim, in our view, has merit.

[122] Another objection of the mining companies to the combination of the opt-out and opt-in processes is that it fails to eradicate the uncertainty about the precise number of plaintiffs that are suing them. This, they point out, would affect and may even be decisive in, their answer to the question on whether they should persist with their opposition or should settle the claims.

[123] The objection is without merit. The problem of not knowing the total number of class members exists in all class actions where the opt-out system is adopted. This is bound to be factored into the quantum awarded on any settlement amount that the parties may agree on should they choose not to pursue the litigation.

[124] In any event, the mining companies are not completely ignorant of the potential number of mineworkers that will eventually stake a claim against them. These are their former employees or dependants of their former employees. They have, or should have, records of these employees.

This is amply demonstrated in the testimonies of the individual mineworkers and the testimonies of the dependants of deceased mineworkers quoted above. In these circumstances, care must be taken not to exaggerate the problem of identifying the total number of actual mineworkers, or dependants of deceased mineworkers, until the litigation is finalised.

[125] It bears remembering that the mining companies may refuse to settle the claims at all, mainly because they remain convinced that the mineworkers will not succeed in proving their cause of action. The decision to settle the claims is dependent as much on their assessment of the strength of the case of the mineworkers as well as the strength of their defence. In the result, the problem of not knowing beforehand the actual number of mineworkers or dependants of deceased mineworkers is not weighty enough for us to refuse the certification of the proposed class action, or to refuse to sanction the adoption of a bifurcated process.

Suitability of class representatives, legal representatives and their fees

Introduction

[126] The suitability of the proposed class representatives, the lawyers and their fees are considered against the relevant legal guidelines.

[127] Firstly in *Children's Trust*, the SCA held that the capability to conduct the litigation has a number of aspects that must be dealt with in the certification application. They include the following:

127.1 The representatives must have the time, the inclination and the means to procure the evidence necessary to conduct the litigation;

127.2 The representatives must have the financial means to conduct the litigation or must have the ability to procure finance to conduct it;

127.3 The representatives must have access to lawyers who have the capacity to run the litigation properly;

127.4 The representatives have to disclose the basis on which the lawyers are going to be funded;

127.5 If the litigation is to be funded on a contingency fee basis, details of the funding arrangements must be disclosed to ensure that they do not give rise to a conflict between the lawyers and the members of the class.[47]

[128] Secondly in *Mukkadam* the CC held as follows:

> ". . . a representative in whose name the class action would be brought must be identified. The interests of the representative must not be in conflict with those of the members of the class. In addition the representative must have the capacity to prosecute the class action, including funds necessary for litigation."[48]

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47 *Children's Trust*, *supra* at [47]–[48].
48 *Mukkadam*, *supra* at [18].

Suitability of class representatives

[129] Upon the institution of these proceedings there were over sixty (60) proposed representatives of the two classes in this application. Some have unfortunately passed on. All the representatives are current and former employees of the mining companies, lawful representatives of estates of deceased mineworkers and dependants of the deceased mineworkers. Some of the mining companies contend that they are not suitable class representatives and have made this an issue.

[130] The role of class representatives in class action proceedings is essentially three-fold: they may be required to have personal knowledge of material facts for the purposes of establishing a *prima facie* case for certification; they are responsible for instructing the legal representatives on the conduct of the litigation on behalf of all class members; and they play an important role in facilitating communication with other class members throughout the litigation.[49]

[131] There are more than forty five (45) silicosis class representatives, who are geographically dispersed across Lesotho, Eastern Cape and the Free State. The TB class representatives total over twenty-five (25), similarly based in various parts of South Africa and the sub-continent. They will facilitate access to and communicate with class members in their areas of reach as the litigation proceeds.

[132] The class representatives have access to various employment and community networks, including trade unions, which the class representatives and their legal representatives will utilise to communicate with class members. These include the Mineworkers Development Agency, which has offices in Johannesburg and Maseru, and contacts in other former recruitment centres (Swaziland, Mozambique); the Swaziland Migrant Mineworkers Association; the Association of Mozambican Mineworkers; the Southern African Miners Association, which is a coalition of unions that represents a network of mineworkers in the Southern Africa region; the local trade unions that are active on the mining companies' mines, in particular, the National Union of Mineworkers and the Association of Mineworkers and Construction Union; and the Legal Aid South Africa, which has access to all the justice centres across South Africa.

[133] It is not disputed that the class representatives are committed to vigorously prosecuting the claims of all mineworkers as well as those of all the dependants of former mineworkers. They fully appreciate that they owe a duty to all mineworkers as well as to the dependants of mineworkers to provide fair and adequate representation.

[134] The mining companies object to the class representatives being appointed as representative of the two classes. The objection is based on two grounds.

[135] Their first ground is that the representatives do not cover every mine and job type of mineworkers on the mining companies' mines. They say that

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49 See Mulheron, *supra* at 290–300.

this will result in no evidence being led relating to the conditions applicable to certain mines or certain jobs. This objection is unfounded. It is premised on the incorrect assumption that only the class representatives will give evidence in the class action. There is no requirement that all the evidence in the action be given only by the appointed class representatives. On the contrary, it is anticipated that the evidence on the common issues at the first stage of the class action will be given by a number of mineworkers some of whom are not part of the group of representatives. There will also be evidence by numerous experts and their evidence will not be specific to a single mining company or even a group of mining companies. The lack of a representative from each mine, therefore, has no bearing on the evidence to be led at the trial.

[136] Their second ground of objection is that, in respect of a few of the mining companies, none of the class representatives has a cause of action against them. This issue was raised by the third respondent, Leslie Gold Mines Ltd ("Leslie"), twentieth respondent, Village, the twenty third respondent, Doornfontein Gold Mining Co. Ltd ("Doornfontein") and the twenty sixth respondent, ERPM. The concern of these mining companies really only relates to the alternative prayer of the applicant mineworkers, which is that should this Court refuse certification of a single class action it should certify a class action for each mining company. It is unnecessary to deal with this objection in the light of the conclusion we reach in this case.

[137] Section 38(c) of the Constitution in any event permits a class action to be brought "*in the interests of*" a class by someone who is not a member of it. As was appropriately noted in *Children's Trust*:

> "In some jurisdictions, such as the United States, it is an express requirement that the representative plaintiff has a claim that is typical of the claims of the class. In Canada and Australia, whilst there is no express requirement of typicality, Professor Mulheron suggests that the jurisprudence of those countries, in regard to commonality, makes that a requirement. That question does not arise in South Africa, because s 38(c) of the Constitution expressly contemplates a class action being pursued by 'anyone acting as a member of, *or in the interest of*, a . . . class'. Accordingly, while the appellants include individuals who may be typical of the class they are seeking to represent, the other appellants may permissibly act in the interest of the class. There is no reason to differentiate in that regard between class actions based on infringement of rights protected under the Bill of Rights and other class actions."[50]

[138] A few of the mining companies contend that differences in the conditions on the various mines will give rise to conflicts of interest between the class representatives and other members of the classes. They allege that where, for example, conditions in one mine were more hazardous than in another, it would be in the interests of mineworkers who work on the latter to highlight the conditions on the former.

[139] The objection, in our view, has no merit. The question whether mine A breached its legal duties owed to its mineworkers is not affected by whether mine B did so. The breach of duties by one mining company is

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50 *Children's Trust* at [46].

not determined by comparing conditions at one mine with conditions at another. It is no defence to a claim in delict that one defendant conducted itself worse or better than another. The question of the relative conditions on different mines is even less relevant in the context of stage one of the class action, where evidence will be led on the common issues pertaining to the constitutional, statutory and common law duties of care of all the mining companies where evidence common to all of them will be received.

[140] AngloGold further contends that there is a conflict of interest among class members, the mineworkers and their attorneys because a class member who has a weak case on negligence, or on causation, or whose claim for damages is relatively small has a stronger incentive to settle than one with a strong case and a large claim for damages.

[141] In virtually any class action there is bound to be some tension between those class members with a strong claim and those with a weak claim. But this is no bar to certification of the class action nor is it a bar to the appointment of the applicants who bring the certification application as representatives of the class. There will inevitably be some trade-offs in a class action. However, the benefits of increased access to justice and judicial economy outweigh the inevitable trade-offs involved in aggregate litigation.[51] It has to be remembered that any member of the class with a particularly strong cause of action involving a large claim and who is capable of pursuing it outside of the class, is entitled to opt out of the class action.

[142] In the result, we are satisfied that the surviving applicant mineworkers are suitable to be appointed as class representatives.

Suitability of legal representatives

[143] The legal team representing the two classes consists of experienced local attorneys and Counsel and they have the support services of two United States law firms, Motley Rice LLC and Hausfield LP, who have agreed to fund the litigation as well as act as consultants providing technical and legal advice for the litigation. They have expertise and experience in class action litigation.

[144] The legal team includes three firms of attorneys one of which operates as a non-governmental organisation, the LRC. The LRC has extensive experience in cases concerning public interests as well as cases involving large numbers of people. There are nine Counsel representing the mineworkers, five of whom are senior Counsel. There cannot be any serious argument against their competence and professionalism.

[145] In appropriate circumstances, the court is available to deal with and to supervise any conflict between class members that may arise. Further, any settlement agreement would, in any event, be subject to judicial approval.

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51 *Dabbs v Sun Life Ass Co of Canada* (1999), 40 OR (3d) 429 (Gen Div) at [30]. See also *Ontario New Home Warranty Program v Chevron Chemical Co* (1999) 46 OR (3d) 130 (SCJ) at [89].

A This is required under the contingency fee agreements concluded between the applicant mineworkers and the legal representatives, and in terms of provisions of the CFA.[52] It is, furthermore, a requirement imposed upon them by this Court. And, if deemed necessary, the trial court is at liberty to appoint a curator *ad litem* for the purposes of overseeing any settlement agreement on behalf of all, or part of, the class members.

B [146] We hold that there can be no doubt as to the competence and professionalism of their legal representatives.

Legal representatives and their fees

C [147] The fee sharing arrangements between Spoor and Motley Rice, and between Abrahams and Hausfield, are challenged by the mining companies on a single ground: that they do not comply with the provisions of the CFA. It bears mentioning that the fee agreements have been submitted to the relevant Law Societies for their consideration and they, having considered the agreements, have recorded that they have no objection thereto.

D [148] The only objections then that deserve consideration, are those based on the CFA. They have to be considered against the backdrop of four principled positions that have emerged. These are:

148.1 The mineworkers and their attorneys accept that the position in our E law is clear – the fee agreements must comply with the CFA, failing which they are invalid.[53]

148.2 Should this Court consider that the amended contingency fee agreements concluded by the mineworkers are in any way inconsistent with the CFA, the mineworkers and their attorneys, including the F consultants, have placed on record that they are willing to make any adjustments to these agreements that this Court may require.

148.3 The mineworkers and the class members have the protection of section 5 of the CFA, which provides as follows:

"5 Client may claim review of agreement or fees

G (1) A client of a legal practitioner who has entered into a contingency fees agreement and who feels aggrieved by any provision thereof

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52 *Mofokeng v Road Accident Fund and two other cases* [2012] ZAGPJHC 150 at [51], [53]–[54] [reported at [2012] JOL 29301 (GSJ) – Ed]; see s 4.3 of the CFA. The court's H approval of a settlement agreement in a class action is required in foreign jurisdictions, such as, the USA, Canada and Australia. See, Mulheron, *supra* at 390–407.

53 *Price Waterhouse Coopers Incorporated and others v National Potato Co-operative Ltd* 2004 (6) SA 66 (SCA) at [41] [also reported at [2004] 3 All SA 20 (SCA) – Ed]; *Mofokeng v Road Accident Fund and two other cases* [2012] ZAGPJHC 150 at [41]; *South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional* I *Development* (*Road Accident Fund*, *Intervening Party*) 2013 (2) SA 583 (GSJ) at [8], [27] and [34] [also reported at [2013] 2 All SA 96 (GSJ) – Ed]; *De La Guerre v Ronald Bobroff & Partners Inc and others* [2013] ZAGPPHC 33 at [13]–[14] [reported at [2013] JOL 30002 (GNP) – Ed].The CC and SCA refused leave to appeal in both the *SAAPIL* and in the *De La Guerre* matters, see: *Ronald Bobroff & Partners Inc v De la Guerre* 2014 (3) SA 134 (CC) [also reported as *Ronald Bobroff and Partners Inc v De La Guerre*; *South African Association of Personal Injury Lawyers v Minister of Justice and* J *Constitutional Development and another* at 2014 (4) BCLR 430 (CC) – Ed].

or any fees chargeable in terms thereof may refer such agreement or fees to the professional controlling body or, in the case of a legal practitioner who is not a member of a professional controlling body, to such body or person as the Minister of Justice may designate by notice in the *Gazette* for the purposes of this section.

(2) Such professional controlling body or designated body or person may review any such agreement and set aside any provision thereof or any fees claimable in terms thereof if in his, her or its opinion the provision or fees are unreasonable or unjust."

148.4 The mineworkers and their legal representatives have no objection to this Court appointing a curator *ad litem* to oversee the recovery of fees as well as any deductions made in terms of fee agreements.

[149] The applicant mineworkers and their legal representatives have amended their agreements a number of times in order to ensure that there is no conflict between the agreements and the provisions of the CFA. It is these amended agreements that they seek approval for. It is appropriate at this stage to consider whether it is necessary to order amendments to the agreements as the class action has not yet commenced. Amendments can still be effected without offending the fundamental provisions of the CFA and its underlying principles.[54] To decide whether there is any need for ordering that they be amended it is necessary to examine the objections raised by the mining companies.

[150] Briefly, the complaints raised by most mining companies are:

150.1 firstly, they contended that the Spoor agreement was impermissible in that it did not indicate that the attorneys have formed a view on prospects of success ("the prospects of success objection");

150.2 secondly, the agreements failed to provide that the fees charged would be no more than double the ordinary fees of the attorneys or twenty-five percent (25%) of the total amount obtained by the class members, whichever is lesser;

150.3 thirdly, the agreements failed to define what would constitute success, and what partial success, and failed to indicate what amount would be due in the event of such partial success;

150.4 fourthly, the pro forma agreements impermissibly provided for the attorneys (rather than the class members) to be entitled to receipt of party-and costs; and

150.5 fifthly, the *pro forma* agreements failed to provide for Counsel to sign the agreements.

[151] The five concerns have been addressed in the replying papers. Amended *pro forma* contingency fees agreements have been presented for approval in terms of the amended paragraph 5.3 of the notice of motion.

[152] With regard to the first objection, section 2(1) of the CFA provides that a legal practitioner may enter into a contingency fees agreement, "*if in his or her opinion there are reasonable prospects that his or her client may*

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54 Consider *Tjatji v Road Accident* 2013 (2) SA 632 (GSJ) at [15], [19] and [23].

be successful in any proceedings." A legal representative will presumably not take the risk inherent in contingency fee arrangements unless s/he holds the view that the client has reasonable prospects of success in the contemplated action. The amended Spoor and the amended Abrahams agreements both specifically spell out that Spoor and Abrahams are of the view that the mineworkers' case enjoys more than reasonable prospects of success. The agreements, therefore, comply with the provisions of the CFA.

[153] Both agreements provide further that if, after further investigations, the relevant attorney determines that the client does not have reasonable prospects of success, the attorney may then cancel the agreement within thirty (30) days of such investigation. In those circumstances, the client would not be liable for any costs to the attorney.

[154] As to the second objection, section 2(2) of the CFA sets out the limits on fees that may be recovered under a contingency fees agreement. It provides for a "*success fee*" which shall not be more than hundred percent (100%) of the attorney's normal fee or, if the claim is sounding in money shall not exceed twenty-five percent (25%) of the total amount awarded to the client excluding the costs awarded to the client.

[155] The amended agreements comply with these limits as follows:

155.1 The amended Spoor agreement provides:

> "6.1 The parties agree that if the CLIENT is successful in the proceedings, the fee (exclusive of disbursements) payable to the ATTORNEY shall be the lesser of –
>
> 6.1.1 200% (TWO-HUNDRED PERCENT) of the ATTORNEY's normal fee; or
>
> 6.1.2 15% (FIFTEEN PERCENT) of the total amount awarded or any amount obtained by the CLIENT in consequence of the proceedings where the CLIENT is successful, plus the party and party cost contribution payable by the other party in such proceedings,
>
> provided that the amount of the fees payable as determined by the application of this clause 6.1 shall not exceed 25% (TWENTY-FIVE PERCENT) of the total amount awarded or any amount obtained by the CLIENT in consequence of the proceedings where the CLIENT is successful.
>
> 6.2 For purposes of calculating the limit in the proviso to clause 6.1, the total award or amount obtained, shall not include any costs awarded."

155.2 The amended Abrahams agreement provides:

> "It is agreed that, if the Client is successful in proceedings pursued in South Africa, Abrahams Kiewitz shall be entitled to recover disbursement and a success fee equal to the lesser of:
>
> 15.1 TWO HUNDRED PERCENT (200% or double) Abrahams Kiewitz' normal hourly fees as described hereunder, or
>
> 15.2 TWENTY FIVE PERCENT (25%) of the amount awarded to the Client in damages or obtained by the Client in consequence of the proceedings concerned, which amount does not include any costs."

[156] As to the third objection, the amended agreements now define "*success*" and no longer contain any reference to "*partial success*". A

[157] As to the fourth objection, the agreements now contain no reference to the attorneys being entitled to payment of party and party costs. The mineworkers' entitlement to such costs remains unaffected.

[158] Finally, as to the fifth objection, signature of Counsel for the mineworkers is not necessary as Counsel for the mineworkers do not act on contingency. The services of Counsel do not fall under the contingency fee arrangements unless Counsel co-signs the agreement. The amended agreements nevertheless make provision for signature of Counsel. It is a provision which was not necessary to include where it is expressly clear that Counsel do not act on contingency. B C

[159] One mining company, ARM, raised three other objections. The first relates to premature termination of mandates. In terms of the agreements, if the mineworkers choose to terminate their mandates and the accompanying contingency agreements before the date on which judgment is given or the matter is settled, the mineworkers become liable for their *pro rata* portion of the fees incurred up to the date of termination. ARM contends that this is inequitable. We do not agree. It is appropriate and equitable that a mineworker who terminates the mandate of the attorney should be liable for costs incurred up to date of such termination. By prematurely terminating the agreement, the mineworker effectively deprives Spoor and Abrahams of the opportunity of recovering their fees and disbursements from his or her award upon the successful conclusion of the case. Yet, at the same time, his success would derive from the work of the attorneys. It is only fair that the attorneys should be entitled to recover their costs from the mineworker who terminates the agreement. Furthermore, the class members are not subject to these arrangements, and need not pay any fees, should they opt-out at the beginning of the proceedings. There is nothing inequitable or inappropriate in the provision in question. D E F

[160] ARM raises a further concern that the combined effect of the Spoor and Abrahams agreements might be that fees of up to fifty percent (50%) of the damages awarded could be claimed as fees as each could claim the maximum of twenty-five percent (25%) in respect of a given class member. The concern does not arise if each class member is to be subject to only the Spoor or the Abrahams contingency fees agreement. There is no need for the mineworker to conclude two agreements, one with Spoor and one with Abrahams. Spoor and Abrahams acknowledge expressly that, if inadvertently a mineworker concluded a separate agreement with each of them they would not both be holding him to the agreement as this would be unlawful and in breach of the CFA. Accordingly, this concern is misinformed. G H I

[161] Finally, ARM raises a concern about the fact that the agreements contemplate that class members will be liable for the fees of the consultants, which would be covered under the rubric of "disbursements".

[162] The consultants, Motley Rice and Hausfield, are not party to the contingency fees agreements. There is therefore no basis to hold them to the J

terms of those agreements. The mineworkers are the clients of Spoor and Abrahams. The consultants provide services to Spoor and Abrahams. The cost of their services, quite rightly, are disbursements incurred by Spoor and Abrahams.

[163] As for how they are calculated, we are told that the consultants will charge the normal fees they charge in the United States. However, any legitimate concerns regarding their fees are addressed by them and by Spoor and Abrahams in two ways.

[164] Firstly, they have all expressly agreed that the Taxing Master, this Court and the relevant Law Society will have jurisdiction over any amounts charged by consultants in respect of their fees. There are, therefore, sufficient safeguards to ensure that the fees charged as disbursements by United States consultants are within reasonable and acceptable professional limits.

[165] Secondly, and more importantly, the contingency fees agreements expressly cap the recovery of any fees payable as disbursements to the consultants together with fees recoverable by Spoor or Abrahams (as the case may be) at twenty-five percent (25%) of the total amount awarded or obtained by the mineworker. In other words, seventy-five percent (75%) of the capital awarded to the mineworker is protected and secured for him. This is no different to a situation where the consultants were made a party to the contingency fee agreements and thus subject to the provisions of the CFA. There can therefore be no legitimate concern of over-recovery by the attorneys from the capital awarded to or obtained by a mineworker.

[166] In our view, the objections to the fee agreements are devoid of merit. We reject them.

The notices

[167] The mineworkers ask that the court sanction the notices annexed to this judgment as B1 and B2. The mining companies oppose this. They claim that the notices are too complicated and inappropriate given that the large majority of the mineworkers are either illiterate or semi-literate. They, however, do not suggest any alternative wording for the notices. It is really difficult to see how the notices can be simplified. They are brief. They say what needs to be said and no more. They are neutral and objective. They avoid any ambiguity and they will be translated where necessary. They must be seen in context of the existence of the active network of trade union and community-based organisations and associations of former and current mineworkers that we referred to in this judgment. The message in the notices will in all probability be carried with ease to the mineworkers should the process referred to in the order we make below be followed. If, for any reason, the process cannot be adhered to, or if the mineworkers and the mining companies jointly deem it necessary to augment the notices with (an) additional process(es), then they are free to do so by agreement between themselves. If, on the other hand, they are unable to do so then any party is free to call upon this Court for further direction or even for an amendment of the order.

[168] In our view, the notices, as they stand, are sufficient and so too are the processes that will be set in motion to advertise them. They are designed to ensure that they are brought to the attention of the maximum number of mineworkers possible.

The conditional counter-application by Harmony

[169] Simultaneous with its answering papers, Harmony launched a conditional counter-application ("counter-application"). The counter-application is conditional upon this Court certifying the class action. In that case, Harmony seeks an order directing the mineworkers to:

169.1 deliver a report, confirmed under oath by their attorneys listing each envisaged plaintiff in the silicosis and TB class action who may have instructed legal representatives to institute proceedings on his or her behalf;

169.2 furnish copies of any fee agreements, powers of attorney, letters of instructions and/or other mandate documents which may have been signed or authorised by a mineworker;

169.3 include in their periodic reports envisaged in prayer 9 of the amended notice of motion, a list of all persons who have given or may give notice of a wish to be excluded from membership of any certified class at the first stage of the class action or to be included as members of any certified class at the second stage of the class action, together with copies of all such notices.

[170] Harmony claims that it requires this information in order to determine which claims have prescribed. It also wishes to know the identity of the mineworkers who wish to be included in the second phase.

[171] There is, in our view, no basis for Harmony to be furnished with all this information even before summons has been served. The documents and information that Harmony seeks may be obtained by it, once the action has commenced. It will obtain it by operation of the Uniform Rules of Court.

[172] All the mining companies, including Harmony, will further have access to all reports which the mineworkers file with the court on a quarterly basis as envisaged in the application and the order. Harmony has not explained why it requires such information prior to the issuing of the class action and why the rules and procedures are not sufficient to safeguard any legitimate interest it may have in acquiring such information and documents. It is significant that none of the other mining companies seek this information in advance.

[173] As already explained, the applicants seek to proceed with class action in two stages (the bifurcated process), namely the opt-out stage and the opt-in stage. It is a peculiarity of the opt-out process that the class action defendant(s) do not know the number and identity of the potential plaintiffs. The identity of class members will be revealed at the opt-in stage. This however, does not deprive them of the opportunity to raise whatever defence they wish to raise. The defence can be raised at the appropriate stage and can also be brought by way of an amendment to the plea.

A [174] The counter-application thus effectively seeks to anticipate the opt-in stage, or is a pre-discovery fishing expedition. There is neither a right nor a legitimate interest that Harmony seeks to enforce or protect that would justify the granting of the orders it seeks. Accordingly, Harmony is not entitled to the relief it seeks at this stage.

B [175] In the result, the counter-application stands to be dismissed with costs.

Transmissibility of general damages

[176] The mineworkers ask that this Court declare that any claim for general damages that a mineworker brings, or may wish to bring, against any of the mining companies is transmissible to his estate should he die before the litigation reaches the stage of *litis contestatio*. In order to make sense of this relief it is necessary to explore the historical roots and development of our law of delict regarding the transmissibility of claims for damages (whether general or specific) to the heirs or the estate of the deceased. To begin with it is necessary to have regard to the historical development of the concept of *litis contestatio* commencing with the early Roman law.

The Roman law

[177] In its earliest period, Roman civil law followed a procedure which was divided into two separate and distinct stages: the first being *in iure* and the second being *in iudicio* or *apud indicem*. The *in iure* stage involved the assertion of a claim before the magistrate, while the *in iudicio* stage concerned the actual hearing and decision of the case by a judge or arbitrator.[55] The *in iure* stage was a preliminary proceeding which determined the validity of the plaintiff's claim.[56] A few centuries later the formulary system was introduced. During the tenure of this system the two stages were effectively kept intact albeit in a modified form. The process commenced with an oral proceeding before a praetor who after hearing from the parties provided a written *formula*, which in essence was the synopsis of the plaintiff's claim and the defendant's defence. The written *formula* was:

> "addressed to the intended judge with instructions on how he was to adjudicate. The available *formulae* were set out in the praetor's Edict and the grant of this formula marked *litis contestatio*."[57]

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55 JAC Thomas, *Textbook of Roman Law*, (North-Holland Co), 1976, at 70. The description of the system by the learned author demonstrates that the system of arbitration as we know it today is no modern invention. His description reads:

> "Returning to the individual judge, the parties might have agreed upon a name, failing that they could select one from the list (*album*) of qualified persons kept by the magistrate (ie praetor); if they could not agree, a name would be chosen by lot from the *album*." (At 76).

Another learned author reminds us that the judge was a private individual and not always a lawyer. (P van Wermelo, *An Introduction to the Principles of Roman Civil law*, 1976 (Juta) at para 734).

56 Peter Spiller, *A Manual of Roman law*, 1985, (Butterworth Publishers (Pty) Ltd) at 8.

57 JAC Thomas, *supra* at 84.

[178] By virtue of his (it was always a male, patriarchy reigned without challenge in that era) authority to issue the written *formulae* (his "*processual powers*", in the words of the learned author JAC Thomas) the praetor was able to assume immense power over the matter. Apart from defining the issue and issuing instructions in the *formula* to the judge, he was empowered to refuse the *formula* and if he did so the matter could not proceed. His discretion in this regard was wide. Of importance, for the moment at least, is that the stage of *litis contestatio* was reached when the *formula* was obtained or delivered by the plaintiff to the defendant. In sum, the stage of *litis contestatio* was reached once the parties had identified their respective cases (the plaintiff stated the basis of his claim, the defendant identified his defence and the praetor issued the instruction to the *iudex*). Once the stage of *litis contestatio* was reached, there was no turning back for either party. They were bound by the terms set out in the *formula* and had to prove their respective cases on those terms alone. If either party was not able to do so, he would lose his case. Moreover, once *litis contestatio* was reached the plaintiff was not able to re-enact the same claim.[58] Any attempt on the part of the plaintiff to do so would be an invitation to the defendant to meet it with an exception (*exceptiones*) that would be decisive, as the praetor would have to refuse to issue the *formula* the second time.

[179] In the quest to draw meaning on the effect of *litis contestatio* the early recorders of the Roman law observed:

> "If the suggested theoretical basis of jurisdiction in the agreement of the parties and the arbitral concept of litigation be accepted, the preparation and issue of the *formula* was not unlike the making of a contract between the parties, as it were, settling the terms of which they submitted themselves to the decision of the judge in lieu of their erstwhile rights. The effects of *litis contestatio* were accordingly of great importance."[59]

[180] The most important aspects of the stage of *litis contestatio* in the Roman law was that it was arrived at as a result of the praetor's (a third party) intervention and was fixed (or "*frozen*", in the words of some learned authors) once the praetor had identified the issues that were to be taken to the judge. The parties were not able to alter or amend the *formula*, and the judge was bound to determine the matter solely on the basis of what was stated in the *formula.*[60] Apart from "*freezing*" the rights of the parties, the *formula* went further and prescribed to the judge what issues he should make a determination on. In these circumstances, the attempt to make sense of the meaning of the concept, *litis contestatio*, by way of analogy to a binding contract, and to refer to the rights of the parties as being "*frozen*" upon the arrival of the stage *litis contestation*,[61] is logical and understandable.

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58 This was in terms of the rule *ne bis in idem* (no one can try the same case twice or no legal action can be instituted twice for the same cause of action), see*:* P Van Wermelo, *supra* at para 733.

59 JAC Thomas, *supra* at 104, see the authorities cited therein.

60 *Government of the Republic of South Africa v Ngubane* 1972 (2) SA 601 (A) at 608A–B [also reported at [1972] 2 All SA 489 (A) – Ed].

61 *Litis contestatio* was then, and still is now, dealt with in the literature and case-law as "*a legal concept*" as well as "*a stage in the legal process*".

[181] Roman law prevented the transmissibility of certain claims to or against heirs of a deceased but allowed the transmissibility of others. In general, claims *in rem* could be transmitted, while those *in personam* could not. Thus, for example, a claim for an *iniuriarum* (*actio iniuriarum* – a claim for relief pursuant to a wrongful and intentional damage to personality) was not transmissible to or against the heirs. However, there was an exception to this rule. It was this: regardless of whether the claim was *in rem* or *in personam*, once *litis contestatio* had taken place "*the death of either party in no way prevented the continuation of proceedings by or against his heir.*"[62] Thus, as far back as the period when the *formulary system* was in place, the Roman law allowed for the transmissibility of claims for or against heirs of a deceased litigant once the stage of *litis contestatio* had been reached and such transmissibility was not affected by the nature of the claim.

The Roman-Dutch law and the modern-day South African common law

[182] The learning and experience of the Roman law was neither lost nor dispensed with upon the collapse of the Roman Empire. Instead, it was adopted by other legal systems that followed, not least the Roman-Dutch system that came many centuries later. The concept of *litis contestatio*, the rule prohibiting the transmissibility of certain types of claims as well as its exception was embraced by the Roman-Dutch law without more. This is recorded in a case reported in 1880 dealing with a claim brought in terms of the *actio iniuriarum*,[63] namely *Executors of Meyer v Gericke*,[64] which was a claim for damages incurred as a result of a defamation. There the court observed:

> "This case raises for the first time so far as reported cases go, the important question, at what stage of an action for defamation or other personal injury the death of one of the parties puts an end to the action. It is admitted on both sides that such an action cannot be instituted after the death of the person who was guilty of the defamation or other injury, or after the death of the person defamed or injured. It is further admitted that such an action, even if instituted during the lifetime of both parties, cannot be continued after the death of either party unless the stage known as *litis constestatio* has been reached. The authorities fully support these admissions. It would indeed appear from a passage in *Grotius* (Introduction, 3, 35, 5) that that eminent writer was of opinion that the heirs of the party committing an injury are only liable if case sentence has been pronounced against the party in his lifetime, but *Groenewegen*, in his note to that passage, enlarges the liability of the heirs, by extending it to those cases in which, as he expresses it in the vernacular, '*de zake voldongen is*.' This expression appears to be the Dutch equivalent for the *litis contestatio* of the Romans, for *Groenewegen* quotes a case decide in the Supreme Court of Friesland on the 22nd of May, 1604, where it was held that no action for

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62 JAC Thomas, *supra* at 92.

63 The *actio iniuriarum* is basically a claim in delict aimed at protecting the dignity, reputation or personal integrity of an individual.

64 1880 Foord 14.

personal injury can be brought against the heirs of the guilty party unless the *litis contestatio* had taken place in his lifetime."[65]

[183] In that case, as the allegedly defamed plaintiff had died pre-*litis contestatio* the court held that so did his claim and refused to allow the executor of his estate to pursue the claim. The outcome was a result of a pure and simple application of the rule established in the Roman law. Bearing in mind that the Roman system of intervention by a praetor in the first stage of a case was not followed in the Roman-Dutch system, the court there held that in the Roman-Dutch system the stage of *litis contestatio* would be reached when pleadings were closed. The next reported case that had cause to focus on this issue was *Pienaar and Marais v Pretoria Printing Works Ltd and others*.[66] It was a decision of a Full Court constituting Innes CJ, and Smith and Mason JJ. The Full Court there took the view that as the rule as well as the exception to the rule was embedded into the fabric of our common law by the Roman-Dutch authorities all that was needed in the case before them was one of application of the rule or its exception to the facts before them. Hence, the court found:

> "If the present firm has not been libelled, it cannot sue for damages save as successor to the old one, and as being entitled by way of cession to its rights in this respect. And it cannot possibly set up such a case, because a personal action for libel cannot be ceded. It perishes on the death of the person libelled, and it does not even pass to his heirs unless the action had been commenced before his death and had reached the stage of *litis contestatio*. That was so decided in *Meyer's Executors v Gericke*, (Foord 14), in accordance with the weight of Roman-Dutch authority."[67]

[184] All subsequent cases followed this approach.[68] The courts took for granted the correctness of the doctrine and adhered to it. The position to date, therefore, remains unchanged from that expressed in 1880 in *Executors of Meyer*. As a result, the position of our modern common law, as well as that of the early Roman-Dutch law is really a facsimile of the early Roman law. However, social, economic and legal conditions that prevail today are very different from those that prevailed during the tenure of the early Roman law. One of the most important expressions of that difference is to be found in answer to the question as to when the stage of *litis contestatio* is reached. We know that in the Roman law it was when the praetor issued the *formula* and in the early Roman-Dutch law (which was implanted, without more, into our modern common law) the stage was reached when pleadings were closed. But the issue as to when pleadings are closed in our present legal system is a lot more complicated than it ever was under both the Roman law or the early Roman-Dutch law and this is an issue that is of immense significance in this case. Hence, the transplantation of the rule and its exception into our law produced its own complications and challenges.

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65 *Id* at 15–16.
66 1906 TS 654.
67 *Id* at 656.
68 *Jankowiak v Parity Insurance Co (Pty) Ltd* 1963 (2) SA 286 (W) [also reported at [1963] 2 All SA 75 (W) – Ed]; *Government of the RSA v Ngubane* 1972 (2) SA 601 (A).

[185] But before looking into these it is necessary to scan this issue in the context of the distinction (drawn in the Roman law and carried over into the modern-day law of delict) between a claim for patrimonial loss and one for a non-patrimonial damage. A claim for non-patrimonial damages, also referred to as general damages, is a claim for the personal injury sustained in the form of pain and suffering, loss of amenities of life and for disfigurement. But this claim does not fall within the scope of the *lex Aquilia*.[69] Roman law initially did not avail the *aquilian* remedy to a freeman for he "*did not own his body*".[70] This was changed by the praetors who allowed the freeman to sue for the recovery of patrimonial loss incurred (such as medical expenses) by the wrongful and negligent conduct of another, but not for any intangible harm (non-patrimonial loss, or general damages, in today's terms) such as wounded feelings or pain and suffering caused to the freeman, as no price could be placed on it since, "*the body of a freeman is not susceptible of valuation.*"[71] The Roman-Dutch law, however, provided for the payment of compensation to any man who suffered harm in the form of wounded feeling, pain and suffering, disfigurement or loss of amenities of life, but it did so not by extending the scope of the *lex Aquilia* but rather by establishing an altogether self-standing independent remedy, an "*actio sui generis.*"[72] In essence then:

> "And we at once faced with the fact that it was essential to a claim under the *Lex Aquilia* that there should have been actual *damnum* in the sense of loss to the property of the injured person by the act complained of. In later Roman law property came to mean the *universitas* of the plaintiff's rights and duties, and the object of the action was to recover the difference between that *universitas* as it was after the act of damage, and as it would have been if the act had not

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69 The *lex aquilia* was developed around 286 BC by the Romans. It was an action that was penal in nature and was designed to compensate a person for the damage done to his property. It is not uncommon to refer to it as "*the delict of damnum iniuria datum*" – JC Van der Walt, *Delict Principles and Cases*, Butterworths, 1979 at para [7].

70 *Guardian National Insurance Co Ltd. v Van Gool NO* 1992 (4) SA 61 (A) at 63H [also reported at [1992] 2 All SA 287 (A) – Ed].

71 *Id* at 64E. See also: *Hoffa NO v SA Mutual Fire & General Insurance Co* 1965 (2) SA 944 (C) at 950D–E [also reported at [1965] 3 All SA 15 (C) – Ed]. This principle has been captured in a lecture of Professor JC de Wet which was approvingly quoted by Holmes JA. It reads:

> "In Roman law, as we have seen, a free man, who had been wounded, could claim medical expenses and loss of earnings from the male-factor, but no claim was allowed for scars and disfigurement, the reason being that the body of a free man had no monetary value. This rule was retained in medieval secular law and also in the Canon law. Our Roman-Dutch institutional writers are, however, unanimous in allowing the victim of bodily injuries not only his medical expenses and loss of earnings but also a claim for pain and suffering (*dolor*) and disfigurement (*cicatrix*, *deformitas*).
>
> That a claim for pain and disfigurement was an anomaly in a system which was supposed to know only 'actiones reipersecutoriae' cannot be contradicted. Grotius realised this and admits that pain and disfigurement (are) really not capable of compensation." (*Government of RSA v Ngubane* 1972 (2) SA 601 (A) at 606B–C).

72 *Administrator, Natal v Edouard* 1990 (3) SA 581 (A) at 595H [also reported at [1990] 2 All SA 374 (A) – Ed]. A most illuminating exposition of the development of this legal rule is provided by Van Winsen J in *Hoffa*, *supra* at 950E–952F.

been committed. Any element of attachment or affection for the thing damaged was rigorously excluded. And this principle was fully recognised by the law of Holland. As pointed out by Professor *de Villiers* the compensation recoverable under the *Lex Aquilia* was only for patrimonial damages, that is, loss in respect of property, business or prospective gains. He draws attention to the clear cut distinction between actions of *injuria* (where intent was of the essence) and actions founded on *culpa* alone. In the former case compensation might be awarded by way of satisfaction for injured feelings. In the latter all that could be claimed was patrimonial damage, which had to be explicitly and specifically proved. The difference between the two forms of relief is emphasised by *Voet*, who states that where one and the same act gives ground for both actions, the receiving of satisfaction for the *injuria* does not bar the claim for patrimonial loss resulting from the *culpa.* The award of compensation for physical pain caused to a person injured through negligence, which was recognised by the law of Holland, constitutes a notable exception to the rule in question."[73]

[186] While the claim for pain and suffering, loss of amenities and disfigurement (non-patrimonial damage) is not part of the *Aquilian* action it is, nevertheless, brought simultaneously with an *Aquilian* action because, as Voet recognised, the facts relied upon to establish it are the same as those relied upon to claim patrimonial loss in terms of the *lex Aquilia*. It is "*one and the same act* (that) *gives ground to both actions.*" Nevertheless, unlike a claim for patrimonial damages, a claim for non-patrimonial damages has no scientifically calculable economic or monetary value, and as we saw above, for the Romans this problem was insoluble ("*the body of a freeman is not susceptible of valuation*"). Since the Roman-Dutch authorities provided for this claim, the law is required to do its best by placing a monetary value in the quest of providing satisfaction, or solace, to the plaintiff. It does so by granting the plaintiff a once-off *solatium* as compensation, or reparation for the wrong suffered.

[187] As we said above, the common law does not entitle a dependant of a deceased person, or an estate (through the executor) of a deceased person, to pursue a claim for general damages, future loss of earnings, or future medical expenses. However, the dependants of the deceased claimant can pursue claims for loss of support and actual diminution of their patrimony resulting from the wrongful conduct of the defendant, and which wrongful conduct caused the death of their breadwinner. For the dependant(s) this would include loss of support due to the death of the breadwinner as well as medical and funeral expenses incurred by that dependant(s). For the estate it would only cover damage to property as well as medical and funeral expenses incurred by the deceased and the estate:

"The executor can sue for medical expenses incurred as a result of the fatal injuries suffered by the deceased before his death and which, on his death, vested in his estate. The executor can sue for damage to property which had been damaged or destroyed during the deceased's lifetime. The executor can recover the funeral expenses of the deceased; the reason for that is less clear, but the

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73 *Union Government* (*Minister of Railways and Harbours*) *v Warneke* 1911 AD 657 at 665–666 (references omitted).

rule is an ancient one and is, no doubt, based on the fact that the burial of the deceased is an expense necessarily defrayed by the executor."[74]

[188] In other words, the executor can sue for any patrimonial loss the deceased suffered before his death as well as the funeral expenses which is a patrimonial loss suffered after death, and the dependants can sue for any patrimonial loss they themselves will suffer as a result of the premature death of their financial provider or breadwinner. Neither can sue for any personal injury such as pain and suffering, loss of amenities of life or disfigurement (general damages) the deceased suffered prior to his death. There is, however, an exception to the rule, which is that where the deceased had already commenced action and the claim had reached the stage of *litis contestatio* before his/her death, and the claim is continued by the executor of his/her estate, the claim for the personal injuries does not abate. In such a case, the law allows for the claim for such general damages to be transmitted to the estate. The basis for the exception is exactly the same as that under the early Roman law, which is that the rights of the plaintiff were defined and "*frozen*", at the very moment the stage of *litis contestatio* was reached. In such a case, so goes the logic, the executor of the estate has merely stepped into the shoes of the deceased. She has not acquired a claim in her own right. However, the issue as to when the stage of *litis contestatio* is reached in the modern day law is a complicated one. It is reached when pleadings are closed. But this is no simple matter. Guidance as to when pleadings are closed can be found in rule 29 of the Uniform Rules of Court. It advises that pleadings are closed if all parties to the case have joined issue and there are no longer any new or further pleadings, or the time period for the filing of a replication has expired, or the parties have agreed in writing that the pleadings have closed and have filed their agreement with the Registrar of the court, or the court, on application, has declared that the pleadings are closed. At that point the pleadings are treated as being closed and the proceedings are said to have reached the stage of *litis contestatio*. In everyday practice, they are normally closed as soon as the period for the filing of the replication has expired, for at that stage the issues have become identified and parties are able to commence preparation for battle. However, it is important to bear in mind that, as annoying as it can be, the law often places a caveat to its pronouncements. In this case it is this: pleadings, though closed, will be re-opened should an amendment be effected, or should the parties agree to alter the pleadings. Amendments to pleadings can be brought by any party any time before judgment is delivered.[75] Thus, as the law stands, a claim for non-patrimonial loss can be transmitted to the estate of the deceased

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74 *Lockhat's Estate v North British & Mercantile Insurance Co Ltd* 1959 (3) SA 295 (A) at 304B–C.

75 R 28 of the Uniform Rules of Court. Courts have, over the years, identified the principles underlying the granting of an application for an amendment to a pleading. These have been succinctly summarised in *Commercial Union Assurance Co Ltd v Waymark NO* 1995 (2) SA 73 (Tk) at 77F–I [also reported at [1995] 4 All SA 48 (Tk) – Ed]. See also: *Affordable Medicines Trust and others v Minister of Health of RSA and another* 2006 (3) SA 247 (CC) at [9] [also reported at 2005 (6) BCLR 529 (CC) – Ed].

claimant should his/her death occur after pleadings are closed. In such a case, the executor of the estate would take his/her place as the plaintiff, but should any party re-open the pleadings by amending its case or should the parties agree to alter the pleadings then the claim for non-patrimonial loss cannot be transmitted, even if by that stage his/her place had already been taken by the estate, because by this time "*the initial situation of litis contestatio falls away and is only restored once the issues have once more been defined in the pleadings or in some other less formal manner.*"[76]

[189] It can be seen from this that in our system the defendant is afforded a lot more time than was given to a defendant in Roman times to spell out his defence. Furthermore, in our law even when the defendant fails to adhere to the time periods afforded to him to identify his defence he is always given the opportunity to seek condonation for his failure to adhere to those time periods. It follows that in our legal system it takes much longer for the stage of *litis contestatio* to be reached. Further, unlike the old Roman legal process, which consisted of two stages (*in iure* and *in iudicio* or *apud indicem*) ours is a single process which can be a long drawn-out affair. In the Roman legal system the arrival of the stage of *litis contestatio* was a simple and straightforward matter. As we show above, the arrival of the stage of *litis contestatio* now is anything but a simple and straight forward matter. The procedural developments that have taken place in our modern law have ensured that our legal process is significantly distinct and different from that which prevailed during the Roman times. A difference of fundamental significance is that in our law pleadings can be re-opened at any stage before judgment. This means that it can never be said with absolute certainty in any case that the stage of *litis contestatio* has been reached at a specific time. Unsurprisingly, in these circumstances, Holmes JA was prompted to refer to it as the "*alchemy of litis contestatio*".[77]

[190] Furthermore, we allow far greater time for the defendant to deliver his plea than was allowed during the Roman law and in this regard, it bears remembering that failure to adhere to the time-periods as set out in the rules of court for the delivery of a plea is rarely, if ever, fatal. Accordingly, the probability of a plaintiff dying before pleadings are closed is significantly higher in our system than it ever was in the Roman legal and the early Roman-Dutch law systems.

[191] To summarise. The reasoning underlying the rule – that the claim for general damages is not transmissible to her estate – is that the general damages are personal to the claimant: neither the dependant(s) nor the estate, suffer any loss or damage from the pain and suffering, the loss of amenities of life and the disfigurement endured by the deceased during her lifetime. Therefore, they can have no claim for the bodily injuries suffered by the deceased. In other words, the claim for general damages

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76 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at [15] [also reported at [2012] 2 All SA 262 (SCA) – Ed].

77 *Ngubane*, *supra* at 608C.

abated upon the death of the deceased. They have not abated though if the stage of *litis contestatio* was reached before her death. The position of the common law, therefore, is this: if such a claim is brought and pleadings are closed then the claim is transmissible to the deceased claimant's estate, but if they are not then the claim is not. The fact of the matter is that the common law has failed to keep pace with the procedural developments harvested over the centuries, which have been collated in the rules of court regarding pleadings and amendments thereto.

[192] It is this failing of the common law that the mineworkers turn their attention to. They claim that it has the potential to cause immense injustice, and will certainly cause immense injustice to them and their heirs in this case. They also claim that the common law infringes various provisions in the Bill of Rights.[78] To prevent any further injustice from prevailing they ask that the common law be developed. They ask that it be developed in such a manner as to allow them to transmit any claim for general damages that accrued as at the date of the launch of the certification application to the estate of any mineworker who passes on after that date, even though his case is a long way from reaching the stage of *litis contestatio*. All the mining companies are opposed to this Court developing the common law in the manner suggested by the mineworkers. Apart from two respondents, Harmony and AngloGold, all the mining companies contend that this Court should not develop the common law at all. Harmony and AngloGold contend that in the event this Court authorises the class action, it should leave this issue for the trial court to determine. They proffer no sound reason as to why that court is in a better position than this one to finalise the issue.

The common law is dynamic, fluid and ever-changing

[193] It is no revelation to say that to remain purposeful and to retain its moral authority the common law should whenever necessary change to meet changing facts and circumstances. This has long been accepted and, as we will shortly show, been applied by our courts. As knowledge or ideas change, and as political, social and economic life progresses, develops and advances with time so should the law. Indeed, on more than one occasion it has done so. This approach is not alien to the Roman or the Roman-Dutch legal systems. It is embedded in the very fabric of the two legal systems. It is on this principled basis that the common law has retained its utility and its moral authority. The principle is also not exclusive to the Roman or Roman-Dutch legal systems. Innes CJ reminded us of this principle and articulated its premise in these terms:

> "There come times in the growth of every living system of law when old practice and ancient formulae must be modified in order to keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions. And it is for the Courts to decide when the modifications, which time has proved to be desirable, are of a nature to be effected by judicial

78 See [200] below.

decision, and when they are so important or so radical that they should be left to the Legislature."[79]

[194] This approach was basic and fundamental to the Roman law, as is evidenced by the role of the praetors' *Ius Honorable* remedy. This was recognised more particularly during Justinian's reign where in order to remain relevant to changing social conditions the law underwent some significant changes. And, as observed by Lord Tomlin, this has been true for the Roman-Dutch legal system too:

> "In the first place, the questions to be resolved are questions of Roman-Dutch law. That law is a virile living system, of law, ever seeking, as every such system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of modern organised society".[80]

[195] More recently, the Appellate Division (now SCA) has reiterated this principle. In *Kommissaris van Binnelande Inkomste v Absa Bank Bpk*, Botha JA pointed out:

> "om met letterknegtige formalisme vas te klou aan stellings in die ou bronne, wat onversoenbaar sou wees met die lewenskragtige ontwikkeling van die reg om te voorsien in die behoeftes van nuwe feitelike situasies".[81]

[196] Accordingly, the need to develop the common law is not a recent phenomenon. It has been recognised and practised for a long time. In the development of the common law so that it remains relevant and purposeful to the needs of society in order for justice to prevail, courts are sometimes required to engage in policymaking, even if only in a very narrow sense of the term.[82] One of the policymaking functions is to ensure that practices which through time have become antiquated and which cause injustice are no longer allowed to stand. History demonstrates that our courts have not evaded their responsibility to develop the common law in this regard. When necessary, it has embraced the challenge to create new obligations, to create new rights, to remove penalties for certain conducts, to eliminate obstacles posed by old and dated practices and to fashion new remedies.[83] This it has done by taking heed of the ever-changing "*legal convictions of the community*",[84], a concept that is now so deeply ingrained into our law that it infuses all areas of our law.

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79 *Blower v Van Noorden* 1909 TS 890 at 905.

80 *Pearl Assurance Co v Union Government* 1934 AD 560 at 563. The judgment is that of the Privy Council; see also, *Feldman* (*Pty*) *Ltd v Mall* 1945 AD 733 at 789 and *Willis Faber Enthoven* (*Pty*) *Ltd v Receiver of Revenue and another* 1992 (4) SA 202 (A) at 220C–G [also reported at [1992] 4 All SA 62 (A) – Ed].

81 1995 (1) SA 653 (A) at 669F–H [also reported at [1995] 1 All SA 517 (A) – Ed].

82 See, Corbett MM, *Aspects of the Role of policy in the evolution of our common law*, (1987) 104 *SALJ* 52 at 54.

83 A brief but thoroughly digestible read of this development of the common law in South Africa is provided by Corbett MM, *supra* who went on to become the Chief Justice of this country and whose contribution in developing the common law to meet the changing norms of society is exemplary. Many of his judgments were rich in scholarship and rich in thought.

84 *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 597A [also reported at [1975] 3 All SA 599 (A) – Ed].

[197] This is not unique to South Africa. As observed by Lord Goff, this is the position in all common law countries:

> "It is universally recognised that judicial development of the common law is inevitable. If it had never taken place, the common law would be the same now as it was in the reign of King Henry II; it is because of it that the common law is a living system of law, reacting to new events and new ideas, and so capable of providing the citizens of this country with a system of practical justice relevant to the times in which they live."[85]

[198] In the common law world it is not unusual for judges to make law as they are from time to time required to do so if justice is to prevail. After all,

> "(t)he common law is judge-made law. For centuries judges have been charged with the responsibility of keeping this law abreast of current social conditions and expectations. That is still the position."[86]

On this, Lord Hoffmann is more forthright:

> "To say that they [the judges] never change the law is a fiction and to base any practical decision upon such a fiction would indeed be abstract juridical correctitude. But the other question is whether a judicial decision changes the law retrospectively and here the answer is equally clear. It does. It has immediate practical consequence that the unsuccessful party loses, notwithstanding that, in the nature of things, the relevant events occurred before the court had changed the law."[87]

The constitutional imperative to develop the common law

[199] In South Africa this responsibility to reform and refocus the common law in order to keep it "*abreast of current social conditions and expectations*" is entrenched in the Constitution, with the added obligation that the judges do so in a manner that it is consistent with, and gives expression to, the rights articulated in the Bill of Rights. Subsections 8(3) and 39(2) of the Constitution explicitly enjoins the court to develop the common law to the extent that it is necessary to make it consistent with the values enshrined in the Constitution, especially those explicitly mentioned in the Bill of Rights.[88] Thus, it is the constitutionally imposed duty of this Court to

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85 *Kleinwort Benson Ltd v Lincoln City Council and other appeals* [1998] 4 All ER 513 (HL) at 534g–h.

86 *In re Spectrum Plus Ltd*: *National Westminster Bank plc v Spectrum Plus Ltd and others* [2005] 4 All ER 41 (HL) at [32].

87 *Deutsche Morgan Grenfell Group plc v IRC* [2007] 1 All ER 449 (HL) at [23] (references omitted.)

88 Subsections 8(3) and 39(2) of the Constitution read:

> "8(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of s 8(2),
>
> (a) a court in order to give effect to a right, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and,
>
> (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with s 36(1)."
>
> 39(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

develop the common law in order to harmonise it with the Bill of Rights. The development must reflect the "*spirit*, *purport and objects of the Bill of Rights*". We are duty-bound to develop the common law so that it does not "*deviate*" from the "*spirit*, *purport and objects of the Bill of Rights*".[89] It is a duty we cannot abdicate.

[200] The mineworkers claim that the existing common law violates their rights to equality,[90] human dignity,[91] life,[92] freedom and security of the person[93] and access to courts.[94] They say that the failing of the common law is "*a constitutional matter*" that requires redress by this Court. By refusing to transmit their claim for general damages to their estates upon their deaths, the common law violates their right to "*bodily integrity*". Their right to "*bodily integrity*" is an integral part of their right to "*freedom and security of the person*."[95] Their right to bodily integrity is vindicated by them being compensated in the form of general damages by the wrongdoer, in this case the mining companies. The benefit they acquire from this is, without doubt, shared by their dependants. Denying them the opportunity to transmit this compensation of general damages to their estates effectively removes their "*right to bodily integrity*". To the extent that it does so, the common law is incompatible with, or "*deviates from*", the Constitution. They are entitled to the compensation from the wrongdoer (the mining companies) and their dependants are entitled to benefit therefrom. The fact that the harm to their "*bodily integrity*" was specific to them is not, and should not be, a bar to their right to compensation *post mortem*. That they themselves would not have received the benefit during their lifetime is of no moment. As the common law presently stands, it unjustifiably takes away from them the right to see that the beneficiaries of their estate, who in most cases are their dependants, receive the benefit of the compensation that they were entitled to, and would have received but for their premature deaths, which premature death was caused by the acts and/or unlawful omissions of the mining companies. For this reason, the common law has to be developed so that they are allowed to transmit their claims to their estates upon their deaths. The argument bears considerable force.

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89 *Carmichele v Minister of Safety and Security and another* 2001 (4) SA 938 (CC) at [33] [also reported at 2001 (10) BCLR 995 (CC) – Ed]; *First National Bank of SA v Minister of Finance* 2002 (4) SA 768 (CC) at [31] [also reported as *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and another*; *First National Bank of SA Limited t/a Wesbank v Minister of Finance* at 2002 (7) BCLR 702 (CC) – Ed]; *Van Jaarsveld v Bridges* 2010 (4) SA 558 (SCA) at [3] [also reported at [2010] 4 All SA 389 (SCA) – Ed].

90 S 9 of the Constitution.

91 S 10 of the Constitution.

92 S 11 of the Constitution.

93 S 12 of the Constitution.

94 S 34 of the Constitution.

95 See: *Law Society of South Africa and others v Minister of Transport and another* 2011 (1) SA 400 (CC) at [63] [also reported at 2011 (2) BCLR 150 (CC) – Ed]; *S v Baloyi* 2000 (2) SA 425 (CC) at [11] [also reported at 2000 (1) BCLR 86 (CC) – Ed].

[201] One of the mining companies, Gold Fields, reminds us that the CC has noted that the claim for non-patrimonial loss (general damages) is a claim "*for the deterioration of a highly personal legal interests that attach to the body and personality of the claimant*."[96] The *obiter dictum* of Moseneke DCJ in *Van der Merwe*, which Gold Fields rely upon reads in full:

> "On the other hand non-patrimonial damages, which also bear the name of general damages, are utilised to redress the deterioration of a highly personal legal interests that attach to the body and personality of the claimant. However, ordinarily the breach of a personal legal interest does not reduce the individual's estate and does not have a readily determinable or direct monetary value. Therefore, general damages are, so to speak, illiquid and are not instantly sounding in money. They are not susceptible to exact or immediate calculation in monetary terms. In other words, there is no real relationship between the money and the loss. In bodily injury claims, well-established variants of general damages include 'pain and suffering', 'disfigurement', and 'loss of amenities of life.'"[97]

[202] Gold Fields argues that the obvious conclusion to draw from this is that the CC recognised that it is not transmissible to anyone else. We do not agree. Moseneke DCJ made no comment on the constitutional compliance of the common law rule that precludes the transmissibility of general damages pre-*litis constestatio*. All that Moseneke DCJ did was describe what non-patrimonial loss is. There is nothing in the *dictum*, or in the judgment as a whole, that indicates that the Moseneke DCJ was even remotely conscious of the issue concerning the transmissibility of the general damages pre-*litis contestatio* to the estate of the deceased plaintiff who allegedly suffered at the hands of the defendant. There is no indication in the judgment that Moseneke DCJ gave any thought to the impact of the evolved legal convictions of the community, and therefore came to the conclusion that the common law as it stands is consistent with the legal convictions of our community captured in the Bill of Rights. There can be no suggestion that Moseneke DCJ found the common law rule to be consistent with our modern day constitutional democracy. It is, therefore, our view, that the conclusion proffered by Gold Fields is mistaken.

[203] Another right the mineworkers invoke in support of transmissibility is the right of the dependants, especially the children, of the deceased mineworkers.[98] It is a well-established constitutional principle that whenever the rights of a child are brought to bear on a matter, the court must ensure that the best interests of the child receive paramount consideration. This is in terms of section 28(2) of the Constitution, which is nothing short of

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96 *Van der Merwe v Road Accident Fund and others* (*Women's Legal Centre Trust as amicus curiae*) 2006 (4) SA 230 (CC) at [39] [also reported at 2006 (6) BCLR 682 (CC) – Ed].

97 *Id*.

98 S 28 of the Constitution.

"*an expansive guarantee that a child's best interests are paramount in every matter concerning the child.*"[99]

[204] The mineworkers further point out that the common law rule contravenes section 9 of the Constitution in that it arbitrarily differentiates between survivors pre-*litis contestatio* from survivors post-*litis contestatio*. None of the mining companies took issue with this claim. In short, the mineworkers claim that this issue concerns the rights of the terminally ill who may not survive the finalisation of the action. Such persons or their heirs will lose what may be a genuine claim only because they succumbed to their illness pre-*litis contestatio*. By virtue of this result, the rule of non-transmissibility pre-*litis contestatio* violates the right to equality by setting apart, and discriminating against, those who have succumbed to their illnesses (silicosis or TB) pre-*litis contestatio* from those who had been fortunate enough not to have succumbed to their illnesses pre-*litis contestatio.* This distinction is discriminatory. It is a discrimination that is unfair as well as irrational, and it is made all the more poignant when it is to a considerable extent a consequence of the legal process over which they have little control: they have minimal influence over when the stage of *litis contestatio* is reached. In the meantime, given the fatal character of their illnesses some of them would have, as many mineworkers already have, succumbed to their illnesses. In the circumstances, the legal process would have failed them by cementing the discrimination between them and their fellow claimants who were fortunate enough to have survived until the stage of *litis contestatio* was reached.

The position in the UK, Australia and the USA

[205] The mineworkers refer to developments in other jurisdictions, particularly the UK, the USA and Australia to support their case in this regard. In these jurisdictions the legislatures intervened to put an end to the injustices caused by the common law holding that general damages can only be transmitted post *litis contestatio*.

[206] The history underlying the legislative intervention in the UK is succinctly articulated in a single paragraph in a recent judgment of the UK Supreme Court, where the following is observed:

"Before 1846, English law did not permit actions in tort for the death of a human being. This was the combined result of two rules of common law. The first was that the right of action or a person who had been tortuously injured was a personal action, which did not survive for the benefit of the estate upon his death. This rule survived until 1934, when it was abolished by the Law

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99 *Sonderup v Tondelli and another* 2001 (1) SA 1171 (CC) at [29] [also reported at 2001 (2) BCLR 152 (CC) – Ed]. See also: *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 (2) SA 168 (CC) at [71] [also reported as *Teddy Bear Clinic for Abused Children and another v Minister of Justice and Constitutional Development and another* (*Justice Alliance of South Africa and others as amici curiae*) at 2013 (12) BCLR 1429 (CC) – Ed]; *S v M* (*Centre for Child Law as amicus curiae)* 2008 (3) SA 232 (CC) at [15]–[21] [also reported as *M v S* (*Centre for Child Law as amicus curiae*) at 2007 (12) BCLR 1312 (CC) – Ed].

A Reform (Miscellaneous Provisions) Act. The second rule was that '[i]n a civil court, the death of a human being could not be complained of as an injury' by dependents claiming in their own right: *Baker v Bolton* (1808) 1 Camp 493 (Lord Ellenborough). This is still the rule at common law, but it was largely superseded by the Fatal Accidents Act 1846 ('Lord Campbell's Act'), which created a new statutory cause of action in favour of certain categories of de-
B pendent, including widows. The 1846 Act was repeatedly amended, elaborated and re-enacted, and the statutory cause of action is now contained in section 1(1) and (2) of the Fatal Accidents Act 1976."[100]

[207] Similarly in Australia, it was stated in the Legislature that it was necessary to intervene in order to avert the injustice that prevailed, and that
C many had previously been forced to endure, because of this rule precluding transmissibility of general damages pre-*litis contestatio*. It was especially highlighted that this failing was most acute in cases involving claims for pain and suffering endured by plaintiffs by virtue of them contracting dust-related diseases. The failing of the common law was elo-
D quently captured in a speech delivered in a South Australia Parliamentary debate where it was said:

> "The way the current legislation exists, if litigation has commenced but the applicant passes away before it has been completed, that individual is not able to have that case proceeded with on their behalf for the non-economic loss. That is an absurdity. There is clearly no justice, equity or fairness in a system such
E as this when we are talking about a totally unique disease of this nature. This puts enormous pressure on the sick and the dying plaintiffs to press ahead as quickly as possible with their litigation, the pressure of which may greatly increase the plaintiff's distress. Sometimes they may succeed in doing that, and sometimes they may not. It is simply a lottery: sometimes it may happen, and sometimes it may not work."[101]

F [208] All fifty states in the United States of America have enacted statutes to attend to the issue of wrongful death and the claim for damages for injuries sustained by the deceased. The majority of them allow for the estate of the deceased to receive the amount due to the deceased. There is no restriction in any of the statutes for the deceased to have launched his/her
G case for the claim prior to his/her death and for the case to have reached the stage of *litis contestatio* in order for the claim to remain valid.

[209] These legislative interventions demonstrate that the law which prohibits the transmissibility of general damages pre-*litis contestatio* fails to reflect the *boni mores* of a modern society organised along the principle of the
H rule of law.

Should this matter be decided by the trial court?

[210] The mineworkers contend that this Court should determine the issue now. One of the mining companies, ARM, maintains that the issue should be
I left to the trial court as that court will receive more evidence, and therefore will be able to make a more informed decision on the matter than this

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100 *Cox v Ergo Versicherung* [2014] UKSC 22 at [6].
J 101 South Australia, Parliamentary Debates, House of Assembly, 4 October 2001, 2385.

Court. We disagree with ARM. All the facts that are pertinent to the determination of this issue are already known and placed before this Court. The key facts are these:

210.1 the stage when *litis contestatio* will be reached in this case, if indeed it will be reached,[102] is a very long way off;

210.2 the mining companies agree that a large number of the mineworkers have already lost their lives as a result of contracting silicosis or TB, and that the only new evidence that the trial court will receive on this issue is that many more would have died before the stage of *litis contestatio* is reached. This new evidence will not alter the outcome of the issue – the death of a single mineworker with a legitimate claim, is sufficient evidence for this Court to note the undue, unjustified and irreparable prejudice that will ensue if the issue is left undeveloped;

210.3 the common law in its present form endorses the financial loss and social harm that the estates of the deceased mineworkers and their families endure as a result of these mineworkers succumbing to the diseases of silicosis or pulmonary TB. The mining companies are the only ones which benefit from this state of affairs and their benefit is at the expense of the deceased mineworkers and their dependants;

210.4 it is common cause that the common law does not reflect the legal convictions of the community and violates a number of constitutional principles, and to that extent it fails to promote the "*spirit, purport and objects of the Bill of Rights*"; and

210.5 finally, the issues have been extensively canvassed in the pleadings before this Court and comprehensively argued by all the parties.

Conclusion on transmissibility

[211] The irrefutable fact is that there exists a high mortality rate amongst the miners suffering from silicosis and TB. By May 2014 five of the applicant mineworkers in the Spoor application had passed away. Initially the LRC had instituted proceedings on behalf of twenty-four (24) plaintiffs but by the time it instituted the certification application, eight (8) of those had passed away – that constitutes a third of those plaintiffs. During the course of the hearing we were informed that the 33rd applicant mineworker, Mr Zwelake Dala, had passed away. This means that, as all these persons (and others) that have passed away pre-*litis contestatio*, if the common law is not developed, they will have to forego their claims for general damages despite the fact that such claims can be proven even though they have passed away.

[212] It is true that the defect in the common law could be remedied by the Legislature. There is, however, no possibility of our Legislature doing so

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102 We were informed that it is not impossible for the matter to be settled without going to trial.

in the near future. It is in any event, a failing of the common law and not the statutory law that we are asked to focus our attention on. It was the judicial arm of the State that established the rule prohibiting the transmissibility of general damages to the estate of a deceased plaintiff or defendant. When the initial rule was found to be wanting, it was the judicial arm, once again, that decided to establish the exception to the rule. Now that it has come to light that the rule as well as the exception cause grave injustice and are incompatible with the legal convictions of our community and do not reflect the "*spirit*, *purport and object of the Bill of Rights*", it is necessary for the judicial arm to perform its obligations in terms of sub-sections 8(3) and 39(2) of the Constitution and remedy this defect. In our view, one of the reasons the sub-sections were enacted was to cater for precisely the kind of situation that prevails in this case where intervention by the Legislature to remedy the huge injustice that prevails is not contemplated for the near future. These sub-sections ensure that it should not be left to the Legislature to remedy all the injustices that prevail by virtue of the failings resulting from the rules established by the common law.

[213] There is no doubt that on the facts of this case a huge injustice would result if the general damages that would have been due to the now deceased class member is denied simply because he succumbed to his disease before the case he brings or intended to bring had reached the stage of *litis contestatio* The injustice is all the more poignant when regard is taken of the fact that a denial of the benefits of general damages to the beneficiaries of the estate of the deceased class member could well result in the mining companies securing a benefit from the very harm they caused the deceased class member. Undoubtedly, the loss of the general damages (by dint of the operation of the existing common law) will, in this case, be borne by the widows and children of the deceased class member, as they would have benefited should their primary provider not have died pre-*litis contestatio*. It bears reminding that they are the indigent, the weak and the vulnerable in our society. That they should bear this loss and the respective mining company(ies) benefit from the death of their spouse and/or parent is grossly unjust, especially when regard is taken of two facts: one, the respective mining company(ies)' conduct (or wrongful omission) may be a significant contributor to the early death of their breadwinner, and two, the respective mining company(ies)' attitude and approach to the litigation has a significant influence over when the stage of *litis contestatio* is reached. In fact, to the extent that they can amend their pleadings at any time before judgment is given by the trial court they have significant, if not determinative, control over when the stage of *litis contestatio* is reached. Consequently, if the law is not developed, then in this case it would have failed the weak individuals and benefited the powerful corporates. It has to be borne in mind that while the mineworker experienced pain and suffering from the loss of amenities of life prior to his death, his widow and children too, bore some hardship by virtue of the care they were required to give to him as a result of his loss of amenities of life.

[214] The *amici*, forcefully contended that this rule of non-transmissibility of general damages pre-*litis contestatio* had, on the facts of this case, a strong gender bias in its consequence. They also produced evidence in support of this contention, which evidence was neither challenged nor contradicted by any of the mining companies. The evidence they brought shows that the mineworkers come from rural areas ("*labour-providing areas*") where they are dependent largely upon home-based care to assist them in coping with their illnesses. Such care is ordinarily provided by their wives and daughters. The care-work is demanding and includes efforts such as carrying, lifting and bathing the mineworkers, monitoring their medication, and staying up at night to attend to their needs. These women, and in some cases girls, are often anxious about the physical deterioration of their loved ones, the mineworkers, and as a result "*have reported experiencing tearfulness*, *nightmares*, *insomnia*, *worry*, *anxiety*, *fear*, *despair and despondency*, . . . *trauma* . . . *headaches*, *body aches and physical exhaustion.*" In short, they too bear a heavy burden as a result of the mineworkers contracting silicosis and TB. Often, the care work requires full-time attention, effectively compelling many women and girls to forego income-generating, educational, and other opportunities. Should the mineworkers receive compensation for the pain and suffering and loss of amenities of life they endured, (ie general damages) these women and girls would benefit therefrom by reducing the care-work they provide. It would also indirectly compensate them for the care-work they have already provided. Should the claim for general damages dissipate because the mineworker succumbed to his illness pre-*litis contestatio* it would mean that these women and girls would be deprived, by the common law, of that which they otherwise would have received. Hence, the *amici* point out, the common law, in effect, has a gender bias to it and such gender bias, they forcefully argue, is not consonant with our constitutional values and principles. They are only denied this benefit because the common law's approach to compensation for general damages has failed to keep pace with the procedural developments of the law as a whole. There is no logical or principled reason for the common law to deny them the benefits they would have received had their spouses and fathers not succumbed to their illnesses pre-*litis contestatio*.

[215] In the light of these circumstances and bearing in mind the injunctions of subsections 8(3) and 39(2) of the Constitution, it is our view that the common law has to be developed to allow for the claim for general damages to be transmissible to the estate or executor of a deceased mineworker, even though the stage of *litis contestatio* had not been reached at the time of his death. Also, the development is necessary in the light of the court's general duty to do justice by the persons affected by its orders.

[216] The development should not be restricted to the case where the plaintiff has died pre-*litis contestatio*. It should also apply to the case where the defendant or potential defendant has died pre-*litis contestatio* as the same principles as those that apply to plaintiffs apply to them.

[217] We have read the dissenting judgment of Windell J and wish to comment thereon briefly. Windell J is of the view that the development of the

common law should be restricted to class actions only. We do not agree with her for the following reasons:

217.1 The common law precluding transmissibility of general damages pre-*litis contestatio* is part of our substantive law. It is not part of our procedural law. A class action is a procedural device. It is neither proper nor logical to make a substantive law applicable only to a particular procedural device;

217.2 As a procedural device a class action allows the court to enter judgment that is binding on all class members who joined in the class action whether by failing to opt-out or by agreeing to opt-in. The judgment does not bind anyone who did not join the class action regardless of whether they were entitled to do so or not. Since the substantive law as developed by Windell J would only apply to class action litigants, any plaintiff(s) bringing the same case against the same defendant(s) but who refuses or fails to join the class action would not have his (their) claim(s) for general damages transmitted should he (they) die pre-*litis contestatio*. Thus in this case, should two mineworkers both sue the same mining companies with one doing so as part of the class action and one individually, and should both die pre-*litis contestatio* one would have his claim for general damages transmitted to his estate while the other not. The law as proposed, would effectively discriminate between them. Not only is there no rational or logical reason to justify this discrimination, it is patently unjust;

217.3 The law precluding transmissibility of general damages pre-*litis contestatio* is a law of general application. It applies to all cases. It cannot be developed for some cases and not for others. In other words, it cannot be developed for delictual cases involving claims by employees or former employees against their employers or former employers for unlawfully causing damage to their health, but not developed for delictual claims brought by for example victims of motor vehicle accidents who sue the wrongdoer, or the insurance that indemnified the wrongdoer, for the unlawful harm caused by the wrongdoer. There is no rational or reasonable basis to discriminate between both delictual claims. The fact that the damages caused by a wrongdoer in the case of the motor vehicle accident may be covered by the Road Accident Fund is of no moment. In fact, as it presently stands, the common law does not discriminate against or in favour of any particular plaintiff or species of plaintiffs. It, without discrimination, holds that no claim for general damages is transmissible pre-*litis contestatio* and all such claims are transmissible post *litis contestatio*, including those involving motor vehicle accidents. Should such a law be found to be inconsistent with the values of our society, especially those values articulated in our Bill of Rights, its development, accordingly, has to be equally non-discriminating. This is the only way to make the law equally applicable to all and sundry. To develop the law as suggested by Windell J would mean that those plaintiffs who are part

of a class action would have the new modern law on the transmissibility of general damages pre-*litis contestatio* applicable to their cases, while those who are not would have the old law on transmissibility applicable to their cases. A conclusion to this effect does not reflect the "*spirit*, *purport and objects*" of the Constitution. It is one that is, at the very least, not consistent with a fundamental principle expressed in section 9 of the Constitution, which is that "*everyone is equal before the law and has the right to equal protection and benefit of the law*." There may be other rights, such as the right to access to court, which may be violated by a general law that discriminates in favour of one set or group of litigants against all other litigants.

[218] By holding that the common law can only be developed in the manner we suggest below does not, in our view, mean that we have ignored the judicial caution captured in the *dictum* that judges should only develop the common law incrementally. Judicial caution in this regard, it has to be remembered, is borne out of a need to ensure that the judicial arm of the State does not trespass on the field reserved for the Legislature; the Legislature is doubtlessly better placed to make laws than the judiciary is, but as we point out above judges are often required to make law for no reason other than to ensure that the law adapts to new circumstances and meets new challenges. This, we believe, is all we are doing. Moreover, the need for judicial restraint expressed in the *dictum* does not mean that we must always only develop the law piecemeal. How the law is developed depends on the circumstances that prevail at the time. Of course, if it is possible to make a small adjustment to the law in order to make it reflect the "*spirit*, *purport and objects*" of the Constitution, then this must be the route to follow. But if by doing so we create as many problems as we attempt to solve, or to put it differently, we create as much hardship and injustice as there already prevails in the law, then a small (or piecemeal) adjustment is to be avoided. This approach we advocate is not an innovation of ours. It has long been part of our law. More than a century ago, Innes CJ said:

> "And we should be slow to perpetuate a form of legal remedy which may work hardship, if it can be modified so as to do away with that possibility".[103]

We hold the view that this is precisely what will occur if we are to develop the common law on transmissibility of general damages only for class action suits. We have no doubt that the problems we allude to in the previous paragraph are bound to surface in practice.

[219] In our view there is no way other than the one suggested by us below to develop the common law that prohibits the transmissibility of general damages pre-*litis contestatio*. This is because this law, as we say above, is one of general application. Its failings, too, are of general application. Hence, its development has to be of general application. There simply is no middle road and there can be no half measures. Once one accepts that

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103 *Blower*, *supra* at 900.

the common law precluding the transmissibility of general damages pre-*litis contestatio* does not reflect the "*spirit*, *purport and objects*" of the Bill of Rights, there can be no retreat from this conclusion. One becomes bound to develop it in a manner that fully and uncompromisingly reflects the "*spirit*, *purport and objects*" of the Bill of Rights. Anything less, would not suffice. It would only replicate the very anomalies and injustices that result from its application in practice.

[220] In conclusion, we hold that the common law should be developed as follows:

1. A plaintiff who had commenced suing for general damages but who has died whether arising from harm caused by a wrongful act or omission of a person or otherwise, and whose claim has yet to reach the stage of *litis contestatio*, and who would but for his/her death be entitled to maintain the action and recover the general damages in respect thereof, will be entitled to continue with such action notwithstanding his/her death; and
2. The person who would have been liable for the general damages if the death of a plaintiff had not ensued remains liable for the said general damages notwithstanding the death of the plaintiff so harmed;
3. Such action shall be for the benefit of the estate of the person whose death had been so caused;
4. A defendant who dies while an action against him has commenced for general damages arising from harm caused by his wrongful act or omission and whose case has yet to reach the stage of *litis contestatio* remains liable for the said general damages notwithstanding his death, and the estate of the defendant shall continue to bear the liability despite the death of the defendant.

[221] This we find is the only way to cure the common law of the arbitrariness, irrationality and unreasonableness that presently plagues it.

[222] Before closing on this subject it is necessary to deal with the issue of which stage in this litigation should the general damages that would be claimed by the mineworkers be transmissible to their estates. The mineworkers have at this stage only applied for certification of their class action. Those who want to be part of the class action have to await the outcome before they can take any further steps. Until then they are legally paralysed. Once the class action is certified they can issue summons against the mining companies. Only then would their claims be legally recognisable. The application for certification was first filed in August 2012. It is now May 2016. For various reasons the matter has taken four years to reach this stage. In the meantime, many mineworkers have succumbed to their illnesses. For this reason the mineworkers have asked that, should we declare their claims for general damages be transmissible to their estates then, we should do so on the basis that it be recognised that their claims have actually commenced as from the date when the certification application was launched and not from the date when the judgment is handed down. They argue that but for the legal requirement that a

class action be certified before they issue summons they would have actually done so in August 2012, or at least when the consolidated notice of motion was filed. As a result of this legal requirement all the mineworkers who have succumbed to their illnesses since the launching of the certification application would be deprived of their claim for general damages. Such deprivation is, they say, unfair and unjustifiable as they cannot be held responsible or accountable for the delays inherent in the legal process which resulted in their case only being finalised in May 2016. The mining companies did not mount any serious opposition to the request of the mineworkers. We find great force in the argument of the mineworkers. That many mineworkers have succumbed to their illnesses since the commencement of this application for certification is an undeniable fact. There is no doubt that failure to recognise their claims for general damages as having commenced from the date of the certification application would produce an unfair and unjust result for the heirs of mineworkers who have succumbed to their illnesses after the certification application was launched but before summons was issued in the class action. We can find no justifiable reason to deny their heirs the benefit of such claims. Accordingly, we hold that the only way justice can prevail is if the declaratory order sought by the mineworkers is granted.

Conclusion

[223] The only way justice can prevail in the cases of the individual mineworkers or their dependants is if they are afforded an opportunity to pursue their claims by at least having significant parts of it determined through a class action. Further, in our judgment it is in the interests of the mining companies that the many common issues as well as the common evidence referred to above be dealt with in a class action proceeding. As for the practical arrangements, we hold that these can be fully and finally determined by the trial court after pleadings have closed and all the factual and legal issues have crystallised or been identified. It is not within the power of this Court to prescribe to that court how it should structure its hearings.

[224] Accordingly, we reject the submissions of the mining companies that the class action is untenable and unmanageable and hold to the contrary.

[225] We wish to iterate that by holding that it is in the interests of justice that a class action be certified in this case, we do not, as was contended by the mining companies, hold that the mining companies are jointly liable for the harm suffered by an individual mineworker. Our law of delict is clear in this regard. A defendant can only be held liable for his own delict and not that of another defendant. The liability of each mining company will be determined at the second stage of the proceedings when all the mineworkers and all the dependants of deceased mineworkers have staked their claims. At that stage, the claims will be pared against the respective mining company(ies) alleged to have committed the delict. Hence, each mining company will be held responsible for its own actions or unlawful omissions. But, this does not affect the fact that a substantial body of the evidence to be led against them is the same, or common, to all of them and that the evidence is relevant to the individual mineworker's case.

Once this is received and the common factual and legal issues are determined, the case if necessary will proceed to the next stage where their individual culpabilities will be scrutinised and determined.

[226] Finally, it bears mentioning that at the hearing the mineworkers through their Counsel voiced their frustration with the mining companies. They complained about being stonewalled without relent by the mining companies from the beginning and all the way through this litigation. They say that their frustration must be understood in the context of the fact that they are no strangers to the mining companies: they are all former employees, or dependants of former employees, of the mining companies. They allege that the mining companies have placed every possible obstacle to having the matter adjudicated and that the mining companies have fought this application as vigorously and as aggressively as they possibly could. They have spared neither effort nor resources in doing so. They say that the mining companies have done this, despite the fact that the mining companies are not able to deny that, should this Court refuse the certification and the mineworkers be forced to bring individual actions, the result without doubt will sterilise the large majority of the individual claims. They allege that the mining companies' conduct has been obstructive and deliberately undermining of the interests of justice. The mineworkers say that it is necessary for them to voice their frustration as this is only the first stage in the litigation, and they ask the court to take note of it so that the mining companies may reconsider their approach as the litigation proceeds. The mining companies chose to ignore the accusation that they have deliberately obstructed the course of justice.

[227] This is unfortunate. An accusation that a party is deliberately undermining the interest of justice is a serious one. It is one thing for Counsel to exchange insults (and there was no shortage of that at the hearing) but it is another for the party to stand accused of deliberately undermining the interests of justice. It is one that is cause for disquiet. Conduct that deliberately undermines the cause of justice damages the integrity of the judicial system. Law-abiding persons, including juristic ones, should refrain from such conduct. That said, we have no doubt that the rest of the litigation will be conducted in a manner that advances rather than hinders the interests of justice.

Costs

[228] The mineworkers seek costs against the mining companies, including costs of nine Counsel. They have assured the court that the services by Counsel were shared and there was no duplication. The costs will follow that pattern; and they assured the court that the combined costs of nine Counsel shall not exceed the costs of three Counsel. This we find is justified having regard to the complicity and the aggregated strength of opposition by the mining companies. Counsel for the mining companies, like those for the mineworkers, shared responsibility and topics in presenting the case to this Court and would, if successful, all have been included in the mining companies' entitlement to costs. The costs order sought by the mineworkers is justified.

[229] Finally, we seize this opportunity to thank all the parties, including the *amici* for their assistance in this matter.

The order

[230] The order of the court is as follows:

1. It is declared that the following group of persons constitutes a class:

   1.1 Current and former underground mineworkers who have contracted silicosis, and the dependants of underground mineworkers who died of silicosis (whether or not accompanied by any other disease):

      1.1.1 where such mineworkers work or have worked on one or more of the gold mines listed on the attached "Annexure A", after 12 March 1965;

      1.1.2 whose claims are not among the claims which, by agreement, are to be determined by arbitration in the matter of *Blom and others v Anglo American South Africa Limited*; and

      1.1.3 who are not named plaintiffs in the action instituted in the United Kingdom against Anglo American South Africa Limited under case numbers HQ11X03245, HQ11X03246, HQ12X02667 and HQ12X05544 (the silicosis class).

   It is declared that the following group of persons constitutes a class:

2. Current and former underground mineworkers who have contracted pulmonary tuberculosis, and the dependants of deceased underground mineworkers who died of pulmonary tuberculosis (but excluding silico-tuberculosis), where such mineworkers work or have worked for at least two years on one or more of the gold mines listed on the attached "Annexure A", after 12 March 1965 (the pulmonary tuberculosis class).

3. The attorneys of record for the applicants are certified as the legal representatives of the members of the classes for the further conduct of the class action as follows:

   3.1 Abrahams Kiewitz Incorporated ("Abrahams"), Richard Spoor Inc. Attorneys ("Spoor") and the Legal Resources Centre ("LRC") are certified as the joint legal representatives of the members of the silicosis class;

   3.2 Abrahams is certified as the legal representative of the members of the pulmonary tuberculosis class; and

   3.3 The fee arrangements set out in annexures "RS13" and "RS21" to the replying affidavit of Richard Spoor are authorised in respect of the legal representatives of the classes.

4. In the further conduct of these proceedings (the class action), the following applicants, whomever are surviving at the time of the class action, are granted leave to act as class representatives:

   4.1 The first to fifty-second applicants are granted leave to act as representatives of the silicosis class of which they are members;

4.2 The thirty-third, thirty-fifth, thirty-sixth and the fifty-third to sixty-ninth applicants are granted leave to act as representatives of the pulmonary tuberculosis class of which they are members.

(the class representatives)

5. It is declared that the class representatives in paragraph 4 above have the requisite standing to bring the class action and to represent the members of the silicosis class and the pulmonary tuberculosis class in claims for damages.

6. It is directed that the following steps shall be taken to give notice of the class action to members of the classes substantially in accordance with the notice attached as "Annexure B1" (the notice):

6.1 The applicants' legal representatives shall forthwith publish the notice:

6.1.1 as an advertisement in the newspapers listed in "Annexure D" hereto. The notice shall be published in each such newspaper once per week for a period of four (4) weeks;

6.1.2 as a radio announcement substantially in the form of "Annexure C1", broadcast on each of the radio stations listed in "Annexure D" and in the languages stipulated therein. Such broadcasts are to be made twice daily on alternate days for a period of 4 weeks;

6.1.3 on a prominent notice board at each of the offices of the applicants' legal representatives for a period of not less than 180 days;

6.1.4 on a prominent notice board at each office of the Employment Bureau of Africa in Southern Africa for a period of not less than 180 days;

6.1.5 on a prominent notice board at each Justice Centre and public office of Legal Aid South Africa for a period of not less than 180 days;

6.1.6 on a prominent notice board at each regional office of the National Union of Mineworkers ("NUM") and the Association of Mineworkers and Construction Union ("AMCU") for a period of not less than 180 days;

6.1.7 by procuring Legal Aid South Africa to circulate the notice to each of its attorneys and candidate attorneys employed in providing legal aid in civil matters; and

6.1.8 by delivering a copy of the notice to each advice office, paralegal office and community-based organisation with which the applicants' legal representatives are familiar and which are likely, in the opinion of the applicants' legal representatives, to be approached by members of the class; and

6.1.9 on the websites of the applicants' legal representatives.

6.2 The respondents shall publish the notice:

6.2.1 on a prominent notice board for mineworkers at each mine owned, operated, controlled and/or advised by the respondents for a period of not less than 180 days; and

6.2.2 on the homepage of each respondent's website for a period of not less than 180 days.

7. The applicants' legal representatives are directed to file reports with the court on a quarterly basis setting out the steps taken to publish the notice and the progress made in identifying the members of the classes, the first such report to be filed 3 months after the date of the order.

8. It is declared that any claimant, who has claimed for general damages, and who has died or dies prior to the finalisation of his case, will have such general damages transmissible to his estate, regardless of whether he has joined the class action or not. The claim of general damages in this case shall be transmissible from the date when the certification application was launched in August 2012.

9. It is ordered that the members of the classes will be bound by the judgment or judgments in the first stage of the class action against the mining companies, unless they give written notice to Abrahams, Spoor, or the LRC by 31 January 2017, that they wish to be excluded as members of any of the classes against each or any of the respondents.

10. It is ordered that:

10.1 upon conclusion of the first stage of the class action, the members of the silicosis class must give written notice to Abrahams, Spoor or the LRC by a date to be determined by the court at that time:

10.1.1 that they wish to opt in and be included as members of the silicosis class in the second stage of the class action; and

10.1.2 which respondent or respondents they seek to hold liable in the second stage of the class action.

10.2 upon conclusion of the first stage of the class action, the members of the pulmonary tuberculosis class must give written notice to Abrahams by a date to be determined by the court at that time:

10.2.1 that they wish to opt in and be included as members of the pulmonary tuberculosis class in the second stage of the class action; and

10.2.2 which respondent or respondents they seek to hold liable in the second stage of the class action.

10.3 only members who give such notice timeously will have the benefit of and be bound by the judgments in the second stage of the class action as against the respondent or respondents that are found to be liable to them.

11. The references to respondent or respondents:

11.1 In paragraph 6.2 exclude the twentieth (20th), twenty-first (21st), twenty-fifth (25th) and twenty-sixth (26th) respondents insofar as they pertain to the notice obligations and costs in respect of the tuberculosis class.

11.2 In paragraph 6.2 exclude twentieth (20th) and twenty-first (21st) respondents insofar as they pertain to the notice obligations and costs in respect of the silicosis class.

11.3 In paragraph 15 exclude the twentieth (20th), twenty-first (21st) and twenty-ninth (29th) respondents as a whole and the twenty-fifth (25th) and twenty-sixth (26th) respondents insofar as they pertain to costs of the tuberculosis class.

12. It is ordered that the respondents are jointly and severally liable for half of the mineworkers' costs of publicising the notice as set out in paragraph 6.1 above.

13. It is ordered that any settlement agreement reached by the parties shall only be of force and take effect if approved by this Court.

14. The conditional counter-application of first (1st), second (2nd), fourth to eighth (4th–8th) and thirty-second (32nd) respondents is dismissed with costs.

15. It is ordered that the respondents are jointly and severally liable for the costs of this application which costs are to include those occasioned by the employment of four senior Counsel and five junior Counsel.

16. The parties are granted leave to approach this Court, on the same papers duly supplemented, for an order varying or amplifying the provisions of this order pertaining to notice and the costs associated with notice, in the event that this is considered necessary by any party.

Windell J:

[231] I dissent with the majority judgment on one issue only; that issue concerns the question of the transmissibility of general damages prior to *litis contestatio*. I consider it necessary to express my perspective on this aspect only, as the majority judgment encompasses my views on the certification of the class action. I agree with my brothers' interpretation of the common law and the exposition of the facts and issues. I further agree with the reasoning as to why it is incumbent for this Court to develop the common law. I however, respectfully differ with the extent of the development, for the reasons that follow.

[232] The mineworkers claim damages under five separate heads: past loss of earnings; future loss of earnings; past medical expenses; future medical expenses; and general damages for pain and suffering, loss of amenities of life, disablement and reduced life expectancy. The damages claimed under two of the five heads of damage constitute special damages (past loss

of earnings and past medical expenses) and will immediately be transmissible to their deceased estates in the event of death occurring after the institution of these proceedings.[104]

[233] In terms of the common law claims for general damages are not transmissible, except after *litis contestatio* has occurred during the lifetime of the injured party. The general damages claimed by the mineworkers in this instance are for pain and suffering, loss of amenities of life, disablement and reduced life expectancy as well as prospective medical expenses and future loss of income. The mineworkers seek a declarator that, in the event any class member dies after the institution of the certification application and prior to the finalisation of the class action, such general damages as a class member would have been entitled to claim, shall be transmissible to his or her deceased estate. The development of the common law is proposed in relation to class actions only. It was only during the hearing of this matter that the proposition that the common law should also in that respect be developed in respect of all actions and not only for class actions, was raised and debated.

[234] The general development of the common law proposed by Mojapelo DJP and Vally J to provide for active and passive transmissibility before *litis contestatio*, will have far reaching implications. The mine workers' arguments were directed at class action proceedings and the implications of the common law position (that general damages are only transmissible after *litis contestatio*) on a class action. The mining companies also prepared arguments based on the relief originally sought by the mineworkers in the notice of motion. Transmissibility of general damages in all actions generally was neither dealt with nor is it relevant for the purpose of deciding this case. We have not had the benefit of well-researched arguments on the proposed far reaching development. I am accordingly hesitant to tread this complex field of the law in the absence of a proper opportunity to consider the implications that such a development may and will have on the broader community and the knock-on effect it might have on other branches of the law, for example, the law of cession[105] and on litigation in, for example, Road Accident Fund matters. Road accidents are one of the leading causes of death in South Africa. Any development that would lead to the transmissibility of actions for general damages before *litis contestatio* in general, will have an impact on the economic viability of the Road Accident Fund. The same policy considerations that militate in favour of the development of the common law in class actions of this nature will not necessarily be present in other situations where delictual liability accrues to a defendant.

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104 *Lockhat's Estate v North British and Mercantile Insurance Co Ltd* 1959 (1) SA 24 (D) [also reported at [1959] 1 All SA 166 (D) – Ed].

105 See *Ngubane*, *supra* at 607 where the Court relied on the *maxim*- what cannot be transmitted on death, cannot be ceded in life. See however the exception in relation to *usus-fructus.* (*Collegium Theoretico-practicum ad Pandectas*). H de Cocceii argues (*Disputationes 2 65*) that the two institutions, cession and succession differ so radically that any rule endeavouring to create a link between the two would of necessarily be incorrect.

[235] The common law rule dealing with transmissibility of general damages regulates both the active and passive transmissibility of general damages. Claims are accordingly available to the heir of the person wronged and against the heir of the wrongdoer. It is important to strike a balance between the rights of heirs of wrongdoers and the rights of heirs of persons who have been wronged. The development of the common law will have implications for the deceased estates (and hence the heirs) of any wrongdoers who die before *litis contestatio*. Neither the mineworkers nor the mining companies dealt with those implications on passive transmissibility.

[236] During the hearing of this matter, legislation in foreign jurisdictions such as the United States of America, the United Kingdom and Australia where the law regarding transmissibility has been developed, were referred to and considered. Legislation has been enacted in all three countries to provide a statutory cause of action for wrongful death and the preservation of any pre-existing rights of action held by the injured party. The legislation in these countries differs with respect to the type of damages that can be claimed. Two States in the USA exclude damages for pain and suffering, and all Australian states exclude damages for pain and suffering except in the case of deaths resulting from dust-related or asbestos-related diseases. The majority of the Canadian provinces have expressly excluded the transmissibility of claims for "damages for loss of expectation of life, pain and suffering, physical disfigurement or loss of amenities". There are clearly divergent approaches in the respective Legislatures of different jurisdictions. Foreign models should not be used without proper recognition of non-legal aspects that influence the procedures in both foreign and local jurisdictions. Incorporating foreign customs into practice through judicial prescriptions may not have the desired result.[106] This approach is sensible, specifically in the South African social context. We did not have the benefit of a complete comparative analysis dealing with the effect that the transmissibility of general damages had in those countries where such enabling legislation exists.

[237] The power of the courts to develop the common law must be exercised in an incremental fashion as required by the facts of each particular case. This duty was summarised in *R v Salituro*[107] and cited with approval in *Du Plessis and others v De Klerk and another*[108]as follows:

> "Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the Judiciary to change the law. . . In a constitutional democracy such as ours it is the Legislature and not the courts which has the major responsibility for law reform. . . . The Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society."

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106 Hurter 2006; Cilsa 485 at 500 and 503.
107 (1992) 8 CRR (2d) 173 ([1991] 3 SCR 654).
108 1996 (3) SA 850 (CC) [also reported at 1996 (5) BCLR 658 (CC) – Ed].

[238] South Africa does not have legislation governing class action claims. The rules governing class actions have been developed by the courts. In the absence of legislative regulation in South Africa, the courts are duty bound to continue the development of class action proceedings. In *Children's Trust* the court for example held that for purposes of prescription, service of the application for certification should constitute service of process claiming payment of the debt for the purpose of section 15(1) of the Prescription Act 68 of 1969.[109] In Australia, specific legislation exists to provide for transmissibility of claims for pain and suffering resulting from dust-related or asbestos-related diseases. Section 173 read with section 39(2) of our Constitution imposes an obligation on courts to develop the common law appropriately, if it is in the interest of justice. The foreign jurisdictions referred to have no equivalent duty under their constitutional framework.

[239] In *Thebus and another v S*,[110] the need to develop the common law under section 39(2) of the Constitution was held to arise in at least two instances. The first, when a rule of the common law is inconsistent with a constitutional provision and the second, where the common law may have fallen short of its spirit, purport and objects, even though not inconsistent with a specific constitutional provision. It is then that "*the common law had to be adapted so that it grew in harmony with the* '*objective normative value system*' *found in the Constitution*".[111]

[240] Social justice and the advancement of human rights and freedoms (with an emphasis on the values of human dignity, substantive equality, and non-discrimination) are described as "*[t]he leitmotif of our Constitution*."[112] These constitutional values militate in favour of the development of the common law. In the present matter the constitutional rights of two categories of persons are relevant to transmissibility: the rights of mineworkers, who are members of the class, and the rights of their heirs. The question is whether these values (human dignity, equality and non-discrimination) are advanced by acknowledging and perpetuating the distinction the common law draws between the transmissibility of actions for pain and suffering before and after *litis contestatio*, particularly in circumstances of the kind currently before this Court.

[241] The development of the common law must be fact-driven. Insufficient facts were placed before this Court to go as far as holding that general damages are transmissible in all matters in which an injured party has a claim. The facts are however, sufficient to justify the development of the common law in relation to class action proceedings. Such development is in the interest of justice and any further delay would cause an injustice. In the context of a class action, and specifically a class action of this magnitude, it will take much longer to reach *litis contestatio*. The courts have

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109 At [89].
110 2003 (6) SA 505 (CC) para [28] [also reported at [2003] JOL 11400 (CC) – Ed].
111 *Thebus* at para [28].
112 *Kaunda and others v President of the RSA and others* (*2*) 2005 (4) SA 235 (CC) para [220] [also reported at 2004 (10) BCLR 1009 (CC) – Ed].

not yet pronounced on the application of the rules relating to close of pleadings and transmissibility in the context of class action proceedings. If the rule is applied strictly, *litis contestatio* cannot be reached during the certification proceedings at all. It would be reached only after the finalisation of the certification process, and thus after the exchange of pleadings.

[242] The mineworkers and their dependants form part of the most vulnerable and marginalised members in our society. Such injustice as there may be extends to women and children living in geographical localities of mining and rural communities. These communities are home to individuals (mostly relatives) upon whom ailing mineworkers would have relied on for the provision of accommodation and food as well as maintaining the quality of life of terminally ill mineworkers.

[243] Taking into consideration the specific circumstances of this case, as highlighted in the main application and the evidence of the mineworkers, I am of the view that the spirit, purport and objects of the Bill of Rights requires the incremental development of the common law regarding transmissibility in respect of class actions. This development extends only to the transmissibility of claims for general damages in those cases where a class member dies after the institution of the certification application and prior to finalisation of a class action. In those instances, such general damages as that class member would have been entitled to claim, will be transmitted to his or her deceased estate.

ANNEXURE "A" LIST OF MINES*

1. Harmony Gold Mine
2. Virginia Gold Mine
3. Merriespruit Gold Mine
4. Unisel Gold Mine
5. Free State Saaiplaas Gold Mine
6. Free State Saaiplaas Gold Mine Shafts 2 and 3
7. Saaiplaas Gold Mine Shafts 4 and 5 (now Masimong Mine)
8. President Steyn Gold Mine
9. President Steyn Gold Mine Shafts 1 and 2 (now part of Bambanani)
10. President Steyn Gold Mine Shaft 4
11. President Brand Gold Mine
12. President Brand Gold Mine Shafts 1, 2, 3 and 5
13. Kusasalethu Gold Mine (formerly Elandsrand)
14. Elandsrand Gold Mine
15. DeeiKraal Gold Mine
16. Evander Gold Mine
17. Kinross Gold Mine
18. Winkelhaak Gold Mine
19. Bracken Gold Mine

20. Leslie Gold Mine
21. Randfontein Estates Gold Mine
22. Doornkop Gold Mine
23. Freegold 1 Gold Mine (now Bambanani)
24. Freegold 2 Gold Mine (now part ofTshepong)
25. Free Gold 3 Gold Mine (now part ofTshepong)
26. Freegold 4 Gold Mine (now part ofTshepong)
27. Tshepong Gold Mine (formerly Freegold 2 and 4)
28. Bambanani Gold Mine (formerly Freegold 1)
29. Masimong Gold Mine (formerly FS Saaiplaas 4 and 5)
30. H J Joel Gold Mine
31. Joel Gold Mine
32. St Helena Gold Mine
33. Western Holdings Gold Mine
34. Matjhabeng Gold Mine (formerly part of Western Holdings)
35. Target Gold Mine
36. Target Gold Mine Shafts 1 and 2
37. Target Gold Mine Shaft 3
38. Loraine Gold Mine
39. Loraine Gold Mine Shaft 3 (now part of Target)
40. Freddies Gold Mine
41. Freddies Gold Mine Shafts 7 and 9 (now part of Target)
42. Phakisa Gold Mine
43. Hartebeesfontein (now part of Buffelsfontein)
44. Vaal Reefs Gold Mine
45. Vaal Reefs Gold Mine Shafts 1, 2, 3, 4, 5, 6 and 7
46. Vaal Reefs Gold Mine No 8 Shaft (now Great Noligwa)
47. Vaal Reefs Gold Mine No 9 Shaft (now Kopanong)
48. Vaal Reefs Gold Mine No 10 Shaft (now Tau Lekoa)
49. Vaal Reefs Gold Mine No 11 Shaft (now Moab Khotsong)
50. Great Noligwa Gold Mine (formerly Vaal Reefs 8)
51. Kopanang Gold Mine (formerly Vaal Reefs 9)
52. Tau Lekoa Gold Mine (formerly Vaal Reefs 10)
53. Moab Khotsong Gold Mine {formerly Vaal Reefs 11)
54. Western Deep Levels Gold Mine
55. Western Deep Levels Gold Mine Shaft 1 (now Mponeng)
56. Western Deep Levels Gold Mine Shaft 2 (now Savuka)
57. Western Deep Levels Gold Mine Shaft 3 (now Tau Tona)

58. Mponeng Gold Mine (formerly Western Deep Levels 1)
59. Savuka Gold Mine(formerly Western Deep Levels 2)
60. Tau Tona Gold Mine(formerly Western Deep Levels 3)
61. Free State Geduld Gold Mine
62. South Deep Gold Mine
63. Beatrix Gold Mine
64. Oryx Gold Mine
65. Kloof Gold Mine
66. Libanon Gold Mine
67. Leeudoorn Gold Mine
68. Venterspost Gold Mine
69. Western Areas Gold Mine
70. East Driefontein Gold Mine
71. West Driefontein Gold Mine
72. Driefontein Consolidated Gold Mine
73. Kloof-Driefontein Complex (KDC Complex)
74. of stat Buffelsfontein Gold Mine
75. Blyvooruitzicht Gold Mine
76. Doornfontein Gold Mine (now part of Blyvooruitzicht)
77. East Rand Proprietary Mines
78. Durban Roodepoort Deep Gold Mine
79. Welkom Gold Mine
80. East Geduld Gold mine
81. Orkney Mines
82. Vlakfontein Gold Mine

ANNEXURE B1 (AMENDED): PUBLISHED NOTICE TO CLASS MEMBERS

Notice of class action to:

All underground mineworkers who work or have worked on any of the gold mines listed below, at any time after 12 March 1965, and who have silicosis and/or pulmonary tuberculosis;

and

The dependants of underground mineworkers who worked on any of the gold mines listed below, at any time after 12 March 1965, and who died from silicosis and/or pulmonary tuberculosis.

The relevant mines:

Bambanani Gold Mine (formerly Freegold 1)	Matjhabeng Gold Mine (formerly part of Western Holdings
Beatrix Gold Mine	Merriespruit Gold Mine
Blyvooruitzicht Gold Mine	Moab Khotsong Gold Mine (formerly Vaal Reefs 11)
Bracken Gold Mine	Mponeng Gold Mine (formerly Western Deep Levels 1)
Buffelsfontein Gold Mine	Oryx Gold Mine
DeelKraal Gold Mine	Phakisa Gold Mine
Doornfontein Gold Mine (now part of Blyvooruitzicht)	President Brand Gold Mine
Doornkop Gold Mine	President Brand Gold Mine Shafts 1, 2, 3 and 5
Driefontein Consolidated Gold Mine	President Steyn Gold Mine
Durban Roodepoort Deep Gold Mine	President Steyn Gold Mine Shaft 4
East Driefontein Gold Mine	President Steyn Gold Mine Shafts 1 and 2 (now part of Bambanani)
East Rand Proprietary Mines	Randfontein Estates Gold Mine
Elandsrand Gold Mine	Saaiplaas Gold Mine Shafts 4 and 5 (now Masimong Mine)
Evander Gold Mine	Savuka Gold Mine (formerly Western Deep Levels 2)
Freddies Gold Mine	South Deep Gold Mine
Freddies Gold Mine Shafts 7 and 9 (now part of Target)	St Helena Gold Mine
Free Gold 3 Gold Mine (now part of Tshepong	Target Gold Mine
Free State Geduld Gold Mine	Target Gold Mine Shaft 3
Free State Saaiplaas Gold Mine	Target Gold Mine Shafts 1 and 2
Free State Saaiplaas Gold Mine Shafts 2 and 3	Tau Lekoa Gold Mine (formerly Vaal Reefs 10)
Freegold 1 Gold Mine (now Bambanani)	Tau Tona Gold Mine (formerly Western Deep Levels 3)
Freegold 2 Gold Mine (now part of Tshepong)	Tshepong Gold Mine (formerly Freegold 2 and 4)
Freegold 4 Gold Mine (now part of Tshepong)	Unisel Gold Mine

Great Noligwa Gold Mine (formerly Vaal Reefs 8)	Vaal Reefs Gold Mine
H J Joel Gold Mine	Vaal Reefs Gold Mine No 10 Shaft (now Tau Lekoa)
Harmony Gold Mine	Vaal Reefs Gold Mine No 11 Shaft (now Moab Khotsong)
Hartebeesfontein (now part of Buffelsfontein)	Vaal Reefs Gold Mine No 8 Shaft (now Great Noligwa)
Joel Gold Mine	Vaal Reefs Gold Mine No 9 Shaft (now Kopanong)
Kinross Gold Mine	Vaal Reefs Gold Mine Shafts 1, 2, 3, 4, 5, 6 and 7
Kloof Gold Mine	Venterspost Gold Mine
Kloof-Driefontein Complex (KDC Complex)	Virginia Gold Mine
Kopanong Gold Mine (formerly Vaal Reefs 9)	West Driefontein Gold Mine
Kusasalethu Gold Mine (formerly Elandsrand)	Western Areas Gold Mine
Leeudoorn Gold Mine	Western Deep Levels Gold Mine
Leslie Gold Mine	Western Deep Levels Gold Mine Shaft 1 (now Mponeng)
Libanon Gold Mine	Western Deep Levels Gold Mine Shaft 2 (now Savuka)
Loraine Gold Mine	Western Deep Levels Gold Mine Shaft 3 (now Tau Tona)
Loraine Gold Mine Shaft 3 (now part of Target)	Western Holdings Gold Mine
Masimong Gold Mine (formerly Free State Saaiplaas 4 and 5)	Winkelhaak Gold Mine

Please take note that:

1. A class action for money damages has been started in the Gauteng Local Division of the High Court, Johannesburg, against the companies that owned, operated, controlled and/or advised the gold mines listed above, on behalf of:

   All current and former underground mineworkers who have silicosis and/or pulmonary tuberculosis and who have worked on any of the above listed gold mines at any time after 12 March 1965, as well as the dependants of such mineworkers who have died of silicosis and/or pulmonary tuberculosis, with the exclusion of persons –

   (i) whose claims are to be determined by arbitration in the matter of Blom and others v Anglo American South Africa Limited; and

(ii) who are named plaintiffs in the action instituted in the United Kingdom against Anglo American South Africa Limited under case numbers HQ11X03245, HQ11X03246, HQ12X02667 and HQ12X05544.

2. If you fall in the above class of persons, you automatically form part of the class action unless you opt out of the class action by sending a written notice to the attorneys representing the class, to be received by no later than 31 January 2017.

3. Please include your name, address and telephone number in the notice, and send it by post, fax or email to one of the following attorneys:

Richard Spoor Incorporated

Tel: +27 (0)11 482 6081

Fax: +27 (0)11 482 1419

Email: info@richardspoor.co.za

Postal address: PO Box 303 Parklands, 2121

Attention: Richard Spoor

Abrahams Kiewitz Incorporated

Tel: +27 (0)21 914 4842

Fax: +27 (0)21 914 1455

Email: classaction@ak.law.za

Postal address: PO Box 3048, Tygervalley, 7536, Cape Town

Attention: Charles Abrahams

Legal Resources Centre

Tel: +27 (0)11 836 9831

Fax: +27 (0)11 834 4273

Email: sayi@lrc.org.za

Postal address: PO Box 9495, Johannesburg, 2000

Attention: Sayi Nindi

www.lrc.org.za

4. TAKE NOTE THAT: Each class member who does not opt-out will be bound by any judgment or settlement, whether favourable or not, and will not be allowed to proceed with an independent action.

5. Any money damages and other court order obtained by the class representatives under a judgment or settlement will be distributed to individual members of the class. Should the class action proceed to a stage where the liability of specific companies has to be decided and individual money damages are to be decided, class members will be advised by the legal representatives of the steps you will have to take as a class member to opt-in to the action for this purpose. **This means that you will have to take more steps yourself at a later stage to benefit personally from any success in the class action**.

6. The attorneys have entered into contingency fee agreements with the class representatives with respect to recovery of their legal fees and disbursements. These agreements provide that the attorneys will not receive payment for their work unless and until the class action is successful or costs are received from the defendant gold mining companies. If the class action is successful, the attorneys will be entitled to a fee payable out of the amount recovered under the judgment or settlement of the action, which amount will require court approval.

   As a member of the class, you have a right to participate in the proceedings. Should you wish to do so, kindly contact the attorneys (details listed above). You can also visit the following website for copies of the legal documents filed in the case: www.lrc.org.za and www.goldminersilicosis.co.za.

7. To get more information about the class action, to obtain assistance in opting out or opting in, or if you wish to participate in the case, you may:
   (a) Contact one of the legal representatives (details listed above);
   (b) Call the toll free Call Centre at [insert number]. The Call Centre will operate from [hours], until [date]. There is no cost to persons calling that number from within the borders of the Republic of South Africa; or
   (c) Send a "please call me" by SMS to the following number [insert number], and one of the legal representatives will call you.

8. The following persons have been certified as the class representatives, and will act on behalf of the class in the action:

Bongani Nkala	Kambi Administrative area, Mthatha
Siporono Phahlam	Imizizi a/a Redoubt, Bizana, 4800
Thembekile Mnaheni	Mohoabatsana a/a, Mt Fletcher, 4770
Matona Mabea	Mohale's Hoek, Mekaling, Ha-makoanyane
Mokholofu Boxwell	Butha-buthe, Tlokoeng
Alloys Mncedi Msuthu	Mthumasi a/a, Ramafole Loc, Mt Fletcher
Myekelwa Mkenyane	Bizana
Zwelendaba Mgidi	Twazi a/a, Flaggstaff, 4810
Mthobeli Gangatha	Nkunzimbini a/a, Lusikisiki
Landile Qebula	Ngxokweni Admin Area, Libode
Phumelelo Solitasi Siyocolo	Ntlenzi Administrative Area, Flaggstaff
Tekeza Joseph Mdukisa	Madiba a/a, Bizana, 4800
Joseph Lebone	Mohale's Hoek, Taung, Ha-monyake
Zama Gangi	Gorha Admin Area, Lusikisiki, 4820

Malungisa Thole	Imiziu a/a, Bizana, 4800
Monokoa Thomas Lepota	Maseru, Roma, Ha-elia
Mzawubalekwa Diya	Tyeni a/a Bizana, 4800
Msekeli Mbuziweni	Nqabeni Village, Isikelo a/a, Bizana, 4800
Zaneyeza Ntloni	Twazi a/a Flaggstaff
Tohlang paulosi mako	Mohale's Hoek, Taung, Siloe
Nanabezi Mgoduswa	Wphilisweni/ Tshuzi Woc, Bizana
Thulenkho Kuswana	Mikhwe Loc, Bizana
Maleburu Regina Lebitsa	Liribe, Pela-tsoeu, Ha-motsoane
Mataaso Mable Makone	Butha Buthe, Makeneng, Ha-tumane
Matsekelo Cisilia Masupha	Thuathe, Putha-lichaba, Maseru
Matiisetso Maseipati Jesenta Nong	Ha Rannakoe, Matelile, Mafeteng
Bangumzi Bennett Balakazi	Peddie, Eastern Cape
Watu Livingston Dala	Cala, Eastern Cape
Zwelake Dala	Cala, Eastern Cape
Dyamara January Jibhana	Merino Park, Queenstown, Eastern Cape
Mantso Hendrick Mokoena	25 Reitz Street, Doorn, Welkom, Free State
Mbikanye Alfred Sawule	458 Kopano, Midford, Eastern Cape
Zonisele Jan Nkompela	1909 Mzamo Street, Linge, Queens-town, Eastern Cape
Ishmael Tsikwane Motleke	516 Slovo Park, Witsieshoek, Free State
Thabo Edwin Ntsala	4422 Zone 7, Meqheleng, Ficksburg, Free State
Malepa Puso	916 Phomolong Rheedespark ext 2, 9458, Welkom, Free State
Noebejara Tau	Ha-kholanyane, Matelile, Mafiteng, Lesotho
Elia Motlalepula Phetane	Mosoang Ha-mojela Ha Maphephe, Lesotho
Motlalepula Mokoena	Ha-motloheloa, Lesotho
Sekhobe Letsie	Matiseng, Lesotho
Tshehla Solomon Hlalele	3878 ks, Kutlwanong, od 9480, Welkom, Free State

Mona Ashton Melao	Hangoatonyane, Mazenod, Maseru, Lesotho
Nkosi Selata Selata	35149 Hanipark, Shilosert, Bronville, 9459, Free State
Edgar Ntjana Ntjana	PO Box Tlali 70, Setleketseng, Lesotho
Mahola Emmanuel Selibo	Saint Roderick, Ha-shoepane, Khubetsoana, Lesotho
Ezekiel Mutsana Mashupa	Room e20, Harmony, Welkom, 9460, Free State
Malefetsane Mohlakasi	Mosoang, Ha-mojela, Ha-makoetue Sehlabeng SA, Lesotho
Mthetheleli Nelson Satu	Eskobeni Location, Cofimvaba, Eastern Cape

ANNEXURE C1 (AMENDED): RADIO NOTICE TO CLASS MEMBERS

This is a message to: All underground mineworkers who work or have worked on certain gold mines in South Africa, at any time from 12 March 1965, and who have contracted silicosis, and/or tuberculosis.

This message is also directed to: All the dependants of underground mineworkers who worked on certain gold mines in South Africa, at any time from 12 March 1965, and who died from silicosis or tuberculosis.

Please take note that:

1. A class action for money damages has been started in the Gauteng Local Division of the High Court, Johannesburg, against the companies that owned, operated, controlled and/or advised certain gold mines in South Africa, on behalf of:

   All current and former underground mineworkers who have silicosis and/or pulmonary tuberculosis and who have worked on any of the gold mines cited in the proceedings, at any time after 12 March 1965, as well as the dependants of such mineworkers who have died of silicosis or pulmonary tuberculosis, with the exclusion of persons –

   (i) whose claims are subject to arbitration in the matter of Blom and Others v Anglo American South Africa Limited; and

   (ii) who are named plaintiffs in the actions pending in the United Kingdom against Anglo American South Africa Limited.

2. If you fall within this class of persons, you automatically form part of the class action, and you will be bound by any judgment or settlement obtained in the class action.

3. If you do not wish to be part of the class action, you must opt out by sending a written notice to the attorneys representing the class, to be received by no later than [date].

4. Please refer to this week's [SPECIFY NEWSPAPERS] for the list of gold mines covered by the class action; and for details of how to "opt out" should you choose not to be a member of the class and how to "opt in" at the stage when final liability and damages are decided.
5. For more information, you can also:
   (a) Call the following toll-free number: [insert]. The Call Centre will operate until [date]. There is no costs to persons calling that number from within the borders of the Republic of South Africa; or
   (b) Send a "please call me" by SMS to the following number [insert], and the legal representative will call you; or
   (c) Visit the websites at www.lrc.org.za and www.goldmindersilicosis.co.za.

ANNEXURE D: LIST OF NEWSPAPERS

Newspapers		
South Africa		
Newspapers	**Language/s**	**Distribution**
Alex Pioneer	All Languages	Gauteng
Horizon	English, Afrikaans	Gauteng
Soweto Express & Soweto Times	Zulu, Xhosa, English, S Sotho, Pedi	Gauteng
Kathorus Mail	Zulu, SeSotho, English	Gauteng
Tshwane Sun Ham-manskraal, Tswane Sun Central	Setswana and English	Gauteng
Kruger 2 Canyon	N Sotho, Tsonga, Siswati & English	Mpumalanga
The Herald	N Sotho, Tsonga, Siswati & English	Mpumalanga
The Herald	Setswana, Ndebele & English	Mpumalanga
The Herald	SiSwati, Zulu, English, Afrikaans	Mpumalanga
Highlands Panorama	N Sotho, Tsonga, Siswati, Pedi, English	Mpumalanga
Polokwane Observer	N Sotho & English	Limpopo
Bulletin	N Sotho, Tsonga, Afri-kaans, English	Limpopo

Limpopo Mirror	Venda, Tsonga, Sepedi, Afrikaans, English	Limpopo
Seipone, Mogol Post	N Sotho, English, Afrikaans, Ndebele	Limpopo
Zoutpansberger	English, Afrikaans, Venda, Sotho, Tsonga	Limpopo
Mangaung Issue	English, Sotho	Free State
Eastern Free State Issue	Sesotho, Zulu & English	Free State
Maluti News	Sesotho & English	Free State
Northwest Independent, Overvaal	Setswana, Afrikaans, Sesotho, N Sotho	North West
Zeerust News	Setswana, English, Afrikaans	North West
Mmega District News	Setswana, Afrikaans, English	North West
Pinetown Izindaba, Amanzimtoti,	Zulu, Xhosa & Siswati	Kwa-Zulu Natal
Galaxy, Northern Star, Stanger Weekly	Zulu, English, Xhosa	Kwa-Zulu Natal
Al Qalam KZN	Zulu, English, Afrikaans, German	Kwa-Zulu Natal
Ladysmith Herald, Stanger weekly	Zulu, English	Kwa-Zulu Natal
The Reporter	Xhosa, Afrikaans, English	Eastern Cape
Eastern Cape Today	Xhosa & English	Eastern Cape
Pondo News	Xhosa, English, Sesotho, Afrikaans	Eastern Cape
Kathu Gazette	Afrikaans, Setswana, Xhosa & English	Northern Cape
De Aar Echo	Afrikaans, Xhosa, English	Northern Cape
Durban North News	Xhosa & English	Western Cape
Zimbabwe		
Newspapers	**Language/s**	**Distribution**
Sunday Mail	English	National
The Chronicle	English	National
The Herald	English	National
The Manic Post	English	National

Zambia		
Newspapers	**Language/s**	**Distribution**
Zambia Daily Mail	English	National
The Post	English	National
Swaziland		
Newspapers	**Language/s**	**Distribution**
Times of Swaziland	English	National
Swazi Observer	English	National
Mozambique		
Newspapers	**Language/s**	**Distribution**
Noticias	Portuguese	National
Savana	Portuguese	National
Domingo	Portuguese	National
Malawi		
Newspapers	**Language/s**	**Distribution**
Malawi News	English, Chichewa	National
The Sunday Times	English	National
Lesotho		
Newspapers	**Language/s**	**Distribution**
Public Eye	English, Sesotho	National
Botswana		
Newspapers	**Language/s**	**Distribution**
Botswana Gazette	English	National
The Voice	English, Setswana	National

ANNEXURE D: LIST OF RADIO STATIONS

Radio Stations		
South Africa		
Station	**Language/s**	**Distribution**
Alx FM	All Languages	Gauteng
Eldos FM	English, Afrikaans	Gauteng
Jozi FM	Zulu, Xhosa, English, S Sotho, Pedi	Gauteng
Kasie FM	Zulu, SeSotho, English	Gauteng
Radio Moretele	Setswana and English	Gauteng

Radio Shoshanguve	Setswana and English	Gauteng
Barberton Community Radio	N Sotho, Siswati & English	Mpumalanga
Radio Bushbuckridge	N Sotho, Tsonga, Siswati, English	Mpumalanga
eMalahleni Community	N Sotho, Tsonga, Siswati, English	Mpumalanga
Radio Middleburg	Zulu, Ndebele and English	Mpumalanga
Radio Kangala	Setswana, Ndebele & English	Mpumalanga
Radio Kanyamazane	SiSwati, Zulu, English, Afrikaans	Mpumalanga
Radio Moutse	N Sotho, Tshonga, Siswati, English	Mpumalanga
Tubatse	N Sotho, Pedi, English	Mpumalanga
Radio Botlokwa	N Sotho and English	Limpopo
Greater Lebowakgomo	N Sotho and English	Limpopo
Greater Tzaneen FM	N Sotho, Tsonga, Afrikaans, English	Limpopo
Makhado FM	Venda, Tsonga, Sepedi, Afrikaans, English	Limpopo
Radio Mohodi	N Sotho and English	Limpopo
Mokopane Radio	N Sotho, English, Afrikaans, Ndebele	Limpopo
Radio Moletsi	N Sotho and English	Limpopo
Musina	English, Afrikaans, Venda, Sotho, Tsonga	Limpopo
Phalaborwa	Tsonga, Sepedi, Zulu, English	Limpopo
Radio Sekgosese	SePedi & English	Limpopo
SKFM	SePedi and English	Limpopo
Radio Univen	Venda and English	Limpopo
Motheo FM	English, Sotho	Free State
Radio Naledi	Sesotho and English	Free State
Qwa Qwa Radio	Sesotho, Zulu and English	Free State
Setsoto FM	Sesotho and English	Free State
Aganang	Setswana, Afrikaans, Sesotho, N Sotho	North West
Kopanong	Setswana, English, Afrikaans	North West
Lethlabile	Setswana, English	North West

Radio Mafikeng	Setswana, English	North West
Modiri FM	Setswana, Afrikaans, English	North West
Radio Mafisa	Setswana and English	North West
Vaaltar	Setswana and English	North West
Icora FM	Zulu	Kwa-Zulu Natal
Imbokodo	Zulu, Xhosa, Siswati	Kwa-Zulu Natal
Inanda FM	Zulu, English, Xhosa	Kwa-Zulu Natal
Izwi Lomzansi	Zulu, English	Kwa-Zulu Natal
Radio Khwezi	Zulu, English, Afrikaans, German	Kwa-Zulu Natal
Zululand	Zulu, English	Kwa-Zulu Natal
Alfred Nzo	Xhosa & S Sotho, with English in the News	Eastern Cape
Inkonjane	Xhosa, English	Eastern Cape
Radio Khanya	Xhosa, English	Eastern Cape
Lukhanji	Xhosa, Afrikaans, English	Eastern Cape
Nkqubela Radio	Xhosa, English	Eastern Cape
Radio Takalani	English, Xhosa	Eastern Cape
Unique FM	English, Xhosa	Eastern Cape
Radio Unitra	Xhosa, English, Sesotho, Afrikaans	Eastern Cape
Radio Vukani	Xhosa	Eastern Cape
Radio Riverside	Afrikaans, Setswana, Xhosa, English	Northern Cape
Radio Teemaneng	Xhosa, Tswana, S Sotho, English	Northern Cape
Ulwazi	Afrikaans, Xhosa, English	Northern Cape
Radio Zibonele	Xhosa, English	Western Cape

Zimbabwe

Station	**Language/s**	**Distribution**
ZFM	English/Shona	National
Star FM	English/Shona	National
ZBC FM (official radio)	English/Shona/Ndebele	National
BBC WS Africa	English	International

Zambia		
Station	**Language/s**	**Distribution**
ZNBC (official radio)	English	National
BBC WS Africa	English	International

Swaziland		
Station	**Language/s**	**Distribution**
SBIS Radio 1	Siswati	National
SBIS Radio 2	English	National
TWR Voice of the Church	English	National

Mozambique		
Station	**Language/s**	**Distribution**
Radio Mozambique	All indigenous languages, English & Portuguese	National
BBC WS Africa	English	International
RDP Africa	Portuguese	National

Malawi		
Station	**Language/s**	**Distribution**
MBC Radio 1	English, Chichewa, Tumbuka, Ya, Lomwe, Tonga	National
MBC Radio 2	English, Chichewa	National
BBC WS Africa	English	International

Lesotho		
Station	**Language/s**	**Distribution**
Radio Lesotho	Sesotho and English	National
BBC WS Africa	English	International
People's Choice FM	Sesotho and English	National

Botswana		
Station	**Language/s**	**Distribution**
Radio Botswana RB1	English, Setswana	National
Radio Botswana RB2	English, Setswana	National
Duma FM	English, Setswana	National

For the applicants:
WH Trengrove SC, *GJ Marcus* SC, *G Budlender* SC, *AC Dodson* SC, *S Budlender*, *M le Roux*, *J Brickhill*, *N Ferreira* and *J Bleazard*

For the 1st–10th and 32nd respondents (Harmony):
CDA Loxton SC, *AE Franklin* SC, *RM Pearse* and *L Sisilana* instructed by *Baker & McKenzie Attorneys*

For the 11th and 12th respondents (AngloGold Ashanti):
SA Cilliers SC, *DM Fine* SC, *IB Currie* and *KD Iles* instructed by *Edward Nathan Sonnenbergs*

For the 13th–19th, 30th and 31st respondents (Gold Fields):
JJ Gauntlett SC, *WHG van der Linde* SC, *IP Green*, *DA Turner* and *FB Pelser* instructed by *Norton Rose Fulbright South Africa*

For the 20th and 21st respondents (Village Main Reef):
DN Unterhalter SC and *AD Stein* instructed by *Tugendaft*, *Wapnick, Banchetti and Partners*

For the 25th and 26th respondents (DRD Gold):
BE Leech SC, *MA Wesley* and *RA Carvalheira* instructed by *Malan Scholes Incorporated*

For the 27th respondent (Anglo American):
MD Kuper SC, *M du P van der Nest* SC, *AC Cockrell* SC, *KS McLean* and *DJ Smit* instructed by *Webber Wentzel*

For the 28th respondent (ARM):
T Beckerling SC, *I Goodman* and *K Hofmeyr* instructed by *Cliffe Dekker Hofmeyr*

For the *amici curiae*:
M Chaskalson SC, *A Hassim* and *J Berger*

Attorneys for the 1st to 30th applicants:
Richard Spoor Inc Attorneys

Attorneys for the 31st to 39th applicants:
Abrahams Kiewitz Incorporated

Attorneys for the 40th to 52nd applicants:
Legal Resources Centre

Attorneys for 29th respondent:
Van Hulsteyns Attorneys

The following cases were referred to in the above judgment:

South Africa

Administrator, Natal v Edouard [1990] 2 All SA 374 (1990 (3) SA 581) (A) – **Referred to**..... 942
Affordable Medicines Trust and others v Minister of Health of RSA and another 2005 (6) BCLR 529 (2006 (3) SA 247) (CC) – **Referred to**..... 944
Beinash and another v Ernst and Young and others 1999 (2) BCLR 125 1999 (2) SA 116 (CC) – **Referred to**..... 924
Blower v Van Noorden 1909 TS 890 – **Referred to**..... 947
Carmichele v Minister of Safety and Security and another 2001 (10) BCLR 995 (2001 (4) SA 938) (CC) – **Referred to** 949
Commercial Union Assurance Co Ltd v Waymark NO [1995] 4 All SA 48 (1995 (2) SA 73) (Tk) – **Referred to** 944

De La Guerre v Ronald Bobroff & Partners Inc and others
[2013] JOL 30002 [2013] ZAGPPHC 33 (GNP) – **Referred to** 932
Du Plessis and others v De Klerk and another 1996 (5) BCLR 658
(1996 (3) SA 850) (CC) – **Referred to** 966
Executors of Meyer v Gericke 1880 Foord 14 – **Referred to** 940
Feldman (Pty) Ltd v Mall 1945 AD 733 – **Referred to** 947
First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and another; First National Bank of SA Limited t/a Wesbank v Minister of Finance 2002 (7) BCLR 702
(2002 (4) SA 768) (CC) – **Referred to** 949
Gold Fields Limited and others v Motley Rice LLC; *In re*: Nkala and others v Harmony Gold Mining Company Limited and others
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O'Reilly v Imperial Chemical Industries Ltd
[1955] 3 All ER 382

Categories:	EMPLOYMENT; Contract of service
Court:	COURT OF APPEAL
Lord(s):	SINGLETON, JENKINS AND PARKER LJJ
Hearing Date(s):	12, 13 OCTOBER 1955

Master and Servant – Loan of servant – Long-standing arrangement – Hirer's duty to servant – Whether that of invitor or employer – Hire of lorry driver – Driver working for hirer full time – Driver injured through unsafe method of unloading adopted by hirer.

The plaintiff was a lorry driver employed by British Road Services. A number of their lorries and drivers, of whom the plaintiff was one, were, by arrangement made between British Road Services and the defendants, put at the defendants' disposal on a full-time basis. The lorries bore the name of the defendants but the drivers were paid by British Road Services and could be dismissed only by them. Over a period of years the plaintiff in accordance with this arrangement had taken his lorry from the British Road Services' depot in the morning, had driven to one of the defendants' depots, had loaded the lorry and then had taken the goods to another of the defendants' depots where he unloaded. The defendants controlled and assisted in the loading and unloading in a general way; they made suggestions and requests and supplied unloading gear, but it was not established that British Road Services had in any sense delegated to the defendants the right to give orders how the work was to be done and the plaintiff was not bound to take orders in that regard from the defendants. On 1 January 1953, the plaintiff was unloading from his lorry drums of Terylene at the defendants' plant on to a tiering truck provided by the defendants. Owing to the relative heights of the platform of the tiering truck and the top tier of drums on the loaded lorry, to the size of the platform and to other factors, the method of unloading thus adopted was unsafe. One of the drums fell on to the plaintiff who suffered injuries. In an action for damages for negligence against the defendants,

Held – The defendants did not owe to the plaintiff the duty of providing a safe system of work, because the contractual relationship of master and servant was between British Road Services and the plaintiff, and because the heavy onus of proving that a relationship of employer and employee pro hac vice, viz, for the occasion of unloading the lorry, existed between the defendants and the plaintiff, had not been discharged, as the plaintiff had failed to show that the defendants had the right to direct how the unloading was to be carried out by him; accordingly the defendants were not liable in damages.

Principle stated in *Mersey Docks & Harbour Board v Coggins & Griffith (Liverpool) Ltd* ([1946] 2 All ER at p 351 per Lord Porter and at p 352 per Lord Simonds) applied.

Decision of Oliver J ([1955] 2 All ER 567) reversed.

Notes

This case may be compared with the decision of the Court of Appeal in *Denham v Midland Employers' Mutual Assurance Ltd* ([1955] 2 All ER 561), where Denning LJ, emphasised that the liability of a master, with whom the servant is in contractual relationship, is not transferred to a temporary employer unless, at any rate, the temporary employer has the right to dictate not only what a servant is to do but also how he is to do it (see [1955] 2 All ER at p 564, letter *e*). In the present case the question of any liability of British Road Services, as the general employer, remains open (see p 388, letter *a*, post).

As to a master's duty to his servant, see 22 *Halsbury's Laws* (2nd Edn) 187, para 314; and for cases on the subject, see 34 *Digest* 194-198, *1583-1620*.

As to the existence of the relationship of master and servant, see 22 *Halsbury's Laws* (2nd Edn) 112, para 191; and for cases on the subject, see 34 *Digest* 22-27, *24-55*.

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Donovan v Laing, Wharton & Down Construction Syndicate [1893] 1 QB 629, 63 LJQB 25, 68 LT 512, 57 JP 583, 34 *Digest* 26, *49*.

M'Alister (or Donoghue) v Stevenson [1932] AC 562, 1932 SC (HL) 31, 101 LJPC 119, 147 LT *281*, *Digest* Supp.

London Graving Dock Co Ltd v Horton [1951] 2 All ER 1, [1951] AC 737, 2nd *Digest* Supp.

Appeal

The defendants appealed from an order of Oliver J at Manchester Assizes dated 9 May 1955, and reported [1955] 2 All ER 567, whereby he awarded the plaintiff the sum of £2,341 as damages for personal injuries against the defendants.

The facts appear in the judgment of Parker LJ.

R H Forrest QC and *R G Clover* for the defendants.
H I Nelson QC and *C M W Elliott* for the plaintiff.

13 October 1955. The following judgments were delivered.

PARKER LJ. This is an appeal from a judgment of Oliver J given at Manchester Assizes on 9 May 1955, by which he awarded the plaintiff, John Thomas O'reilly, the sum of £2,341 as damages for personal injuries suffered by him in an accident on 1 January 1953.

The facts concerning the accident itself are simple. The plaintiff was a lorry driver employed by British Road Services. He was in one of their lorries in the course of delivering drums of a chemical known as Terylene to an experimental plant of the defendants, Imperial Chemical Industries Ltd at Thorntonle-Fylde. The Terylene was packed in metal drums three feet long and two feet in diameter, and when filled with the chemical they weighed some three hundred pounds. There were no handles or lugs on the drums and quite clearly a drum would be an awkward thing to handle, at at any rate single-handed. At Billingham the plaintiff had loaded on to his lorry twenty-three of these drums. They were stacked in three tiers, the bottom tier being stacked in the upright or vertical position and the other two tiers horizontally. The plaintiff carried on his lorry no ropes, pulleys or any form of chute or gantry for the purpose of unloading and when he arrived at the defendants' premises he was supplied with a piece of equipment known as a tiering truck. When I say he was supplied with it, I mean that an employee of the defendants drove out the truck and put it in position at the rear of the lorry to enable the plaintiff to stack the drums on it. In appearance the truck was not unlike the ordinary truck one sees at stations used for carrying goods; but its platform which was five feet by three feet was constructed in such a way that it could be raised, the idea being that it should be raised flush with the floor of a lorry so that any goods stacked on the lorry could be slid or rolled, as the case may be, on to the platform. The platform, however, at its maximum height was only some five feet two inches above the ground, a distance which in the case of this lorry would only bring the platform a matter of inches above the floor of the lorry and, certainly, would not bring it anywhere near the height of either the second or third tiers of drums. It was clearly necessary, therefore, in the case of a fully laden lorry of this kind, for the driver to stand in the first instance on this platform to manoeuvre the top tier of drums down towards himself and on to the platform.

In the present case the plaintiff had manoeuvred the first horizontal drum from its position in the top tier down on to the platform and he was in the process of doing the same with another horizontal drum at the rear of the lorry. He stood on the platform, twisted the drum round slightly and attempted to slide it down in the groove formed by two drums on the bottom tier and while so doing the drum suddenly "kicked", as the plaintiff described it, by which I

understand him to mean that it came down rather fast. He overbalanced and fell to the ground and, most unfortunately, the drum followed him and struck him in the back. Pausing there, it seems to me that this method of unloading these drums was clearly an unsafe method. The platform was not big enough to enable more than one person to work from it, and a reference to the plan before the court shows that at least three, and possibly more, drums would have to be unloaded before the driver could safely stand on the lorry itself to continue the unloading. I entirely agree with the learned judge's finding on this point which was in these terms:

> "Now, as I have already indicated, I find the operation by this method which was adopted was clearly dangerous. I doubt even if evidence about this was necessary, but, if it was, it was

> given in no uncertain terms, and it was clearly unshaken. Mr. Faris said: 'In view of the weight of the drum, the size of the platform, and the difference in height between the load and the platform'—that, of course, is very important—'I think that this was not a safe system'. The evidence of the plaintiff himself—not that he himself has to decide it any more than Mr. Faris—was this: 'Before the accident I thought it was wrong. The platform was not big enough. I agree that these deficiencies were obvious and I agree I made no complaint about them'."

The real question, however, in this case is: What, if any, duty was owed by these defendants to the plaintiff? If he was merely an invitee his claim would be bound to fail since on the evidence he was well aware of the danger. If, on the other hand, he had become a servant of the defendants then it is clear, in my view, that they had failed in their duty of care towards him and, as the learned judge found, there is no evidence of contributory negligence on his part. It is necessary in considering this question of duty to go further into the facts. For a number of years the defendants had an arrangement with British Road Services. The exact terms of the arrangement were not in evidence, but it was one whereby British Road Services set aside certain of their lorries for almost exclusive use on the defendants' business, and in addition to the lorries, some of their drivers were employed almost exclusively in carrying goods from one depot of the defendants to another depot, or from a depot to a plant, or for delivering to customers. Indeed the lorries were painted in a special colour and carried the name of the defendants and their trade mark. The plaintiff had been one of these drivers for a number of years. He carried no equipment for loading or unloading his lorry; but the defendants, to put it quite generally, would assist in both operations. At first the drums of Terylene were delivered to the main stores at Thornton-le-Fylde where there was a proper unloading bay and there was no trouble there in unloading drums stacked in this way. Later when the experimental plant, which was situated some four hundred yards away was opened, it became more convenient to deliver the drums direct to the plant. At this plant there was no unloading bay and the evidence, which the learned judge accepted, was that the defendants would there supply the driver in question with sacks, straw, and old motor tyres on which the drums could be dropped off the lorry. Later still, and for about a year before the accident in question the defendants had this tiering truck at the plant.

It is, I think, clear that the learned judge accepted the evidence called by the plaintiff in preference to that called by the defendants. For instance, there was an issue, whether the defendants had supplied sacks, straw and motor tyres and had given instructions about the unloading. On that the learned judge accepted the evidence of the plaintiff and his witnesses and his findings were as follows:

> "Having reached the appropriate depot of the I.C.I. the plaintiff (I am taking it merely as an example; there were many other men doing the same thing) would load his lorry under the supervision and direction of whoever was in charge of the I.C.I. depot. They would decide what load was to be taken. The driver, of course, would decide how that load was to be stowed,

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> and I suppose if he thought the load was so big as to be dangerous he could have refused to load. The same could be said of his ordinary employers; if they told him to do a thing that he thought was dangerous he could refuse to do it, but subject to that he was entirely under the direction of whoever was in charge of the I.C.I. depot … Each of these methods [i.e., methods of unloading at the bay, unloading on to the sacks of straw and unloading on to the tiering truck] as counsel for the plaintiff pointed out, was inaugurated by the I.C.I. It was their method. Just as they were in control of the loading, so they were in control of the unloading to that extent, always bearing in mind that this plaintiff could have said: 'I am not going to use that machine; I am going to take my load back home to Kearsley', which was about fifty miles away, and waste the day, and probably get the sack when he got there for not doing what the I.C.I. told him … With considerable hesitation I have come to the conclusion that the plaintiff is right and that in this case, by reason of all the circumstances, the defendants owed him the same duty as regards appliances and system of work as if he had in fact been their own employee. They were his employers in every respect except that they did not pay him and could not dismiss him."

It seems to me that the learned judge is there finding that, although undoubtedly the plaintiff always remained in the general employment of British Road Services, yet in the circumstances of this case he became the servant of the defendants at the moment of unloading.

That such a position can occur is shown by a series of cases of which the most recent authority is *Mersey Docks & Harbour Board v Coggins & Griffith (Liverpool) Ltd* ([1946] 2 All ER 345). It is unnecessary to consider the actual facts of that case. The importance of it is that their Lordships there lay down the test which has to be applied in considering the question whether at any moment a workman, although in the general employment of A, for certain purposes comes into the special employment of B Viscount Simon emphasises the difficulty of proof. He says this ([1946] 2 All ER at p 348):

> "It is not disputed that the burden of proof rests upon the general or permanent employer—in this case the board—to shift the prima facie responsibility for the negligence of servants engaged and paid by such employer so that this burden in a particular case may come to rest on the hirer who for the time being has the advantage of the service rendered. And, in my opinion, this burden is a heavy one and can only be discharged in quite exceptional circumstances."

it is perfectly true that that was a case in which both the general employers and what I may call the temporary employers were both sued and the burden there referred to is the burden on the general employer. It seems to me, however, that if, as in this case, a workman chooses to sue not his general employers but the persons whom he says temporarily owed him as servant the duty of master there is a considerable burden on him to show that those temporary employers have come under that duty.

Lord Porter said (ibid, at p 351):

> "Many factors have a bearing on the result. Who is paymaster, who can dismiss, how long the alternative service lasts, what machinery is employed—all these questions have to be kept in mind. The expressions used in any individual case must always be considered in regard to the subject-matter under discussion, but among the many tests suggested I think that the most satisfactory by which to ascertain who is the employer at any particular time is to ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged. If someone other than his general employer is authorised to do this, he will, as a rule, be the person liable for the employee's negligence. But it is not enough that the task to be performed

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> should be under his control, he must also control the method of performing it. It is true that in most cases no orders as to how a job should be done are given or required. The man is left to do his own work in his own way, but the ultimate question is not what specific orders, or whether any specific orders, were given, but who is entitled to give the orders as to how the work should be done. Where a man driving a mechanical device, such as a crane, is sent to perform a task, it is easier to infer that the general employer continues to control the method of performance since it is his crane and the driver remains responsible to him for its safe keeping. In the present case, if the appellants' contention were to prevail, the crane driver would change his employer each time he embarked on the discharge of a fresh ship."

Lord Simonds said (ibid, at p 352):

> "In the cited case [*Donovan* v. *Laing, Wharton & Down Construction Syndicate* ([1893] 1 Q.B. 629)] the court held upon the facts that the burden of proof had been discharged and I do not question the decision. But it appears to me that the test can only be satisfied if the temporary employer (if to use the word 'employer' is not to beg the question) can direct not only what the workman is to do but also how he is to do it."

In considering whether the judge's findings, to which I have referred, are justified by the evidence it is proper, I think, to refer only to the evidence of the plaintiff and his witnesses which the judge preferred to that of the defendants. The plaintiff was asked:

> "Having put the thing there [i.e., having put the tiering truck at the back of the lorry] was anything said about what you were to do? A.—Just to put the drums on the platform of the tiering truck. Q.—Who told you that? A.—The person in charge of the tiering truck."

He described the methods which had been employed and he was asked questions in cross-examination specifically on this point.

> "Q.—Mr. O'Reilly, you were employed by British Road Services? That is right, is it not? A.—That is correct. Q.—And they were the people who could give you orders? That is right, is it not? A.—Yes. Q.—And tell you who it was could tell you where you were to go, for example? A.—Yes. Q.—Who? British Road Services? A.—British Road Services in the second place. Q.—And as regards the way you were to do your job? They were the People who could tell you how to do your job, weren't they? A.—No, sir. Not always. Q.—Let me put it his way. The only people who could sack you if you did not do your job properly were British Road Services? That is right, is it not? A.—That is correct. Q.—And you need not take orders from anybody else at all, need you? A.—No, not really. Q.—And the method of loading your lorry—loading it—was entirely under your control? That is right, is it not? A.—That is correct. Q.—And the method unloading your lorry was entirely under your control, was it not? A.—No. Q.—Don't you agree with that? A.—No. Q.—I will have to follow that last question up in that case. If a factory to which you went suggested to you a dangerous way of unloading your lorry you could refuse to do it, could you not, that way? A.—If I were aware of it being dangerous I could refuse."

I have very grave doubts whether, accepting those answers in that form, it can possibly be said that the rigorous test laid down by the House of Lords in the *Mersey Docks & Harbour Board* case is satisfied in this case. The answers of that witness leave the matter in doubt to say the least, and, bearing in mind the heavy burden of proof and the rigorous test to be applied, I do not think it is

possible on the facts of this case, accepting as the learned judge did, the evidence given for the plaintiff, to say that that test has been satisfied.

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No doubt the defendants would in a general sense control and assist in the operations of unloading and loading; they might make suggestions; indeed they might make requests and when there was no other way they would supply, as they did here, some platform on which they desired the carrier to unload the goods. It seems to me, however, that one of the difficulties, in suggesting that the plaintiff went into the special employ of the defendants is to be seen at once when one realises that except for certain periods in the defendants' business it is beyond argument that the plaintiff was acting for British Road Services and for British Road Services only. From the moment he left their depot with their lorry he was clearly acting as their servant. What is being suggested here is that at some undefined moment of time, on arriving at a depot or at this experimental plant, and presumably at a time when he had dismounted from the driving seat, he became temporarily the servant of the defendants; and equally at the moment the unloading ceased and the plaintiff rolled up his tarpaulins and got back into the driving seat he ceased to be in any relationship of servant to the defendants and reverted to the position of being the servant solely of British Road Services. It seems to me on the facts of this case that the test laid down by the House of Lords cannot be said to be satisfied. I should add this: no doubt British Road Services as general employers give their drivers, including, the plaintiff in this case, instructions to do what the defendants, ICI, want; but throughout, it seems to me, British Road Services remained sub-contractors of the defendants using their own lorry and their own driver and had in no sense delegated to the defendants the right to give orders how the work was to be done. I think it is unfortunate that the learned judge was not referred specifically to the *Mersey Docks & Harbour Board* case and to the passages to which I have referred. I am not blaming anybody because there is considerable doubt exactly how the case was put below, and indeed if one looks at the pleadings it is hardly surprising that the learned judge himself did not have this case in mind as relevant to the argument or that counsel for the defendants did not refer the learned judge specifically to it. I think it may well be that if the learned judge had been referred to that case he would have come to a different conclusion.

The matter does not rest there, however, because counsel for the plaintiff puts his case in a much broader way. He says in effect that even if he cannot satisfy the test laid down in the *Mersey Docks & Harbour Board* case yet he is entitled to succeed and he puts forward this proposition: that if, in the case of a carrier delivering goods to a consignee, the consignee interferes, and a fortiori if he gives instructions to the carrier, he comes under a duty; and having got to that stage, counsel says that where that interference and instruction assume the form of control not only is there a duty, but there is a duty akin to or of the same nature as that between master and servant. On that basis, as I understand it, he would say that there may well be two people, the employers, British Road Services, and the defendants, both of whom owe the plaintiff a similar duty, the duty of master to servant. I confess that it does seem to me that counsel is putting forward a completely new and novel claim, something, so far as I know, unknown to the law. If the duty of master to servant is to be found in any case it can exist only where there is either a true relation of master and servant or a relationship of master and servant of a temporary character as that envisaged in the *Mersey Docks & Harbour Board* case. Unless one or other of those features be proved I cannot see any possibility of maintaining a claim for a breach of the duty owed by a master to his servant. I understand that below a reference was made to the principle in *M'Alister (or Donoghue) v Stevenson* ([1932] AC 562). That has not been developed in this court and it is sufficient for me to say that I see no possibility of presenting the case on those lines. Indeed a similar argument based on *Donoghue v Stevenson* was advanced in the House of Lords in *London Graving Dock Co Ltd v Horton* ([1951] 2 All ER 1) and was specifically rejected.

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Sorry as I am for the plaintiff in this case, I am not satisfied that he has shown a breach of any duty owed to him by these defendants. It may well be that he may yet have a perfectly good claim against British Road Services. For these reasons I would allow the appeal.

JENKINS LJ. I agree. It is not in dispute that if the relationship between the plaintiff and the defendants in this case were merely that of invitor and invitee, the plaintiff's case must fail owing to his knowledge of the danger, as is shown by *Horton's* case. It has, however, been argued for the plaintiff that in all the circumstances of this case the defendants owed to him a duty amounting to the duty owed by an employer to an employee; that is to say, the duty on the employer to provide the employee with adequate plant, to devise a safe system of work for the employee and not to do anything to expose the employee to unnecessary risk. Had it been established that the defendants

were under such a duty in this case, it is clear from the learned judge's findings and from the evidence that the plaintiff would be entitled to succeed, for the tiering truck was not an adequate apparatus for unloading a lorry having on it three tiers of three hundred pound drums. The duty owed by an employer to his employee, however, is a contractual duty and prima facie, therefore, it can only exist in a case in which the contractual relationship of employer and employee exists between the parties. For instance, as was shown by *Horton's* case, the fact that A enters the premises of B for the purpose of rendering services to B pursuant to a contract between the employer of A and B, the occupier of the premises, does not give A any higher right than that of an invitee, because there is no contract of service between him and B, and it matters not what arrangement may have been made between his employer and B, that being an arrangement to which he is not a party.

There is, however, a rare exception to that rule which has been referred to sometimes as the case of employment pro hâc vice. That is the kind of case in which an employer hires out to some other person the services of his employee and the transfer of the control and direction of the actions of the employee is so complete and puts his temporary employer in such close control of the situation that for the purposes of liability either to a third party, or equally I think to the employee himself, the temporary employer is to be regarded in law as his master. As Parker LJ has said, the onus on those who seek to establish a relationship of employer and employee pro hac vice is a heavy one, and in my view the range of cases in which that relationship should be held to have been set up ought not to be extended; notwithstanding the learned judge's findings in the present case I cannot agree that the facts here suffice to establish the existence of such a relationship. I say that with the greatest respect to the learned judge, and I note that he arrived at his conclusion with, as he said, "considerable hesitation". When one adds to that hesitation the fact that the leading case on this subject *Mersey Docks & Harbour Board v Coggins & Griffith (Liverpool) Ltd* was not cited to the learned judge, I think it is easy to understand how he reached the conclusion that he did; it seems to me that had that case been cited to him and had he applied his mind to the facts in the light of that authority he might well have come to a different conclusion.

If there is here no relationship of master and servant in the ordinary sense, as I hold there is not (indeed it could not be contended that there was), and if the facts here do not suffice to discharge the heavy onus lying on those who seek to make out a case of employment pro hac vice, as in my view they do not suffice, then it seems to me that the plaintiff's case must necessarily fail. I decline to erect in cases of this kind a new duty which is neither the duty subsisting between invitor and invitee nor the duty arising from the relationship of employer and employee. For these reasons and for the reasons given by Parker LJ I agree that this appeal should be allowed.

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SINGLETON LJ. I am in full agreement with the judgments which have been given and there is nothing that I wish to add.

Appeal allowed.

Solicitors: *J W Ridsdale* (for the defendants); *Fielding & Fernihough*, Bolton (for the plaintiff).

Philippa Price Barrister.

ANNOTATIONS

Date	Note	Selected Text

HIGHLIGHTS

Date	Selected Text

Beck / Parmalat SA (Pty) Ltd
[2021] 2 BALR 131 (CCMA)

Division: Commission for Conciliation, Mediation and Arbitration
Date: 02/11/2020
Case No: **ECPE2373-20**
Before: N Bisiwe, Commissioner

Referral in terms of section 191(5)(a)(i) of the LRA

Dismissal - Substantive fairness - Absence without leave - Employee dismissed for declining to attend work during Covid-19 lockdown for fear of infecting family - Dismissal unfair because instruction to attend work unreasonable.

Editor's Summary

The applicant, a laboratory analyst, was dismissed for being absent from work without permission for 21 days during the level 5 lockdown implemented to combat the Covid-19 pandemic. The applicant admitted that she had not reported for duty during this period, but claimed that she had decided to remain at home after her application for leave (even unpaid) had been turned down and that she had been forced to take the decision for herself because she was afraid of infecting her family. The respondent claimed that it was required to continue full production during the lockdown because it provided what had been deemed an essential service, that all prescribed safety precautions had been taken and that only pregnant employees and those with underlying chronic conditions had been allowed to stay at home during the period in question.

The Commissioner noted that at the time the President had called on companies to take care of their workers in the exceptional situation created by the pandemic. During the period in question, the number of people infected had increased from 61 to 420 and by the time the arbitration was conducted it had risen to 725 000. The respondent had heeded the President's call to continue production and had taken measures expected of it. However, the applicant was not merely seeking the comfort of her family because she was scared of an unknown virus. She had informed her manager that her child suffered from asthma and that she was living with her vulnerable elderly mother. Although the respondent had 16 other employees in the laboratory, it had not even considered the applicant's proposal that she take unpaid leave. The applicant had a reasonable explanation for not reporting for duty as contractually required and the respondent was more concerned about creating a possible precedent than with dealing with the applicant's personal circumstances. Her dismissal was, accordingly, unjustified and unfair.

Turning to relief, the Commissioner noted that although there was no reason not to reinstate the applicant, it would be unfair to the respondent to make reinstatement fully retrospective.

The applicant was reinstated, with back pay limited to a month's salary.

Award

Details of hearing and representation

[1] This matter was referred to the CCMA for arbitration in terms of section 191(5) of the Labour Relations Act 66 of 1995, as amended (the "LRA"). The arbitration was heard before me at the CCMA offices in Port Elizabeth. The proceedings were electronically recorded.

[2] Ms [****] Beck, the applicant, attended the arbitration hearing and represented herself. Lactalis SA (Pty) Ltd, the respondent, was represented by its Regional HR Manager, Mr Xolani Buqa. At the conclusion of the arbitration hearing the parties were given time until 23 October 2020 to submit their written closing arguments. Those were duly received and have been taken into consideration in the preparation of this award.

Issues to be determined

[3] I am required to determine whether or not the dismissal of the applicant was substantively and procedurally fair, and if not to consider an appropriate relief in accordance with the provisions of LRA.

Background information

[4] The applicant worked for the respondent as a Lab Analyst from 1 July 2010 until her dismissal on 29 April 2020. Her salary at the time was R21 057 per month.

[5] Her dismissal followed a disciplinary enquiry in which she was found guilty of misconduct allegations as follows:

> "AWOL for 21 days in that from 27 March 2020 you were absent from work without permission."

The applicant considers the sanction of dismissal to be too harsh. She seeks to be reinstated to her former employment.

Survey of evidence and arguments

[6] The respondent led the evidence of two witnesses who testified under oath. They are Mr Owen Walsh, the

respondent's Production Manager who was the presiding officer at the applicant's disciplinary hearing; and Ms Hendrieta Janse Van Rensburg, the respondent's Quality Manager who was the applicant's line manager. The applicant led her own evidence and that of her witness, Mr Werner Cowley, the respondent's Lab Coordinator. Only a summary of the gist of the parties' evidence is referred to below.

[7] The respondent's evidence, in a nutshell, is that the applicant was scheduled to work between March and April 2020 but failed to do so. This was during Level 5 of the national lockdown imposed by the South African Government to limit the spread of the corona virus, Covid-19. The respondent is one of the companies that were issued with permission to continue operations due to its production falling under the food value chain

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which was declared as essential in terms of the national state of disaster Regulations. Its evidence is that, while the pandemic was new for it and the country at large, it managed, at short notice, to put together personal and production safety and compliance protocols to guide its employees and disseminated information and personal protective equipment to all its employees. It cancelled all leave for its employees, denied others who needed to take leave and ensured that all were at work to meet its production demands, in line with it being declared a service essential to meet the country's food requirements. It made exception by allowing pregnant employees and those with chronic illnesses and other underlying conditions, to stay at home for a period. It argues that the applicant did not fall in those categories and her continued stay away from work without authorisation to do so, from the date of Level 5 of the national lockdown, was unreasonable and amounted to a dismissible misconduct.

[8] The applicant's evidence is that the new pandemic, Covid-19, brought with it fear for those with underlying medical conditions. She respected the respondent's call for its employees to work through Level 5 of the national lockdown. However, as a person who stays with an elderly parent and an asthmatic child, she feared exposing her child and parent to the disease. Her manager knew of her child's medical condition. She asked to be given leave and when that was denied, she offered to take unpaid leave and that was also denied. In the end she was forced to take a decision to follow lockdown rules and stay away from work to protect herself and her family. She considered the respondent's insistence that she should continue working as unreasonable and unfair, more so as no PPE was provided to employees at that time but only sanitiser and social distancing of 1.5 meters which was often difficult to maintain, especially in the Lab where she worked and where all the products are tested for quality standards.

[9] The applicant further testified that the disciplinary hearing was unfair as the presiding officer was not objective but interjected and spoke on behalf of a witness, and he was not supposed to have chaired the hearing as he is not from a different department to the one the applicant worked in. The presiding officer allowed the disciplinary hearing to be interrupted and adjourned as they needed to attend a management meeting as managers. She was also never provided with the minutes of the disciplinary hearing until after the CCMA conciliation meeting.

Analysis of evidence and arguments

[10] The applicant was disciplined for *Absence Without Leave*, which is commonly referred to as AWOL. It is common cause that she was absent from work from 27 March until 17 April 2020, when she was issued with a notice to attend a disciplinary hearing. The first sitting of the disciplinary hearing was on 21 April and concluded on 29 April 2020.

[11] It is common cause that on 15 March 2020 the President of the Republic of South Africa announced that the corona virus pandemic was declared a national disaster and introduced a package of extraordinary measures to combat this grave public health emergency. At the time 162 000 people

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had tested positive for the virus across the globe, and South Africa had 61 confirmed cases. On 23 March 2020, the President announced a national lockdown for 21 days with effect from 27 April 2020, with only essential services allowed to operate. The President called on companies to take care of their workers during this time and called on all South Africans to act in the interest of the nation and not in their own selfish interests. The country's approach was to ensure that the elderly and those with comorbidities are protected from infection due to their compromised immune systems. By this time, the South African confirmed infection cases had increased from 61 to 402. As I write this, the South African numbers are at 725 000 infections with 19 276 deaths.

[12] When the Covid-19 information was shared with employees within the respondent's workplace, the applicant took it upon herself to explain her personal circumstances to her manager and asked to be considered for leave. When her manager declined her leave, she was taken to the plant manager where she pleaded for consideration but was again denied leave. In essence the respondent management had taken a decision to implement the President's call that those services considered essential should continue operations without disruption. To this end it cancelled all leave and refused to grant leave to any employee requesting time off at this critical time. An example was given of two young employees who were concerned of being alone and on their own, being away from family and wished to travel and be with family at this time.

[13] The applicant's situation was not ordinarily that of a person just scared of an unknown virus and wishing to be in the comfort of family at this time. She had explained to her manager that, as she was aware, her young child suffered from asthma and she stayed with her vulnerable elderly mother. She sought to be considered for time off, as she wanted to avoid commuting to work for fear of being infected and exposing her family.

[14] What strikes me as odd is that the respondent showed no willingness to consider the applicant's request on

its merits, check how much time she needed to be away, whether that would cause disruptions to the operations in the Lab where she worked, and whether the respondent could tolerate the applicant's absence for that long. Evidence led by the respondent is that there were 16 employees employed in the Lab. It simply stopped her in her tracks and told her to continue working and was not willing to engage on her request. The applicant understood that she was not sick and could not take sick leave. She understood that her request for annual leave was denied, as part of the blanket cancellation of annual leaves, and she offered and requested to be granted unpaid leave. She was willing to sacrifice her salary to protect her family, but that offer was not even entertained. She was merely told that nobody was allowed to take leave.

[15] The elements of the offence of absenteeism are that the employee must have been absent from work when contractually obliged to render service, and that the employee had no reasonable excuse for his/her absence. It is trite law that an employee may have compelling reason to absent himself from work even though he has been told that he may not take leave. *Kievits Kroon Country Estate* (*Pty*) *Ltd v CCMA* [2011] 3 BLLR 241

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(LC) provides an instructive example of that. The question the Court asked was whether the employee's absence from work was justified. The employer's refusal to grant the employee special leave was considered unjustified and the subsequent dismissal of the employee unfair. This decision was upheld on appeal by the Labour Appeal Court.

[16] I find that the applicant had a reasonable excuse for her absence from work, even though she was contractually obligated to work. The respondent does not deny knowledge of the circumstances that caused the applicant to stay away from work. It merely argues that she was not authorised to be absent, despite such circumstances. It seems that the respondent was more concerned against creating a precedent if they allowed the applicant to take leave and, possibly, open the flood gates for other employees to seek to be considered for leave. That is unfortunately the task entrusted on managers, to manage the workplace by evaluating circumstances and taking decisions based on those evaluated circumstances. It is not a tick box exercise. Equally, precedence is an important principle in our law. However, the principle that *each case is based on its own merits*, is a very important one. That is why courts sit daily to hear merits of cases and decide cases on their own unique facts.

[17] It seems to me that had the respondent considered the applicant's request, and differentiated her situation from that of other employees who simply wanted to be with family at the time, they would have seen justification in her request. The fact that she was even willing to forgo her salary would have been considered less burdensome on the respondent.

[18] I find that the respondent has failed to discharge the onus to prove that the applicant's dismissal was justifiable under these circumstances.

[19] I have considered the applicant's challenge on the conduct of the presiding officer and find nothing unfair with it. It is trite law that disciplinary processes are not court proceedings that should be conducted with legal precision and formalities. They remain processes within the workplace to provide an accused employee with *a mere opportunity to be heard* before a decision on her conduct is taken. These presiding officers are mere line managers who have to balance the need to conduct a hearing with the competing workplace demands, such as production pressures, and are not judicial officers.

[20] I have considered that the applicant had offered and was willing to take unpaid leave. It has been six months since the applicant was dismissed. The country has, since then, moved from Level 5 lockdown to Level 1, with much awareness about safety and precautionary measures against the corona virus. I will order for her retrospective reinstatement with back pay only for the period since 21 September 2020, when Level 1 lockdown was announced. The applicant has throughout made it clear that her family safety was more important than money. I have taken that into account in balancing the financial implication of her reinstatement, so as not to unfairly burden the respondent with a huge cost of her reinstatement.

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Award

(a) I find that the dismissal of Ms [****] Beck, the applicant, by Lactalis SA (Pty) Ltd, the respondent, on 29 April 2020, was substantively unfair.

(b) I order the respondent to reinstate the applicant in its employ on terms and conditions no less favourable to her than those that governed their employment relationship immediately prior to her dismissal. This reinstatement is to operate with retrospective [*sic*] from the date of dismissal and will take effect on 16 November 2020.

(c) The remuneration due to the applicant, as a result of the retrospective operation of this reinstatement, is equivalent to one months' pay amounting to R21 057, calculated at the applicant's gross earnings per month at the time of her dismissal, minus such deductions as the respondent is in terms of the law entitled or obliged to make. This amount is to be paid by the respondent to the applicant not later than 30 November 2020.

(d) Ms [****] Beck is ordered to report to work at the respondent's HR manager's office on 16 November 2020 at 9am to tender her services. This date is intended to allow the respondent to make the necessary arrangements for her resumption of duties.

The following case was referred to in the above award:

DETAWU obo Jacobs / Quality Express

National Bargaining Council for the Road Freight Logistics Industry

Award date: 13/12/2020 *Case No*: ECPE4805-20

Before: J Gruss

Referral in terms of section 191(5)(a)(i) of the LRA

Dismissal – Substantive fairness – Misconduct – Endangering safety of colleagues – Employee reporting for duty while in quarantine and before Covid-19 test results known – Dismissal fair.

Editor's Summary

The applicant was dismissed for reporting for duty knowing that he was a Covid-19 risk and for failing to notify management that he had been tested for the virus and should have been in isolation. He claimed that he had not breached any rule and that his dismissal was unfair.

The Commissioner noted that the employee had disputed that there was a rule requiring him not to report for duty if he had symptoms of Covid-19 or for how long to self-isolate. He had previously self-isolated for the required period, which showed that he was aware of the protocols. Given the seriousness of the virus, the employee could not hide behind ignorance. Since the employee had deliberately endangered the safety of colleagues, his offence was serious and had damaged the trust relationship.

The employee's dismissal was upheld.

Award

Details of the hearing and representation

[1] This dispute was referred for arbitration in terms of section 191(5)(a)(i) of the Labour Relations Act 66 of 1995 as amended (hereinafter referred to as the "LRA"). The hearing was held at the offices of the National Bargaining Council for the Road Freight Logistics Industry (hereinafter referred to as the NBCRFLI) in Port Elizabeth on 7 December 2020. The proceedings were electronically recorded. The applicant, Mzwandile Jacobs was represented by Mr Kayiyana, an official from DETAWU. The respondent, Quality Express was represented by Mr Vosloo from GDPEO, an employer's organisation.

Issue to be decided

[2] I am required to determine whether the applicant's dismissal was substantively fair, procedural fairness was not challenged.

Background to the issues

[3] The following were agreed as salient common cause facts or facts not in dispute:

3.1 The applicant had commenced employment with Quality Express on 11 March 2016 as a Code 10 (EC1) truck driver.

3.2 The applicant was dismissed on 28 August 2020 and prior to his dismissal he earned R53,15 per hour, R10 365,88 per month.

3.3 The applicant was dismissed on charges of misconduct, (1) Gross Misconduct in that the applicant allegedly reported for duty on 6 August 2020 knowing that he could be a Covid-19 risk. (2) Gross Negligence, in that the applicant allegedly failed to notify management that he was going for a Covid-19 test or that he had already gone for a test and still returned to work without notifying.

3.4 The applicant claims that there was no rule that he breached and therefore his dismissal was unfair. He seeks to be reinstated.

Survey of evidence and argument

[4] This is a brief summary of evidence considered as provided for in terms of section 138(7)(a) of the LRA relevant to the dispute at hand and does not reflect all the evidence and arguments heard and considered in deciding this matter.

Respondent's evidence and argument

[5] Mr Willie Botha testified to the following effect.

5.1 He is currently employed by the respondent as operations manager. He was appointed during June 2020.

5.2 At the applicant's disciplinary hearing, he was the initiator and represented the respondent. He confirmed the correctness of the disciplinary outcome and minutes as contained in the bundle.

5.3 On 3 August 2020 the applicant arrived at work claiming that he was suffering from headaches. The respondent advised him to see a doctor and he was booked off from 4–6 August 2020 and according to the medical certificate they were waiting Covid test results. The applicant came to work on 6 August 2020 and handed in a brown envelope. The applicant was a shop steward and therefore arrived at the respondent's premises to represent an employee in a disciplinary hearing scheduled for that day. When he arrived, he was fully clothed in uniform. The brown envelope handed in by the applicant was given to him and therein contained two notes. The one note was a medical certificate and other was a note from the clinic. As from the 4 August 2020, the applicant made no mention to the respondent that he went for a Covid-19 test and the first time that they discovered this was when he opened the brown envelope handed in by the applicant. He only became aware on 7 August 2020 at 1pm that the applicant had tested positive for Covid-19. This was when the applicant telephonically notified him of the test results.

5.4 As a result of the applicant returning to work he had had contact with him (Willie Botha) and Mr Winter who was then the operations manager, thereby exposing them both to the risk of contracting Covid-19.

5.5 During June 2020, the applicant was off work and had self-isolated himself in that he had come into contact with someone who had tested positive for Covid-19.

5.6 On 14 August 2020 the applicant was provided with a confirmation letter giving permission to de-isolate of the Covid-19 positive test. This letter recorded that patients can be de-isolated 10 days after onset of the symptoms (in mild cases), in 10 days after achieving clinical stability (in severe cases) or [*sic*] 10 days of the positive test (in asymptomatic cases).

5.7 The applicant knew of the protocol, considering that he had previously self-isolated and was tested for Covid-19 during June 2020, of at least 10 days or until you receive your Covid-19 test results that you must self-isolate and not return to work. When the applicant returned to work on 6 August 2020, he had not received his Covid-19 test results and by coming to work he had subjected his co-workers to the risk of contracting Covid-19.

5.8 As a manager, considering the applicant's conduct, he cannot trust the applicant and therefore he will also not trust the applicant with client stock. The applicant has never shown any remorse for subjecting the respondent and his co-workers to the risk of contracting Covid-19. He failed to accept responsibility for his actions.

5.9 On the previous occasion, during June 2020 they recorded the telephonic conversation with the applicant when he was phoned in that they were enquiring as to his whereabouts. It was in this conversation that the applicant informed the respondent that he was self-isolating and staying at home and this served as proof that he was aware of the dangers and risk associated with contracting Covid-19.

5.10 Under cross examination, the witness conceded that the respondent had no written rule or standard operating procedures dealing with Covid-19 although this topic is discussed with staff regularly and they have flyers warning employees to sanitise, wash hands and use facemasks. This includes social distancing. When employees arrive for work they complete a pre-screening Covid-19 test form.

[6] Ms Christen Koch testified under oath to the following effect.

6.1 She is employed by the respondent as the administration manager and has been in that post for nine years. The respondent has taken steps to safeguard employees against the Covid-19 pandemic. This includes providing sanitising bottles, masks and ensuring that all trucks have sanitising bottles. They also ensure that all employees wear masks.

6.2 As to the fact that there is no written policy or rule relating to Covid-19 does not mean that there is no rule. It is advertised on TV and on radio constantly informing everyone to sanitise, regular washing of hands, wear masks and to practice social distancing. It is accepted as a norm that should you be in contact with anyone who has Covid-19 you must self quarantine or self isolate, thereby not allowing yourself to come in contact with other people whilst still at risk.

[7] Mr Tony Winslow testified under oath to the following effect.

7.1 He is employed by the respondent as a warehouse manager and has been in that position for the past nine years.

7.2 The first incident concerning the applicant having to be tested was when the applicant's neighbour contracted Covid-19. He told the applicant that he needed to self-isolate and after self-isolating the applicant brought him the Covid-19 test results indicating that he was negative.

7.3 They did not provide specific training concerning measures to combat Covid-19, although they did have talks with staff regularly telling them that they should self-quarantine should they be tested. The applicant had a cough and as a consequence thereto he went for a Covid-19 test. Fortunately, when the applicant returned to work on 6 August 2020 he had very little contact with the staff other than with management.

7.4 As a consequence to the applicant's behaviour, he was suspended as a precautionary measure with salary.

Applicant's evidence and argument

[8] The applicant testified to the following effect.

8.1 He was dismissed because he did not notify the company that he had gone for a Covid-19 test and he did not notify them when he would be returning. He was never trained concerning Covid-19 measures.

8.2 When he arrived at work on 6 August 2020 he did so to bring in the documents. He was never told when to bring in the certificates. He was tested and returned to work because the medical certificate issued by his medical doctor told him that he was fit to work. There was also no rule or code that provides that if you return to work before you receive your test results you will be dismissed. The sanction of dismissal he considered to be too harsh.

8.3 Under cross-examination as to whether he had shown remorse, he admitted that he did not say sorry nor did he apologise for not informing the respondent that he had gone for a Covid-19 test and for returning to work before receiving his test results. When he had brought in the medical certificate and the clinic report, the first time that he was tested for Covid-19 during June 2020, the respondent should have informed him not to bring documents in person.

Analysis of evidence and argument

[9] Section 192 of the LRA provides that in any proceedings concerning any dismissal, the employee must establish the existence of the dismissal. If the existence of the dismissal is established, the employer must prove that the dismissal is fair. Accordingly, due to the fact that dismissal was not in dispute, the onus was on the respondent to prove that the dismissal was substantively fair.

[10] Schedule 8 of the Code of Good Practice (Code of Good Practice) states in item 7: Guidelines in cases of dismissal for misconduct the following:

> "Any person who is determining whether a dismissal for misconduct is unfair should consider—
>
> (a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the work-place; and
>
> (b) if a rule or standard was contravened, whether or not—
>
> (i) the rule was a valid or reasonable rule or standard;
>
> (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
>
> (iii) the rule or standard has been consistently applied by the employer; and
>
> (iv) dismissal was an appropriate sanction for the contravention of the rule or standard."

[11] The existence and knowledge of the rule was in dispute. The respondent admitted that they had no standard operating procedures (SOP) or a policy dealing with Covid-19. It was argued that employees and staff were informed verbally of measures in order to protect themselves. There were flyers on the notice board and the staff were told to regularly sanitise, wear masks and to social distance. It was further argued that the applicant considering the fact that he had previously self-quarantined and being tested for Covid-19 and only having returned to work after testing negative was well aware that until he receives a negative test result or if he had contracted Covid-19, unless he had self-quarantined or self-isolated for at least 10 days he must not come to work.

[12] When the applicant testified concerning the first period when he self-quarantined in June 2020 he had brought the respondent his medical certificate before receiving the Covid-19 test results. This version was never put to any of the respondent's witnesses in that especially, Mr Willie Botha and Mr Tony Winslow were adamant that during the applicant's absence during June 2020 he only returned to work after receiving his Covid-19 test results. I therefore accept that on the previous occasion, the applicant returned to work when he knew it was safe to do so. This tells me that he knew that you could only return to work or de-isolate once you are aware that you are no longer a risk.

[13] Item 3(1) of the LRA's Code of Good Practice Dismissal provides that an employer's rules must create certainty and consistency in the application of discipline. This requires that the standards of conduct are clear and made available to employees in a manner that is easily understood. Some rules or standards may be so well established and known that is not necessary to communicate them.

[14] The charges for which the applicant was dismissed relates to gross misconduct and gross negligence. The fact that the respondent had no written policy and procedures dealing with the Covid-19 pandemic and measures to combat the pandemic, I cannot blame the applicant for failure to notify management that he was going for or had gone for Covid-19 test. However, considering the dangers Covid-19 has on the lives of ordinary people and how contagious the virus is, the applicant cannot hide behind ignorance. As the Code of Good Practice provides that some rules and standards may be so well established and known that it is not necessary to communicate them. Therefore considering the fact that the applicant had previously during June 2020 self-isolated whilst waiting for his test results, this is a clear indication to me that the applicant knew that he should not return to work until his test results indicate that he has not contracted Covid-19 or if he has, that he was no longer infectious in that a period of at least 10 days had passed from when he experienced the symptoms for the first time. By coming to work as the applicant did on 6 August 2020 and had Mr Willie Botha not immediately opened the brown envelope the applicant handed in, the applicant would have been allowed to work and he would have infected respondent's workforce. I therefore, find the applicant guilty on this charge.

[15] According to the LRA's Code of Good Practice the transgression falls under the banner of serious misconduct that falls under the classification of wilful endangering of the safety of others. This type of transgression is so serious that the respondent cannot be expected to continue trusting the applicant. As testified by Mr Botha, the applicant can no longer be trusted.

[16] I therefore make the following award.

Award

[17] I find the dismissal of the applicant, Mzwandile Jacobs to be substantively fair. The applicant is not entitled to any relief.

No cases were referred to in the above award.

October / Teleperformance SA (Pty) Ltd

Commission for Conciliation, Mediation and Arbitration

Award date: 17/12/2020 *Case No*: WECT9216-20

Before: FS Ngcaba

Referral in terms of section 191(5)(a)(i) of the LRA

Dismissal – Substantive fairness – Absenteeism – Employee dismissed for staying at home during Covid-19 pandemic after colleague tested positive – Dismissal unfair.

Editor's Summary

The applicant, a call centre agent, was dismissed for absenting himself from work without permission for four days during May 2020. He claimed that when the Covid-19 pandemic had intensified he had felt afraid after a colleague had been infected and that after he had expressed his concern about the company's compliance with health and safety directives his supervisor had given him permission to stay at home until he felt it was safe to return to work. The respondent claimed that it had complied with all lockdown directives, that the applicant was the only agent who had declined to report for duty and that he had a poor attendance record.

The Commissioner noted that a regulation issued by the Minister of Employment and Labour in April 2020 provided *inter alia* that employees may refuse to work if they reasonably feel that doing so would pose an imminent threat of exposure to Covid-19 and that they may not be dismissed, disciplined or harassed for remaining away from work. The applicant's dismissal had flowed from the concern he expressed about health and safety in the workplace. He had been told to go home if he wished and that the policy of "no work no pay" would be applied. The respondent's reliance on its sick leave and disciplinary policies was misplaced; the applicable regulation should have been followed. The applicant's dismissal was a breach of that regulation, which rendered the dismissal unfair.

The applicant was awarded compensation of four months' salary.

Award

Details of hearing and representation

[1] An arbitration hearing was heard on 10 September 2020 at the CCMA Offices in Cape Town, and on the 22 October 2020 and concluded on 26 November 2020 at the respondent's premises. The applicant was present and represented by Mr Zama Sonjica, NUPSAW Official. The

respondent, Teleperformance SA was present and represented by Ms Carine van Blerk, CEO SA Official.

[2] Both parties submitted a bundle of documents, after both parties had concluded their case they were granted indulgence to submit their arguments in writing upon request. An agreement was reached that both parties will submit their closing arguments by no later than close of business 3 December 2020, and no closing arguments were submitted on the said date, other than an attachment from the applicant party which was not related to the case.

[3] The proceedings were manually and digitally recorded, and conducted in English.

Issue to be decided

[4] I have to decide whether the applicant was dismissed, and if so, whether the dismissal was substantively and procedurally fair. If not, I have to decide on the appropriate remedy.

Background to the dispute

[5] The respondent business engages in the provision of telemarketing, customer relationship management, marketing and communication services and it falls under the South African Call Centre Sector.

[6] The applicant was employed on 8 January 2018, as a Call Centre Agent. The dismissal is dated 17 June 2020 which is common cause. He was earning a basic salary R8 440,80 per month.

[7] The applicant was charged with misconduct as follows; “In that during the period from 19 until 22 May 2020, the applicant failed to report for work. Despite being on an active final written warning which was issued to him on 10 June 2019. Such conduct is considered to be a very serious offence, as it has a huge negative impact on the organisation”.

[8] The applicant referred a case of dismissal to the CCMA on 30 June 2020, the matter was referred within the prescribed 30- day period.

[9] The applicant is seeking financial compensation.

Summary of evidence by parties

Respondent’s case

[10] The respondent’s representative, Ms Carine van Blerk during his opening statement averred that the applicant was dismissed fairly. The reason for dismissal was as a result of him being absent from work for four days. The applicant was made aware of the action to be taken should he be absent from work without the relevant authority’s approval. However, he failed to come to work, he also did not inform the company of his whereabouts. The company called him during his absence, but could not get hold of him. When he reported for work subsequently, he was charged for the misconduct and he attended a disciplinary hearing which led to his dismissal.

A [11] The dismissal was an appropriate sanction, because the applicant was on a final warning for a similar misconduct. The company would prove its case by relying on the company policy which deals with the offence that led to the applicant's dismissal and will also call three witnesses to validate the dismissal of the applicant which was procedurally and substantively fair.

B [12] The respondent's first witness, Mr Riaan Mentz during his evidence under oath testified that he commenced employment following the lockdown on 14 May 2020. There was one employee within the company, whom it was confirmed tested positive for covid-19. The night the company became aware of the incident, all the employees were sent home and the company closed the business. On Thursday it appointed a company to deep clean
C the entire offices, and it also followed the directive of Department of Labour which specified that a company can re-open and resume its operation within 24 hours after the deep cleaning of the premises had taken place. However, the company only re-opened on Monday.

D [13] When the employee returned to work, he engaged with them including the applicant on the procedure that was followed by the company to ensure the safety of its employees and also informed the employees about the premises having been decontaminated and the company was also adhering to the directive from the Department of Labour and even showed them proof of the premises having been decontaminated since they were nerv-
E ous and concerned about the confirmed Covid-19 case in the workplace.

[14] There were questions pertaining to employees with underlying medical conditions, and he said such employees should not report to work and should adhere to company protocols on such issues. During the said dis-
F cussion, the applicant indicated that he was not feeling safe being at work. He told the applicant that there was no need for him to wait for his Manager to send him home, if he did not feel safe at the workplace he can go home since he had had the authority to release an employee from work if necessary.

G [15] After having given the applicant permission to go home, he informed the applicant's Manager about the issue. The company policy directs that if any employee does not feel well, he has to inform the relevant Manager before he/she can go home and has to update the company on his/her medical condition or submit a medical certificate at a later stage.

H [16] The company policy, directs that:

> "the employee is required to contact the company (as per the absence to work policy), telephonically. No later than within one hour prior to his/her shift commencing, including over weekends and public holiday. So that the company can attempt to make appropriate arrangements to cover the employee's duties over such unplanned absence.

I [17] Employees are expected to keep the company regularly informed of their progress and when they are likely to return to work. If an employee is absent from work without notifying the business in line with the notification procedure, the company reserves the right to take disciplinary action for absence without leave (AWOL/NCNS)".

J [18] The applicant was supposed to inform the company about his situation after having been allowed to go home on 18 May 2020, but the applicant

never followed the procedure. He had an obligation to inform the company, but he failed to do that. The company made a follow up to establish when he was coming to work, but it was unable to get hold of him.

[19] The business is a commercial business, which requires employees to report for work and execute their duties for the business to generate income. That being the case, the company could not afford to have an employee staying at home for an indefinite period. The company has an obligation to its client to deliver, for the business to meet the said obligations it needed its employees to be at work, in order to execute their duties so that the company can meet its obligations, if the company fails to meet its obligation such occurrence would have a reputational damage to the company.

[20] They could not afford to have the applicant or any other employee to decide not to come to work, as such conduct would have a negative effect on the company's operation.

[21] Under cross-examination, he testified that the applicant was dismissed for not adhering to procedures" time keeping, AWOL/alternatively, no call no show.

[22] The first case of a confirmed covid-19 case at the workplace was brought to his attention on 14 May 2020 around 7pm. He discussed the issue with Management. When he spoke to the agents about the issue, their concerns they had raised was relating to health and safety and the proposal to work from home. Their concerns were addressed, and they were informed that the company can only accommodate a certain number of employees to work from home, and it was impractical for everyone to work from home.

[23] Despite the company premises having been decontaminated, employees had health and safety concerns since Covid-19 was something new to everybody. The employees wanted to know about the operation and the personnel that tested positive for Covid-19. The applicant indicated that he wanted to go home, because he was not feeling safe.

[24] He gave him permission to go home, he was expecting the applicant to report for work the following day and not to stay at home for an indefinite period without informing the company. He never contacted the applicant after the 18 May 2020, the applicant [*sic*] but his Line Manager, Jade called the applicant on the same day if not the following day on numerous times because he was aware of the issue, but he could not get hold of him. Jade never produced the telephone records linked to the attempts he made to get hold of the applicant.

[25] When the applicant said he did not feel safe at work, he told him that he can go home for that day, he did not feel that it was necessary to inform him what he was supposed to do, since the applicant was aware of what was entailed in the company policy when he signed his employment contract.

[26] He further indicated that he never informed the applicant that he expected him to come to work on a specific day, but he informed him to refer to his employment contract on the steps he should follow pertaining to the issue. When he said the absence protocols would be followed, he meant that

there will not be special leave, when an employee is sick, his/her sick leave would be utilised and if there was no sick leave arrangements must be made.

[27] At no stage did he inform the applicant that he can go home for an indefinite period, despite having indicated that he was willing to stay at home without pay. Other than to go home on the day that he said he was not feeling safe at work. He also indicated that he was aware of the directive by the Minister of Labour which states that when an employee shows concerns related to Covid-19, he should not be disciplined. The company did not know where the applicant was after he had left the premises on 18 May 2020, all the applicant's concerns were addressed to an extent of his concerns being addressed on email and the company put in place procedures and resources within the workplace to counter the transmission of Covid-19 as it was outlined by the Department of Labour. He was not aware on when the applicant came back to work, but the applicant's Line Manager had such information.

[28] The applicant said that he was not feeling safe at the workplace, from the company's point of view, his concerns could not be addressed with him not being around. The applicant should have informed the company what to do, for him to feel safe at the workplace but he did not other than to opt to stay home and not inform the company about his whereabouts.

[29] The applicant stayed at home for four days despite the health and safety measures having been put in place by the company, without informing the company and such conduct led to his dismissal

[30] Under re-examination, he testified that the applicant was not the only one that had concerns. No other employee left and never reported for work after he had spoken to approximately 120 employees on 18 May 2020. The employees within the company were responsible to contact the company when not coming to work, that was also entailed in their employment contract.

[31] The rule or directive was reasonable, because it directs the approach one has to take when not reporting for work and the sanction for being found guilty of contravening the directive. It also allowed open communication for an employee to alert the company about his/her whereabouts. On 18 May 2020, the applicant indicated that he was not feeling safe but he never elaborated on what made him feel unsafe.

[32] Under clarity seeking question, he testified that according to his recollection he told the applicant that it was not necessary for him to wait for his line Manager before he can knock off, he permitted him to leave but despite having informed the applicant to go home, the policy pertaining to absenteeism should be considered by the applicant when deciding to stay home beyond the day he was informed to go home. The applicant and seven other agents were around on the day. I never personally made a follow up with the applicant not [*sic*] did he expect the applicant to call him. The applicant's Line Manager contacted the applicant regarding being absent from work.

[33] The respondent's second witness, Mr Sipho Zungu during his evidence under oath testified that he was the Chairperson of the disciplinary enquiry. I confirmed with the applicant pertaining to his rights and explained how the process would unfold. He read the charge to the applicant, and indicated that he would request for his pleading and explained the procedure that would be followed when the applicant pleaded guilty and the procedure that would follow when he pleaded guilty. He also read out his rights as indicated on the charge sheet.

[34] He denied having been biased in the disciplinary proceedings, and that the only issue of concern by the applicant that was raised was when he made an application for the initiator not to lead the company case and such a request was not granted. He made reference to the disciplinary enquiry minutes, and stated that they were a true reflection of the evidence that was lead during the enquiry. He also indicated that the applicant and the company were afforded equally a fair opportunity to state their respective case and were allowed to ask questions to the witnesses that testified.

[35] Regarding the reason for being called to a disciplinary hearing, the applicant indicated that he had a conversation with Mentz on 18 May 2020 and he gave him permission to go home. The company's initiator tried to call Mentz to testify, but he was busy in a meeting. He also went to check on him, and he established that he was in a meeting.

[36] The issue of Mentz not being able to attend the proceedings led to a discussion between the parties, it was agreed that AWOL charge would not be pursued. The only charge which the applicant had to defend was failure to inform the company about his whereabouts. He was found guilty on the said charge, and he was dismissed because he failed to update the company on his whereabouts, he had a responsibility as per his employment contract to make contact with the company. The applicant indicated that on 19 May 2020 he used a friend's phone to call the company but was unable to provide proof. The applicant was dismissed on the basis that he was on a final warning for similar misconduct.

[37] Despite the applicant's final warning having expired, he took into consideration the fact that he was aware of the rule and was on a final warning. He was previously made aware of the consequences that may follow, but he committed the similar misconduct. The fact that the final warning had expired did not mean it could not be taken into consideration.

[38] Under cross-examination, he testified that he explained the applicant's rights including his right to representation. The applicant had to personally make a decision by himself on whether he would like to have a representative, he never indicated that he would like to have one during the enquiry.

[39] In terms of the company's records and the evidence that was led by the company initiator, the applicant signed the final written warning. He was informed that should he commit a similar misconduct, the final written warning would be taken into consideration.

[40] He conceded that the company was aware of the applicant's absence, and such absence was authorised hence the applicant was not found guilty of

AWOL. He was found guilty of failure to inform the company of his whereabouts after 18 May 2020. He found the applicant guilty because of his failure to abide by the disciplinary policy which required him to contact the respondent when not coming to work. The disciplinary policy and employment contract did not make provision for the respondent to call the applicant if he did not report for work.

[41] Under re-examination, he testified that although it was not the responsibility of the company to contact the applicant when he opted not to come to work, however the company called the applicant but could not get hold of him. Mr Sizo Magwaza indicated that they tried to get hold of the applicant, but no supporting documents to that effect was provided.

[42] Under clarity seeking question, he testified that if he had issued the applicant with a final written warning again since the last one he had expired when the alleged misconduct was committed but despite that he believed that the applicant's conduct was repetitive and warrants a dismissal.

[43] Respondent's third witness, Ms Meagan Lesch testified under oath that she was a Team Leader and she was superior to the applicant. The applicant never informed her of his absence from 19 to 22 May 2020, she was aware that Mentz gave permission for the applicant to go home on 18 May 2020 because he indicated that he was not feeling well.

[44] We called all the employees that did not report for work, including the applicant from the 19 until 22 May 2020 but the call went to voicemail. The applicant had her number, but he never contacted her pertaining to his failure to report to work and failure to inform the company about his whereabouts.

[45] Mentz was his superior, and he held a position of a Call Centre Manager. When the lockdown was announced in March, they worked from home. The applicant worked approximately two weeks from home, on the last shift when a decision was taken that employees would work from home the applicant indicated that he no longer had a cellphone. He gave her an alternative number that the company can contact him on, that was the night before lock down.

[46] When she contacted the applicant during his absence, she used the number on the system. The reason why she used that number was because the company had a policy that indicated that employees should update their contact details on the system. It was the applicant's responsibility to ensure that he updated the contact number should the company intend to call him but the applicant failed to update his contact number.

[47] Sizwe Magwaza, the respondent's fourth witness during his evidence under oath testified that he was a team leader. During the disciplinary enquiry against the applicant he was the initiator. During the enquiry both parties were given equally fair opportunity to state their respective case. The applicant seemed unprepared though, he established that when he led his evidence.

[48] He was one of the employees that worked from home when lockdown started, the company requested employees to update their contact details

on the system and it was the sole responsibility of the employees to update the contact details. There was a mass communication to all employees which requested all employees to update their details on 16 April 2020, and he was not aware whether the applicant updated his details. There was no animosity that he was aware of between him and the applicant as such was never brought to the company's attention, he also never had any undue influence on the Chairperson of the disciplinary enquiry.

[49] Under cross-examination, he testified that he was the initiator because the applicant was reporting directly to him. He was also aware of the reason that led to Mentz giving permission for the applicant to go home. The health and safety issues that the applicant raised were addressed.

[50] The applicant was informed to leave on 18 May 2020, it was never said he could stay at home after the said date. The applicant raised health and safety related concerns, and such concerns were addressed when he was allowed to go home. He further indicated that he was aware of the regulations issued by the Department of Labour related to Covid-19 but he was not aware of any regulations that made reference to employees who have health and safety related concerns relating to Covid-19 could not be disciplined or dismissed.

[51] The also indicated that the applicant raised the issue of representation on the day of the day the enquiry was concluded after having been postponed on two occasions [*sic*]. He requested an opportunity to have legal representation. A ruling was made on the issue, wherein the Chairperson of the enquiry ruled that the applicant had ample opportunity to bring along a representative and the matter could not be postponed as a result of him having failed to secure a representative.

[52] Under re-examination, he testified that the Chairperson of the disciplinary enquiry was an external client and he believed that the company paid for his services and a postponement taking into consideration that the enquiry was postponed on two occasions would have cost the company more money.

[53] Mr Ismael Adams, the respondent's fifth witness during his evidence under oath testified that he was an Assistant Call Centre Manager. During the incident related to this matter which arose on 18 May 2020, he was a Senior Team Leader. The applicant's direct Line Manager reported to him, when the lockdown commenced the company employees were authorised to work from home for approximately five weeks. In May 2020 some employees including the applicant were ordered to report back at work.

[54] The company adhered to the regulations by the Department of Labour, and the Department of Labour inspected the workplace and during their inspection there were proper measures in place to prevent the transmission of covid-19. Despite that, the applicant raised his concerns in that the hand sanitizer dispensers were not always filled and he asked him to report to the relevant authority should such incident occur. In response to that, he said it was not his responsibility to raise such concerns, he also

A complained about the taxis loading full capacity, and that such conduct posed a high risk of Covid-19 transmission.

[55] In addressing the applicant's concerns, measures were put in place to ensure that the sanitizer dispensers were kept filled. Pertaining to his concern on public transport, he was informed that the company had no control on the capacity which the public transport decided to load however they should leave home early as to arrive on time at work. The company also asked the facilities management to clean surfaces after every four hours and to keep the doors open for ventilation. Pertaining to the issue of curfew ending at 8pm, it was communicated to the employees that as long as they were in the taxi before 8pm, that would not result in any issues for them and the company also issued the employees with permits.

[56] Since the applicant's concerns were attended to, he was informed that should he decide not to come to work, disciplinary process would be followed by the company. He further indicated that the applicant was never dismissed for raising concerns related to Covid-19, the applicant was dismissed for staying at home and not notifying the company about his whereabouts. There was no complaint or grievances lodged by the applicant in that his concerns were not attended to.

[57] The applicant was also aware that employees were required to update their information on the system and the communique to that effect was sent to all employees including the applicant in April 2020. The applicant was required to update his contacts on the system, but he failed to do that despite being aware of the procedure to follow in that regard.

[58] Under cross-examination, he testified that there was an inspection which was conducted by the Department of Labour at the company premises on 27 May 2020. He was not in a position to answer on what led to such an inspection being conducted and on who initiated it. He also said he was not implying that the company was compliant with the Disaster Management Act and the directive from the Department of Labour taking into consideration that there was an inspection conducted at the company premises.

[59] It was highly likely that the applicant raised his concerns around 5 May 2020. The date he raised his concerns and the date of the inspections were far apart. He further conceded that covid-19 was a very scary situation for everyone and that people's response in terms of being scared was different and their reaction was obviously different. Amongst the concerns that were raised by the applicant, he would say they were reasonable concerns, amongst the applicant communique the applicant indicated that he would like to stay home until he feels safe. In response, he told the applicant that he cannot be coerced to come to work, however if no work is completed the company would not be in a position to pay him. In response the applicant indicated that he accepts not being paid when he does not report for work. He informed the applicant that if he opted not to come to work, the absence process would be followed.

[60] The company had guidelines on situations that we believe are improper, the actions I refer to were actions that talks to a behaviour that is contrary

to the disciplinary code of conduct. I had a company disciplinary code in mind when I said actions would be followed. If the applicant could not report for work, and did not get through the company landline he was allowed to contact the team leader to report his absence to a team leader. Pertaining to the applicant having given his alternative number to his Line Manager, from a personal perspective there was nothing wrong with what he did. But from a procedural perspective, the applicant was supposed to update his contact details on the system. The circumstances would dictate, but he was expected to update it on the system. The system was not specific on the number nor does it state that the number which an employee can be reached on should a need to contact him arise, it should belong to an employee. It requires contact details where the company can get hold of an employee when the company want to be in contact with the employee.

[61] Under re-examination, he testified that he agreed that people's degree of being scared of Covid-19 was different however he did not believe that that entitled the applicant to act unreasonably taking into consideration that the company and its employees had duties and responsibilities that they had to fulfil. There were measures in place towards preventing the transmission of Covid-19 at the company, hand sanitisers and cloth masks amongst other measures were made available to employees. The applicant had no reason to be unreasonable taking into consideration that his concerns were attended to.

Applicant's case

[62] Mr Zama Sonjica, the applicant's representative during his opening statement indicated that the respondent was in total disregard or in contravention of the directive or regulation by the Minister of Department of Labour when it took a decision to take disciplinary action against the applicant despite the directive prohibiting any employer from such action. In support of its case, they will make reference to the said directive.

[63] Mr Mogamat Tariq October, the applicant during his opening statement he indicated he was dismissed by the respondent, and there was a hearing held before his dismissal [*sic*]. He challenged the substantive fairness, on the ground that he was given permission to leave work and only come back when he felt safe to come back, however upon his return he was disciplined and dismissed. He also challenged the procedural fairness of his dismissal, in that he asked for the presence of a witness whom he believed was critical in the matter, but despite having brought the issue to the attention of the Disciplinary Enquiry Chairperson, the witness refused to come and the Disciplinary Enquiry Chairperson failed to take the necessary steps so that the witness can attend the proceedings. He further indicated that the Chairperson was biased, he constantly interjected or interfered when he presented his case, however that did not happen when the company representative presented the company's case.

[64] During his evidence under oath he testified that he was not a flawless employee but he mostly adhered to the company's disciplinary policy. He

had a final written warning which expired on 10 June 2020. His conduct changed after the final warning.

[65] He informed the Call Centre Manager (Vice President), Mentz the reason why he did not feel safe being at work and covid-19 was something new and deadly. After he had informed Mentz about his concerns, and requested to stay home even without pay, he was given permission to go home and could come back when he felt safe to come back to work. Despite having been given permission to stay at home until he felt safe, he was charged and dismissed.

[66] He further indicated that the reasons why he did not come to work from 19 to 22 May 2020 other than having been given permission to stay at home by Mentz, he was fearful to come to work as he was utilising public transport filled to capacity. He was also fearful to contract Covid-19 since there was a confirmed positive case at work and his mother had just had an operation. He lived with his ill mother and his fear was that should he be infected with Covid-19, he would obviously transmit it to his sick mother and that would have put his health and his mother's health at risk.

[67] In terms of the Department of Labour regulations the certificate to show that the premises had been decontaminated was supposed to have been displayed by the company, on the premises but it was not. He also came across empty sanitizer dispensers and there was no social distancing at the workplace let alone in the lifts. Hence he did not feel safe at work, and he raised those issues even with Mentz during the meeting he had with staff on 18 May 2020. When he was told to go home, he was never told to take a day off. He was told to go home and come back when he felt safe. He was not told to contact the company whilst at home.

[68] Under normal circumstances, an employee who is sick is required to inform the company, however his situation was different, a Senior Vice President gave me permission to leave and said he should come back when he felt safe to come back to work. He left immediately because he didn't feel safe.

[69] During lockdown he gave his line Manager his alternative details. At no stage was he told to capture the details on the system. There was an issue with the system. If the company wanted to get hold of him the company could have used the alternative number.

[70] He raised his objection about the Chairperson always being the one that presides on all the cases at the company. He had the same concern with the initiator. He was also not pleased with the conduct of the chairperson. The chairperson interjected when he led evidence but did not do the same with the company. The chairperson was biased, hence he believed that his dismissal was procedurally and substantively unfair.

[71] The unfair dismissal has affected him financially, he has been without income since his dismissal and would like to be compensated.

[72] Under cross-examination, he testified that he was not aware of the directive in the *Government Gazette* pertaining to Covid-19 issues at the workplace. He was committed to assisting at the company to ensure that

proper safety measures were in place. Hence, he raised the issues of concerns at the company. He even mentioned the seating arrangements and the issue of the sanitizer dispensers being empty at times and lack of proper measures to maintain social distancing amongst employees.

[73] That he does not believe that he was unreasonable when he raised his concerns pertaining to not feeling safe at work. There was no other employee that asked for permission to leave, besides him. Mentz was upset when he posed questions. He was told that there would be no disciplinary action should he stay at home as a result of not feeling safe.

[74] The company should have treated his matter as unpaid leave instead of taking a decision to dismiss him, taking into consideration that he was given permission to stay at home. The company email to everyone on page 75 indicated that those that opted to be at home would not be paid, the government indicated that people that do not feel safe due to Covid-19 should not be charged.

[75] The number that he gave to Lesch was not his personal number, the company was incorrect by stating that they did not have his alternative number because he gave the number to Lesch. The chairperson of the disciplinary enquiry was biased, if the recordings were available that would have substantiated his version. He came back to work to assess the situation and was fearing negative impact should he stay at home for an unreasonable period. His concerns were based on fear of possibly getting infected with Covid-19 and transmitting it to his sick mother and other family members.

[76] The fact that other agents reacted differently by not opting to stay home, did not imply that his conduct was unreasonable. The reason why his representative brought the Department of Labour directive related to the issue, was so that the CCMA can consider it in making a determination on whether the company acted fairly in dismissing him.

[77] Applicant's first witness, Shakira Akbar testified under oath that she was employed as a call centre agent, she was present in the meeting wherein the applicant raised issues on the health and safety in the workplace, and Mentz told the applicant that he can go home if he did not feel safe at work. He could come back when he felt safe to return to work. She could not remember everything that was said, however the conversation got intense between the applicant and Mentz when the applicant asked questions which Mentz could not answer directly. He said to the applicant he would not get a warning or be charged if he did not feel safe. He was told that he would not be paid whilst at home. The applicant said if that was the case he would go home and he logged out and left.

[78] She further indicated that the concerns that were raised by the applicant were genuine, most of them felt the same way and the first case of someone that tested positive for Covid-19 was confirmed. The first confirmed case of an employee having tested positive to Covid-19 was between 15 and 16 May 2020. When they were asked to go home, the lifts were overcrowded with around 10 people at once, the transport had minimum

eight people and as employees they were concerned with having to report to the office.

[79] Under cross-examination, she testified that the company was not complying with the directive from Department of Labour in terms of social distancing and it was also not issuing them with disposable masks, and the hand sanitizers were not always filled as required, the toilets were not cleaned or sanitized often. She also did not feel safe but she never opted to stay at home because she had financial commitments. Most of them had to put their life at risk of contracting Covid-19 to earn a salary. She further indicated that there were other agents who opted to leave on 18 May 2020 because they did not feel safe at work.

[80] The reason why the employees did not feel safe was because no adequate information was provided by the company pertaining to the alleged decontamination of the offices. When the applicant reported for work, there were no other confirmed cases. Since Covid-19 was serious, it was justified for the applicant to not feel safe. She also did not feel safe but due to financial challenges she had to come to work.

[81] Mr Cupido, the applicant's second witness, during his evidence under oath testified that he was employed by the company as a Call Centre Agent. He commenced employment on 1 August 2019. He could not remember the entire conversation wherein Mentz indicated that the applicant could go home and could come back when he felt safe. No disciplinary action would be taken against him, however, he would not be paid if he did not come to work.

[82] The Covid-19 statistics were increasing during the period the applicant raised his concerns. There were other [*sic*] of cases of Covid-19 positive cases at work, hence the company closed down so that the workplace could be decontaminated.

[83] The applicant opted to go home, despite an indication by Mentz that those who opt to go home would not be paid. There were a handful of them at work at the time because the country was on level 5 of lockdown. They came to work because of the undertaking by the company to pay them more remuneration.

[84] He also did not feel safe coming to work, but he had to risk his life and come to work because he had financial obligations. The company complied with Covid-19 regulations to a certain extent and an employee tested positive to Covid-19. It was a reasonable decision for someone who had no financial obligation to decide to stay at home instead of coming to work and possibly getting Covid-19.

[85] It was also a reasonable decision to someone who had a chronic illness or family member who was sickly and living with an employee from the company.

Analysis of submissions and arguments

[86] In terms of the Labour Relations Act 66 of 1995, as amended ("LRA"), it stipulates in section 186(1)(a) that; Dismissal means one of the following: (a) an employer terminated a contract of employment with or without notice.

[87] Disaster Management Act (57/2002): Direction by the Minister of Employment and Labour in terms of Regulation 4(10) of the Regulations R480 of 29 April 2020 issued by the Minister of Cooperative Governance and Traditional Affairs in terms of section 27(2) of the Act pertaining to "refusal to work due to exposure to Covid-19" stipulates that:

> "48. An employee may refuse to perform any work if circumstances arise which with reasonable justification appear to that employee or to a health and safety representative to pose an imminent and serious risk of their exposure to COVID-19.
>
> 49. An employee who has refused to perform work in terms of clause 48 must as soon as is reasonably practicable notify the employer either personally or through a health and safety representative of the refusal and the reason for the refusal.
>
> 50. Clause 48 applies whether or not the person refusing to work has used exhausted any other applicable external or internal procedure.
>
> 51. No person may advantage or promise to advantage any person for not exercising his or her right in terms of clause 48.
>
> 52. No employer may make any deduction from an employee's remuneration, or require or permit an employee to make any payment to the employer or any other person, in respect of anything which the employer is obliged to provide or to do in terms of this Direction.
>
> 53. No person may threaten to take any action against a person because that person has exercised or intends to exercise the right in terms of clause 48.
>
> 54. No employee may be dismissed, disciplined, prejudiced or harassed for refusing to perform any work as contemplated in clause 48.
>
> 55. If there is a dispute as to whether clause 48 has been contravened, the employee may refer the dispute to the Commission for Conciliation, Mediation and Arbitration or an accredited bargaining council for conciliation and arbitration in accordance with the procedures contained in section 191 of the Labour Relations Act, 1995 (Act No. 66 of 1995).
>
> 56. If the arbitrator appointed in terms of section 191 of that Act to determine a dispute referred in terms of clause 56 finds that the employer has contravened clause 55, the arbitrator may make any appropriate order contemplated in section 193 read with 194(3) or (4) of that Act."

[88] After having considered the totality of the evidence it is clear that the dismissal of the applicant stems from the meeting of 18 May 2020. The respondent disputed that the applicant was authorised to go home and that he was only required to return to work if he felt it was safe to do so. This evidence was contradicted by the evidence of the applicant. The applicant's two witnesses confirmed that the applicant was given the option to go home. The applicant was told that he was only required to return to work if he felt that it was safe to do so. The applicant was also told that no disciplinary action would be taken against him but he was informed that the principle of no work no pay would be applied.

[89] The reliance of the respondent on the sick leave policy and AWOL to justify the dismissal was misplaced, The Disaster Management Act (57/2002): Direction by the Minister of Employment and Labour in terms of Regulation 4(10) of the Regulations R480 of 29 April 2020 issued by

A the Minister of Cooperative Governance and Traditional Affairs in terms of section 27(2) of the Act pertaining to "refusal to work due to exposure to Covid-19" entails the directive on how the situation in question should have been handled.

B [90] The respondent was prohibited in terms of the directive to take disciplinary actions against the applicant. This is so especially given the applicant's fear of contracting CoVid-19. At the time the Covid-19 positive cases were very high and the applicant was using public transport. The taxi operator did not comply with the Covid-19 regulations in terms of the number of passengers. The applicant regarded the workplace as unsafe since an employee tested positive for Covid-19 at the workplace.

C

[91] Being nervous about the coronavirus would most likely be enough reason for an employee to be legally protected if he/she refuses to come back to work, unless there is legal justification or employer consent. The applicant's version in that he was given permission to stay at home was supported by two witnesses. No evidence was presented to indicate that the witnesses were not part of the meeting chaired by Mentz on 18 May 2020.

D

[92] The respondent's version in that the applicant was told that he should only take a day off was not substantiated by any tangible evidence. If indeed that was the case the applicant should have been charged for refusing to work. Nor was there a communiqué to the applicant during his absence wherein the company informed him of the alleged instruction by Mentz.

E

[93] I, therefore, find that respondent's actions were in contravention of the Disaster Management Act (57/2002): Direction by the Minister of Employment and Labour in terms of Regulation 4(10) of the Regulations R480 of 29 April 2020 issued by the Minister of Cooperative Governance and Traditional Affairs in terms of section 27(2) of the Act pertaining to "refusal to work due to exposure to Covid-19.

F

G [94] The respondent did not have sufficient grounds to dismiss the applicant, and dismissal was not an appropriate sanction.

[95] Having found that the applicant's dismissal was substantively unfair, I must determine the appropriate relief. The Labour Relations Act provides that the primary remedy for unfair dismissal is reinstatement, however the applicant indicated that he wished to be compensated.

H

[96] The applicant has worked for the respondent approximately two years and five months. He has not found alternative employment since his dismissal which resulted in a loss of income for six months. Taking into consideration the economic situation due to Covid-19 it may be difficult for him to find work. Having considered the applicant's personal circumstances and the circumstances surrounding his dismissal, I deem four months' compensation to be just and equitable. This amounts to R33 763,20 (Thirty Three Thousand, Seven Hundred, Sixty Three Rand and Twenty Cents). (R8 440,80 (monthly salary) x 4 (four months' compensation = R33 763,20).

I

J

Award

A

[97] I find that the dismissal of the applicant, Mogamat Tariq October, by the respondent, Teleperformance SA, was substantively and procedurally unfair.

[98] Therefore the respondent, Teleperformance SA, is ordered to pay the applicant, Mogamat Tariq October an amount of R33 763,20 (Thirty Three Thousand, Seven Hundred, Sixty Three Rand and twenty Cents) in respect of four months compensation. The amount must be paid to the applicant by no later than 31 December 2020, failing which the said amount shall bear interest from the date of this award to date of payment at the rate of interest prescribed in terms of the Prescribed Rate of Interest Act.

B

C

There were no cases referred to in the above award.

Arbitration Award

Case Number: ***GAEK14749-20***
Commissioner: ***Zinziswa Gumede***
Date of Award: ***16 April 2021***

In the **ARBITRATION** between

SACCAWU obo Mgcina, N.A
(Union/Applicant)

And

Seton Auto Leather (Pty) Ltd
(Respondent)

Union/Employee's representative: ***Mr May Malinga***
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Details of hearing and representation

1. This is an arbitration award in the matter between SACCAWU obo of Ntlantla Adophas Mgcina, the applicant, and Seton Auto Leather (Pty) Ltd, the respondent. The matter was set down for arbitration in terms of section 191(5)(a) of the Labour Relations Act 66 of 1995 (the LRA). The arbitration process took place on 17 November 2020 and was finalized on 7 April 2021 at the CCMA offices in Benoni. The proceedings were digitally recorded, and the recordings are filed with the CCMA.

2. The applicant was represented by Mr May Malinga, a union official from SACCAWU and the respondent was represented by Mr Mosiuwa Liphapang, the HR Manager for the respondent.

3. Both parties submitted bundles of documents, the applicant's bundle was marked "A" and the respondent's bundles were marked marked "R" and "R1".

4. The parties submitted written closing arguments and same were considered in this award.

Background to the dispute

5. Mr Mgcina was employed by the respondent on 19 September 2007, he held a position of a Line Feeder and earned a wage of R1 200.00 per week.

6. The applicant alleges that he was unfairly dismissed for misconduct on 20 July 2020. The allegations are that he refused to obey COVID-19 safety precautions and regulations by not wearing a mask when he was instructed to do so. The second allegation was that he put the lives of his fellow colleagues at risk by purposefully neglecting and disobeying safety rules and guidelines in line with COVID-19 regulations.

7. The applicant only disputes substantive fairness. His version is that he did not contravene any rule because he did not refuse to wear a mask, he pulled it a bit to speak and put it back when he was done talking. The applicant also challenges consistency in that a Manager by the name of Martin was caught on camera without a mask but was never disciplined.

Issue to be decided

8. I must decide whether the dismissal was substantively fair, if not, I must determine the appropriate relief.

Survey of evidence and closing arguments

9. All evidence was given under oath, below is the summary of evidence pertinent to the issues.

Respondent's evidence

10. Three witnesses were called by the respondent. The first witness was Mr Shon Kotze, the Head of Supply Chain. He testified that on 16 July 2020 the employees, including the applicant were gathered together to be addressed by the company nurse about Covid-19 related issues. They discovered that morning that someone had tested positive. All employees gathered as per department and they were about 10 people in a group. As they were being addressed by the company nurse, the applicant pulled his mask to his chin, Mr Kotze instructed him to put it back up about three times but the applicant refused. The applicant said he wanted to be heard. He said the applicant did put the mask back up after he finished speaking.

11. Mr Kotze said he was with the nurse, Radesh, Mr Liphapang and he was not sure if Sello, who is the Head of HR, was also present. He said the employees were standing around a three square meter table and they were not 1.5 meters apart. There was no adherence to social distancing, they did not address the issue of social distancing even though it is an offence and no employee was charged for it.

12. Mr Kotze testified that Martin is the gentlemen on the picture on page 53 of bundle "A", he is a Plant Manager. He did not wear his mask while addressing his team. Martin is still in the respondent's employ and Mr Kotze was not sure if he was disciplined.

13. The second witness was Mrs Sarah Matabane-Mabena the Professional Nurse for the respondent. She testified that on 16 July 2020 she was called to address the employees and re-assure them that the premises were disinfected after a Covid-19 case was discovered and explain the Covid-19 regulations to them. She said she did not go in and address the employees in the applicant's group because the applicant started talking alleging that management wanted to divide them while his mask was off. They (management) instructed the applicant to put the mask back on, the applicant refused and said they won't hear him and he suffocates when he speaks with the mask on. Mrs Matabane-Mabena said she did not see the applicant put the mask back on because she left the meeting before even addressing the employees.

14. She said she could not remember if Mr Kotze addressed the employees at any stage, she could not remember if the applicant did put the mask back on. She further stated that Mr Mazibuko said there was no adherence to social distancing and that the meeting could not proceed.

15. The last witness was Mr Sello Mazibuko, the Head of HR. He also testified that the applicant refused to put on his mask stating that he needed to talk. He also urged the applicant to put on his mask, however, he

refused. He said the employees were divided into small groups to avoid mass gatherings. He confirmed the picture of Martin not wearing a mask and stated that Martin did not refuse to put on his mask, he failed to put it on which is a different charge. Martin's matter was dealt with by the IR Specialist and he was issued with a final written warning. He said Martin did put the mask back on when he was asked to do so but he did not know who asked Martin to put the mask back on as he was not present at the time, neither was the IR Specialist. He was confronted with the fact that the final written warning presented had Christian Steinmann as the person who received the warning and he said that it is the same person but did not have proof to support that allegation. He said the inconsistency with the dates on the warning must have been an error.

16. Mr Liphapang argued in closing that the applicant refused to put his mask on and simply made an excuse for it. He knew the implication of not wearing a mask but still did not put it when instructed to do so. The applicant's offense is serious and he showed no remorse, therefore, dismissal was and is an appropriate sanction.

Applicant's evidence

17. The applicant testified that on 16 July 2020 he arrived at work and found his colleagues at the gate, he enquired as to the reason they stood at the gate they sad someone tested positive for Covid-19 and they were uncomfortable to go in and work because they did not know if the premises were disinfected and the person who tested positive was working in all stations.

18. The management team arrived at the gate and called them in for a meeting where they were standing around a table which was about 2 square meters big. He said the employees around that table were close to twenty if not more because there are eight stations there and each has four people. They could not adhere to social distancing because the space was small. One of the shop stewards was addressing management stating that the employees are not comfortable to work without proof that the premises were disinfected but management was not listening to him so he pulled his mask away from the mouth as he was desperate to be heard and there were noisy machines in there, he spoke and then placed it back. The applicant's version is that he did not refuse to put on his masks, he did put it back on.

19. The applicant said Martin addressed his juniors without wearing a mask as seen on the picture, he was not disciplined, the alleged warning should be rejected as evidence because it has another person's name. The applicant could not recall Mr Mazibuko saying they cannot address the employees in huge number and they must go back to their work stations. He said when he put the mask back the management team was still present and saw him.

20. The applicant called one witness by the name if Mr Miyedwa Mhlanga. Mr Mhlanga was amongst the employees who attended the meeting on 16 July 2020, he collaborated the applicant's evidence in all material aspects. That was the applicants case.

21. In closing Mr Malinga argued that I should find in the applicant's favour because he did not refuse to wear his mask, he delayed putting it up. He said the respondent is the one that put the employees' lives at risk by calling them to a meeting where they were in close proximity. Lastly he said if the respondent took this offence seriously they would have dismissed Martin and all the employees who were not adhering to social distancing.

Analysis of evidence

22. In terms of section 188 (1) of the LRA for a dismissal to be fair it needs to be for a fair reason and effected in accordance with a fair procedure. Section 192 of the LRA states that the respondent has the burden of proving the fairness of the applicant's dismissal. All evidence will be evaluated on the balance of probabilities.

23. It is common cause that at some stage the applicant pulled his mask down, he was asked to put it back up and he did after he had spoken in the meeting. I need to make a decision as to whether his conduct amounted to refusal to wear a mask and thereby putting the lives of fellow colleagues at risk.

24. The applicant and his witness were credible and reliable witnesses, there were no material contradictions in their evidence and I have no reason not to accept their evidence as probable.

25. The respondent's witnesses were not entirely consistent. Mr Kotze testified that the employees were being addressed by Mrs Matabane- Mabena when he saw the applicant with the mask on his chin and asked him to put it back on. However, Mrs Matabane-Mabena said she left before addressing the employees. Mr Kotze in counting the attendees was not even sure if Mr Mazibuko was present and said nothing about him addressing the employees and specifically urging the applicant to wear his mask. However, Mr Mazibuko said he addressed the employees first, then Mr Kotze spoke then the meeting was adjourned. Mr Kotze said they never addressed the fact that the employees were in close proximity to each other, but Mr Mazibuko said he did and that was the reason he adjourned the meeting. Mr Kotze conceded that the applicant did put the mask back up, Mrs Matabane-Mabena said she did not see if the applicant put the mask back on despite leaving the meeting with Mr Kotze. She said this after attempting to avoid the question numerous time. These are material contradictions which speak to the crux of the matter and cannot be ignored. I find their evidence not so reliable.

26. The documentary evidence on additional bundle "R1" is very questionable. The final written warning has Christian Steinmaan as the employee, despite the fact that the employee on the picture without a mask was identified as Martin by all parties. The alleged date of incident on that warning is 4 August 2020, however, the warning was signed on 6 July 2020. The said warning is only signed by the applicant, the spaces for the superior's and Industrial Relations personnel is left unsigned. This speaks to the validity of the alleged warning and therefore, I reject that document. Page 2 of the same document is the alleged comprehensive warning which is also questionable; it has Christian Steinmann at the top but it is addressed to Martin, there is insufficient evidence speaking to this inconsistency. Martin/Christian was not called to differentiate between his case and that of the applicant and confirm that it is indeed the same person, even though he still under the employ of the respondent. The IR official who allegedly dealt with his matter was also not called as a witness.

27. The respondent bears the onus to prove the fairness of the dismissal. Even though the applicant might have pulled down his mask, it was clearly for a very short period as it is common cause that he spoke and then put it back in its place. The meeting was only for a few minutes, and if so, the probability is that the applicant pulled down his mask for a few seconds as some other people addressed the meeting as well. I tend to agree with the applicant's representative that he delayed putting the mask where it is supposed to be but he did not refuse. None of the witnesses testified that the applicant blatantly refused to put up his mask, and we see that in him putting it back up after talking. He went to the meeting with the mask on and left with the mask on.

28. I am by no means condoning the applicant's conduct but I am prone to compare it with Martin's who is clearly seen on the picture comfortably addressing his juniors and got away with his conduct because they (junior employees) could not have instructed him to put back his mask. It is also probable that management was not happy with what the applicant was saying as opposed to the actual non-adherance to Covid 19 protocols. I am stating this because if these regulations were that important to the respondent the employees would not have been called to gather in a space where social distancing was not adhered to. Mr Mazibuko should have charged all the employees for the same offence as the applicant, because his own testimony is that he told the employees to adhere to social distancing and they refused that is the reason he left the meeting. The respondent's hands are not as clean as was portrayed.

29. I therefore find that the applicant did not contravene the rule, he did not refuse to wear his mask and he did not purposefully neglect and disobey safety rules and guidelines in line with Covid-19 regulations. The applicant's conduct was not worthy of a dismissal, it could have been dealt with progressively and constructively. The respondent did not apply its own rule consistently and therefore; the dismissal is substantively unfair.

30. The applicant requested retrospective reinstatement as a relief for the unfair dismissal. I have considered that the dismissal is substantively unfair and the fact that I found that the applicant did not contravene any rule, in fact the respondent was more in the wrong than the applicant. I have considered that the applicant was in the respondent's employ for almost thirteen years. The applicant is still unemployed, not only is he unemployed but he has not been receiving a salary for nine months. Taking into account the above I find it appropriate to re-instate the applicant, the said re-instatement is with retrospective effect and with back pay. Back pay will be calculated as follows: R1 200.00 x 4.33 = R5 196.00 (per month), R5 196.00 x 9 (August 2020 to April 2021) = R46 764.00.

Award

31. The dismissal of the applicant, Mr Ntlantla Adophas Mgcina by the respondent, Seton Auto Leather (Pty) Ltd was substantively unfair.

32. The respondent is ordered to re-instate applicant in its employ on terms and conditions no less favourable than those that governed the employment relationship immediately prior to his dismissal.

33. The reinstatement referred to in paragraph 32 is to operate retrospectively with effect from 20 July 2020.

34. The respondent is ordered to pay Mr Ntlantla Adophas Mgcina as back pay the amount of R46 764.00.

35. The back pay referred to in paragraph 34 must be paid to the applicant's bank account by no later than 15 May 2021.

36. The applicant, Mr Ntlantla Adophas Mgcina, is to tender his services to the respondent by no later than 1 May 2021.

Signature: _____

Commissioner: ***Zinziswa Gumede***
Sector: ***Business Industry***

The Constitution

OF THE REPUBLIC OF SOUTH AFRICA, 1996

As adopted on 8 May 1996 and amended
on 11 October 1996 by the Constitutional Assembly

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CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

(Manner of reference to the Act, previously "Constitution of the Republic of South Africa, Act 108 of 1996", substituted by s. 1 (1) of the Citation of Constitutional Laws, 2005 (Act No. 5 of 2005)
[Assented to 16 December 1996]

[DATE OF PROMULGATION: 18 DECEMBER, 1996]
[DATE OF COMMENCEMENT: 4 FEBRUARY, 1997]
(unless otherwise indicated - see also s. 243[5])
(English text signed by the President)

as amended by
Constitution First Amendment Act of 1997
Constitution Second Amendment Act of 1998
Constitution Third Amendment Act of 1998
Constitution Fourth Amendment Act of 1999
Constitution Fifth Amendment Act of 1999
Constitution Sixth Amendment Act of 2001
Constitution Seventh Amendment Act of 2001
Constitution Eighth Amendment Act of 2002
Constitution Ninth Amendment Act of 2002
Constitution Tenth Amendment Act of 2003
Constitution Eleventh Amendment Act of 2003
Constitution Twelfth Amendment Act of 2005
Constitution Thirteenth Amendment Act of 2007
Constitution Fourteenth Amendment Act of 2008
Constitution Fifteen Amendment Act of 2008
Constitution Sixteenth Amendment Act of 2009
Constitution Seventeenth Amendment Act of 2012

In terms of Proclamation No. 26 of 26 April, 2001, the administration of this Act has been assigned to the Minister for Justice and Constitutional Development.

ACT

To introduce a new Constitution for the Republic of South Africa and to provide for matters incidental thereto.

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PREAMBLE

We, the people of South Africa,
Recognise the injustices of our past;
Honour those who suffered for justice and freedom in our land;
Respect those who have worked to build and develop our country; and
Believe that South Africa belongs to all who live in it, united in our diversity.
We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to -

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

Improve the quality of life of all citizens and free the potential of each person; and

Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

May God protect our people.
Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso.
God seën Suid-Afrika. God bless South Africa.
Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika.

CHAPTER 1

FOUNDING PROVISIONS

Republic of South Africa

1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:
    (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
    (b) Non-racialism and non-sexism.
    (c) Supremacy of the constitution and the rule of law.
    (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

Supremacy of Constitution

2. This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

Citizenship

3. (1) There is a common South African citizenship.
    (2) All citizens are—
        (a) equally entitled to the rights, privileges and benefits of citizenship; and
        (b) equally subject to the duties and responsibilities of citizenship.
    (3) National legislation must provide for the acquisition, loss and restoration of citizenship.

National anthem

4. The national anthem of the Republic is determined by the President by proclamation.

National flag

5. The national flag of the Republic is black, gold, green, white, red and blue, as described and sketched in Schedule 1.

Languages

6. (1) The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.

(2) Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.

(3) (a) The national government and provincial governments may use any particular official languages for the purposes of government, taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned; but the national government and each provincial government must use at least two official languages.

(b) Municipalities must take into account the language usage and preferences of their residents.

(4) The national government and provincial governments, by legislative and other measures, must regulate and monitor their use of official languages. Without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably.

(5) A Pan South African Language Board established by national legislation must—

(a) promote, and create conditions for, the development and use of—

(i) all official languages;

(ii) the Khoi, Nama and San languages; and

(iii) sign language; and

(b) promote and ensure respect for—

(i) all languages commonly used by communities in South Africa, including German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu and Urdu; and

(ii) Arabic, Hebrew, Sanskrit and other languages used for religious purposes in South Africa.

CHAPTER 2
BILL OF RIGHTS

Rights

7. (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
   (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.
   (3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

Application

8. (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
   (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
   (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—
      (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
      (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).
   (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

Equality

9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
   (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed

to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Human dignity

10. Everyone has inherent dignity and the right to have their dignity respected and protected.

Life

11. Everyone has the right to life.

Freedom and security of the person

12. (1) Everyone has the right to freedom and security of the person, which includes the right—

(a) not to be deprived of freedom arbitrarily or without just cause;

(b) not to be detained without trial;

(c) to be free from all forms of violence from either public or private sources;

(d) not to be tortured in any way; and

(e) not to be treated or punished in a cruel, inhuman or degrading way.

(2) Everyone has the right to bodily and psychological integrity, which includes the right—

(a) to make decisions concerning reproduction;

(b) to security in and control over their body; and

(c) not to be subjected to medical or scientific experiments without their informed consent.

Slavery, servitude and forced labour

13. No one may be subjected to slavery, servitude or forced labour.

Privacy

14. Everyone has the right to privacy, which includes the right not to have—
    (a) their person or home searched;
    (b) their property searched;
    (c) their possessions seized; or
    (d) the privacy of their communications infringed.

Freedom of religion, belief and opinion

15. (1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
    (2) Religious observances may be conducted at state or state-aided institutions, provided that—
        (a) those observances follow rules made by the appropriate public authorities;
        (b) they are conducted on an equitable basis; and
        (c) attendance at them is free and voluntary.
    (3) (a) This section does not prevent legislation recognising—
            (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
            (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
        (b) Recognition in terms of paragraph *(a)* must be consistent with this section and the other provisions of the Constitution.

Freedom of expression

16. (1) Everyone has the right to freedom of expression, which includes—
        (a) freedom of the press and other media;
        (b) freedom to receive or impart information or ideas;
        (c) freedom of artistic creativity; and
        (d) academic freedom and freedom of scientific research.
    (2) The right in subsection (1) does not extend to—

(a) propaganda for war;
(b) incitement of imminent violence; or
(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

Assembly, demonstration, picket and petition

17. Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.

Freedom of association

18. Everyone has the right to freedom of association.

Political rights

19. (1) Every citizen is free to make political choices, which includes the right—
(a) to form a political party;
(b) to participate in the activities of, or recruit members for, a political party; and
(c) to campaign for a political party or cause.
(2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
(3) Every adult citizen has the right—
(a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
(b) to stand for public office and, if elected, to hold office.

Citizenship

20. No citizen may be deprived of citizenship.

Freedom of movement and residence

21. (1) Everyone has the right to freedom of movement.
(2) Everyone has the right to leave the Republic.
(3) Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic.
(4) Every citizen has the right to a passport.

Freedom of trade, occupation and profession

22. Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

Labour relations

23. (1) Everyone has the right to fair labour practices.

(2) Every worker has the right—

(a) to form and join a trade union;

(b) to participate in the activities and programmes of a trade union; and

(c) to strike.

(3) Every employer has the right—

(a) to form and join an employers' organisation; and

(b) to participate in the activities and programmes of an employers' organisation.

(4) Every trade union and every employers' organisation has the right—

(a) to determine its own administration, programmes and activities;

(b) to organise; and

(c) to form and join a federation.

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

(6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

Environment

24. Everyone has the right—

(a) to an environment that is not harmful to their health or wellbeing; and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

Property

25. (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application—

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—

(a) the current use of the property;

(b) the history of the acquisition and use of the property;

(c) the market value of the property;

(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(e) the purpose of the expropriation.

(4) For the purposes of this section—

(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and

(b) property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results

of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

(9) Parliament must enact the legislation referred to in subsection (6).

Housing

26. (1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

Health care, food, water and social security

27. (1) Everyone has the right to have access to—

(a) health care services, including reproductive health care;

(b) sufficient food and water; and

(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment.

Children

28. (1) Every child has the right—

(a) to a name and a nationality from birth;

(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;

(c) to basic nutrition, shelter, basic health care services and social services;

(d) to be protected from maltreatment, neglect, abuse or degradation;

(e) to be protected from exploitative labour practices;

(f) not to be required or permitted to perform work or provide services that—

(i) are inappropriate for a person of that child's age; or

(ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;

(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be—
  (i) kept separately from detained persons over the age of 18 years; and
  (ii) treated in a manner, and kept in conditions, that take account of the child's age;
(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
(i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section "child" means a person under the age of 18 years.

Education

29. (1) Everyone has the right—
(a) to a basic education, including adult basic education; and
(b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

(2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account—
(a) equity;
(b) practicability; and
(c) the need to redress the results of past racially discriminatory laws and practices.

(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that—
(a) do not discriminate on the basis of race;
(b) are registered with the state; and
(c) maintain standards that are not inferior to standards at comparable public educational institutions.

(4) Subsection (3) does not preclude state subsidies for independent educational institutions.

Language and culture

30. Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

Cultural, religious and linguistic communities

31. (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community—
(a) to enjoy their culture, practise their religion and use their language; and
(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

Access to information

32. (1) Everyone has the right of access to—
(a) any information held by the state; and
(b) any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

Just administrative action

33. (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must—

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
(c) promote an efficient administration.

Access to courts

34. Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

Arrested, detained and accused persons

35. (1) Everyone who is arrested for allegedly committing an offence has the right—
(a) to remain silent;
(b) to be informed promptly—
(i) of the right to remain silent; and
(ii) of the consequences of not remaining silent;
(c) not to be compelled to make any confession or admission that could be used in evidence against that person;
(d) to be brought before a court as soon as reasonably possible, but not later than—
(i) 48 hours after the arrest; or
(ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;
(e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and
(f) to be released from detention if the interests of justice permit, subject to reasonable conditions.
(2) Everyone who is detained, including every sentenced prisoner, has the right—
(a) to be informed promptly of the reason for being detained;
(b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;

(c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
(d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;
(e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and
(f) to communicate with, and be visited by, that person's—
(i) spouse or partner;
(ii) next of kin;
(iii) chosen religious counsellor; and
(iv) chosen medical practitioner.

(3) Every accused person has a right to a fair trial, which includes the right—
(a) to be informed of the charge with sufficient detail to answer it;
(b) to have adequate time and facilities to prepare a defence;
(c) to a public trial before an ordinary court;
(d) to have their trial begin and conclude without unreasonable delay;
(e) to be present when being tried;
(f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
(g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
(i) to adduce and challenge evidence;
(j) not to be compelled to give self-incriminating evidence;
(k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
(l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
(m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;

(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(o) of appeal to, or review by, a higher court.

(4) Whenever this section requires information to be given to a person, that information must be given in a language that the person understands.

(5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

Limitation of rights

36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

States of emergency

37. (1) A state of emergency may be declared only in terms of an Act of Parliament, and only when—

(a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and

(b) the declaration is necessary to restore peace and order.

(2) A declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, may be effective only—

(a) prospectively; and

(b) for no more than 21 days from the date of the declaration, unless the National Assembly resolves to extend the declaration. The Assembly may extend a declaration of a state of emergency for no more than three months at a time.

The first extension of the state of emergency must be by a resolution adopted with a supporting vote of a majority of the members of the Assembly. Any subsequent extension must be by a resolution adopted with a supporting vote of at least 60 per cent of the members of the Assembly. A resolution in terms of this paragraph may be adopted only following a public debate in the Assembly.

(3) Any competent court may decide on the validity of—
  (a) a declaration of a state of emergency;
  (b) any extension of a declaration of a state of emergency; or
  (c) any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.

(4) Any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that—
  (a) the derogation is strictly required by the emergency; and
  (b) the legislation—
    (i) is consistent with the Republic's obligations under international law applicable to states of emergency;
    (ii) conforms to subsection (5); and
    (iii) is published in the national Government Gazette as soon as reasonably possible after being enacted.

(5) No Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise—
  (a) indemnifying the state, or any person, in respect of any unlawful act;
  (b) any derogation from this section; or
  (c) any derogation from a section mentioned in column 1 of the Table of Non-Derogable Rights, to the extent indicated opposite that section in column 3 of the Table.

Table of Non-Derogable Rights

1 Section number	2 Section title	3 Extent to which the right is protected
9	Equality	With respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion or language.
10	Human Dignity	Entirely
11	Life	Entirely
12	Freedom and Security of the person	With respect to subsections (1)*(d)* and *(e)* and (2)*(c)*.
13	Slavery, servitude and forced labour	With respect to slavery and servitude
28	Children	With respect to: — subsection (1)*(d)* and *(e)*; — the rights in subparagraphs (i) and (ii) of subsection (1)*(g)*; and — subsection 1*(i)* in respect of children of 15 years and younger.
35	Arrested, detained and accused persons	With respect to: — subsections (1)*(a)*, *(b)* and *(c)* and (2)*(d)*; — the rights in paragraphs *(a)* to *(o)* of subsection (3), excluding paragraph *(d)* — subsection (4); and — subsection (5) with respect to the exclusion of evidence if the admission of that evidence would render the trial unfair.

(6) Whenever anyone is detained without trial in consequence of a derogation of rights resulting from a declaration of a state of emergency, the following conditions must be observed:

(a) An adult family member or friend of the detainee must be contacted as soon as reasonably possible, and informed that the person has been detained.
(b) A notice must be published in the national Government Gazette within five days of the person being detained, stating the detainee's name and place of detention and referring to the emergency measure in terms of which that person has been detained.
(c) The detainee must be allowed to choose, and be visited at any reasonable time by, a medical practitioner.
(d) The detainee must be allowed to choose, and be visited at any reasonable time by, a legal representative.
(e) A court must review the detention as soon as reasonably possible, but no later than 10 days after the date the person was detained, and the court must release the detainee unless it is necessary to continue the detention to restore peace and order.
(f) A detainee who is not released in terms of a review under paragraph (e), or who is not released in terms of a review under this paragraph, may apply to a court for a further review of the detention at any time after 10 days have passed since the previous review, and the court must release the detainee unless it is still necessary to continue the detention to restore peace and order.
(g) The detainee must be allowed to appear in person before any court considering the detention, to be represented by a legal practitioner at those hearings, and to make representations against continued detention.
(h) The state must present written reasons to the court to justify the continued detention of the detainee, and must give a copy of those reasons to the detainee at least two days before the court reviews the detention.

(7) If a court releases a detainee, that person may not be detained again on the same grounds unless the state first shows a court good cause for re-detaining that person.

(8) Subsections (6) and (7) do not apply to persons who are not South African citizens and who are detained in consequence of an international armed conflict. Instead, the state must comply with the standards binding on the Republic under international humanitarian law in respect of the detention of such persons.

Enforcement of rights

38. Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—

(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members.

Interpretation of Bill of Rights

39. (1) When interpreting the Bill of Rights, a court, tribunal or forum—

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
(b) must consider international law; and
(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

CHAPTER 3

CO-OPERATIVE GOVERNMENT

Government of the Republic

40. (1) In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.

(2) All spheres of government must observe and adhere to the principles in this Chapter and must conduct their activities within the parameters that the Chapter provides.

Principles of co-operative government and intergovernmental relations

41. (1) All spheres of government and all organs of state within each sphere must—

(a) preserve the peace, national unity and the indivisibility of the Republic;

(b) secure the well-being of the people of the Republic;

(c) provide effective, transparent, accountable and coherent government for the Republic as a whole;

(d) be loyal to the Constitution, the Republic and its people;

(e) respect the constitutional status, institutions, powers and functions of government in the other spheres;

(f) not assume any power or function except those conferred on them in terms of the Constitution;

(g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and

(h) co-operate with one another in mutual trust and good faith by—

(i) fostering friendly relations;

(ii) assisting and supporting one another;

(iii) informing one another of, and consulting one another on, matters of common interest;

(iv) co-ordinating their actions and legislation with one another;

(v) adhering to agreed procedures; and

(vi) avoiding legal proceedings against one another.

(2) An Act of Parliament must—
   (a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and
   (b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.

(3) An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.

(4) If a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved.

CHAPTER 4

PARLIAMENT

Composition of Parliament

42. (1) Parliament consists of—
    (a) the National Assembly; and
    (b) the National Council of Provinces.
    (2) The National Assembly and the National Council of Provinces participate in the legislative process in the manner set out in the Constitution.
    (3) The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.
    (4) The National Council of Provinces represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. It does this mainly by participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces.
    (5) The President may summon Parliament to an extraordinary sitting at any time to conduct special business.
    (6) The seat of Parliament is Cape Town, but an Act of Parliament enacted in accordance with section 76(1) and (5) may determine that the seat of Parliament is elsewhere.

Legislative authority of the Republic

43. In the Republic, the legislative authority—
    (a) of the national sphere of government is vested in Parliament, as set out in section 44;
    (b) of the provincial sphere of government is vested in the provincial legislatures, as set out in section 104; and
    (c) of the local sphere of government is vested in the Municipal Councils, as set out in section 156.

National legislative authority

44. (1) The national legislative authority as vested in Parliament—
    (a) confers on the National Assembly the power—
        (i) to amend the Constitution;
        (ii) to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5; and
        (iii) to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government; and
    (b) confers on the National Council of Provinces the power—
        (i) to participate in amending the Constitution in accordance with section 74;
        (ii) to pass, in accordance with section 76, legislation with regard to any matter within a functional area listed in Schedule 4 and any other matter required by the Constitution to be passed in accordance with section 76; and
        (iii) to consider, in accordance with section 75, any other legislation passed by the National Assembly.

    (2) Parliament may intervene, by passing legislation in accordance with section 76(1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary—
    (a) to maintain national security;
    (b) to maintain economic unity;
    (c) to maintain essential national standards;
    (d) to establish minimum standards required for the rendering of services; or
    (e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.

    (3) Legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4 is, for all purposes, legislation with regard to a matter listed in Schedule 4.

    (4) When exercising its legislative authority, Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution.

Joint rules and orders and joint committees

45. (1) The National Assembly and the National Council of Provinces must establish a joint rules committee to make rules and orders concerning the joint business of the Assembly and Council, including rules and orders—

(a) to determine procedures to facilitate the legislative process, including setting a time limit for completing any step in the process;

(b) to establish joint committees composed of representatives from both the Assembly and the Council to consider and report on Bills envisaged in sections 74 and 75 that are referred to such a committee;

(c) to establish a joint committee to review the Constitution at least annually; and

(d) to regulate the business of—

(i) the joint rules committee;

(ii) the Mediation Committee;

(iii) the constitutional review committee; and

(iv) any joint committees established in terms of paragraph (b).

(2) Cabinet members, members of the National Assembly and delegates to the National Council of Provinces have the same privileges and immunities before a joint committee of the Assembly and the Council as they have before the Assembly or the Council.

The National Assembly

Composition and election

46. (1) The National Assembly consists of no fewer than 350 and no more than 400 women and men elected as members in terms of an electoral system that—
    (a) is prescribed by national legislation;
    (b) is based on the national common voters roll;
    (c) provides for a minimum voting age of 18 years; and
    (d) results, in general, in proportional representation.
    (2) An Act of Parliament must provide a formula for determining the number of members of the National Assembly.

[Sub-s. (1) amended by s. 1 of the Constitution Tenth Amendment Act of 2003 and by s. 1 of the Constitution Fifteenth Amendment Act of 2008.]

Membership

47. (1) Every citizen who is qualified to vote for the National Assembly is eligible to be a member of the Assembly, except—
    (a) anyone who is appointed by, or is in the service of, the state and receives remuneration for that appointment or service, other than—
        (i) the President, Deputy President, Ministers and Deputy Ministers; and
        (ii) other office-bearers whose functions are compatible with the functions of a member of the Assembly, and have been declared compatible with those functions by national legislation;
    (b) permanent delegates to the National Council of Provinces or members of a provincial legislature or a Municipal Council;
    (c) unrehabilitated insolvents;
    (d) anyone declared to be of unsound mind by a court of the Republic; or
    (e) anyone who, after this section took effect, is convicted of an offence and sentenced to more than 12 months imprisonment without the option of a fine, either in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic, but no one may be regarded as having been sentenced until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired. A disqualification under this paragraph ends five years after the sentence has been completed.

(2) A person who is not eligible to be a member of the National Assembly in terms of subsection (1)(a) or (b) may be a candidate for the Assembly, subject to any limits or conditions established by national legislation.

(3) A person loses membership of the National Assembly if that person—

(a) ceases to be eligible; or

(b) is absent from the Assembly without permission in circumstances for which the rules and orders of the Assembly prescribe loss of membership; or

(c) ceases to be a member of the party that nominated that person as a member of the Assembly.

[Sub-s. (3) substituted by s. 2 of the Constitution Tenth Amendment Act of 2003 and by s. 2 of the Constitution Fifteenth Amendment Act of 2008.]

(4) Vacancies in the National Assembly must be filled in terms of national legislation.

Oath or affirmation

48. Before members of the National Assembly begin to perform their functions in the Assembly, they must swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

Duration of National Assembly

49. (1) The National Assembly is elected for a term of five years.

(2) If the National Assembly is dissolved in terms of section 50, or when its term expires, the President, by proclamation must call and set dates for an election, which must be held within 90 days of the date the Assembly was dissolved or its term expired. A proclamation calling and setting dates for an election may be issued before or after the expiry of the term of the National Assembly.

[Sub-s. (2) substituted by s. 1 of the Constitution Fifth Amendment Act of 1999.]

(3) If the result of an election of the National Assembly is not declared within the period established in terms of section 190, or if an election is set aside by a court, the President, by proclamation, must call and set dates for another election, which must be held within 90 days of the expiry of that period or of the date on which the election was set aside.

(4) The National Assembly remains competent to function from the time it is dissolved or its term expires, until the day before the first day of polling for the next Assembly.

Dissolution of National Assembly before expiry of its term

50. (1) The President must dissolve the National Assembly if—
(a) the Assembly has adopted a resolution to dissolve with a supporting vote of a majority of its members; and
(b) three years have passed since the Assembly was elected.
(2) The Acting President must dissolve the National Assembly if—
(a) there is a vacancy in the office of President; and
(b) the Assembly fails to elect a new President within 30 days after the vacancy occurred.

Sittings and recess periods

51. (1) After an election, the first sitting of the National Assembly must take place at a time and on a date determined by the Chief Justice, but not more than 14 days after the election result has been declared. The Assembly may determine the time and duration of its other sittings and its recess periods.

[Sub-s. (1) substituted by s. 1 of the Constitution Sixth Amendment Act of 2001.]

(2) The President may summon the National Assembly to an extraordinary sitting at any time to conduct special business.
(3) Sittings of the National Assembly are permitted at places other than the seat of Parliament only on the grounds of public interest, security or convenience, and if provided for in the rules and orders of the Assembly.

Speaker and Deputy Speaker

52. (1) At the first sitting after its election, or when necessary to fill a vacancy, the National Assembly must elect a Speaker and a Deputy Speaker from among its members.
(2) The Chief Justice must preside over the election of a Speaker, or designate another judge to do so. The Speaker presides over the election of a Deputy Speaker.

[Sub-s. (2) substituted by s. 2 of the Constitution Sixth Amendment Act of 2001.]

(3) The procedure set out in Part A of Schedule 3 applies to the election of the Speaker and the Deputy Speaker.
(4) The National Assembly may remove the Speaker or Deputy Speaker from office by resolution. A majority of the members of the Assembly must be present when the resolution is adopted.

(5) In terms of its rules and orders, the National Assembly may elect from among its members other presiding officers to assist the Speaker and the Deputy Speaker.

Decisions

53. (1) Except where the Constitution provides otherwise—
(a) a majority of the members of the National Assembly must be present before a vote may be taken on a Bill or an amendment to a Bill;
(b) at least one third of the members must be present before a vote may be taken on any other question before the Assembly; and
(c) all questions before the Assembly are decided by a majority of the votes cast.

(2) The member of the National Assembly presiding at a meeting of the Assembly has no deliberative vote, but—
(a) must cast a deciding vote when there is an equal number of votes on each side of a question; and
(b) may cast a deliberative vote when a question must be decided with a supporting vote of at least two thirds of the members of the Assembly.

Rights of certain Cabinet members and Deputy Ministers in the National Assembly

54. The President, and any member of the Cabinet or any Deputy Minister who is not a member of the National Assembly, may, subject to the rules and orders of the Assembly, attend and speak in the Assembly, but may not vote.

[S. 54 substituted by s. 3 of the Constitution Sixth Amendment Act of 2001.]

Powers of National Assembly

55. (1) In exercising its legislative power, the National Assembly may—
(a) consider, pass, amend or reject any legislation before the Assembly; and
(b) initiate or prepare legislation, except money Bills.

(2) The National Assembly must provide for mechanisms—
(a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and
(b) to maintain oversight of—

(i) the exercise of national executive authority, including the implementation of legislation; and
(ii) any organ of state.

Evidence or information before National Assembly

56. The National Assembly or any of its committees may—
(a) summon any person to appear before it to give evidence on oath or affirmation, or to produce documents;
(b) require any person or institution to report to it;
(c) compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph (a) or (b); and
(d) receive petitions, representations or submissions from any interested persons or institutions.

Internal arrangements, proceedings and procedures of National Assembly

57. (1) The National Assembly may—
(a) determine and control its internal arrangements, proceedings and procedures; and
(b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.
(2) The rules and orders of the National Assembly must provide for—
(a) the establishment, composition, powers, functions, procedures and duration of its committees;
(b) the participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy;
(c) financial and administrative assistance to each party represented in the Assembly in proportion to its representation, to enable the party and its leader to perform their functions in the Assembly effectively; and
(d) the recognition of the leader of the largest opposition party in the Assembly as the Leader of the Opposition.

Privilege

58. (1) Cabinet members, Deputy Ministers and members of the National Assembly—
    (a) have freedom of speech in the Assembly and in its committees, subject to its rules and orders; and
    (b) are not liable to civil or criminal proceedings, arrest, imprisonment or damages for—
        (i) anything that they have said in, produced before or submitted to the Assembly or any of its committees; or
        (ii) anything revealed as a result of anything that they have said in, produced before or submitted to the Assembly or any of its committees.

(2) Other privileges and immunities of the National Assembly, Cabinet members and members of the Assembly may be prescribed by national legislation.

(3) Salaries, allowances and benefits payable to members of the National Assembly are a direct charge against the National Revenue Fund.

[S. 58 amended by s. 4 of the Constitution Sixth Amendment Act of 2001.]

Public access to and involvement in National Assembly

59. (1) The National Assembly must—
    (a) facilitate public involvement in the legislative and other processes of the Assembly and its committees; and
    (b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken—
        (i) to regulate public access, including access of the media, to the Assembly and its committees; and
        (ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.

(2) The National Assembly may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.

National Council of Provinces

Composition of National Council

60. (1) The National Council of Provinces is composed of a single delegation from each province consisting of ten delegates.

(2) The ten delegates are—

(a) four special delegates consisting of—

(i) the Premier of the province or, if the Premier is not available, any member of the provincial legislature designated by the Premier either generally or for any specific business before the National Council of Provinces; and

(ii) three other special delegates; and

(b) six permanent delegates appointed in terms of section 61(2).

(3) The Premier of a province, or if the Premier is not available, a member of the province's delegation designated by the Premier, heads the delegation.

Allocation of delegates

61. (1) Parties represented in a provincial legislature are entitled to delegates in the province's delegation in accordance with the formula set out in Part B of Schedule 3.

(2) (a) A provincial legislature must, within 30 days after the result of an election of that legislature is declared—

(i) determine, in accordance with national legislation, how many of each party's delegates are to be permanent delegates and how many are to be special delegates; and

(ii) appoint the permanent delegates in accordance with the nominations of the parties.

(b) .....

[Para. (b) omitted by s. 1 of the Constitution Fourteenth Amendment Act of 2008.]

[Sub-s. (2) substituted by s. 1 of the Constitution Ninth Amendment Act of 2002 and by s. 1 of the Constitution Fourteenth Amendment Act of 2008.]

(3) The national legislation envisaged in subsection (2)*(a)* must ensure the participation of minority parties in both the permanent and special delegates' components of the delegation in a manner consistent with democracy.

(4) The legislature, with the concurrence of the Premier and the leaders of the parties entitled to special delegates in the province's delegation, must designate special delegates, as required from time to time, from among the members of the legislature.

Permanent delegates

62. (1) A person nominated as a permanent delegate must be eligible to be a member of the provincial legislature.

(2) If a person who is a member of a provincial legislature is appointed as a permanent delegate, that person ceases to be a member of the legislature.

(3) Permanent delegates are appointed for a term that expires—

(a) immediately before the first sitting of the provincial legislature after its next election..

(b) . . . . . .

[Para. (b) omitted by s. 2 of the Constitution Fourteenth Amendment Act of 2008.]

[Sub-s. (3) substituted by s. 2 of the Constitution Ninth Amendment Act of 2002 and substituted by s. 2 of the Constitution Fourteenth Amendment Act of 2008.]

(4) A person ceases to be a permanent delegate if that person—

(a) ceases to be eligible to be a member of the provincial legislature for any reason other than being appointed as a permanent delegate;

(b) becomes a member of the Cabinet;

(c) has lost the confidence of the provincial legislature and is recalled by the party that nominated that person;

(d) ceases to be a member of the party that nominated that person and is recalled by that party; or

(e) is absent from the National Council of Provinces without permission in circumstances for which the rules and orders of the Council prescribe loss of office as a permanent delegate.

(5) Vacancies among the permanent delegates must be filled in terms of national legislation.

(6) Before permanent delegates begin to perform their functions in the National Council of Provinces, they must swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

Sittings of National Council

63. (1) The National Council of Provinces may determine the time and duration of its sittings and its recess periods.

(2) The President may summon the National Council of Provinces to an extraordinary sitting at any time to conduct special business.

(3) Sittings of the National Council of Provinces are permitted at places other than the seat of Parliament only on the grounds of public interest, security or convenience, and if provided for in the rules and orders of the Council.

Chairperson and Deputy Chairpersons

64. (1) The National Council of Provinces must elect a Chairperson and two Deputy Chairpersons from among the delegates.

(2) The Chairperson and one of the Deputy Chairpersons are elected from among the permanent delegates for five years unless their terms as delegates expire earlier.

(3) The other Deputy Chairperson is elected for a term of one year, and must be succeeded by a delegate from another province, so that every province is represented in turn.

(4) The Chief Justice must preside over the election of the Chairperson, or designate another judge to do so. The Chairperson presides over the election of the Deputy Chairpersons.

[Sub-s. (4) substituted by s. 5 of the Constitution Sixth Amendment Act of 2001.]

(5) The procedure set out in Part A of Schedule 3 applies to the election of the Chairperson and the Deputy Chairpersons.

(6) The National Council of Provinces may remove the Chairperson or a Deputy Chairperson from office.

(7) In terms of its rules and orders, the National Council of Provinces may elect from among the delegates other presiding officers to assist the Chairperson and Deputy Chairpersons.

Decisions

65. (1) Except where the Constitution provides otherwise—

(a) each province has one vote, which is cast on behalf of the province by the head of its delegation; and

(b) all questions before the National Council of Provinces are agreed when at least five provinces vote in favour of the question.

(2) An Act of Parliament, enacted in accordance with the procedure established by either subsection (1) or subsection (2) of section 76, must provide for a uniform procedure in terms of which provincial legislatures confer authority on their delegations to cast votes on their behalf.

Participation by members of national executive

66. (1) Cabinet members and Deputy Ministers may attend, and may speak in, the National Council of Provinces, but may not vote.

(2) The National Council of Provinces may require a Cabinet member, a Deputy Minister or an official in the national executive or a provincial executive to attend a meeting of the Council or a committee of the Council.

Participation by local government representatives

67. Not more than ten part-time representatives designated by organised local government in terms of section 163, to represent the different categories of municipalities, may participate when necessary in the proceedings of the National Council of Provinces, but may not vote.

Powers of National Council

68. In exercising its legislative power, the National Council of Provinces may—

(a) consider, pass, amend, propose amendments to or reject any legislation before the Council, in accordance with this Chapter; and

(b) initiate or prepare legislation falling within a functional area listed in Schedule 4 or other legislation referred to in section 76(3), but may not initiate or prepare money Bills.

Evidence or information before National Council

69. The National Council of Provinces or any of its committees may—

(a) summon any person to appear before it to give evidence on oath or affirmation or to produce documents;

(b) require any institution or person to report to it;

(c) compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph (a) or (b); and
(d) receive petitions, representations or submissions from any interested persons or institutions.

Internal arrangements, proceedings and procedures of National Council

70. (1) The National Council of Provinces may—
(a) determine and control its internal arrangements, proceedings and procedures; and
(b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.
(2) The rules and orders of the National Council of Provinces must provide for—
(a) the establishment, composition, powers, functions, procedures and duration of its committees;
(b) the participation of all the provinces in its proceedings in a manner consistent with democracy; and
(c) the participation in the proceedings of the Council and its committees of minority parties represented in the Council, in a manner consistent with democracy, whenever a matter is to be decided in accordance with section 75.

Privilege

71. (1) Delegates to the National Council of Provinces and the persons referred to in sections 66 and 67—
(a) have freedom of speech in the Council and in its committees, subject to its rules and orders; and
(b) are not liable to civil or criminal proceedings, arrest, imprisonment or damages for—
(i) anything that they have said in, produced before or submitted to the Council or any of its committees; or
(ii) anything revealed as a result of anything that they have said in, produced before or submitted to the Council or any of its committees.

(2) Other privileges and immunities of the National Council of Provinces, delegates to the Council and persons referred to in sections 66 and 67 may be prescribed by national legislation.

(3) Salaries, allowances and benefits payable to permanent members of the National Council of Provinces are a direct charge against the National Revenue Fund.

Public access to and involvement in National Council

72. (1) The National Council of Provinces must—

(a) facilitate public involvement in the legislative and other processes of the Council and its committees; and

(b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken—

(i) to regulate public access, including access of the media, to the Council and its committees; and

(ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.

(2) The National Council of Provinces may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.

National Legislative Process

All Bills

73. (1) Any Bill may be introduced in the National Assembly.

(2) Only a Cabinet member or a Deputy Minister, or a member or committee of the National Assembly, may introduce a Bill in the Assembly, but only the Cabinet member responsible for national financial matters may introduce the following Bills in the Assembly:

(a) a money Bill; or

(b) a Bill which provides for legislation envisaged in section 214.

[Sub-s. (2) substituted by s. 1(a) of the Constitution Seventh Amendment Act of 2001.]

(3) A Bill referred to in section 76(3), except a Bill referred to in subsection (2)(a) or (b) of this section, may be introduced in the National Council of Provinces.

[Sub-s. (3) substituted by s. 1(b) of the Constitution Seventh Amendment Act of 2001.]

(4) Only a member or committee of the National Council of Provinces may introduce a Bill in the Council.

(5) A Bill passed by the National Assembly must be referred to the National Council of Provinces if it must be considered by the Council. A Bill passed by the Council must be referred to the Assembly.

Bills amending the Constitution

74. (1) Section 1 and this subsection may be amended by a Bill passed by—
   (a) the National Assembly, with a supporting vote of at least 75 per cent of its members; and
   (b) the National Council of Provinces, with a supporting vote of at least six provinces.

(2) Chapter 2 may be amended by a Bill passed by—
   (a) the National Assembly, with a supporting vote of at least two thirds of its members; and
   (b) the National Council of Provinces, with a supporting vote of at least six provinces.

(3) Any other provision of the Constitution may be amended by a Bill passed—
   (a) by the National Assembly, with a supporting vote of at least two thirds of its members; and
   (b) also by the National Council of Provinces, with a supporting vote of at least six provinces, if the amendment—
      (i) relates to a matter that affects the Council;
      (ii) alters provincial boundaries, powers, functions or institutions; or
      (iii) amends a provision that deals specifically with a provincial matter.

(4) A Bill amending the Constitution may not include provisions other than constitutional amendments and matters connected with the amendments.

(5) At least 30 days before a Bill amending the Constitution is introduced in terms of section 73(2), the person or committee intending to introduce the Bill must—
   (a) publish in the national Government Gazette, and in accordance with the rules and orders of the National Assembly, particulars of the proposed amendment for public comment;
   (b) submit, in accordance with the rules and orders of the Assembly, those particulars to the provincial legislatures for their views; and

(c) submit, in accordance with the rules and orders of the National Council of Provinces, those particulars to the Council for a public debate, if the proposed amendment is not an amendment that is required to be passed by the Council.

(6) When a Bill amending the Constitution is introduced, the person or committee introducing the Bill must submit any written comments received from the public and the provincial legislatures—
(a) to the Speaker for tabling in the National Assembly; and
(b) in respect of amendments referred to in subsection (1), (2) or (3)(b), to the Chairperson of the National Council of Provinces for tabling in the Council.

(7) A Bill amending the Constitution may not be put to the vote in the National Assembly within 30 days of—
(a) its introduction, if the Assembly is sitting when the Bill is introduced; or
(b) its tabling in the Assembly, if the Assembly is in recess when the Bill is introduced.

(8) If a Bill referred to in subsection (3)(b), or any part of the Bill, concerns only a specific province or provinces, the National Council of Provinces may not pass the Bill or the relevant part unless it has been approved by the legislature or legislatures of the province or provinces concerned.

(9) A Bill amending the Constitution that has been passed by the National Assembly and, where applicable, by the National Council of Provinces, must be referred to the President for assent.

Ordinary Bills not affecting provinces

75. (1) When the National Assembly passes a Bill other than a Bill to which the procedure set out in section 74 or 76 applies, the Bill must be referred to the National Council of Provinces and dealt with in accordance with the following procedure:
(a) The Council must—
(i) pass the Bill;
(ii) pass the Bill subject to amendments proposed by it; or
(iii) reject the Bill.
(b) If the Council passes the Bill without proposing amendments, the Bill must be submitted to the President for assent.

(c) If the Council rejects the Bill or passes it subject to amendments, the Assembly must reconsider the Bill, taking into account any amendment proposed by the Council, and may—
  (i) pass the Bill again, either with or without amendments; or
  (ii) decide not to proceed with the Bill.
(d) A Bill passed by the Assembly in terms of paragraph (c) must be submitted to the President for assent.

(2) When the National Council of Provinces votes on a question in terms of this section, section 65 does not apply; instead—
(a) each delegate in a provincial delegation has one vote;
(b) at least one third of the delegates must be present before a vote may be taken on the question; and
(c) the question is decided by a majority of the votes cast, but if there is an equal number of votes on each side of the question, the delegate presiding must cast a deciding vote.

Ordinary Bills affecting provinces

76. (1) When the National Assembly passes a Bill referred to in subsection (3), (4) or (5), the Bill must be referred to the National Council of Provinces and dealt with in accordance with the following procedure:
(a) The Council must—
  (i) pass the Bill;
  (ii) pass an amended Bill; or
  (iii) reject the Bill.
(b) If the Council passes the Bill without amendment, the Bill must be submitted to the President for assent.
(c) If the Council passes an amended Bill, the amended Bill must be referred to the Assembly, and if the Assembly passes the amended Bill, it must be submitted to the President for assent.
(d) If the Council rejects the Bill, or if the Assembly refuses to pass an amended Bill referred to it in terms of paragraph (c), the Bill and, where applicable, also the amended Bill, must be referred to the Mediation Committee, which may agree on—

(i) the Bill as passed by the Assembly;
(ii) the amended Bill as passed by the Council; or
(iii) another version of the Bill.

(e) If the Mediation Committee is unable to agree within 30 days of the Bill's referral to it, the Bill lapses unless the Assembly again passes the Bill, but with a supporting vote of at least two thirds of its members.

(f) If the Mediation Committee agrees on the Bill as passed by the Assembly, the Bill must be referred to the Council, and if passes the Bill, the Bill must be submitted to the President for assent.

(g) If the Mediation Committee agrees on the amended Bill as passed by the Council, the Bill must be referred to the Assembly, and if it is passed by the Assembly, it must be submitted to the President for assent.

(h) If the Mediation Committee agrees on another version of the Bill, that version of the Bill must be referred to both the Assembly and the Council, and if it is passed by the Assembly and the Council, it must be submitted to the President for assent.

(i) If a Bill referred to the Council in terms of paragraph (f) or (h) is not passed by the Council, the Bill lapses unless the Assembly passes the Bill with a supporting vote of at least two thirds of its members.

(j) If a Bill referred to the Assembly in terms of paragraph (g) or (h) is not passed by the Assembly, that Bill lapses, but the Bill as originally passed by the Assembly may again be passed by the Assembly, but with a supporting vote of at least two thirds of its members.

(k) A Bill passed by the Assembly in terms of paragraph (e), (i) or (j) must be submitted to the President for assent.

(2) When the National Council of Provinces passes a Bill referred to in subsection (3), the Bill must be referred to the National Assembly and dealt with in accordance with the following procedure:

(a) The Assembly must—
(i) pass the Bill;
(ii) pass an amended Bill; or
(iii) reject the Bill.

(b) A Bill passed by the Assembly in terms of paragraph (a)(i) must be submitted to the President for assent.

(c) If the Assembly passes an amended Bill, the amended Bill must be referred to the Council, and if the Council passes the amended Bill, it must be submitted to the President for assent.

(d) If the Assembly rejects the Bill, or if the Council refuses to pass an amended Bill referred to it in terms of paragraph (c), the Bill and, where applicable, also the amended Bill must be referred to the Mediation Committee, which may agree on—

(i) the Bill as passed by the Council;

(ii) the amended Bill as passed by the Assembly; or

(iii) another version of the Bill.

(e) If the Mediation Committee is unable to agree within 30 days of the Bill's referral to it, the Bill lapses.

(f) If the Mediation Committee agrees on the Bill as passed by the Council, the Bill must be referred to the Assembly, and if the Assembly passes the Bill, the Bill must be submitted to the President for assent.

(g) If the Mediation Committee agrees on the amended Bill as passed by the Assembly, the Bill must be referred to the Council, and if it is passed by the Council, it must be submitted to the President for assent.

(h) If the Mediation Committee agrees on another version of the Bill, that version of the Bill must be referred to both the Council and the Assembly, and if it is passed by the Council and the Assembly, it must be submitted to the President for assent.

(i) If a Bill referred to the Assembly in terms of paragraph (f) or (h) is not passed by the Assembly, the Bill lapses.

(3) A Bill must be dealt with in accordance with the procedure established by either subsection (1) or subsection (2) if it falls within a functional area listed in Schedule 4 or provides for legislation envisaged in any of the following sections:

(a) Section 65(2);

(b) section 163;

(c) section 182;

(d) section 195(3) and (4);

(e) section 196; and

(f) section 197.

(4) A Bill must be dealt with in accordance with the procedure established by subsection (1) if it provides for legislation—
  (a) envisaged in section 44(2) or 220(3); or
  (b) envisaged in Chapter 13, and which includes any provision affecting the financial interests of the provincial sphere of government.

[Para. (b) substituted by s. 1 of the Constitution Eleventh Amendment Act of 2003.]

(5) A Bill envisaged in section 42(6) must be dealt with in accordance with the procedure established by subsection (1), except that—
  (a) when the National Assembly votes on the Bill, the provisions of section 53(1) do not apply; instead, the Bill may be passed only if a majority of the members of the Assembly vote in favour of it; and
  (b) if the Bill is referred to the Mediation Committee, the following rules apply:
    (i) If the National Assembly considers a Bill envisaged in subsection (1)(g) or (h), that Bill may be passed only if a majority of the members of the Assembly vote in favour of it.
    (ii) If the National Assembly considers or reconsiders a Bill envisaged in subsection (1)(e), (i) or (j), that Bill may be passed only if at least two thirds of the members of the Assembly vote in favour of it.

(6) This section does not apply to money Bills.

Money Bills

77. (1) A Bill is a money Bill if it—
  (a) appropriates money;
  (b) imposes national taxes, levies, duties or surcharges;
  (c) abolishes or reduces, or grants exemptions from, any national taxes, levies, duties or surcharges; or
  (d) authorises direct charges against the National Revenue Fund, except a Bill envisaged in section 214 authorising direct charges.

(2) A money Bill may not deal with any other matter except—
  (a) a subordinate matter incidental to the appropriation of money;
  (b) the imposition, abolition or reduction of national taxes, levies, duties or surcharges;
  (c) the granting of exemption from national taxes, levies, duties or surcharges; or
  (d) the authorisation of direct charges against the National Revenue Fund.

(3) All money Bills must be considered in accordance with the procedure established by section 75. An Act of Parliament must provide for a procedure to amend money Bills before Parliament.

[S. 77 substituted by s. 2 of the Constitution Seventh Amendment Act 2001.]

Mediation Committee

78. (1) The Mediation Committee consists of—

(a) nine members of the National Assembly elected by the Assembly in accordance with a procedure that is prescribed by the rules and orders of the Assembly and results in the representation of parties in substantially the same proportion that the parties are represented in the Assembly; and

(b) one delegate from each provincial delegation in the National Council of Provinces, designated by the delegation.

(2) The Mediation Committee has agreed on a version of a Bill, or decided a question, when that version, or one side of the question, is supported by—

(a) at least five of the representatives of the National Assembly; and

(b) at least five of the representatives of the National Council of Provinces.

Assent to Bills

79. (1) The President must either assent to and sign a Bill passed in terms of this Chapter or, if the President has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration.

(2) The joint rules and orders must provide for the procedure for the reconsideration of a Bill by the National Assembly and the participation of the National Council of Provinces in the process.

(3) The National Council of Provinces must participate in the reconsideration of a Bill that the President has referred back to the National Assembly if—

(a) the President's reservations about the constitutionality of the Bill relate to a procedural matter that involves the Council; or

(b) section 74(1), (2) or (3)(b) or 76 was applicable in the passing of the Bill.

(4) If, after reconsideration, a Bill fully accommodates the President's reservations, the President must assent to and sign the Bill; if not, the President must either—

(a) assent to and sign the Bill; or
(b) refer it to the Constitutional Court for a decision on its constitutionality.

(5) If the Constitutional Court decides that the Bill is constitutional, the President must assent to and sign it.

Application by members of National Assembly to Constitutional Court

80. (1) Members of the National Assembly may apply to the Constitutional Court for an order declaring that all or part of an Act of Parliament is unconstitutional.

(2) An application—
(a) must be supported by at least one third of the members of the National Assembly; and
(b) must be made within 30 days of the date on which the President assented to and signed the Act.

(3) The Constitutional Court may order that all or part of an Act that is the subject of an application in terms of subsection (1) has no force until the Court has decided the application if—
(a) the interests of justice require this; and
(b) the application has a reasonable prospect of success.

(4) If an application is unsuccessful, and did not have a reasonable prospect of success, the Constitutional Court may order the applicants to pay costs.

Publication of Acts

81. A Bill assented to and signed by the President becomes an Act of Parliament, must be published promptly, and takes effect when published or on a date determined in terms of the Act.

Safekeeping of Acts of Parliament

82. The signed copy of an Act of Parliament is conclusive evidence of the provisions of that Act and, after publication, must be entrusted to the Constitutional Court for safekeeping.

CHAPTER 5

THE PRESIDENT AND NATIONAL EXECUTIVE

The President

83. The President—

(a) is the Head of State and head of the national executive;

(b) must uphold, defend and respect the Constitution as the supreme law of the Republic; and

(c) promotes the unity of the nation and that which will advance the Republic.

Powers and functions of President

84. (1) The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive.

(2) The President is responsible for—

(a) assenting to and signing Bills;

(b) referring a Bill back to the National Assembly for reconsideration of the Bill's constitutionality;

(c) referring a Bill to the Constitutional Court for a decision on the Bill's constitutionality;

(d) summoning the National Assembly, the National Council of Provinces or Parliament to an extraordinary sitting to conduct special business;

(e) making any appointments that the Constitution or legislation requires the President to make, other than as head of the national executive;

(f) appointing commissions of inquiry;

(g) calling a national referendum in terms of an Act of Parliament;

(h) receiving and recognising foreign diplomatic and consular representatives;

(i) appointing ambassadors, plenipotentiaries, and diplomatic and consular representatives;

(j) pardoning or reprieving offenders and remitting any fines, penalties or forfeitures; and

(k) conferring honours.

[General Note: Honourable tributes instituted in Government Gazette 24155 of 6 December, 2002 and Government Gazette 25213 of 25 July, 2003.]

Executive authority of the Republic

85. (1) The executive authority of the Republic is vested in the President.

(2) The President exercises the executive authority, together with the other members of the Cabinet, by—

(a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;

(b) developing and implementing national policy;

(c) co-ordinating the functions of state departments and administrations;

(d) preparing and initiating legislation; and

(e) performing any other executive function provided for in the Constitution or in national legislation.

Election of President

86. (1) At its first sitting after its election, and whenever necessary to fill a vacancy, the National Assembly must elect a woman or a man from among its members to be the President.

(2) The Chief Justice must preside over the election of the President, or designate another judge to do so. The procedure set out in Part A of Schedule 3 applies to the election of the President.

[Sub-s. (2) substituted by s. 6 of the Constitution Sixth Amendment Act of 2001.]

(3) An election to fill a vacancy in the office of President must be held at a time and on a date determined by the Chief Justice, but not more than 30 days after the vacancy occurs.

[Sub-s. (3) substituted by s. 6 of the Constitution Sixth Amendment Act of 2001.]

Assumption of office by President

87. When elected President, a person ceases to be a member of the National Assembly and, within five days, must assume office by swearing or affirming faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

Term of office of President

88. (1) The President's term of office begins on assuming office and ends upon a vacancy occurring or when the person next elected President assumes office.

(2) No person may hold office as President for more than two terms, but when a person is elected to fill a vacancy in the office of President, the period between that election and the next election of a President is not regarded as a term.

Removal of President

89. (1) The National Assembly, by a resolution adopted with a supporting vote of at least two thirds of its members, may remove the President from office only on the grounds of—
(a) a serious violation of the Constitution or the law;
(b) serious misconduct; or
(c) inability to perform the functions of office.

(2) Anyone who has been removed from the office of President in terms of subsection (1)(a) or (b) may not receive any benefits of that office, and may not serve in any public office.

Acting President

90. (1) When the President is absent from the Republic or otherwise unable to fulfil the duties of President, or during a vacancy in the office of President, an office-bearer in the order below acts as President:
(a) The Deputy President.
(b) A Minister designated by the President.
(c) A Minister designated by the other members of the Cabinet.
(d) The Speaker, until the National Assembly designates one of its other members.

(2) An Acting President has the responsibilities, powers and functions of the President.

(3) Before assuming the responsibilities, powers and functions of the President, the Acting President must swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

(4) A person who as Acting President has sworn or affirmed faithfulness to the Republic need not repeat the swearing or affirming procedure for any subsequent term as Acting President during the period ending when the person next elected President assumes office.

[Sub-s. (4) added by s. 1 of the Constitution First Amendment Act of 1997]

Cabinet

91. (1) The Cabinet consists of the President, as head of the Cabinet, a Deputy President and Ministers.

(2) The President appoints the Deputy President and Ministers, assigns their powers and functions, and may dismiss them.

(3) The President—

(a) must select the Deputy President from among the members of the National Assembly;

(b) may select any number of Ministers from among the members of the Assembly; and

(c) may select no more than two Ministers from outside the Assembly.

(4) The President must appoint a member of the Cabinet to be the leader of government business in the National Assembly.

(5) The Deputy President must assist the President in the execution of the functions of government.

Accountability and responsibilities

92. (1) The Deputy President and Ministers are responsible for the powers and functions of the executive assigned to them by the President.

(2) Members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.

(3) Members of the Cabinet must—

(a) act in accordance with the Constitution; and

(b) provide Parliament with full and regular reports concerning matters under their control.

Deputy Ministers

93. (1) The President may appoint—

(a) any number of Deputy Ministers from among the members of the National Assembly; and

(b) no more than two Deputy Ministers from outside the Assembly, to assist the members of the Cabinet, and may dismiss them.

(2) Deputy Ministers appointed in terms of subsection (1)*(b)* are accountable to Parliament for the exercise of their powers and the performance of their functions.

[S. 93 substituted by s. 7 of the Constitution Sixth Amendment Act of 2001.]

Continuation of Cabinet after elections

94. When an election of the National Assembly is held, the Cabinet, the Deputy President, Ministers and any Deputy Ministers remain competent to function until the person elected President by the next Assembly assumes office.

Oath or affirmation

95. Before the Deputy President, Ministers and any Deputy Ministers begin to perform their functions, they must swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

Conduct of Cabinet members and Deputy Ministers

96. (1) Members of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation.

(2) Members of the Cabinet and Deputy Ministers may not—

(a) undertake any other paid work;

(b) act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or

(c) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.

Transfer of functions

97. The President by proclamation may transfer to a member of the Cabinet—

(a) the administration of any legislation entrusted to another member; or

(b) any power or function entrusted by legislation to another member.

Temporary assignment of functions

98. The President may assign to a Cabinet member any power or function of another member who is absent from office or is unable to exercise that power or perform that function.

Assignment of functions

99. A Cabinet member may assign any power or function that is to be exercised or performed in terms of an Act of Parliament to a member of a provincial Executive Council or to a Municipal Council. An assignment—

(a) must be in terms of an agreement between the relevant Cabinet member and the Executive Council member or Municipal Council;
(b) must be consistent with the Act of Parliament in terms of which the relevant power or function is exercised or performed; and
(c) takes effect upon proclamation by the President.

National intervention in provincial administration

[Heading amended by s. 2(a) the Constitution Eleventh Amendment Act of 2003.]

100. (1) When a province cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the national executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including—
(a) issuing a directive to the provincial executive, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations; and
(b) assuming responsibility for the relevant obligation in that province to the extent necessary to—
(i) maintain essential national standards or meet established minimum standards for the rendering of a service;
(ii) maintain economic unity;
(iii) maintain national security; or
(iv) prevent that province from taking unreasonable action that is prejudicial to the interests of another province or to the country as a whole.

[Sub-s. (1) amended by s. 2(b) of the Constitution Eleventh Amendment Act of 2003.]

(2) If the national executive intervenes in a province in terms of subsection (1)(b)—
(a) it must submit a written notice of the intervention to the National Council of Provinces within 14 days after the intervention began;
(b) the intervention must end if the Council disapproves the intervention within 180 days after the intervention began or by the end of that period has not approved the intervention; and
(c) the Council must, while the intervention continues, review the intervention regularly and may make any appropriate recommendations to the national executive.

[Sub-s. (2) substituted by s. 2(c) of the Constitution Eleventh Amendment Act of 2003.]

(3) National legislation may regulate the process established by this section.

[S. 100 amended by s. 2 of the Constitution Eleventh Amendment Act of 2003.]

Executive decisions

101. (1) A decision by the President must be in writing if it—
(a) is taken in terms of legislation; or
(b) has legal consequences.

(2) A written decision by the President must be countersigned by another Cabinet member if that decision concerns a function assigned to that other Cabinet member.

(3) Proclamations, regulations and other instruments of subordinate legislation must be accessible to the public.

(4) National legislation may specify the manner in which, and the extent to which, instruments mentioned in subsection (3) must be—
(a) tabled in Parliament; and
(b) approved by Parliament.

Motions of no confidence

102. (1) If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the Cabinet excluding the President, the President must reconstitute the Cabinet.

(2) If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the President, the President and the other members of the Cabinet and any Deputy Ministers must resign.

CHAPTER 6

PROVINCES

Provinces

103. (1) The Republic has the following provinces:

(a) Eastern Cape;
(b) Free State;
(c) Gauteng;
(d) KwaZulu-Natal;
(e) Limpopo;
(f) Mpumalanga;
(g) Northern Cape;
(h) North West;
(i) Western Cape.

[Sub-s. (1) substituted by s. 3 of the Constitution Eleventh Amendment Act of 2003 and substituted by s. 1 of the Constitution Twelfth Amendment Act of 2005]

(2) The geographical areas of the respective provinces comprise the sum of the indicated geographical areas reflected in the various maps referred to in the Notice listed in Schedule 1A.

[Sub-s. (2) substituted by s. 1 of the Constitution Twelfth Amendment Act of 2005.]

(3) (a) Whenever the geographical area of a province is re-determined by an amendment to the Constitution, an Act of Parliament may provide for measures to regulate, within a reasonable time, the legal, practical and any other consequences of the re-determination.

(b) An Act of Parliament envisaged in paragraph (a) may be enacted and implemented before such amendment to the Constitution takes effect, but any provincial functions, assets, rights, obligations, duties or liabilities may only be transferred in terms of that Act after that amendment to the Constitution takes effect.

[S.103 substituted by s. 1 of the Constitution Twelfth Amendment Act of 2005.]

Provincial Legislatures

Legislative authority of provinces

104. (1) The legislative authority of a province is vested in its provincial legislature, and confers on the provincial legislature the power—
   (a) to pass a constitution for its province or to amend any constitution passed by it in terms of sections 142 and 143;
   (b) to pass legislation for its province with regard to—
      (i) any matter within a functional area listed in Schedule 4;
      (ii) any matter within a functional area listed in Schedule 5;
      (iii) any matter outside those functional areas, and that is expressly assigned to the province by national legislation; and
      (iv) any matter for which a provision of the Constitution envisages the enactment of provincial legislation; and
   (c) to assign any of its legislative powers to a Municipal Council in that province.

(2) The legislature of a province, by a resolution adopted with a supporting vote of at least two thirds of its members, may request Parliament to change the name of that province.

(3) A provincial legislature is bound only by the Constitution and, if it has passed a constitution for its province, also by that constitution, and must act in accordance with, and within the limits of, the Constitution and that provincial constitution.

(4) Provincial legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4, is for all purposes legislation with regard to a matter listed in Schedule 4.

(5) A provincial legislature may recommend to the National Assembly legislation concerning any matter outside the authority of that legislature, or in respect of which an Act of Parliament prevails over a provincial law.

Composition and election of provincial legislatures

105. (1) A a provincial legislature consists of women and men elected as members in terms of an electoral system that—
   (a) is prescribed by national legislation;
   (b) is based on that province's segment of the national common voters roll;

(c) provides for a minimum voting age of 18 years; and
(d) results, in general, in proportional representation.

[Sub-s. (1) amended by s. 3 of the Constitution Tenth Amendment Act of 2003 and by s. 3 of the Constitution Fourteenth Amendment Act of 2008.]

(2) A provincial legislature consists of between 30 and 80 members. The number of members, which may differ among the provinces, must be determined in terms of a formula prescribed by national legislation.

Membership

106. (1) Every citizen who is qualified to vote for the National Assembly is eligible to be a member of a provincial legislature, except—
(a) anyone who is appointed by, or is in the service of, the state and receives remuneration for that appointment or service, other than—
(i) the Premier and other members of the Executive Council of a province; and
(ii) other office-bearers whose functions are compatible with the functions of a member of a provincial legislature, and have been declared compatible with those functions by national legislation;
(b) members of the National Assembly, permanent delegates to the National Council of Provinces or members of a Municipal Council;
(c) unrehabilitated insolvents;
(d) anyone declared to be of unsound mind by a court of the Republic; or
(e) anyone who, after this section took effect, is convicted of an offence and sentenced to more than 12 months' imprisonment without the option of a fine, either in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic, but no one may be regarded as having been sentenced until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired. A disqualification under this paragraph ends five years after the sentence has been completed.

(2) A person who is not eligible to be a member of a provincial legislature in terms of subsection (1)(a) or (b) may be a candidate for the legislature, subject to any limits or conditions established by national legislation.

(3) A person loses membership of a provincial legislature if that person—
(a) ceases to be eligible;
(b) is absent from the legislature without permission in circumstances for which the rules and orders of the legislature prescribe loss of membership; or
(c) ceases to be a member of the party that nominated that person as a member of the legislature.

[Sub-s. (3) substituted by s. 4 of the Constitution Tenth Amendment Act of 2003 and by s. 4 of the Constitution Fourteenth Amendment Act of 2008.]

(4) Vacancies in a provincial legislature must be filled in terms of national legislation.

Oath or affirmation

107. Before members of a provincial legislature begin to perform their functions in the legislature, they must swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

Duration of provincial legislatures

108. (1) A provincial legislature is elected for a term of five years.

(2) If a provincial legislature is dissolved in terms of section 109, or when its term expires, the Premier of the province, by proclamation, must call and set dates for an election, which must be held within 90 days of the date the legislature was dissolved or its term expired. A proclamation calling and setting dates for an election may be issued before or after the expiry of the term of a provincial legislature.

[Sub-s. (2) substituted by s. 1 of the Constitution Fourth Amendment Act of 1999.]

(3) If the result of an election of a provincial legislature is not declared within the period referred to in section 190, or if an election is set aside by a court, the President, by proclamation, must call and set dates for another election, which must be held within 90 days of the expiry of that period or of the date on which the election was set aside.

(4) A provincial legislature remains competent to function from the time it is dissolved or its term expires, until the day before the first day of polling for the next legislature.

Dissolution of provincial legislatures before expiry of term

109. (1) The Premier of a province must dissolve the provincial legislature if—
(a) the legislature has adopted a resolution to dissolve with a supporting vote of a majority of its members; and
(b) three years have passed since the legislature was elected.
(2) An Acting Premier must dissolve the provincial legislature if—
(a) there is a vacancy in the office of Premier; and
(b) the legislature fails to elect a new Premier within 30 days after the vacancy occurred.

Sittings and recess periods

110. (1) After an election, the first sitting of a provincial legislature must take place at a time and on a date determined by a judge designated by the Chief Justice, but not more than 14 days after the election result has been declared. A provincial legislature may determine the time and duration of its other sittings and its recess periods.

[Sub-s. (1) substituted by s. 8 of the Constitution Sixth Amendment Act of 2001.]

(2) The Premier of a province may summon the provincial legislature to an extraordinary sitting at any time to conduct special business.
(3) A provincial legislature may determine where it ordinarily will sit.

Speakers and Deputy Speakers

111. (1) At the first sitting after its election, or when necessary to fill a vacancy, a provincial legislature must elect a Speaker and a Deputy Speaker from among its members.
(2) A judge designated by the Chief Justice must preside over the election of a Speaker. The Speaker presides over the election of a Deputy Speaker.

[Sub-s. (2) substituted by s. 9 of the Constitution Sixth Amendment Act of 2001.]

(3) The procedure set out in Part A of Schedule 3 applies to the election of Speakers and Deputy Speakers.
(4) A provincial legislature may remove its Speaker or Deputy Speaker from office by resolution. A majority of the members of the legislature must be present when the resolution is adopted.
(5) In terms of its rules and orders, a provincial legislature may elect from among its members other presiding officers to assist the Speaker and the Deputy Speaker.

Decisions

112. (1) Except where the Constitution provides otherwise—
(a) a majority of the members of a provincial legislature must be present before a vote may be taken on a Bill or an amendment to a Bill;
(b) at least one third of the members must be present before a vote may be taken on any other question before the legislature; and
(c) all questions before a provincial legislature are decided by a majority of the votes cast.

(2) The member presiding at a meeting of a provincial legislature has no deliberative vote, but—
(a) must cast a deciding vote when there is an equal number of votes on each side of a question; and
(b) may cast a deliberative vote when a question must be decided with a supporting vote of at least two thirds of the members of the legislature.

Permanent delegates' rights in provincial legislatures

113. A province's permanent delegates to the National Council of Provinces may attend, and may speak in, their provincial legislature and its committees, but may not vote. The legislature may require a permanent delegate to attend the legislature or its committees.

Powers of provincial legislatures

114. (1) In exercising its legislative power, a provincial legislature may—
(a) consider, pass, amend or reject any Bill before the legislature; and
(b) initiate or prepare legislation, except money Bills.

(2) A provincial legislature must provide for mechanisms—
(a) to ensure that all provincial executive organs of state in the province are accountable to it; and
(b) to maintain oversight of—
(i) the exercise of provincial executive authority in the province, including the implementation of legislation; and
(ii) any provincial organ of state.

Evidence or information before provincial legislatures

115. A provincial legislature or any of its committees may—

(a) summon any person to appear before it to give evidence on oath or affirmation, or to produce documents;

(b) require any person or provincial institution to report to it;

(c) compel, in terms of provincial legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph (a) or (b); and

(d) receive petitions, representations or submissions from any interested persons or institutions.

Internal arrangements, proceedings and procedures of provincial legislatures

116. (1) A provincial legislature may—

(a) determine and control its internal arrangements, proceedings and procedures; and

(b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.

(2) The rules and orders of a provincial legislature must provide for—

(a) the establishment, composition, powers, functions, procedures and duration of its committees;

(b) the participation in the proceedings of the legislature and its committees of minority parties represented in the legislature, in a manner consistent with democracy;

(c) financial and administrative assistance to each party represented in the legislature, in proportion to its representation, to enable the party and its leader to perform their functions in the legislature effectively; and

(d) the recognition of the leader of the largest opposition party in the legislature, as the Leader of the Opposition.

Privilege

117. (1) Members of a provincial legislature and the province's permanent delegates to the National Council of Provinces—
    (a) have freedom of speech in the legislature and in its committees, subject to its rules and orders; and
    (b) are not liable to civil or criminal proceedings, arrest, imprisonment or damages for—
        (i) anything that they have said in, produced before or submitted to the legislature or any of its committees; or
        (ii) anything revealed as a result of anything that they have said in, produced before or submitted to the legislature or any of its committees.

(2) Other privileges and immunities of a provincial legislature and its members may be prescribed by national legislation.

(3) Salaries, allowances and benefits payable to members of a provincial legislature are a direct charge against the Provincial Revenue Fund.

Public access to and involvement in provincial legislatures

118. (1) A provincial legislature must—
    (a) facilitate public involvement in the legislative and other processes of the legislature and its committees; and
    (b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken—
        (i) to regulate public access, including access of the media, to the legislature and its committees; and
        (ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.

(2) A provincial legislature may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.

Introduction of Bills

119. Only members of the Executive Council of a province or a committee or member of a provincial legislature may introduce a Bill in the legislature; but only the member of the Executive Council who is responsible for financial matters in the province may introduce a money Bill in the legislature.

Money Bills

120. (1) A Bill is a money Bill if it—
(a) appropriates money;
(b) imposes provincial taxes, levies, duties or surcharges;
(c) abolishes or reduces, or grants exemptions from, any provincial taxes, levies, duties or surcharges; or
(d) authorises direct charges against a Provincial Revenue Fund.

(2) A money Bill may not deal with any other matter except—
(a) a subordinate matter incidental to the appropriation of money;
(b) the imposition, abolition or reduction of provincial taxes, levies, duties or surcharges;
(c) the granting of exemption from provincial taxes, levies, duties or surcharges; or
(d) the authorisation of direct charges against a Provincial Revenue Fund.

(3) A provincial Act must provide for a procedure by which the province's legislature may amend a money Bill.

[S. 120 substituted by s. 3 of the Constitution Seventh Amendment Act of 2001.]

Assent to Bills

121. (1) The Premier of a province must either assent to and sign a Bill passed by the provincial legislature in terms of this Chapter or, if the Premier has reservations about the constitutionality of the Bill, refer it back to the legislature for reconsideration.

(2) If, after reconsideration, a Bill fully accommodates the Premier's reservations, the Premier must assent to and sign the Bill; if not, the Premier must either—
(a) assent to and sign the Bill; or
(b) refer it to the Constitutional Court for a decision on its constitutionality.

(3) If the Constitutional Court decides that the Bill is constitutional, the Premier must assent to and sign it.

Application by members to Constitutional Court

122. (1) Members of a provincial legislature may apply to the Constitutional Court for an order declaring that all or part of a provincial Act is unconstitutional.

(2) An application—
  (a) must be supported by at least 20 per cent of the members of the legislature; and
  (b) must be made within 30 days of the date on which the Premier assented to and signed the Act.

(3) The Constitutional Court may order that all or part of an Act that is the subject of an application in terms of subsection (1) has no force until the Court has decided the application if—
  (a) the interests of justice require this; and
  (b) the application has a reasonable prospect of success.

(4) If an application is unsuccessful, and did not have a reasonable prospect of success, the Constitutional Court may order the applicants to pay costs.

Publication of provincial Acts

123. A Bill assented to and signed by the Premier of a province becomes a provincial Act, must be published promptly and takes effect when published or on a date determined in terms of the Act.

Safekeeping of provincial Acts

124. The signed copy of a provincial Act is conclusive evidence of the provisions of that Act and, after publication, must be entrusted to the Constitutional Court for safekeeping.

Provincial Executives

Executive authority of provinces

125. (1) The executive authority of a province is vested in the Premier of that province.

(2) The Premier exercises the executive authority, together with the other members of the Executive Council, by—
  (a) implementing provincial legislation in the province;
  (b) implementing all national legislation within the functional areas listed in Schedule 4 or 5 except where the Constitution or an Act of Parliament provides otherwise;

(c) administering in the province, national legislation outside the functional areas listed in Schedules 4 and 5, the administration of which has been assigned to the provincial executive in terms of an Act of Parliament;
(d) developing and implementing provincial policy;
(e) co-ordinating the functions of the provincial administration and its departments;
(f) preparing and initiating provincial legislation; and
(g) performing any other function assigned to the provincial executive in terms of the Constitution or an Act of Parliament.

(3) A province has executive authority in terms of subsection (2)(b) only to the extent that the province has the administrative capacity to assume effective responsibility. The national government, by legislative and other measures, must assist provinces to develop the administrative capacity required for the effective exercise of their powers and performance of their functions referred to in subsection (2).

(4) Any dispute concerning the administrative capacity of a province in regard to any function must be referred to the National Council of Provinces for resolution within 30 days of the date of the referral to the Council.

(5) Subject to section 100, the implementation of provincial legislation in a province is an exclusive provincial executive power.

(6) The provincial executive must act in accordance with—
(a) the Constitution; and
(b) the provincial constitution, if a constitution has been passed for the province.

Assignment of functions

126. A member of the Executive Council of a province may assign any power or function that is to be exercised or performed in terms of an Act of Parliament or a provincial Act, to a Municipal Council. An assignment—
(a) must be in terms of an agreement between the relevant Executive Council member and the Municipal Council;
(b) must be consistent with the Act in terms of which the relevant power or function is exercised or performed; and
(c) takes effect upon proclamation by the Premier.

Powers and functions of Premiers

127. (1) The Premier of a province has the powers and functions entrusted to that office by the Constitution and any legislation.

(2) The Premier of a province is responsible for—

(a) assenting to and signing Bills;

(b) referring a Bill back to the provincial legislature for reconsideration of the Bill's constitutionality;

(c) referring a Bill to the Constitutional Court for a decision on the Bill's constitutionality;

(d) summoning the legislature to an extraordinary sitting to conduct special business;

(e) appointing commissions of inquiry; and

(f) calling a referendum in the province in accordance with national legislation.

Election of Premiers

128. (1) At its first sitting after its election, and whenever necessary to fill a vacancy, a provincial legislature must elect a woman or a man from among its members to be the Premier of the province.

(2) A judge designated by the Chief Justice must preside over the election of the Premier. The procedure set out in Part A of Schedule 3 applies to the election of the Premier.

[Sub-s. (2) substituted by s. 10 of the Constitution Sixth Amendment Act of 2001.]

(3) An election to fill a vacancy in the office of Premier must be held at a time and on a date determined by the Chief Justice, but not later than 30 days after the vacancy occurs.

[Sub-s. (3) substituted by s. 10 of the Constitution Sixth Amendment Act of 2001.]

Assumption of office by Premiers

129. A Premier-elect must assume office within five days of being elected, by swearing or affirming faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

Term of office and removal of Premiers

130. (1) A Premier's term of office begins when the Premier assumes office and ends upon a vacancy occurring or when the person next elected Premier assumes office.

(2) No person may hold office as Premier for more than two terms, but when a person is elected to fill a vacancy in the office of Premier, the period between that election and the next election of a Premier is not regarded as a term.

(3) The legislature of a province, by a resolution adopted with a supporting vote of at least two thirds of its members, may remove the Premier from office only on the grounds of—

(a) a serious violation of the Constitution or the law;

(b) serious misconduct; or

(c) inability to perform the functions of office.

(4) Anyone who has been removed from the office of Premier in terms of subsection (3) (a) or (b) may not receive any benefits of that office, and may not serve in any public office.

Acting Premiers

131. (1) When the Premier is absent or otherwise unable to fulfil the duties of the office of Premier, or during a vacancy in the office of Premier, an office-bearer in the order below acts as the Premier:

(a) A member of the Executive Council designated by the Premier.

(b) A member of the Executive Council designated by the other members of the Council.

(c) The Speaker, until the legislature designates one of its other members.

(2) An Acting Premier has the responsibilities, powers and functions of the Premier.

(3) Before assuming the responsibilities, powers and functions of the Premier, the Acting Premier must swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

Executive Councils

132. (1) The Executive Council of a province consists of the Premier, as head of the Council, and no fewer than five and no more than ten members appointed by the Premier from among the members of the provincial legislature.

(2) The Premier of a province appoints the members of the Executive Council, assigns their powers and functions, and may dismiss them.

Accountability and responsibilities

133. (1) The members of the Executive Council of a province are responsible for the functions of the executive assigned to them by the Premier.

(2) Members of the Executive Council of a province are accountable collectively and individually to the legislature for the exercise of their powers and the performance of their functions.

(3) Members of the Executive Council of a province must—

(a) act in accordance with the Constitution and, if a provincial constitution has been passed for the province, also that constitution; and

(b) provide the legislature with full and regular reports concerning matters under their control.

Continuation of Executive Councils after elections

134. When an election of a provincial legislature is held, the Executive Council and its members remain competent to function until the person elected Premier by the next legislature assumes office.

Oath or affirmation

135. Before members of the Executive Council of a province begin to perform their functions, they must swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

Conduct of members of Executive Councils

136. (1) Members of the Executive Council of a province must act in accordance with a code of ethics prescribed by national legislation.

(2) Members of the Executive Council of a province may not—

(a) undertake any other paid work;

(b) act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or

(c) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.

Transfer of functions

137. The Premier by proclamation may transfer to a member of the Executive Council—
   (a) the administration of any legislation entrusted to another member; or
   (b) any power or function entrusted by legislation to another member.

Temporary assignment of functions

138. The Premier of a province may assign to a member of the Executive Council any power or function of another member who is absent from office or is unable to exercise that power or perform that function.

Provincial intervention in local government

139. (1) When a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including—
   (a) issuing a directive to the Municipal Council, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations;
   (b) assuming responsibility for the relevant obligation in that municipality to the extent necessary to —
      (i) maintain essential national standards or meet established minimum standards for the rendering of a service;
      (ii) prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or
      (iii) maintain economic unity; or
   (c) dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council has been declared elected, if exceptional circumstances warrant such a step.

   (2) If a provincial executive intervenes in a municipality in terms of subsection (1)(b)—
   (a) it must submit a written notice of the intervention to—
      (i) the Cabinet member responsible for local government affairs; and
      (ii) the relevant provincial legislature and the National Council of Provinces, within 14 days after the intervention began;

(b) the intervention must end if—
  (i) the Cabinet member responsible for local government affairs disapproves the intervention within 28 days after the intervention began or by the end of that period has not approved the intervention; or
  (ii) the Council disapproves the intervention within 180 days after the intervention began or by the end of that period has not approved the intervention; and
(c) the Council must, while the intervention continues, review the intervention regularly and may make any appropriate recommendations to the provincial executive.

(3) If a Municipal Council is dissolved in terms of subsection (1)(c)—
(a) the provincial executive must immediately submit a written notice of the dissolution to—
  (i) the Cabinet member responsible for local government affairs; and
  (ii) the relevant provincial legislature and the National Council of Provinces; and
(b) the dissolution takes effect 14 days from the date of receipt of the notice by the Council unless set aside by that Cabinet member or the Council before the expiry of those 14 days.

(4) If a municipality cannot or does not fulfil an obligation in terms of the Constitution or legislation to approve a budget or any revenue-raising measures necessary to give effect to the budget, the relevant provincial executive must intervene by taking any appropriate steps to ensure that the budget or those revenue-raising measures are approved, including dissolving the Municipal Council and—
(a) appointing an administrator until a newly elected Municipal Council has been declared elected; and
(b) approving a temporary budget or revenue-raising measures to provide for the continued functioning of the municipality.

(5) If a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments, the relevant provincial executive must—
(a) impose a recovery plan aimed at securing the municipality's ability to meet its obligations to provide basic services or its financial commitments, which—
  (i) is to be prepared in accordance with national legislation; and

(ii) binds the municipality in the exercise of its legislative and executive authority, but only to the extent necessary to solve the crisis in its financial affairs; and

(b) dissolve the Municipal Council, if the municipality cannot or does not approve legislative measures, including a budget or any revenue-raising measures, necessary to give effect to the recovery plan, and—

(i) appoint an administrator until a newly elected Municipal Council has been declared elected; and

(ii) approve a temporary budget or revenue-raising measures or any other measures giving effect to the recovery plan to provide for the continued functioning of the municipality; or

(c) if the Municipal Council is not dissolved in terms of paragraph (b), assume responsibility for the implementation of the recovery plan to the extent that the municipality cannot or does not otherwise implement the recovery plan.

(6) If a provincial executive intervenes in a municipality in terms of subsection (4) or (5), it must submit a written notice of the intervention to—

(a) the Cabinet member responsible for local government affairs; and

(b) the relevant provincial legislature and the National Council of Provinces, within seven days after the intervention began.

(7) If a provincial executive cannot or does not or does not adequately exercise the powers or perform the functions referred to in subsection (4) or (5), the national executive must intervene in terms of subsection (4) or (5) in the stead of the relevant provincial executive.

(8) National legislation may regulate the implementation of this section, including the processes established by this section.

[S. 139 substituted by s. 4 of the Constitution Eleventh Amendment Act of 2003.]

Executive decisions

140. (1) A decision by the Premier of a province must be in writing if it—

(a) is taken in terms of legislation; or

(b) has legal consequences.

(2) A written decision by the Premier must be countersigned by another Executive Council member if that decision concerns a function assigned to that other member.

(3) Proclamations, regulations and other instruments of subordinate legislation of a province must be accessible to the public.

(4) Provincial legislation may specify the manner in which, and the extent to which, instruments mentioned in subsection (3) must be—

(a) tabled in the provincial legislature; and

(b) approved by the provincial legislature.

Motions of no confidence

141. (1) If a provincial legislature, by a vote supported by a majority of its members, passes a motion of no confidence in the province's Executive Council excluding the Premier, the Premier must reconstitute the Council.

(2) If a provincial legislature, by a vote supported by a majority of its members, passes a motion of no confidence in the Premier, the Premier and the other members of the Executive Council must resign.

Provincial Constitutions

Adoption of provincial constitutions

142. A provincial legislature may pass a constitution for the province or, where applicable, amend its constitution, if at least two thirds of its members vote in favour of the Bill.

Contents of provincial constitutions

143. (1) A provincial constitution, or constitutional amendment, must not be inconsistent with this Constitution, but may provide for—

(a) provincial legislative or executive structures and procedures that differ from those provided for in this Chapter; or

(b) the institution, role, authority and status of a traditional monarch, where applicable.

(2) Provisions included in a provincial constitution or constitutional amendment in terms of paragraphs (a) or (b) of subsection (1)—

(a) must comply with the values in section 1 and with Chapter 3; and

(b) may not confer on the province any power or function that falls—

(i) outside the area of provincial competence in terms of Schedules 4 and 5; or

(ii) outside the powers and functions conferred on the province by other sections of the Constitution.

Certification of provincial constitutions

144. (1) If a provincial legislature has passed or amended a constitution, the Speaker of the legislature must submit the text of the constitution or constitutional amendment to the Constitutional Court for certification.

(2) No text of a provincial constitution or constitutional amendment becomes law until the Constitutional Court has certified—

(a) that the text has been passed in accordance with section 142; and

(b) that the whole text complies with section 143.

Signing, publication and safekeeping of provincial constitutions

145. (1) The Premier of a province must assent to and sign the text of a provincial constitution or constitutional amendment that has been certified by the Constitutional Court.

(2) The text assented to and signed by the Premier must be published in the national Government Gazette and takes effect on publication or on a later date determined in terms of that constitution or amendment.

(3) The signed text of a provincial constitution or constitutional amendment is conclusive evidence of its provisions and, after publication, must be entrusted to the Constitutional Court for safekeeping.

Conflicting Laws

Conflicts between national and provincial legislation

146. (1) This section applies to a conflict between national legislation and provincial legislation falling within a functional area listed in Schedule 4.

(2) National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions is met:

(a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.

(b) The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing—
  (i) norms and standards;
  (ii) frameworks; or
  (iii) national policies.
(c) The national legislation is necessary for—
  (i) the maintenance of national security;
  (ii) the maintenance of economic unity;
  (iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;
  (iv) the promotion of economic activities across provincial boundaries;
  (v) the promotion of equal opportunity or equal access to government services; or
  (vi) the protection of the environment.

(3) National legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that—
(a) is prejudicial to the economic, health or security interests of another province or the country as a whole; or
(b) impedes the implementation of national economic policy.

(4) When there is a dispute concerning whether national legislation is necessary for a purpose set out in subsection (2)(c) and that dispute comes before a court for resolution, the court must have due regard to the approval or the rejection of the legislation by the National Council of Provinces.

(5) Provincial legislation prevails over national legislation if subsection (2) or (3) does not apply.

(6) A law made in terms of an Act of Parliament or a provincial Act can prevail only if that law has been approved by the National Council of Provinces.

(7) If the National Council of Provinces does not reach a decision within 30 days of its first sitting after a law was referred to it, that law must be considered for all purposes to have been approved by the Council.

(8) If the National Council of Provinces does not approve a law referred to in subsection (6), it must, within 30 days of its decision, forward reasons for not approving the law to the authority that referred the law to it.

Other conflicts

147. (1) If there is a conflict between national legislation and a provision of a provincial constitution with regard to—
(a) a matter concerning which this Constitution specifically requires or envisages the enactment of national legislation, the national legislation prevails over the affected provision of the provincial constitution;
(b) national legislative intervention in terms of section 44 (2), the national legislation prevails over the provision of the provincial constitution; or
(c) a matter within a functional area listed in Schedule 4, section 146 applies as if the affected provision of the provincial constitution were provincial legislation referred to in that section.

(2) National legislation referred to in section 44(2) prevails over provincial legislation in respect of matters within the functional areas listed in Schedule 5.

Conflicts that cannot be resolved

148. If a dispute concerning a conflict cannot be resolved by a court, the national legislation prevails over the provincial legislation or provincial constitution.

Status of legislation that does not prevail

149. A decision by a court that legislation prevails over other legislation does not invalidate that other legislation, but that other legislation becomes inoperative for as long as the conflict remains.

Interpretation of conflicts

150. When considering an apparent conflict between national and provincial legislation, or between national legislation and a provincial constitution, every court must prefer any reasonable interpretation of the legislation or constitution that avoids a conflict, over any alternative interpretation that results in a conflict.

CHAPTER 7

LOCAL GOVERNMENT

Status of municipalities

151. (1) The local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic.

(2) The executive and legislative authority of a municipality is vested in its Municipal Council.

(3) A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.

(4) The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.

Objects of local government

152. (1) The objects of local government are—

(a) to provide democratic and accountable government for local communities;

(b) to ensure the provision of services to communities in a sustainable manner;

(c) to promote social and economic development;

(d) to promote a safe and healthy environment; and

(e) to encourage the involvement of communities and community organisations in the matters of local government.

(2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).

Developmental duties of municipalities

153. A municipality must—

(a) structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community; and

(b) participate in national and provincial development programmes.

Municipalities in co-operative government

154. (1) The national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.

(2) Draft national or provincial legislation that affects the status, institutions, powers or functions of local government must be published for public comment before it is introduced in Parliament or a provincial legislature, in a manner that allows organised local government, municipalities and other interested persons an opportunity to make representations with regard to the draft legislation.

Establishment of municipalities

155. (1) There are the following categories of municipality:

(a) Category A: A municipality that has exclusive municipal executive and legislative authority in its area.

(b) Category B: A municipality that shares municipal executive and legislative authority in its area with a category C municipality within whose area it falls.

(c) Category C: A municipality that has municipal executive and legislative authority in an area that includes more than one municipality.

(2) National legislation must define the different types of municipality that may be established within each category.

(3) National legislation must—

(a) establish the criteria for determining when an area should have a single category A municipality or when it should have municipalities of both category B and category C;

(b) establish criteria and procedures for the determination of municipal boundaries by an independent authority; and

(c) subject to section 229, make provision for an appropriate division of powers and functions between municipalities when an area has municipalities of both category B and category C. A division of powers and functions between a category B municipality and a category C municipality may differ from the division of powers and functions between another category B municipality and that category C municipality.

(4) The legislation referred to in subsection (3) must take into account the need to provide municipal services in an equitable and sustainable manner.

(5) Provincial legislation must determine the different types of municipality to be established in the province.

(6) Each provincial government must establish municipalities in its province in a manner consistent with the legislation enacted in terms of subsections (2) and (3) and, by legislative or other measures, must—

(a) provide for the monitoring and support of local government in the province; and

(b) promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs.

(6A) .....

[Sub-s. (6A) inserted by s. 1 of the Constitution Third Amendment Act of 1998 and deleted by s. 2 of the Constitution Twelfth Amendment Act of 2005.]

(7) The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1).

Powers and functions of municipalities

156. (1) A municipality has executive authority in respect of, and has the right to administer—

(a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and

(b) any other matter assigned to it by national or provincial legislation.

(2) A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer.

(3) Subject to section 151(4), a by-law that conflicts with national or provincial legislation is invalid. If there is a conflict between a bylaw and national or provincial legislation that is inoperative because of a conflict referred to in section 149, the by-law must be regarded as valid for as long as that legislation is inoperative.

(4) The national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if—

(a) that matter would most effectively be administered locally; and
(b) the municipality has the capacity to administer it.

(5) A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.

Composition and election of Municipal Councils

157. (1) A Municipal Council consists of—
(a) members elected in accordance with subsections (2) and (3); or
(b) if provided for by national legislation—
(i) members appointed by other Municipal Councils to represent those other Councils; or
(ii) both members elected in accordance with paragraph (a) and members appointed in accordance with subparagraph (i) of this paragraph.

[Sub-s. (1) substituted by s. 1 (a) of the Constitution Eighth Amendment Act of 2002 and by s. 3 of the Constitution Fifteenth Amendment Act of 2008.]

(2) The election of members to a Municipal Council as anticipated in subsection (1)(a) must be in accordance with national legislation, which must prescribe a system—
(a) of proportional representation based on that municipality's segment of the national common voters roll, and which provides for the election of members from lists of party candidates drawn up in a party's order of preference; or
(b) of proportional representation as described in paragraph (a) combined with a system of ward representation based on that municipality's segment of the national common voters roll.

(3) An electoral system in terms of subsection (2) must result, in general, in proportional representation.

[Sub-s. (3) substituted by s. 1(b) of the Constitution Eighth Amendment Act of 2002.]

(4) (a) If the electoral system includes ward representation, the delimitation of wards must be done by an independent authority appointed in terms of, and operating according to, procedures and criteria prescribed by national legislation.
(b) . . . . . .

[Para. (b) deleted by s. 3 of the Constitution Twelfth Amendment Act of 2005.]

[Sub-s. (4) substituted by s. 2 of the Constitution Third Amendment Act of 1998.]

(5) A person may vote in a municipality only if that person is registered on that municipality's segment of the national common voters roll.

(6) The national legislation referred to in subsection (1)(b) must establish a system that allows for parties and interests reflected within the Municipal Council making the appointment, to be fairly represented in the Municipal Council to which the appointment is made.

Membership of Municipal Councils

158. (1) Every citizen who is qualified to vote for a Municipal Council is eligible to be a member of that Council, except—

(a) anyone who is appointed by, or is in the service of, the municipality and receives remuneration for that appointment or service, and who has not been exempted from this disqualification in terms of national legislation;

(b) anyone who is appointed by, or is in the service of, the state in another sphere, and receives remuneration for that appointment or service, and who has been disqualified from membership of a Municipal Council in terms of national legislation;

(c) anyone who is disqualified from voting for the National Assembly or is disqualified in terms of section 47(1)(c), (d) or (e) from being a member of the Assembly;

(d) a member of the National Assembly, a delegate to the National Council of Provinces or a member of a provincial legislature; but this disqualification does not apply to a member of a Municipal Council representing local government in the National Council; or

(e) a member of another Municipal Council; but this disqualification does not apply to a member of a Municipal Council representing that Council in another Municipal Council of a different category.

(2) A person who is not eligible to be a member of a Municipal Council in terms of subsection (1)(a), (b), (d) or (e) may be a candidate for the Council, subject to any limits or conditions established by national legislation.

(3) Vacancies in a Municipal Council must be filled in terms of national legislation.

[Sub-s. (3) added by s. 4 of the Constitution Fifteenth Amendment Act of 2008.]

Terms of Municipal Councils

159. (1) The term of a Municipal Council may be no more than five years, as determined by national legislation.

(2) If a Municipal Council is dissolved in terms of national legislation, or when its term expires, an election must be held within 90 days of the date that Council was dissolved or its term expired.

(3) A Municipal Council, other than a Council that has been dissolved following an intervention in terms of section 139, remains competent to function from the time it is dissolved or its term expires, until the newly elected Council has been declared elected.

[S. 159 substituted by s. 1 of the Constitution Second Amendment Act of 1998.]

Internal procedures

160. (1) A Municipal Council—

(a) makes decisions concerning the exercise of all the powers and the performance of all the functions of the municipality;

(b) must elect its chairperson;

(c) may elect an executive committee and other committees, subject to national legislation; and

(d) may employ personnel that are necessary for the effective performance of its functions.

(2) The following functions may not be delegated by a Municipal Council:

(a) The passing of by-laws;

(b) the approval of budgets;

(c) the imposition of rates and other taxes, levies and duties; and

(d) the raising of loans.

(3) (a) A majority of the members of a Municipal Council must be present before a vote may be taken on any matter.

(b) All questions concerning matters mentioned in subsection (2) are determined by a decision taken by a Municipal Council with a supporting vote of a majority of its members.

(c) All other questions before a Municipal Council are decided by a majority of the votes cast.

(4) No by-law may be passed by a Municipal Council unless—
  (a) all the members of the Council have been given reasonable notice; and
  (b) the proposed by-law has been published for public comment.

(5) National legislation may provide criteria for determining—
  (a) the size of a Municipal Council;
  (b) whether Municipal Councils may elect an executive committee or any other committee; or
  (c) the size of the executive committee or any other committee of a Municipal Council.

(6) A Municipal Council may make by-laws which prescribe rules and orders for—
  (a) its internal arrangements;
  (b) its business and proceedings; and
  (c) the establishment, composition, procedures, powers and functions of its committees.

(7) A Municipal Council must conduct its business in an open manner, and may close its sittings, or those of its committees, only when it is reasonable to do so having regard to the nature of the business being transacted.

(8) Members of a Municipal Council are entitled to participate in its proceedings and those of its committees in a manner that—
  (a) allows parties and interests reflected within the Council to be fairly represented;
  (b) is consistent with democracy; and
  (c) may be regulated by national legislation.

Privilege

161. Provincial legislation within the framework of national legislation may provide for privileges and immunities of Municipal Councils and their members.

Publication of municipal by-laws

162. (1) A municipal by-law may be enforced only after it has been published in the official gazette of the relevant province.

(2) A provincial official gazette must publish a municipal by-law upon request by the municipality.

(3) Municipal by-laws must be accessible to the public.

Organised local government

163. An Act of Parliament enacted in accordance with the procedure established by section 76 must—

(a) provide for the recognition of national and provincial organisations representing municipalities; and

(b) determine procedures by which local government may—

(i) consult with the national or a provincial government;

(ii) designate representatives to participate in the National Council of Provinces; and

(iii) participate in the process prescribed in the national legislation envisaged in section 221(1)(c).

[S. 163(b) substituted by s. 4 of the Constitution Seventh Amendment Act of 2001.]

Other matters

164. Any matter concerning local government not dealt with in the Constitution may be prescribed by national legislation or by provincial legislation within the framework of national legislation.

CHAPTER 8

COURTS AND ADMINISTRATION OF JUSTICE

Judicial authority

165. (1) The judicial authority of the Republic is vested in the courts.

(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

(3) No person or organ of state may interfere with the functioning of the courts.

(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

(6) The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.

[Sub-s (6) added by s. 1 of the Constitution Seventeenth Amendment Act of 2012.]

Judicial system

166. The courts are—

(a) the Constitutional Court;

(b) the Supreme Court of Appeal;

(c) the High Court of South Africa, and any high court of appeal that may be established by an Act of Parliament to hear appeals from any court of a status similar to the High Court of South Africa;

(d) the Magistrates' Courts; and

(e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Court of South Africa or the Magistrates' Courts.

[Sub-s (c) and (e) substituted by s. 2 of the Constitution Seventeenth Amendment Act of 2012.]

Constitutional Court

167. (1) The Constitutional Court consists of the Chief Justice of South Africa, the Deputy Chief Justice and nine other judges.

[Sub-s. (1) substituted by s. 11 of the Constitution Sixth Amendment Act of 2001.]

(2) A matter before the Constitutional Court must be heard by at least eight judges.

(3) The Constitutional Court—

(a) is the highest court of the Republic; and

(b) may decide—

(i) constitutional matters; and

(ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court, and

(c) makes the final decision whether a matter is within its jurisdiction.

[Sub-s (3) substituted by s. 3 of the Constitution Seventeenth Amendment Act of 2012.]

(4) Only the Constitutional Court may—

(a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;

(b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;

(c) decide applications envisaged in section 80 or 122;

(d) decide on the constitutionality of any amendment to the Constitution;

(e) decide that Parliament or the President has failed to fulfil a constitutional obligation; or

(f) certify a provincial constitution in terms of section 144.

(5) The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force.

[Sub-s (5) substituted by s. 3 of the Constitution Seventeenth Amendment Act of 2012.]

(6) National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—

(a) to bring a matter directly to the Constitutional Court; or
(b) to appeal directly to the Constitutional Court from any other court.

(7) A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution.

Supreme Court of Appeal

168. (1) The Supreme Court of Appeal consists of a President, a Deputy President and the number of judges of appeal determined in terms of an Act of Parliament.

[Sub-s. (1) substituted by s. 12 of the Constitution Sixth Amendment Act of 2001.]

(2) A matter before the Supreme Court of Appeal must be decided by the number of judges determined in terms of an Act of Parliament.

[Sub-s. (2) substituted by s. 12 of the Constitution Sixth Amendment Act of 2001.]

(3) (a) The Supreme Court of Appeal may decide appeals in any matter arising from the High Court of South Africa or a court of a status similar to the High Court of South Africa, except in respect of labour or competition matters to such an extent as may be determined by an Act of Parliament.

(b) The Supreme Court of Appeal may decide only—
(i) appeals;
(ii) issues connected with appeals; and
(iii) any other matter that may be referred to it in circumstances defined by an Act of Parliament.

[Sub-s (3) substituted by s. 4 of the Constitution Seventeenth Amendment Act of 2012.]

High Court of South Africa

169. (1) The High Court of South Africa may decide—
(a) any constitutional matter except a matter that—
(i) the Constitutional Court has agreed to hear directly in terms of section 167(6)(a); or
(ii) is assigned by an Act of Parliament to another court of a status similar to the High Court of South Africa; and
(b) any other matter not assigned to another court by an Act of Parliament.

(2) The High Court of South Africa consists of the Divisions determined by an Act of Parliament, which Act must provide for—
  (a) the establishing of Divisions, with one or two more seats in a Division; and
  (b) the assigning of jurisdiction to a Division or a seat with a Division.

(3) Each Division of the High Court of South Africa—
  (a) has a Judge President;
  (b) may have one or more Deputy Judges President; and
  (c) has the number of other judges determined in terms of national legislation.

[S. 169 substituted by s. 5 of the Constitution Seventeenth Amendment Act of 2012.]

Other courts

170. All courts other than those referred to in sections 167, 168 and 169 may decide any matter determined by an Act of Parliament, but a court of a status lower than the High Court of South Africa may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.

[S. 170 substituted by s. 6 of the Constitution Seventeenth Amendment Act of 2012.]

Court procedures

171. All courts function in terms of national legislation, and their rules and procedures must be provided for in terms of national legislation.

Powers of courts in constitutional matters

172. (1) When deciding a constitutional matter within its power, a court—
  (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
  (b) may make any order that is just and equitable, including—
    (i) an order limiting the retrospective effect of the declaration of invalidity; and
    (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

(2) (a) The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an

order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

[Par (a) substituted by s. 7 of the Constitution Seventeenth Amendment Act of 2012.]

(b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.

(c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.

(d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.

Inherent power

173. The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.

[S. 173 substituted by s. 8 of the Constitution Seventeenth Amendment Act of 2012.]

Appointment of judicial officers

174. (1) Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.

(2) The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.

(3) The President as head of the national executive, after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly, appoints the Chief Justice and the Deputy Chief Justice and, after consulting the Judicial Service Commission, appoints the President and Deputy President of the Supreme Court of Appeal.

[Sub-s. (3) substituted by s. 13 of the Constitution Sixth Amendment Act of 2001.]

(4) The other judges of the Constitutional Court are appointed by the President, as head of the national executive, after consulting the Chief Justice and the leaders of parties represented in the National Assembly, in accordance with the following procedure:
   (a) The Judicial Service Commission must prepare a list of nominees with three names more than the number of appointments to be made, and submit the list to the President.
   (b) The President may make appointments from the list, and must advise the Judicial Service Commission, with reasons, if any of the nominees are unacceptable and any appointment remains to be made.
   (c) The Judicial Service Commission must supplement the list with further nominees and the President must make the remaining appointments from the supplemented list.

[Sub-s. (4) substituted by s. 13 of the Constitution Sixth Amendment Act of 2001.]

(5) At all times, at least four members of the Constitutional Court must be persons who were judges at the time they were appointed to the Constitutional Court.

(6) The President must appoint the judges of all other courts on the advice of the Judicial Service Commission.

(7) Other judicial officers must be appointed in terms of an Act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice.

(8) Before judicial officers begin to perform their functions, they must take an oath or affirm, in accordance with Schedule 2, that they will uphold and protect the Constitution.

Appointment of acting judges

175. (1) The President may appoint a woman or a man to serve as an acting Deputy Chief Justice or judge of the Constitutional Court if there is a vacancy in any of those offices , or if the person holding such an office is absent. The appointment must be made on the recommendation of the Cabinet member responsible for the administration of justice acting with the concurrence of the Chief Justice, and an appointment as acting Deputy Chief Justice must be made from the ranks of the judges who had been appointed to the Constitutional Court in terms of section 174(4).

(2) The Cabinet member responsible for the administration of justice must appoint acting judges to other courts after consulting the senior judge of the court on which the acting judge will serve.

[S. 175 substituted by s. 9 of the Constitution Seventeenth Amendment Act of 2012.]

Terms of office and remuneration

176. (1) A Constitutional Court judge holds office for a non-renewable term of 12 years, or until he or she attains the age of 70, whichever occurs first, except where an Act of Parliament extends the term of office of a Constitutional Court judge.

[Sub-s. (1) substituted by s. 15 of the Constitution Sixth Amendment Act of 2001.]

(2) Other judges hold office until they are discharged from active service in terms of an Act of Parliament.

(3) The salaries, allowances and benefits of judges may not be reduced.

Removal

177. (1) A judge may be removed from office only if—

(a) the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and

(b) the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.

(2) The President must remove a judge from office upon adoption of a resolution calling for that judge to be removed.

(3) The President, on the advice of the Judicial Service Commission, may suspend a judge who is the subject of a procedure in terms of subsection (1).

Judicial Service Commission

178. (1) There is a Judicial Service Commission consisting of—

(a) the Chief Justice, who presides at meetings of the Commission;

(b) the President of the Supreme Court of Appeal;

[Para. (b) substituted by s. 16(a) of the Constitution Sixth Amendment Act of 2001.]

(c) one Judge President designated by the Judges President;

(d) the Cabinet member responsible for the administration of justice, or an alternate designated by that Cabinet member;

(e) two practising advocates nominated from within the advocates' profession to represent the profession as a whole, and appointed by the President;
(f) two practising attorneys nominated from within the attorneys' profession to represent the profession as a whole, and appointed by the President;
(g) one teacher of law designated by teachers of law at South African universities;
(h) six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the Assembly;
(i) four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least six provinces;
(j) four persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the National Assembly; and
(k) when considering matters relating to a specific Division of the High Court of South Africa, the Judge President of that Division and the Premier of the province concerned, or an alternate designated by each of them.

[Para. (k) substituted by s. 2(a) of the Constitution Second Amendment Act of 1998, by s. 16(b) of the Constitution Sixth Amendment Act of 2001 and by s. 10 of the Constitution Seventeenth Amendment Act of 2012.]

(2) If the number of persons nominated from within the advocates' or attorneys' profession in terms of subsection (1)(e) or (f) equals the number of vacancies to be filled, the President must appoint them. If the number of persons nominated exceeds the number of vacancies to be filled, the President, after consulting the relevant profession, must appoint sufficient of the nominees to fill the vacancies, taking into account the need to ensure that those appointed represent the profession as a whole.
(3) Members of the Commission designated by the National Council of Provinces serve until they are replaced together, or until any vacancy occurs in their number. Other members who were designated or nominated to the Commission serve until they are replaced by those who designated or nominated them.

(4) The Judicial Service Commission has the powers and functions assigned to it in the Constitution and national legislation.
(5) The Judicial Service Commission may advise the national government on any matter relating to the judiciary or the administration of justice, but when it considers

any matter except the appointment of a judge, it must sit without the members designated in terms of subsection (1)(h) and (i).

(6) The Judicial Service Commission may determine its own procedure, but decisions of the Commission must be supported by a majority of its members.

(7) If the Chief Justice or the President of the Supreme Court of Appeal is temporarily unable to serve on the Commission, the Deputy Chief Justice or the Deputy President of the Supreme Court of Appeal, as the case may be, acts as his or her alternate on the Commission.

[Sub-s. (7) added by s. 2(b) of the Constitution Second Amendment Act of 1998 and substituted by s. 16 (c) of Constitution Sixth Amendment Act of 2001.]

(8) The President and the persons who appoint, nominate or designate the members of the Commission in terms of subsection (1)(c), (e), (f) and (g), may, in the same manner appoint, nominate or designate an alternate for each of those members, to serve on the Commission whenever the member concerned is temporarily unable to do so by reason of his or her incapacity or absence from the Republic or for any other sufficient reason.

[Sub-s. (8) added by s. 2(b) of the Constitution Second Amendment Act of 1998.]

Prosecuting authority

179. (1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of—

(a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and

(b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.

(2) The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.

(3) National legislation must ensure that the Directors of Public Prosecutions—

(a) are appropriately qualified; and

(b) are responsible for prosecutions in specific jurisdictions, subject to subsection (5).

(4) National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.

(5) The National Director of Public Prosecutions—

(a) must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process;

(b) must issue policy directives which must be observed in the prosecution process;

(c) may intervene in the prosecution process when policy directives are not complied with; and

(d) may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following:

(i) The accused person.

(ii) The complainant.

(iii) Any other person or party whom the National Director considers to be relevant.

(6) The Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.

(7) All other matters concerning the prosecuting authority must be determined by national legislation.

Other matters concerning administration of justice

180. National legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution, including—

(a) training programmes for judicial officers;

(b) procedures for dealing with complaints about judicial officers; and

(c) the participation of people other than judicial officers in court decisions.

CHAPTER 9

STATE INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY

Establishment and governing principles

181. (1) The following state institutions strengthen constitutional democracy in the Republic:
   (a) The Public Protector.
   (b) The South African Human Rights Commission.
   (c) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.
   (d) The Commission for Gender Equality.
   (e) The Auditor-General.
   (f) The Electoral Commission.

(2) These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.

(3) Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.

(4) No person or organ of state may interfere with the functioning of these institutions.

(5) These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.

Public Protector

Functions of Public Protector

182. (1) The Public Protector has the power, as regulated by national legislation—
   (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

(b) to report on that conduct; and
(c) to take appropriate remedial action.

(2) The Public Protector has the additional powers and functions prescribed by national legislation.

(3) The Public Protector may not investigate court decisions.

(4) The Public Protector must be accessible to all persons and communities.

(5) Any report issued by the Public Protector must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential.

Tenure

183. The Public Protector is appointed for a non-renewable period of seven years.

South African Human Rights Commission

Functions of South African Human Rights Commission

184. (1) The South African Human Rights Commission must—
(a) promote respect for human rights and a culture of human rights;
(b) promote the protection, development and attainment of human rights; and
(c) monitor and assess the observance of human rights in the Republic.

(2) The South African Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power—
(a) to investigate and to report on the observance of human rights;
(b) to take steps to secure appropriate redress where human rights have been violated;
(c) to carry out research; and
(d) to educate.

(3) Each year, the South African Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.

(4) The South African Human Rights Commission has the additional powers and functions prescribed by national legislation.

Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities

Functions of Commission

185. (1) The primary objects of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities are—
   (a) to promote respect for the rights of cultural, religious and linguistic communities;
   (b) to promote and develop peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association; and
   (c) to recommend the establishment or recognition, in accordance with national legislation, of a cultural or other council or councils for a community or communities in South Africa.

(2) The Commission has the power, as regulated by national legislation, necessary to achieve its primary objects, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning the rights of cultural, religious and linguistic communities.

(3) The Commission may report any matter which falls within its powers and functions to the South African Human Rights Commission for investigation.

(4) The Commission has the additional powers and functions prescribed by national legislation.

Composition of Commission

186. (1) The number of members of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities and their appointment and terms of office must be prescribed by national legislation.

(2) The composition of the Commission must—
   (a) be broadly representative of the main cultural, religious and linguistic communities in South Africa; and
   (b) broadly reflect the gender composition of South Africa.

Commission for Gender Equality

Functions of Commission for Gender Equality

187. (1) The Commission for Gender Equality must promote respect for gender equality and the protection, development and attainment of gender equality.

(2) The Commission for Gender Equality has the power, as regulated by national legislation, necessary to perform its functions, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.

(3) The Commission for Gender Equality has the additional powers and functions prescribed by national legislation.

Auditor-General

Functions of Auditor-General

188. (1) The Auditor-General must audit and report on the accounts, financial statements and financial management of—

(a) all national and provincial state departments and administrations;

(b) all municipalities; and

(c) any other institution or accounting entity required by national or provincial legislation to be audited by the Auditor-General.

(2) In addition to the duties prescribed in subsection (1), and subject to any legislation, the Auditor-General may audit and report on the accounts, financial statements and financial management of—

(a) any institution funded from the National Revenue Fund or a Provincial Revenue Fund or by a municipality; or

(b) any institution that is authorised in terms of any law to receive money for a public purpose.

(3) The Auditor-General must submit audit reports to any legislature that has a direct interest in the audit, and to any other authority prescribed by national legislation. All reports must be made public.

(4) The Auditor-General has the additional powers and functions prescribed by national legislation.

Tenure

189. The Auditor-General must be appointed for a fixed, non-renewable term of between five and ten years.

Electoral Commission

Functions of Electoral Commission

190. (1) The Electoral Commission must—
(a) manage elections of national, provincial and municipal legislative bodies in accordance with national legislation;
(b) ensure that those elections are free and fair; and
(c) declare the results of those elections within a period that must be prescribed by national legislation and that is as short as reasonably possible.
(2) The Electoral Commission has the additional powers and functions prescribed by national legislation.

Composition of Electoral Commission

191. The Electoral Commission must be composed of at least three persons. The number of members and their terms of office must be prescribed by national legislation.

Independent Authority to Regulate Broadcasting

Broadcasting Authority

192. National legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.

General Provisions

Appointments

193. (1) The Public Protector and the members of any Commission established by this Chapter must be women or men who—

(a) are South African citizens;
(b) are fit and proper persons to hold the particular office; and
(c) comply with any other requirements prescribed by national legislation.

(2) The need for a Commission established by this Chapter to reflect broadly the race and gender composition of South Africa must be considered when members are appointed.

(3) The Auditor-General must be a woman or a man who is a South African citizen and a fit and proper person to hold that office. Specialised knowledge of, or experience in, auditing, state finances and public administration must be given due regard in appointing the Auditor-General.

(4) The President, on the recommendation of the National Assembly, must appoint the Public Protector, the Auditor-General and the members of—
(a) the South African Human Rights Commission;
(b) the Commission for Gender Equality; and
(c) the Electoral Commission.

(5) The National Assembly must recommend persons—
(a) nominated by a committee of the Assembly proportionally composed of members of all parties represented in the Assembly; and
(b) approved by the Assembly by a resolution adopted with a supporting vote—
(i) of at least 60 per cent of the members of the Assembly, if the recommendation concerns the appointment of the Public Protector or the Auditor-General; or
(ii) of a majority of the members of the Assembly, if the recommendation concerns the appointment of a member of a Commission.

(6) The involvement of civil society in the recommendation process may be provided for as envisaged in section 59(1)(a).

Removal from office

194. (1) The Public Protector, the Auditor-General or a member of a Commission established by this Chapter may be removed from office only on—
(a) the ground of misconduct, incapacity or incompetence;
(b) a finding to that effect by a committee of the National Assembly; and
(c) the adoption by the Assembly of a resolution calling for that person's removal from office.

(2) A resolution of the National Assembly concerning the removal from office of—
  (a) the Public Protector or the Auditor-General must be adopted with a supporting vote of at least two thirds of the members of the Assembly; or
  (b) a member of a Commission must be adopted with a supporting vote of a majority of the members of the Assembly.

(3) The President—
  (a) may suspend a person from office at any time after the start of the proceedings of a committee of the National Assembly for the removal of that person; and
  (b) must remove a person from office upon adoption by the Assembly of the resolution calling for that person's removal.

CHAPTER 10

PUBLIC ADMINISTRATION

Basic values and principles governing public administration

195. (1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
   (a) A high standard of professional ethics must be promoted and maintained.
   (b) Efficient, economic and effective use of resources must be promoted.
   (c) Public administration must be development-oriented.
   (d) Services must be provided impartially, fairly, equitably and without bias.
   (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
   (f) Public administration must be accountable.
   (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
   (h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
   (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

(2) The above principles apply to—
   (a) administration in every sphere of government;
   (b) organs of state; and
   (c) public enterprises.

(3) National legislation must ensure the promotion of the values and principles listed in subsection (1).

(4) The appointment in public administration of a number of persons on policy considerations is not precluded, but national legislation must regulate these appointments in the public service.

(5) Legislation regulating public administration may differentiate between different sectors, administrations or institutions.

(6) The nature and functions of different sectors, administrations or institutions of public administration are relevant factors to be taken into account in legislation regulating public administration.

Public Service Commission

196. (1) There is a single Public Service Commission for the Republic.

(2) The Commission is independent and must be impartial, and must exercise its powers and perform its functions without fear, favour or prejudice in the interest of the maintenance of effective and efficient public administration and a high standard of professional ethics in the public service. The Commission must be regulated by national legislation.

(3) Other organs of state, through legislative and other measures, must assist and protect the Commission to ensure the independence, impartiality, dignity and effectiveness of the Commission. No person or organ of state may interfere with the functioning of the Commission.

(4) The powers and functions of the Commission are—

(a) to promote the values and principles set out in section 195, throughout the public service;

(b) to investigate, monitor and evaluate the organisation and administration, and the personnel practices, of the public service;

(c) to propose measures to ensure effective and efficient performance within the public service;

(d) to give directions aimed at ensuring that personnel procedures relating to recruitment, transfers, promotions and dismissals comply with the values and principles set out in section 195;

(e) to report in respect of its activities and the performance of its functions, including any finding it may make and directions and advice it may give, and to provide an evaluation of the extent to which the values and principles set out in section 195 are complied with; and

(f) either of its own accord or on receipt of any complaint—

(i) to investigate and evaluate the application of personnel and public administration practices, and to report to the relevant executive authority and legislature;

(ii) to investigate grievances of employees in the public service concerning official acts or omissions, and recommend appropriate remedies;

(iii) to monitor and investigate adherence to applicable procedures in the public service; and

(iv) to advise national and provincial organs of state regarding personnel practices in the public service, including those relating to the recruitment, appointment, transfer, discharge and other aspects of the careers of employees in the public service; and

(g) to exercise or perform the additional powers or functions prescribed by an Act of Parliament.

[Para. (g) added by s. 3 of the Constitution Second Amendment Act of 1998.]

(5) The Commission is accountable to the National Assembly.

(6) The Commission must report at least once a year in terms of subsection (4)(e)—

(a) to the National Assembly; and

(b) in respect of its activities in a province, to the legislature of that province.

(7) The Commission has the following 14 commissioners appointed by the President:

(a) Five commissioners approved by the National Assembly in accordance with subsection (8)(a); and

(b) one commissioner for each province nominated by the Premier of the province in accordance with subsection (8)(b).

(8) (a) A commissioner appointed in terms of subsection (7)(a) must be—

(i) recommended by a committee of the National Assembly that is proportionally composed of members of all parties represented in the Assembly; and

(ii) approved by the Assembly by a resolution adopted with a supporting vote of a majority of its members.

(b) A commissioner nominated by the Premier of a province must be—

(i) recommended by a committee of the provincial legislature that is proportionally composed of members of all parties represented in the legislature; and

(ii) approved by the legislature by a resolution adopted with a supporting vote of a majority of its members.

(9) An Act of Parliament must regulate the procedure for the appointment of commissioners.

(10) A commissioner is appointed for a term of five years, which is renewable for one additional term only, and must be a woman or a man who is—

(a) a South African citizen; and
(b) a fit and proper person with knowledge of, or experience in, administration, management or the provision of public services.

(11) A commissioner may be removed from office only on—
(a) the ground of misconduct, incapacity or incompetence;
(b) a finding to that effect by a committee of the National Assembly or, in the case of a commissioner nominated by the Premier of a province, by a committee of the legislature of that province; and
(c) the adoption by the Assembly or the provincial legislature concerned, of a resolution with a supporting vote of a majority of its members calling for the commissioner's removal from office.

(12) The President must remove the relevant commissioner from office upon—
(a) the adoption by the Assembly of a resolution calling for that commissioner's removal; or
(b) written notification by the Premier that the provincial legislature has adopted a resolution calling for that commissioner's removal.

(13) Commissioners referred to in subsection (7)(b) may exercise the powers and perform the functions of the Commission in their provinces as prescribed by national legislation.

Public Service

197. (1) Within public administration there is a public service for the Republic, which must function, and be structured, in terms of national legislation, and which must loyally execute the lawful policies of the government of the day.

(2) The terms and conditions of employment in the public service must be regulated by national legislation. Employees are entitled to a fair pension as regulated by national legislation.

(3) No employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause.

(4) Provincial governments are responsible for the recruitment, appointment, promotion, transfer and dismissal of members of the public service in their administrations within a framework of uniform norms and standards applying to the public service.

CHAPTER 11

SECURITY SERVICES

Governing principles

198. The following principles govern national security in the Republic:

(a) National security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life.

(b) The resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in terms of the Constitution or national legislation.

(c) National security must be pursued in compliance with the law, including international law.

(d) National security is subject to the authority of Parliament and the national executive.

Establishment, structuring and conduct of security services

199. (1) The security services of the Republic consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution.

(2) The defence force is the only lawful military force in the Republic.

(3) Other than the security services established in terms of the Constitution, armed organisations or services may be established only in terms of national legislation.

(4) The security services must be structured and regulated by national legislation.

(5) The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.

(6) No member of any security service may obey a manifestly illegal order.

(7) Neither the security services, nor any of their members, may, in the performance of their functions—

(a) prejudice a political party interest that is legitimate in terms of the Constitution; or

(b) further, in a partisan manner, any interest of a political party.

(8) To give effect to the principles of transparency and accountability, multi-party parliamentary committees must have oversight of all security services in a manner determined by national legislation or the rules and orders of Parliament.

Defence

Defence force

200. (1) The defence force must be structured and managed as a disciplined military force.

(2) The primary object of the defence force is to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force.

Political responsibility

201. (1) A member of the Cabinet must be responsible for defence.

(2) Only the President, as head of the national executive, may authorise the employment of the defence force—

(a) in co-operation with the police service;

(b) in defence of the Republic; or

(c) in fulfilment of an international obligation.

(3) When the defence force is employed for any purpose mentioned in subsection (2), the President must inform Parliament, promptly and in appropriate detail, of—

(a) the reasons for the employment of the defence force;

(b) any place where the force is being employed;

(c) the number of people involved; and

(d) the period for which the force is expected to be employed.

(4) If Parliament does not sit during the first seven days after the defence force is employed as envisaged in subsection (2), the President must provide the information required in subsection (3) to the appropriate oversight committee.

Command of defence force

202. (1) The President as head of the national executive is Commander-in-Chief of the defence force, and must appoint the Military Command of the defence force.

(2) Command of the defence force must be exercised in accordance with the directions of the Cabinet member responsible for defence, under the authority of the President.

State of national defence

203. (1) The President as head of the national executive may declare a state of national defence, and must inform Parliament promptly and in appropriate detail of—
(a) the reasons for the declaration;
(b) any place where the defence force is being employed; and
(c) the number of people involved.
(2) If Parliament is not sitting when a state of national defence is declared, the President must summon Parliament to an extraordinary sitting within seven days of the declaration.
(3) A declaration of a state of national defence lapses unless it is approved by Parliament within seven days of the declaration.

Defence civilian secretariat

204. A civilian secretariat for defence must be established by national legislation to function under the direction of the Cabinet member responsible for defence.

Police

Police service

205. (1) The national police service must be structured to function in the national, provincial and, where appropriate, local spheres of government.
(2) National legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively, taking into account the requirements of the provinces.
(3) The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.

Political responsibility

206. (1) A member of the Cabinet must be responsible for policing and must determine national policing policy after consulting the provincial governments and taking into account the policing needs and priorities of the provinces as determined by the provincial executives.

(2) The national policing policy may make provision for different policies in respect of different provinces after taking into account the policing needs and priorities of these provinces.

(3) Each province is entitled—

(a) to monitor police conduct;

(b) to oversee the effectiveness and efficiency of the police service, including receiving reports on the police service;

(c) to promote good relations between the police and the community;

(d) to assess the effectiveness of visible policing; and

(e) to liaise with the Cabinet member responsible for policing with respect to crime and policing in the province.

(4) A provincial executive is responsible for policing functions—

(a) vested in it by this Chapter;

(b) assigned to it in terms of national legislation; and

(c) allocated to it in the national policing policy.

(5) In order to perform the functions set out in subsection (3), a province—

(a) may investigate, or appoint a commission of inquiry into, any complaints of police inefficiency or a breakdown in relations between the police and any community; and

(b) must make recommendations to the Cabinet member responsible for policing.

(6) On receipt of a complaint lodged by a provincial executive, an independent police complaints body established by national legislation must investigate any alleged misconduct of, or offence committed by, a member of the police service in the province.

(7) National legislation must provide a framework for the establishment, powers, functions and control of municipal police services.

(8) A committee composed of the Cabinet member and the members of the Executive Councils responsible for policing must be established to ensure effective co-ordination of the police service and effective co-operation among the spheres of government.

(9) A provincial legislature may require the provincial commissioner of the province to appear before it or any of its committees to answer questions.

Control of police service

207. (1) The President as head of the national executive must appoint a woman or a man as the National Commissioner of the police service, to control and manage the police service.

(2) The National Commissioner must exercise control over and manage the police service in accordance with the national policing policy and the directions of the Cabinet member responsible for policing.

(3) The National Commissioner, with the concurrence of the provincial executive, must appoint a woman or a man as the provincial commissioner for that province, but if the National Commissioner and the provincial executive are unable to agree on the appointment, the Cabinet member responsible for policing must mediate between the parties.

(4) The provincial commissioners are responsible for policing in their respective provinces—

(a) as prescribed by national legislation; and

(b) subject to the power of the National Commissioner to exercise control over and manage the police service in terms of subsection (2).

(5) The provincial commissioner must report to the provincial legislature annually on policing in the province, and must send a copy of the report to the National Commissioner.

(6) If the provincial commissioner has lost the confidence of the provincial executive, that executive may institute appropriate proceedings for the removal or transfer of, or disciplinary action against, that commissioner, in accordance with national legislation.

Police civilian secretariat

208. A civilian secretariat for the police service must be established by national legislation to function under the direction of the Cabinet member responsible for policing.

Intelligence

Establishment and control of intelligence services

209. (1) Any intelligence service, other than any intelligence division of the defence force or police service, may be established only by the President, as head of the national executive, and only in terms of national legislation.

(2) The President as head of the national executive must appoint a woman or a man as head of each intelligence service established in terms of subsection (1), and must either assume political responsibility for the control and direction of any of those services, or designate a member of the Cabinet to assume that responsibility.

Powers, functions and monitoring

210. National legislation must regulate the objects, powers and functions of the intelligence services, including any intelligence division of the defence force or police service, and must provide for—

(a) the co-ordination of all intelligence services; and

(b) civilian monitoring of the activities of those services by an inspector appointed by the President, as head of the national executive, and approved by a resolution adopted by the National Assembly with a supporting vote of at least two thirds of its members.

CHAPTER 12

TRADITIONAL LEADERS

Recognition

211. (1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.

(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.

(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

Role of traditional leaders

212. (1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.

(2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law—

(a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and

(b) national legislation may establish a council of traditional leaders.

CHAPTER 13

FINANCE

General Financial Matters

National Revenue Fund

213. (1) There is a National Revenue Fund into which all money received by the national government must be paid, except money reasonably excluded by an Act of Parliament.

(2) Money may be withdrawn from the National Revenue Fund only—

(a) in terms of an appropriation by an Act of Parliament; or

(b) as a direct charge against the National Revenue Fund, when it is provided for in the Constitution or an Act of Parliament.

(3) A province's equitable share of revenue raised nationally is a direct charge against the National Revenue Fund.

[Date of commencement of s. 213: 1 January 1998]

Equitable shares and allocations of revenue

214. (1) An Act of Parliament must provide for—

(a) the equitable division of revenue raised nationally among the national, provincial and local spheres of government;

(b) the determination of each province's equitable share of the provincial share of that revenue; and

(c) any other allocations to provinces, local government or municipalities from the national government's share of that revenue, and any conditions on which those allocations may be made.

(2) The Act referred to in subsection (1) may be enacted only after the provincial governments, organised local government and the Financial and Fiscal Commission have been consulted, and any recommendations of the Commission have been considered, and must take into account—

(a) the national interest;

(b) any provision that must be made in respect of the national debt and other national obligations;

(c) the needs and interests of the national government, determined by objective criteria;
(d) the need to ensure that the provinces and municipalities are able to provide basic services and perform the functions allocated to them;
(e) the fiscal capacity and efficiency of the provinces and municipalities;
(f) developmental and other needs of provinces, local government and municipalities;
(g) economic disparities within and among the provinces;
(h) obligations of the provinces and municipalities in terms of national legislation;
(i) the desirability of stable and predictable allocations of revenue shares; and
(j) the need for flexibility in responding to emergencies or other temporary needs, and other factors based on similar objective criteria.

[Date of commencement of s. 214: 1 January 1998]

National, provincial and municipal budgets

215. (1) National, provincial and municipal budgets and budgetary processes must promote transparency, accountability and the effective financial management of the economy, debt and the public sector.

(2) National legislation must prescribe—
(a) the form of national, provincial and municipal budgets;
(b) when national and provincial budgets must be tabled; and
(c) that budgets in each sphere of government must show the sources of revenue and the way in which proposed expenditure will comply with national legislation.

(3) Budgets in each sphere of government must contain—
(a) estimates of revenue and expenditure, differentiating between capital and current expenditure;
(b) proposals for financing any anticipated deficit for the period to which they apply; and
(c) an indication of intentions regarding borrowing and other forms of public liability that will increase public debt during the ensuing year.

[Date of commencement of s. 215: 1 January 1998.]

Treasury control

216. (1) National legislation must establish a national treasury and prescribe measures to ensure both transparency and expenditure control in each sphere of government, by introducing—
(a) generally recognised accounting practice;
(b) uniform expenditure classifications; and
(c) uniform treasury norms and standards.

(2) The national treasury must enforce compliance with the measures established in terms of subsection (1), and may stop the transfer of funds to an organ of state if that organ of state commits a serious or persistent material breach of those measures.

[Sub-s. (2) substituted by s. 5 (a) of the Constitution Seventh Amendment Act of 2001.]

(3) A decision to stop the transfer of funds due to a province in terms of section 214(1) (b) may be taken only in the circumstances mentioned in subsection (2) and—
(a) may not stop the transfer of funds for more than 120 days; and
(b) may be enforced immediately, but will lapse retrospectively unless Parliament approves it following a process substantially the same as that established in terms of section 76(1) and prescribed by the joint rules and orders of Parliament. This process must be completed within 30 days of the decision by the national treasury.

[Sub-s. (3) amended by s. 5 (b) of the Constitution Seventh Amendment Act of 2001.]

(4) Parliament may renew a decision to stop the transfer of funds for no more than 120 days at a time, following the process established in terms of subsection (3).

(5) Before Parliament may approve or renew a decision to stop the transfer of funds to a province—
(a) the Auditor-General must report to Parliament; and
(b) the province must be given an opportunity to answer the allegations against it, and to state its case, before a committee.

Procurement

217. (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for—
   (a) categories of preference in the allocation of contracts; and
   (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.

[Sub-s. (3) substituted by s. 6 of the Constitution Seventh Amendment Act of 2001.]

Government guarantees

218. (1) The national government, a provincial government or a municipality may guarantee a loan only if the guarantee complies with any conditions set out in national legislation.

(2) National legislation referred to in subsection (1) may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.

(3) Each year, every government must publish a report on the guarantees it has granted.

[Date of commencement of S. 218: 1 January 1998.]

Remuneration of persons holding public office

219. (1) An Act of Parliament must establish a framework for determining—
   (a) the salaries, allowances and benefits of members of the National Assembly, permanent delegates to the National Council of Provinces, members of the Cabinet, Deputy Ministers, traditional leaders and members of any councils of traditional leaders; and
   (b) the upper limit of salaries, allowances or benefits of members of provincial legislatures, members of Executive Councils and members of Municipal Councils of the different categories.

(2) National legislation must establish an independent commission to make recommendations concerning the salaries, allowances and benefits referred to in subsection (1).

(3) Parliament may pass the legislation referred to in subsection (1) only after considering any recommendations of the commission established in terms of subsection (2).

(4) The national executive, a provincial executive, a municipality or any other relevant authority may implement the national legislation referred to in subsection (1) only after considering any recommendations of the commission established in terms of subsection (2).

(5) National legislation must establish frameworks for determining the salaries, allowances and benefits of judges, the Public Protector, the Auditor-General, and members of any commission provided for in the Constitution, including the broadcasting authority referred to in section 192.

Financial and Fiscal Commission

Establishment and functions

220. (1) There is a Financial and Fiscal Commission for the Republic which makes recommendations envisaged in this Chapter, or in national legislation, to Parliament, provincial legislatures and any other authorities determined by national legislation.

(2) The Commission is independent and subject only to the Constitution and the law, and must be impartial.

(3) The Commission must function in terms of an Act of Parliament and, in performing its functions, must consider all relevant factors, including those listed in section 214(2).

Appointment and tenure of members

221. (1) The Commission consists of the following women and men appointed by the President, as head of the national executive:

(a) A chairperson and a deputy chairperson;

(b) three persons selected, after consulting the Premiers, from a list compiled in accordance with a process prescribed by national legislation;

(c) two persons selected, after consulting organised local government, from a list compiled in accordance with a process prescribed by national legislation; and

(d) two other persons.

[Sub-s (1) substituted by s. 2 of the Constitution Fifth Amendment Act of 1999] and substituted by s. 7(a) of the Constitution Seventh Amendment Act of 2001.]

(1A) National legislation referred to in subsection (1) must provide for the participation of—

(a) the Premiers in the compilation of a list envisaged in subsection (1) (b); and

(b) organised local government in the compilation of a list envisaged in subsection (1) (c).

[Sub-s. (1A) inserted by s. 7(b) of the Constitution Seventh Amendment Act of 2001.]

(2) Members of the Commission must have appropriate expertise.

(3) Members serve for a term established in terms of national legislation. The President may remove a member from office on the ground of misconduct, incapacity or incompetence.

Reports

222. The Commission must report regularly both to Parliament and to the provincial legislatures.

Central Bank

Establishment

223. The South African Reserve Bank is the central bank of the Republic and is regulated in terms of an Act of Parliament.

Primary object

224. (1) The primary object of the South African Reserve Bank is to protect the value of the currency in the interest of balanced and sustainable economic growth in the Republic.

(2) The South African Reserve Bank, in pursuit of its primary object, must perform its functions independently and without fear, favour or prejudice, but there must be regular consultation between the Bank and the Cabinet member responsible for national financial matters.

Powers and functions

225. The powers and functions of the South African Reserve Bank are those customarily exercised and performed by central banks, which powers and functions must be determined by an Act of Parliament and must be exercised or performed subject to the conditions prescribed in terms of that Act.

Provincial and Local Financial Matters

Provincial Revenue Funds

226. (1) There is a Provincial Revenue Fund for each province into which all money received by the provincial government must be paid, except money reasonably excluded by an Act of Parliament.

(2) Money may be withdrawn from a Provincial Revenue Fund only—

(a) in terms of an appropriation by a provincial Act; or

(b) as a direct charge against the Provincial Revenue Fund, when it is provided for in the Constitution or a provincial Act.

(3) Revenue allocated through a province to local government in that province in terms of section 214(1), is a direct charge against that province's Revenue Fund.

(4) National legislation may determine a framework within which—

(a) a provincial Act may in terms of subsection (2)(b) authorise the withdrawal of money as a direct charge against a Provincial Revenue Fund; and

(b) revenue allocated through a province to local government in that province in terms of subsection (3) must be paid to municipalities in the province.

[Sub-s. (4) added by s. 8 of the Constitution Seventh Amendment Act of 2001.]
[Date of commencement of s. 226: 1 January 1998]

National sources of provincial and local government funding

227. (1) Local government and each province—

(a) is entitled to an equitable share of revenue raised nationally to enable it to provide basic services and perform the functions allocated to it; and

(b) may receive other allocations from national government revenue, either conditionally or unconditionally.

(2) Additional revenue raised by provinces or municipalities may not be deducted from their share of revenue raised nationally, or from other allocations made to them

out of national government revenue. Equally, there is no obligation on the national government to compensate provinces or municipalities that do not raise revenue commensurate with their fiscal capacity and tax base.

(3) A province's equitable share of revenue raised nationally must be transferred to the province promptly and without deduction, except when the transfer has been stopped in terms of section 216.

(4) A province must provide for itself any resources that it requires, in terms of a provision of its provincial constitution, that are additional to its requirements envisaged in the Constitution.

[Date of commencement of s. 227: 1 January 1998]

Provincial taxes

228. (1) A provincial legislature may impose—

(a) taxes, levies and duties other than income tax, value-added tax, general sales tax, rates on property or customs duties; and

(b) flat-rate surcharges on any tax, levy or duty that is imposed by national legislation, other than on corporate income tax, value-added tax, rates on property or customs duties.

[Para. (b) substituted by s. 9 of the Constitution Seventh Amendment Act of 2001.]

(2) The power of a provincial legislature to impose taxes, levies, duties and surcharges—

(a) may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across provincial boundaries, or the national mobility of goods, services, capital or labour; and

(b) must be regulated in terms of an Act of Parliament, which may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.

[Date of commencement of s. 228: 1 January 1998]

Municipal fiscal powers and functions

229. (1) Subject to subsections (2), (3) and (4), a municipality may impose—

(a) rates on property and surcharges on fees for services provided by or on behalf of the municipality; and

(b) if authorised by national legislation, other taxes, levies and duties appropriate to local government or to the category of local government into which that municipality falls, but no municipality may impose income tax, value-added tax, general sales tax or customs duty.

(2) The power of a municipality to impose rates on property, surcharges on fees for services provided by or on behalf of the municipality, or other taxes, levies or duties—

(a) may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across municipal boundaries, or the national mobility of goods, services, capital or labour; and

(b) may be regulated by national legislation.

(3) When two municipalities have the same fiscal powers and functions with regard to the same area, an appropriate division of those powers and functions must be made in terms of national legislation. The division may be made only after taking into account at least the following criteria:

(a) The need to comply with sound principles of taxation.

(b) The powers and functions performed by each municipality.

(c) The fiscal capacity of each municipality.

(d) The effectiveness and efficiency of raising taxes, levies and duties.

(e) Equity.

(4) Nothing in this section precludes the sharing of revenue raised in terms of this section between municipalities that have fiscal power and functions in the same area.

(5) National legislation envisaged in this section may be enacted only after organised local government and the Financial and Fiscal Commission have been consulted, and any recommendations of the Commission have been considered.

[Date of commencement of s. 229: 1 January 1998]

Provincial loans

230. (1) A province may raise loans for capital or current expenditure in accordance with national legislation, but loans for current expenditure may be raised only when necessary for bridging purposes during a fiscal year.

(2) National legislation referred to in subsection (1) may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.

[S. 230 substituted by s. 10 of the Constitution Seventh Amendment Act of 2001.]

Municipal loans

230A. (1) A Municipal Council may, in accordance with national legislation—

(a) raise loans for capital or current expenditure for the municipality, but loans for current expenditure may be raised only when necessary for bridging purposes during a fiscal year; and

(b) bind itself and a future Council in the exercise of its legislative and executive authority to secure loans or investments for the municipality.

(2) National legislation referred to in subsection (1) may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.

[S. 230A inserted by s. 17 of the Constitution Sixth Amendment Act of 2001.]

CHAPTER 14

GENERAL PROVISIONS

International Law

International agreements

231. (1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

Customary international law

232. Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

Application of international law

233. When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

Other Matters

Charters of Rights

234. In order to deepen the culture of democracy established by the Constitution, Parliament may adopt Charters of Rights consistent with the provisions of the Constitution.

Self-determination

235. The right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the notion of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation.

Funding for political parties

236. To enhance multi-party democracy, national legislation must provide for the funding of political parties participating in national and provincial legislatures on an equitable and proportional basis.

Diligent performance of obligations

237. All constitutional obligations must be performed diligently and without delay.

Agency and delegation

238. An executive organ of state in any sphere of government may—

(a) delegate any power or function that is to be exercised or performed in terms of legislation to any other executive organ of state, provided the delegation is consistent with the legislation in terms of which the power is exercised or the function is performed; or

(b) exercise any power or perform any function for any other executive organ of state on an agency or delegation basis.

Definitions

239. In the Constitution, unless the context indicates otherwise—

"national legislation" includes—

(a) subordinate legislation made in terms of an Act of Parliament; and

(b) legislation that was in force when the Constitution took effect and that is administered by the national government;

"organ of state" means—

(a) any department of state or administration in the national, provincial or local sphere of government; or

(b) any other functionary or institution—

(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer;

"provincial legislation" includes—

(a) subordinate legislation made in terms of a provincial Act; and

(b) legislation that was in force when the Constitution took effect and that is administered by a provincial government.

Inconsistencies between different texts

240. In the event of an inconsistency between different texts of the Constitution, the English text prevails.

Transitional arrangements

241. Schedule 6 applies to the transition to the new constitutional order established by this Constitution, and any matter incidental to that transition.

Repeal of laws

242. The laws mentioned in Schedule 7 are repealed, subject to section 243 and Schedule 6.

Short title and commencement

243. (1) This Act is called the Constitution of the Republic of South Africa, 1996, and comes into effect as soon as possible on a date set by the President by proclamation, which may not be a date later than 1 July 1997.

(2) The President may set different dates before the date mentioned in subsection (1) in respect of different provisions of the Constitution.

(3) Unless the context otherwise indicates, a reference in a provision of the Constitution to a time when the Constitution took effect must be construed as a reference to the time when that provision took effect.

(4) If a different date is set for any particular provision of the Constitution in terms of subsection (2), any corresponding provision of the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), mentioned in the proclamation, is repealed with effect from the same date.

(5) Sections 213, 214, 215, 216, 218, 226, 227, 228, 229 and 230 come into effect on 1 January 1998, but this does not preclude the enactment in terms of this Constitution of legislation envisaged in any of these provisions before that date. Until that date any corresponding and incidental provisions of the Constitution of the Republic of South Africa, 1993, remain in force.

SCHEDULE 1

National Flag

(1) The national flag is rectangular; it is one and a half times longer than it is wide.

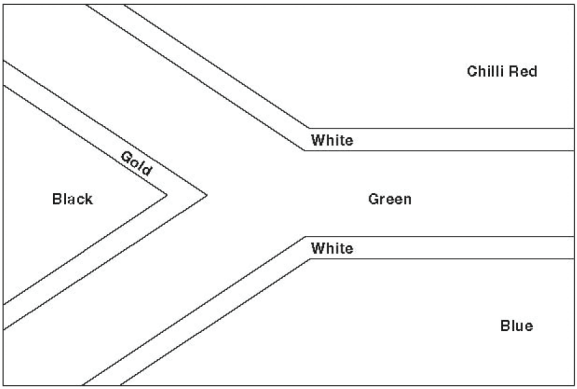
(2) It is black, gold, green, white, chilli red and blue.

(3) It has a green Y-shaped band that is one fifth as wide as the flag. The centre lines of the band start in the top and bottom corners next to the flag post, converge in the centre of the flag, and continue horizontally to the middle of the free edge.

(4) The green band is edged, above and below in white, and towards the flag post end, in gold. Each edging is one fifteenth as wide as the flag.

(5) The triangle next to the flag post is black.

(6) The upper horizontal band is chilli red and the lower horizontal band is blue. These bands are each one third as wide as the flag.



SCHEDULE 1A

Geographical Areas of Provinces

[Schedule 1A inserted by s. 4 of the Constitution Twelfth Amendment Act of 2005 and amended by s. 1 of the Constitution Thirteenth Amendment Act of 2007 and by the Constitution Sixteenth Amendment Act of 2009.]

The Province of the Eastern Cape

[Demarcation of the Province of the Eastern Cape substituted by the Constitution Thirteenth Amendment Act of 2007.]

Map No. 3 of Schedule 1 to Notice 1998 of 2005
Map No. 6 of Schedule 2 to Notice 1998 of 2005
Map No. 7 of Schedule 2 to Notice 1998 of 2005
Map No. 8 of Schedule 2 to Notice 1998 of 2005
Map No. 9 of Schedule 2 to Notice 1998 of 2005
Map No. 10 of Schedule 2 to Notice 1998 of 2005
Map No. 11 of Schedule 2 to Notice 1998 of 2005

The Province of the Free State

Map No. 12 of Schedule 2 to Notice 1998 of 2005
Map No. 13 of Schedule 2 to Notice 1998 of 2005
Map No. 14 of Schedule 2 to Notice 1998 of 2005
Map No. 15 of Schedule 2 to Notice 1998 of 2005
Map No. 16 of Schedule 2 to Notice 1998 of 2005

The Province of Gauteng

[Demarcation of the Province of Gauteng amended by the Constitution Sixteenth Amendment Act of 2009.]

Map No. 4 in Notice 1490 of 2008

[Reference to Map No. 4 substituted by s. 1(a) of the Constitution Sixteenth Amendment Act of 2009.]

Map No. 17 of Schedule 2 to Notice 1998 of 2005
Map No. 18 of Schedule 2 to Notice 1998 of 2005

Map No. 19 of Schedule 2 to Notice 1998 of 2005
Map No. 20 of Schedule 2 to Notice 1998 of 2005
Map No. 21 of Schedule 2 to Notice 1998 of 2005

The Province of KwaZulu-Natal

[Demarcation of the Province of KwaZulu-Natal substituted by the Constitution Thirteenth Amendment Act of 2007.]

Map No. 22 of Schedule 2 to Notice 1998 of 2005
Map No. 23 of Schedule 2 to Notice 1998 of 2005
Map No. 24 of Schedule 2 to Notice 1998 of 2005
Map No. 25 of Schedule 2 to Notice 1998 of 2005
Map No. 26 of Schedule 2 to Notice 1998 of 2005
Map No. 27 of Schedule 2 to Notice 1998 of 2005
Map No. 28 of Schedule 2 to Notice 1998 of 2005
Map No. 29 of Schedule 2 to Notice 1998 of 2005
Map No. 30 of Schedule 2 to Notice 1998 of 2005
Map No. 31 of Schedule 2 to Notice 1998 of 2005
Map No. 32 of Schedule 2 to Notice 1998 of 2005

The Province of Limpopo

Map No. 33 of Schedule 2 to Notice 1998 of 2005
Map No. 34 of Schedule 2 to Notice 1998 of 2005
Map No. 35 of Schedule 2 to Notice 1998 of 2005
Map No. 36 of Schedule 2 to Notice 1998 of 2005
Map No. 37 of Schedule 2 to Notice 1998 of 2005

The Province of Mpumalanga

Map No. 38 of Schedule 2 to Notice 1998 of 2005
Map No. 39 of Schedule 2 to Notice 1998 of 2005
Map No. 40 of Schedule 2 to Notice 1998 of 2005

The Province of the Northern Cape

Map No. 41 of Schedule 2 to Notice 1998 of 2005
Map No. 42 of Schedule 2 to Notice 1998 of 2005
Map No. 43 of Schedule 2 to Notice 1998 of 2005
Map No. 44 of Schedule 2 to Notice 1998 of 2005
Map No. 45 of Schedule 2 to Notice 1998 of 2005

The Province of North West

[Demarcation of the Province of North West amended by the Constitution Sixteenth Amendment Act of 2009.]

Map No. 5 in Notice 1490 of 2008

[Reference to Map No. 5 substituted by s. 1(b) of the Constitution Sixteenth Amendment Act of 2009.]

Map No. 46 of Schedule 2 to Notice 1998 of 2005
Map No. 47 of Schedule 2 to Notice 1998 of 2005
Map No. 48 of Schedule 2 to Notice 1998 of 2005

The Province of the Western Cape

Map No. 49 of Schedule 2 to Notice 1998 of 2005
Map No. 50 of Schedule 2 to Notice 1998 of 2005
Map No. 51 of Schedule 2 to Notice 1998 of 2005
Map No. 52 of Schedule 2 to Notice 1998 of 2005
Map No. 53 of Schedule 2 to Notice 1998 of 2005
Map No. 54 of Schedule 2 to Notice 1998 of 2005

SCHEDULE 2

Oaths and Solemn Affirmations

[Schedule 2 amended by s. 2 of Constitution First Amendment Act of 1997 (Eng text only) and substituted by s. 18 of Constitution Sixth Amendment Act of 2001.]

Oath or solemn affirmation of President and Acting President

1. The President or Acting President, before the Chief Justice, or another judge designated by the Chief Justice, must swear/affirm as follows:

In the presence of everyone assembled here, and in full realisation of the high calling I assume as President/Acting President of the Republic of South Africa, I, A.B., swear/solemnly affirm that I will be faithful to the Republic of South Africa, and will obey, observe, uphold and maintain the Constitution and all other law of the Republic; and I solemnly and sincerely promise that I will always—

- promote all that will advance the Republic, and oppose all that may harm it;
- protect and promote the rights of all South Africans;
- discharge my duties with all my strength and talents to the best of my knowledge and ability and true to the dictates of my conscience;
- do justice to all; and
- devote myself to the well-being of the Republic and all of its people.

(In the case of an oath: So help me God.)

Oath or solemn affirmation of Deputy President

2. The Deputy President, before the Chief Justice or another judge designated by the Chief Justice, must swear/affirm as follows:

In the presence of everyone assembled here, and in full realisation of the high calling I assume as Deputy President of the Republic of South Africa, I, A.B., swear/solemnly affirm that I will be faithful to the Republic of South Africa and will obey, observe, uphold and maintain the Constitution and all other law of the Republic; and I solemnly and sincerely promise that I will always—

- promote all that will advance the Republic, and oppose all that may harm it;
- be a true and faithful counsellor;
- discharge my duties with all my strength and talents to the best of my knowledge and ability and true to the dictates of my conscience;
- do justice to all; and
- devote myself to the well-being of the Republic and all of its people.

(In the case of an oath: So help me God.)

Oath or solemn affirmation of Ministers and Deputy Ministers

3. Each Minister and Deputy Minister, before the Chief Justice or another judge designated by the Chief Justice, must swear/affirm as follows:

I, A.B., swear/solemnly affirm that I will be faithful to the Republic of South Africa and will obey, respect and uphold the Constitution and all other law of the Republic; and I undertake to hold my office as Minister/Deputy Minister with honour and dignity; to be a true and faithful counsellor; not to divulge directly or indirectly any secret matter entrusted to me; and to perform the functions of my office conscientiously and to the best of my ability.
(In the case of an oath: So help me God.)

Oath or solemn affirmation of members of the National Assembly, permanent delegates to the National Council of Provinces and members of the provincial legislatures

4. (1) Members of the National Assembly, permanent delegates to the National Council of Provinces and members of provincial legislatures, before the Chief Justice or a judge designated by the Chief Justice, must swear or affirm as follows:

I, A.B., swear/solemnly affirm that I will be faithful to the: Republic of South Africa and will obey, respect and uphold the Constitution and all other law of the Republic; and I solemnly promise to perform my functions as a member of the National Assembly/permanent delegate to the National Council of Provinces/member of the legislature of the province of C.D. to the best of my ability.
(In the case of an oath: So help me God.)

(2) Persons filling a vacancy in the National Assembly, a permanent delegation to the National Council of Provinces or a provincial legislature may swear or affirm in terms of subitem (1) before the presiding officer of the Assembly, Council or legislature, as the case may be.

Oath or solemn affirmation of Premiers, Acting Premiers and members of provincial Executive Councils

5. The Premier or Acting Premier of a province, and each member of the Executive Council of a province, before the Chief Justice or a judge designated by the Chief Justice, must swear/affirm as follows:

I, A.B., swear/solemnly affirm that I will be faithful to the Republic of South Africa and will obey, respect and uphold the Constitution and all other law of the Republic; and I undertake to hold my office as Premier/Acting Premier/member of the Executive Council of the province of C.D. with honour and dignity; to be a true and faithful counsellor; not to divulge directly or indirectly any secret matter entrusted to me; and to perform the functions of my office conscientiously and to the best of my ability.
(In the case of an oath: So help me God.)

Oath or solemn affirmation of Judicial Officers

6. (1) Each judge or acting judge, before the Chief Justice or another judge designated by the Chief Justice, must swear or affirm as follows:

I, A.B., swear/solemnly affirm that, as a Judge of the Constitutional Court/Supreme Court of Appeal/High Court/ E.F. Court, I will be faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law.
(In the case of an oath: So help me God.)

(2) A person appointed to the office of Chief Justice who is not already a judge at the time of that appointment must swear or affirm before the Deputy Chief Justice, or failing that judge, the next most senior available judge of the Constitutional Court.

(3) Judicial officers, and acting judicial officers, other than judges, must swear/affirm in terms of national legislation.

SCHEDULE 3

Election Procedures

[Schedule 3 amended by s. 2 of the Constitution Fourth Amendment Act of 1999, by s. 19 of the Constitution Sixth Amendment Act of 2001, by s. 3 of the Constitution Ninth Amendment Act of 2002 and by s. 5 of the Constitution Fourteenth Amendment Act of 2008.]

Part A
Election Procedures for Constitutional Office-Bearers

Application

1. The procedure set out in this Schedule applies whenever—
   (a) the National Assembly meets to elect the President, or the Speaker or Deputy Speaker of the Assembly;
   (b) the National Council of Provinces meets to elect its Chairperson or a Deputy Chairperson; or
   (c) a provincial legislature meets to elect the Premier of the province or the Speaker or Deputy Speaker of the legislature.

Nominations

2. The person presiding at a meeting to which this Schedule applies must call for the nomination of candidates at the meeting.

Formal requirements

3. (1) A nomination must be made on the form prescribed by the rules mentioned in item 9.
   (2) The form on which a nomination is made must be signed—
      (a) by two members of the National Assembly, if the President or the Speaker or Deputy Speaker of the Assembly is to be elected;
      (b) on behalf of two provincial delegations, if the Chairperson or a Deputy Chairperson of the National Council of Provinces is to be elected; or
      (c) by two members of the relevant provincial legislature, if the Premier of the province or the Speaker or Deputy Speaker of the legislature is to be elected.

(3) A person who is nominated must indicate acceptance of the nomination by signing either the nomination form or any other form of written confirmation.

Announcement of names of candidates

4. At a meeting to which this Schedule applies, the person presiding must announce the names of the persons who have been nominated as candidates, but may not permit any debate.

Single candidate

5. If only one candidate is nominated, the person presiding must declare that candidate elected.

Election procedure

6. If more than one candidate is nominated—

(a) a vote must be taken at the meeting by secret ballot;

(b) each member present, or if it is a meeting of the National Council of Provinces, each province represented, at the meeting may cast one vote; and

(c) the person presiding must declare elected the candidate who receives a majority of the votes.

Elimination procedure

7. (1) If no candidate receives a majority of the votes, the candidate who receives the lowest number of votes must be eliminated and a further vote taken on the remaining candidates in accordance with item 6. This procedure must be repeated until a candidate receives a majority of the votes.

(2) When applying subitem (1), if two or more candidates each have the lowest number of votes, a separate vote must be taken on those candidates, and repeated as often as may be necessary to determine which candidate is to be eliminated.

Further meetings

8. (1) If only two candidates are nominated, or if only two candidates remain after an elimination procedure has been applied, and those two candidates receive the same number of votes, a further meeting must be held within seven days, at a time determined by the person presiding.

(2) If a further meeting is held in terms of subitem (1), the procedure prescribed in this Schedule must be applied at that meeting as if it were the first meeting for the election in question.

Rules

9. (1) The Chief Justice must make rules prescribing—
   (a) the procedure for meetings to which this Schedule applies;
   (b) the duties of any person presiding at a meeting, and of any person assisting the person presiding;
   (c) the form on which nominations must be submitted; and
   (d) the manner in which voting is to be conducted.

   (2) These rules must be made known in the way that the Chief Justice determines.

Part B
Formula to Determine Party Participation in Provincial Delegations to the National Council of Provinces

1. The number of delegates in a provincial delegation to the National Council of Provinces to which a party is entitled, must be determined by multiplying the number of seats the party holds in the provincial legislature by ten and dividing the result by the number of seats in the legislature plus one.
2. If a calculation in terms of item 1 yields a surplus not absorbed by the delegates allocated to a party in terms of that item, the surplus must compete with similar surpluses accruing to any other party or parties, and any undistributed delegates in the delegation must be allocated to the party or parties in the sequence of the highest surplus.
3. If the competing surpluses envisaged in item 2 are equal, the undistributed delegates in the delegation must be allocated to the party or parties with the same surplus in the sequence from the highest to the lowest number of votes that have been recorded for those parties during the last election for the provincial legislature concerned.

[Item 3 added by s. 2 of the Constitution Fourth Amendment Act of 1999 and substituted by s. 3 of the Constitution Ninth Amendment Act of 2002 and by s. 5(a) of the Constitution Fourteenth Amendment Act of 2008.]

4. If more than one party with the same surplus recorded the same number of votes during the last election for the provincial legislature concerned, the legislature concerned must allocate the undistributed delegates in the delegation to the party with the same surplus in a manner which is consistent with democracy.

[Item 4 added by s. 5(b) of the Constitution Fourteenth Amendment Act of 2008.]

SCHEDULE 4

Functional Areas of Concurrent National and Provincial Legislative Competence

Part A

- Administration of indigenous forests
- Agriculture
- Airports other than international and national airports
- Animal control and diseases
- Casinos, racing, gambling and wagering, excluding lotteries and sports pools
- Consumer protection
- Cultural matters
- Disaster management
- Education at all levels, excluding tertiary education
- Environment
- Health services
- Housing
- Indigenous law and customary law, subject to Chapter 12 of the Constitution
- Industrial promotion
- Language policy and the regulation of official languages to the extent that the provisions of section 6 of the Constitution expressly confer upon the provincial legislatures legislative competence
- Media services directly controlled or provided by the provincial government, subject to section 192
- Nature conservation, excluding national parks, national botanical gardens and marine resources
- Police to the extent that the provisions of Chapter 11 of the Constitution confer upon the provincial legislatures legislative competence
- Pollution control
- Population development
- Property transfer fees

- Provincial public enterprises in respect of the functional areas in this Schedule and Schedule 5
- Public transport
- Public works only in respect of the needs of provincial government departments in the discharge of their responsibilities to administer functions specifically assigned to them in terms of the Constitution or any other law
- Regional planning and development
- Road traffic regulation
- Soil conservation
- Tourism
- Trade
- Traditional leadership, subject to Chapter 12 of the Constitution
- Urban and rural development
- Vehicle licensing
- Welfare services

Part B

The following local government matters to the extent set out in section 155(6)*(a)* and (7):

- Air pollution
- Building regulations
- Child care facilities
- Electricity and gas reticulation
- Firefighting services
- Local tourism
- Municipal airports
- Municipal planning
- Municipal health services
- Municipal public transport
- Municipal public works only in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under this Constitution or any other law
- Pontoons, ferries, jetties, piers and harbours, excluding the regulation of international and national shipping and matters related thereto

- Stormwater management systems in built-up areas
- Trading regulations
- Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems

SCHEDULE 5

Functional Areas of Exclusive Provincial Legislative Competence

Part A

- Abattoirs
- Ambulance services
- Archives other than national archives
- Libraries other than national libraries
- Liquor licences
- Museums other than national museums
- Provincial planning
- Provincial cultural matters
- Provincial recreation and amenities
- Provincial sport
- Provincial roads and traffic
- Veterinary services, excluding regulation of the profession

Part B

The following local government matters to the extent set out for provinces in section 155(6)*(a)* and (7):

- Beaches and amusement facilities
- Billboards and the display of advertisements in public places
- Cemeteries, funeral parlours and crematoria
- Cleansing
- Control of public nuisances
- Control of undertakings that sell liquor to the public
- Facilities for the accommodation, care and burial of animals
- Fencing and fences
- Licensing of dogs
- Licensing and control of undertakings that sell food to the public

- Local amenities
- Local sport facilities
- Markets
- Municipal abattoirs
- Municipal parks and recreation
- Municipal roads
- Noise pollution
- Pounds
- Public places
- Refuse removal, refuse dumps and solid waste disposal
- Street trading
- Street lighting
- Traffic and parking

SCHEDULE 6

Transitional Arrangements

[Schedule 6 amended by s. 3 of Constitution First Amendment Act of 1997, by s. 5 of Constitution Second Amendment Act of 1998 and by s. 20 of Constitution Sixth Amendment Act of 2001.]

Definitions

1. In this Schedule, unless inconsistent with the context—

"homeland" means a part of the Republic which, before the previous Constitution took effect, was dealt with in South African legislation as an independent or a self-governing territory;

"new Constitution" means the Constitution of the Republic of South Africa, 1996;

"old order legislation" means legislation enacted before the previous Constitution took effect;

"previous Constitution" means the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993).

Continuation of existing law

2. (1) All law that was in force when the new Constitution took effect, continues in force, subject to—

(a) any amendment or repeal; and

(b) consistency with the new Constitution.

(2) Old order legislation that continues in force in terms of subitem (1)—

(a) does not have a wider application, territorially or otherwise, than it had before the previous Constitution took effect unless subsequently amended to have a wider application; and

(b) continues to be administered by the authorities that administered it when the new Constitution took effect, subject to the new Constitution.

Interpretation of existing legislation

3. (1) Unless inconsistent with the context or clearly inappropriate, a reference in any legislation that existed when the new Constitution took effect—
   (a) to the Republic of South Africa or a homeland (except when it refers to a territorial area), must be construed as a reference to the Republic of South Africa under the new Constitution;
   (b) to Parliament, the National Assembly or the Senate, must be construed as a reference to Parliament, the National Assembly or the National Council of Provinces under the new Constitution;
   (c) to the President, an Executive Deputy President, a Minister, a Deputy Minister or the Cabinet, must be construed as a reference to the President, the Deputy President, a Minister, a Deputy Minister or the Cabinet under the new Constitution, subject to item 9 of this Schedule;
   (d) to the President of the Senate, must be construed as a reference to the Chairperson of the National Council of Provinces;
   (e) to a provincial legislature, Premier, Executive Council or member of an Executive Council of a province, must be construed as a reference to a provincial legislature, Premier, Executive Council or member of an Executive Council under the new Constitution, subject to item 12 of this Schedule; or
   (f) to an official language or languages, must be construed as a reference to any of the official languages under the new Constitution.

   (2) Unless inconsistent with the context or clearly inappropriate, a reference in any remaining old order legislation—
   (a) to a Parliament, a House of a Parliament or a legislative assembly or body of the Republic or of a homeland, must be construed as a reference to—
      (i) Parliament under the new Constitution, if the administration of that legislation has been allocated or assigned in terms of the previous Constitution or this Schedule to the national executive; or
      (ii) the provincial legislature of a province, if the administration of that legislation has been allocated or assigned in terms of the previous Constitution or this Schedule to a provincial executive; or
   (b) to a State President, Chief Minister, Administrator or other chief executive, Cabinet, Ministers' Council or executive council of the Republic or of a homeland, must be construed as a reference to—

(i) the President under the new Constitution, if the administration of that legislation has been allocated or assigned in terms of the previous Constitution or this Schedule to the national executive; or

(ii) the Premier of a province under the new Constitution, if the administration of that legislation has been allocated or assigned in terms of the previous Constitution or this Schedule to a provincial executive.

National Assembly

4. (1) Anyone who was a member or office-bearer of the National Assembly when the new Constitution took effect, becomes a member or office-bearer of the National Assembly under the new Constitution, and holds office as a member or office-bearer in terms of the new Constitution.

(2) The National Assembly as constituted in terms of subitem (1) must be regarded as having been elected under the new Constitution for a term that expires on 30 April 1999.

(3) The National Assembly consists of 400 members for the duration of its term that expires on 30 April 1999, subject to section 49(4) of the new Constitution.

(4) The rules and orders of the National Assembly in force when the new Constitution took effect, continue in force, subject to any amendment or repeal.

Unfinished business before Parliament

5. (1) Any unfinished business before the National Assembly when the new Constitution takes effect must be proceeded with in terms of the new Constitution.

(2) Any unfinished business before the Senate when the new Constitution takes effect must be referred to the National Council of Provinces, and the Council must proceed with that business in terms of the new Constitution.

Elections of National Assembly

6. (1) No election of the National Assembly may be held before 30 April 1999 unless the Assembly is dissolved in terms of section 50(2) after a motion of no confidence in the President in terms of section 102(2) of the new Constitution.

(2) Section 50(1) of the new Constitution is suspended until 30 April 1999.

(3) Despite the repeal of the previous Constitution, Schedule 2 to that Constitution, as amended by Annexure A to this Schedule, applies—
   (a) to the first election of the National Assembly under the new Constitution;
   (b) to the loss of membership of the Assembly in circumstances other than those provided for in section 47(3) of the new Constitution; and
   (c) to the filling of vacancies in the Assembly, and the supplementation, review and use of party lists for the filling of vacancies, until the second election of the Assembly under the new Constitution.

(4) Section 47(4) of the new Constitution is suspended until the second election of the National Assembly under the new Constitution.

National Council of Provinces

7. (1) For the period which ends immediately before the first sitting of a provincial legislature held after its first election under the new Constitution—
   (a) the proportion of party representation in the province's delegation to the National Council of Provinces must be the same as the proportion in which the province's 10 senators were nominated in terms of section 48 of the previous Constitution; and
   (b) the allocation of permanent delegates and special delegates to the parties represented in the provincial legislature, is as follows:

PROVINCE	PERMANENT DELEGATES	SPECIAL DELEGATES
1. Eastern Cape	ANC 5 NP 1	ANC 4
2. Free State	ANC 4 FF 1 NP 1	ANC 4
3. Gauteng	ANC 3 DP 1 FF 1 NP 1	ANC 3 NP 1

PROVINCE	PERMANENT DELEGATES	SPECIAL DELEGATES
4. KwaZulu-Natal	ANC 1 DP 1 IFP 3 NP 1	ANC 2 IFP 2
5. Mpumalanga	ANC 4 FF 1 NP 1	ANC 4
6. Northern Cape	ANC 3 FF 1 NP 2	ANC 2 NP 2
7. Northern Province	ANC 6	ANC 4
8. North West	ANC 4 FF 1 NP 1	ANC 4
9. Western Cape	ANC 2 DP 1 NP 3	ANC 1 NP 3

(2) A party represented in a provincial legislature—
  (a) must nominate its permanent delegates from among the persons who were senators when the new Constitution took effect and are available to serve as permanent delegates; and
  (b) may nominate other persons as permanent delegates only if none or an insufficient number of its former senators are available.

(3) A provincial legislature must appoint its permanent delegates in accordance with the nominations of the parties.

(4) Subitems (2) and (3) apply only to the first appointment of permanent delegates to the National Council of Provinces.

(5) Section 62(1) of the new Constitution does not apply to the nomination and appointment of former senators as permanent delegates in terms of this item.

(6) The rules and orders of the Senate in force when the new Constitution took effect, must be applied in respect of the business of the National Council to the extent that they can be applied, subject to any amendment or repeal.

Former senators

8. (1) A former senator who is not appointed as a permanent delegate to the National Council of Provinces is entitled to become a full voting member of the legislature of the province from which that person was nominated as a senator in terms of section 48 of the previous Constitution.

(2) If a former senator elects not to become a member of a provincial legislature that person is regarded as having resigned as a senator the day before the new Constitution took effect.

(3) The salary, allowances and benefits of a former senator appointed as a permanent delegate or as a member of a provincial legislature may not be reduced by reason only of that appointment.

National executive

9. (1) Anyone who was the President, an Executive Deputy President, a Minister or a Deputy Minister under the previous Constitution when the new Constitution took effect, continues in and holds that office in terms of the new Constitution, but subject to subitem (2).

(2) Until 30 April 1999, sections 84, 89, 90, 91, 93 and 96 of the new Constitution must be regarded to read as set out in Annexure B to this Schedule.

(3) Subitem (2) does not prevent a Minister who was a senator when the new Constitution took effect, from continuing as a Minister referred to in section 91(1)(a) of the new Constitution, as that section reads in Annexure B.

Provincial legislatures

10. (1) Anyone who was a member or office-bearer of a province's legislature when the new Constitution took effect, becomes a member or office-bearer of the legislature for that province under the new Constitution, and holds office as a member or office-bearer in terms of the new Constitution and any provincial constitution that may be enacted.

(2) A provincial legislature as constituted in terms of subitem (1) must be regarded as having been elected under the new Constitution for a term that expires on 30 April 1999.

(3) For the duration of its term that expires on 30 April 1999, and subject to section 108(4), a provincial legislature consists of the number of members determined for that legislature under the previous Constitution plus the number of former senators who became members of the legislature in terms of item 8 of this Schedule.

(4) The rules and orders of a provincial legislature in force when the new Constitution took effect, continue in force, subject to any amendment or repeal.

Elections of provincial legislatures

11. (1) Despite the repeal of the previous Constitution, Schedule 2 to that Constitution, as amended by Annexure A to this Schedule, applies—

(a) to the first election of a provincial legislature under the new Constitution;

(b) to the loss of membership of a legislature in circumstances other than those provided for in section 106(3) of the new Constitution; and

(c) to the filling of vacancies in a legislature, and the supplementation, review and use of party lists for the filling of vacancies, until the second election of the legislature under the new Constitution.

(2) Section 106(4) of the new Constitution is suspended in respect of a provincial legislature until the second election of the legislature under the new Constitution.

Provincial executives

12. (1) Anyone who was the Premier or a member of the Executive Council of a province when the new Constitution took effect, continues in and holds that office in terms of the new Constitution and any provincial constitution that may be enacted, but subject to subitem (2).

(2) Until the Premier elected after the first election of a province's legislature under the new Constitution assumes office, or the province enacts its constitution, whichever occurs first, sections 132 and 136 of the new Constitution must be regarded to read as set out in Annexure C to this Schedule.

Provincial constitutions

13. A provincial constitution passed before the new Constitution took effect must comply with section 143 of the new Constitution.

Assignment of legislation to provinces

14. (1) Legislation with regard to a matter within a functional area listed in Schedule 4 or 5 to the new Constitution and which, when the new Constitution took effect, was administered by an authority within the national executive, may be assigned by the President, by proclamation, to an authority within a provincial executive designated by the Executive Council of the province.

(2) To the extent that it is necessary for an assignment of legislation under subitem (1) to be effectively carried out, the President, by proclamation, may—

(a) amend or adapt the legislation to regulate its interpretation or application;

(b) where the assignment does not apply to the whole of any piece of legislation, repeal and re-enact, with or without any amendments or adaptations referred to in paragraph (a), those provisions to which the assignment applies or to the extent that the assignment applies to them; or

(c) regulate any other matter necessary as a result of the assignment, including the transfer or secondment of staff, or the transfer of assets, liabilities, rights and obligations, to or from the national or a provincial executive or any department of state, administration, security service or other institution.

(3) (a) A copy of each proclamation issued in terms of subitem (1) or (2) must be submitted to the National Assembly and the National Council of Provinces within 10 days of the publication of the proclamation.

(b) If both the National Assembly and the National Council by resolution disapprove the proclamation or any provision of it, the proclamation or provision lapses, but without affecting—

(i) the validity of anything done in terms of the proclamation or provision before it lapsed; or

(ii) a right or privilege acquired or an obligation or liability incurred before it lapsed.

(4) When legislation is assigned under subitem (1), any reference in the legislation to an authority administering it, must be construed as a reference to the authority to which it has been assigned.

(5) Any assignment of legislation under section 235(8) of the previous Constitution, including any amendment, adaptation or repeal and re-enactment of any legislation and any other action taken under that section, is regarded as having been done under this item.

Existing legislation outside Parliament's legislative power

15. (1) An authority within the national executive that administers any legislation falling outside Parliament's legislative power when the new Constitution takes effect, remains competent to administer that legislation until it is assigned to an authority within a provincial executive in terms of item 14 of this Schedule.

(2) Subitem (1) lapses two years after the new Constitution took effect.

Courts

16. (1) Every court, including courts of traditional leaders, existing when the new Constitution took effect, continues to function and to exercise jurisdiction in terms of the legislation applicable to it, and anyone holding office as a judicial officer continues to hold office in terms of the legislation applicable to that office, subject to—

(a) any amendment or repeal of that legislation; and

(b) consistency with the new Constitution.

(2) (a) The Constitutional Court established by the previous Constitution becomes the Constitutional Court under the new Constitution.

(b)…….

[Subitem (b) deleted by s. 20(a) of the Constitution Sixth Amendment Act of 2001.]

(3) (a) The Appellate Division of the Supreme Court of South Africa becomes the Supreme Court of Appeal under the new Constitution.

(b)…….

[Subitem (b) deleted by s. 20(a) of the Constitution Sixth Amendment Act of 2001.]

(4) (a) A provincial or local division of the Supreme Court of South Africa or a supreme court of a homeland or a general division of such a court, becomes a High Court under the new Constitution without any alteration in its area of jurisdiction, subject to any rationalisation contemplated in subitem (6).

(b) Anyone holding office or deemed to hold office as the Judge President, the Deputy Judge President or a judge of a court referred to in paragraph *(a)* when the new Constitution takes effect, becomes the Judge President, the Deputy Judge President or a judge of such a court under the new Constitution, subject to any rationalisation contemplated in subitem (6).

(5) Unless inconsistent with the context or clearly inappropriate, a reference in any legislation or process to—

(a) the Constitutional Court under the previous Constitution, must be construed as a reference to the Constitutional Court under the new Constitution;

(b) the Appellate Division of the Supreme Court of South Africa, must be construed as a reference to the Supreme Court of Appeal; and

(c) a provincial or local division of the Supreme Court of South Africa or a supreme court of a homeland or general division of that court, must be construed as a reference to a High Court.

(6) (a) As soon as is practical after the new Constitution took effect all courts, including their structure, composition, functioning and jurisdiction, and all relevant legislation, must be rationalised with a view to establishing a judicial system suited to the requirements of the new Constitution.

(b) The Cabinet member responsible for the administration of justice, acting after consultation with the Judicial Service Commission, must manage the rationalisation envisaged in paragraph (a).

(7) (a) Anyone holding office, when the Constitution of the Republic of South Africa Amendment Act, 2001, takes effect, as—

(i) the President of the Constitutional Court, becomes the Chief Justice as contemplated in section 167(1) of the new Constitution;

(ii) the Deputy President of the Constitutional Court, becomes the Deputy Chief Justice as contemplated in section 167(1) of the new Constitution;

(iii) the Chief Justice, becomes the President of the Supreme Court of Appeal as contemplated in section 168(1) of the new Constitution; and

(iv) the Deputy Chief Justice, becomes the Deputy President of the Supreme Court of Appeal as contemplated in section 168(1) of the new Constitution.

(b) All rules, regulations or directions made by the President of the Constitutional Court or the Chief Justice in force immediately before the Constitution of the Republic of South Africa Amendment Act, 2001, takes effect, continue in force until repealed or amended.

(c) Unless inconsistent with the context or clearly inappropriate, a reference in any law or process to the Chief Justice or to the President of the Constitutional Court, must be construed as a reference to the Chief Justice as contemplated in section 167(1) of the new Constitution.

[Subitem (7) added by s. 20(b) of the Constitution Sixth Amendment Act of 2001.]

Cases pending before courts

17. All proceedings which were pending before a court when the new Constitution took effect, must be disposed of as if the new Constitution had not been enacted, unless the interests of justice require otherwise.

Prosecuting authority

18. (1) Section 108 of the previous Constitution continues in force until the Act of Parliament envisaged in section 179 of the new Constitution takes effect. This subitem does not affect the appointment of the National Director of Public Prosecutions in terms of section 179.

(2) An attorney-general holding office when the new Constitution takes effect, continues to function in terms of the legislation applicable to that office, subject to subitem (1).

Oaths and affirmations

19. A person who continues in office in terms of this Schedule and who has taken the oath of office or has made a solemn affirmation under the previous Constitution, is not obliged to repeat the oath of office or solemn affirmation under the new Constitution.

Other constitutional institutions

20. (1) In this section "constitutional institution" means—

(a) the Public Protector;

(b) the South African Human Rights Commission;

[Para (b) amended by s. 4 of the Constitution Second Amendment Act of 1998.]

(c) the Commission on Gender Equality;
(d) the Auditor-General;
(e) the South African Reserve Bank;
(f) the Financial and Fiscal Commission;
(g) the Judicial Service Commission; or
(h) the Pan South African Language Board.

(2) A constitutional institution established in terms of the previous Constitution continues to function in terms of the legislation applicable to it, and anyone holding office as a commission member, a member of the board of the Reserve Bank or the Pan South African Language Board, the Public Protector or the Auditor-General when the new Constitution takes effect, continues to hold office in terms of the legislation applicable to that office, subject to—
(a) any amendment or repeal of that legislation; and
(b) consistency with the new Constitution.

(3) Sections 199(1), 200(1), (3) and (5) to (11) and 201 to 206 of the previous Constitution continue in force until repealed by an Act of Parliament passed in terms of section 75 of the new Constitution.

(4) The members of the Judicial Service Commission referred to in section 105(1)(h) of the previous Constitution cease to be members of the Commission when the members referred to in section 178(1)(i) of the new Constitution are appointed.

(5) (a) The Volkstaat Council established in terms of the previous Constitution continues to function in terms of the legislation applicable to it, and anyone holding office as a member of the Council when the new Constitution takes effect, continues to hold office in terms of the legislation applicable to that office, subject to—
(i) any amendment or repeal of that legislation; and
(ii) consistency with the new Constitution.
(b) Sections 184A and 184B (1)*(a)*, *(b)* and *(d)* of the previous Constitution continue in force until repealed by an Act of Parliament passed in terms of section 75 of the new Constitution.

Enactment of legislation required by new Constitution

21. (1) Where the new Constitution requires the enactment of national or provincial legislation, that legislation must be enacted by the relevant authority within a reasonable period of the date the new Constitution took effect.

(2) Section 198(b) of the new Constitution may not be enforced until the legislation envisaged in that section has been enacted.

(3) Section 199(3)(a) of the new Constitution may not be enforced before the expiry of three months after the legislation envisaged in that section has been enacted.

(4) National legislation envisaged in section 217(3) of the new Constitution must be enacted within three years of the date on which the new Constitution took effect, but the absence of this legislation during this period does not prevent the implementation of the policy referred to in section 217(2).

(5) Until the Act of Parliament referred to in section 65(2) of the new Constitution is enacted each provincial legislature may determine its own procedure in terms of which authority is conferred on its delegation to cast votes on its behalf in the National Council of Provinces.

(6) Until the legislation envisaged in section 229(1)(b) of the new Constitution is enacted, a municipality remains competent to impose any tax, levy or duty which it was authorised to impose when the Constitution took effect.

National unity and reconciliation

22. (1) Notwithstanding the other provisions of the new Constitution and despite the repeal of the previous Constitution, all the provisions relating to amnesty contained in the previous Constitution under the heading "National Unity and Reconciliation" are deemed to be part of the new Constitution for the purposes of the Promotion of National Unity and Reconciliation Act, 1995 (Act 34 of 1995), as amended, including for the purposes of its validity.

(2) For the purposes of subitem (1), the date "6 December 1993", where it appears in the provisions of the previous Constitution under the heading "National Unity and Reconciliation", must be read as "11 May 1994".

[Subitem (2) added by s. 3 of the Constitution First Amendment Act of 1997.]

Bill of Rights

23. (1) National legislation envisaged in sections 9(4), 32(2) and 33(3) of the new Constitution must be enacted within three years of the date on which the new Constitution took effect.

(2) Until the legislation envisaged in sections 32(2) and 33(3) of the new Constitution is enacted—

(a) section 32 (1) must be regarded to read as follows:
"(1) Every person has the right of access to all information held by the state or any of its organs in any sphere of government in so far as that information is required for the exercise or protection of any of their rights."; and

(b) section 33(1) and (2) must be regarded to read as follows:
"Every person has the right to—

(a) lawful administrative action where any of their rights or interests is affected or threatened;

(b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;

(c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and

(d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened.".

(3) Sections 32(2) and 33(3) of the new Constitution lapse if the legislation envisaged in those sections, respectively, is not enacted within three years of the date the new Constitution took effect.

Public administration and security services

24. (1) Sections 82(4)(b), 215, 218(1), 219(1), 224 to 228, 236(1), (2), (3), (6), (7)(b) and (8), 237(1) and (2)*(a)* and 239(4) and (5) of the previous Constitution continue in force as if the previous Constitution had not been repealed, subject to—

(a) the amendments to those sections as set out in Annexure D;

(b) any further amendment or any repeal of those sections by an Act of Parliament passed in terms of section 75 of the new Constitution; and

(c) consistency with the new Constitution.

(2) The Public Service Commission and the provincial service commissions referred to in Chapter 13 of the previous Constitution continue to function in terms of that Chapter and the legislation applicable to it as if that Chapter had not been repealed, until the Commission and the provincial service commissions are abolished by an Act of Parliament passed in terms of section 75 of the new Constitution.

(3) The repeal of the previous Constitution does not affect any proclamation issued under section 237(3) of the previous Constitution, and any such proclamation continues in force, subject to—

(a) any amendment or repeal; and

(b) consistency with the new Constitution.

Additional disqualification for legislatures

25. (1) Anyone who, when the new Constitution took effect, was serving a sentence in the Republic of more than 12 months' imprisonment without the option of a fine, is not eligible to be a member of the National Assembly or a provincial legislature.

(2) The disqualification of a person in terms of subitem (1)—

(a) lapses if the conviction is set aside on appeal, or the sentence is reduced on appeal to a sentence that does not disqualify that person; and

(b) ends five years after the sentence has been completed.

Local government

26. (1) Notwithstanding the provisions of sections 151, 155, 156 and 157 of the new Constitution—

(a) the provisions of the Local Government Transition Act, 1993 (Act 209 of 1993), as may be amended from time to time by national legislation consistent with the new Constitution, remain in force in respect of a Municipal Council until a Municipal Council replacing that Council has been declared elected as a result of the first general election of Municipal Councils after the commencement of the new Constitution; and

[Subitem (a) substituted by s. 5(a) of the Constitution Second Amendment Act of 1998.]

(b) a traditional leader of a community observing a system of indigenous law and residing on land within the area of a transitional local council, transitional rural council or transitional representative council, referred to in the Local Government Transition Act, 1993, and who has been identified as set out in

section 182 of the previous Constitution, is ex officio entitled to be a member of that council until a Municipal Council replacing that council has been declared elected as a result of the first general election of Municipal Councils after the commencement of the new Constitution.

[Subitem (b) substituted by s. 5(a) of the Constitution Second Amendment Act of 1998.]

(2) Section 245(4) of the previous Constitution continues in force until the application of that section lapses. Section 16(5) and (6) of the Local Government Transition Act, 1993, may not be repealed before 30 April 2000.

[Sub item (2) amended by s. 5 (b) of Constitution Second Amendment Act of 1998.]

Safekeeping of Acts of Parliament and Provincial Acts

27. Sections 82 and 124 of the new Constitution do not affect the safekeeping of Acts of Parliament or provincial Acts passed before the new Constitution took effect.

Registration of immovable property owned by the state

28. (1) On the production of a certificate by a competent authority that immovable property owned by the state is vested in a particular government in terms of section 239 of the previous Constitution, a registrar of deeds must make such entries or endorsements in or on any relevant register, title deed or other document to register that immovable property in the name of that government.

(2) No duty, fee or other charge is payable in respect of a registration in terms of subitem (1).

ANNEXURE A

Amendments to Schedule 2 to the previous Constitution

1. The replacement of item 1 with the following item:

"1. Parties registered in terms of national legislation and contesting an election of the National Assembly, shall nominate candidates for such election on lists of candidates prepared in accordance with this Schedule and national legislation.".

2. The replacement of item 2 with the following item:

"2. The seats in the National Assembly as determined in terms of section 46 of the new Constitution, shall be filled as follows:

(a) One half of the seats from regional lists submitted by the respective parties, with a fixed number of seats reserved for each region as determined by the Commission for the next election of the Assembly, taking into account available scientifically based data in respect of voters, and representations by interested parties.

(b) The other half of the seats from national lists submitted by the respective parties, or from regional lists where national lists were not submitted.".

3. The replacement of item 3 with the following item:

"3. The lists of candidates submitted by a party, shall in total contain the names of not more than a number of candidates equal to the number of seats in the National Assembly, and each such list shall denote such names in such fixed order of preference as the party may determine.".

4. The amendment of item 5 by replacing the words preceding paragraph (a) with the following words:

"5. The seats referred to in item 2(a) shall be allocated per region to the parties contesting an election, as follows:".

5. The amendment of item 6—

(a) by replacing the words preceding paragraph (a) with the following words:

"6. The seats referred to in item 2(b) shall be allocated to the parties contesting an election, as follows:"; and

(b) by replacing paragraph (a) with the following paragraph:

"(a) A quota of votes per seat shall be determined by dividing the total number of votes cast nationally by the number of seats in the National

Assembly, plus one, and the result plus one, disregarding fractions, shall be the quota of votes per seat.".

6. The amendment of item 7(3) by replacing paragraph (b) with the following paragraph:

"(b) An amended quota of votes per seat shall be determined by dividing the total number of votes cast nationally, minus the number of votes cast nationally in favour of the party referred to in paragraph (a), by the number of seats in the Assembly, plus one, minus the number of seats finally allocated to the said party in terms of paragraph (a).".

7. The replacement of item 10 with the following item:

"10. The number of seats in each provincial legislature shall be as determined in terms of section 105 of the new Constitution.".

8. The replacement of item 11 with the following item:

"11. Parties registered in terms of national legislation and contesting an election of a provincial legislature, shall nominate candidates for election to such provincial legislature on provincial lists prepared in accordance with this Schedule and national legislation.".

9. The replacement of item 16 with the following item:

"Designation of representatives

16. (1) After the counting of votes has been concluded, the number of representatives of each party has been determined and the election result has been declared in terms of section 190 of the new Constitution, the Commission shall, within two days after such declaration, designate from each list of candidates, published in terms of national legislation, the representatives of each party in the legislature.

(2) Following the designation in terms of subitem (1), if a candidate's name appears on more than one list for the National Assembly or on lists for both the National Assembly and a provincial legislature (if an election of the Assembly and a provincial legislature is held at the same time), and such candidate is due for designation as a representative in more than one case, the party which submitted such lists shall, within two days after the said declaration, indicate to the Commission from which list such candidate will be designated or in which legislature the candidate will serve, as the case may be, in which event the candidate's name shall be deleted from the other lists.

(3) The Commission shall forthwith publish the list of names of representatives in the legislature or legislatures.”..

10. The amendment of item 18 by replacing paragraph (b) with the following paragraph:

“(b) a representative is appointed as a permanent delegate to the National Council of Provinces;”.

11. The replacement of item 19 with the following item:

“19. Lists of candidates of a party referred to in item 16 (1) may be supplemented on one occasion only at any time during the first 12 months following the date on which the designation of representatives in terms of item 16 has been concluded, in order to fill casual vacancies: Provided that any such supplementation shall be made at the end of the list.”.

12. The replacement of item 23 with the following item:

“Vacancies

23. (1) In the event of a vacancy in a legislature to which this Schedule applies, the party which nominated the vacating member shall fill the vacancy by nominating a person—

(a) whose name appears on the list of candidates from which the vacating member was originally nominated; and

(b) who is the next qualified and available person on the list.

(2) A nomination to fill a vacancy shall be submitted to the Speaker in writing.

(3) If a party represented in a legislature dissolves or ceases to exist and the members in question vacate their seats in consequence of item 23A(1), the seats in question shall be allocated to the remaining parties mutatis mutandis as if such seats were forfeited seats in terms of item 7 or 14, as the case may be.”.

13. The insertion of the following item after item 23:

“Additional ground for loss of membership of legislatures

23A. (1) A person loses membership of a legislature to which this Schedule applies if that person ceases to be a member of the party which nominated that person as a member of the legislature.

(2) Despite subitem (1) any existing political party may at any time change its name.

(3) An Act of Parliament may, within a reasonable period after the new Constitution took effect, be passed in accordance with section 76(1) of the new Constitution to amend this item and item 23 to provide for the manner in which it will be possible for a member of a legislature who ceases to be a member of the party which nominated that member, to retain membership of such legislature.

(4) An Act of Parliament referred to in subitem (3) may also provide for—

(a) any existing party to merge with another party; or

(b) any party to subdivide into more than one party.".

14. The deletion of item 24.

15. The amendment of item 25—

(a) by replacing the definition of "Commission" with the following definition: "'Commission' means the Electoral Commission referred to in section 190 of the new Constitution;"; and

(b) by inserting the following definition after the definition of "national list": "'new Constitution' means the Constitution of the Republic of South Africa, 1996;".

16. The deletion of item 26.

ANNEXURE B

Government of National Unity: National Sphere

1. Section 84 of the new Constitution is deemed to contain the following additional subsection:

"(3) The President must consult the Executive Deputy Presidents—

(a) in the development and execution of the policies of the national government;

(b) in all matters relating to the management of the Cabinet and the performance of Cabinet business;

(c) in the assignment of functions to the Executive Deputy Presidents;

(d) before making any appointment under the Constitution or any legislation, including the appointment of ambassadors or other diplomatic representatives;

(e) before appointing commissions of inquiry;

(f) before calling a referendum; and

(g) before pardoning or reprieving offenders.".

2. Section 89 of the new Constitution is deemed to contain the following additional subsection:

"(3) Subsections (1) and (2) apply also to an Executive Deputy President.".

3. Paragraph (a) of section 90(1) of the new Constitution is deemed to read as follows:

"(a) an Executive Deputy President designated by the President;".

4. Section 91 of the new Constitution is deemed to read as follows:

"Cabinet

91. (1) The Cabinet consists of the President, the Executive Deputy Presidents and—

(a) not more than 27 Ministers who are members of the National Assembly and appointed in terms of subsections (8) to (12); and

(b) not more than one Minister who is not a member of the 175 National Assembly and appointed in terms of subsection (13), provided the President, acting in consultation with the Executive Deputy Presidents and the leaders of the participating parties, deems the appointment of such a Minister expedient.

(2) Each party holding at least 80 seats in the National Assembly is entitled to designate an Executive Deputy President from among the members of the Assembly.

(3) If no party or only one party holds 80 or more seats in the Assembly, the party holding the largest number of seats and the party holding the second largest number of seats are each entitled to designate one Executive Deputy President from among the members of the Assembly.

(4) On being designated, an Executive Deputy President may elect to remain or cease to be a member of the Assembly.

(5) An Executive Deputy President may exercise the powers and must perform the functions vested in the office of Executive Deputy President by the Constitution or assigned to that office by the President.

(6) An Executive Deputy President holds office—

(a) until 30 April 1999 unless replaced or recalled by the party entitled to make the designation in terms of subsections (2) and (3); or

(b) until the person elected President after any election of the National Assembly held before 30 April 1999, assumes office.

(7) A vacancy in the office of an Executive Deputy President may be filled by the party which designated that Deputy President.

(8) A party holding at least 20 seats in the National Assembly and which has decided to participate in the government of national unity, is entitled to be allocated one or more of the Cabinet portfolios in respect of which Ministers referred to in subsection (1)(a) are to be appointed, in proportion to the number of seats held by it in the National Assembly relative to the number of seats held by the other participating parties.

(9) Cabinet portfolios must be allocated to the respective participating parties in accordance with the following formula:

(a) A quota of seats per portfolio must be determined by dividing the total number of seats in the National Assembly held jointly by the participating parties by the number of portfolios in respect of which Ministers referred to in subsection (1)(a) are to be appointed, plus one.

(b) The result, disregarding third and subsequent decimals, if any, is the quota of seats per portfolio.

(c) The number of portfolios to be allocated to a participating party is determined by dividing the total number of seats held by that party in the National Assembly by the quota referred to in paragraph (b).

(d) The result, subject to paragraph (e), indicates the number of portfolios to be allocated to that party.

(e) Where the application of the above formula yields a surplus not absorbed by the number of portfolios allocated to a party, the surplus competes with other similar surpluses accruing to another party or parties, and any portfolio or portfolios which remain unallocated must be allocated to the party or parties concerned in sequence of the highest surplus.

(10) The President after consultation with the Executive Deputy Presidents and the leaders of the participating parties must—

(a) determine the specific portfolios to be allocated to the respective participating parties in accordance with the number of portfolios allocated to them in terms of subsection (9);

(b) appoint in respect of each such portfolio a member of the National Assembly who is a member of the party to which that portfolio was allocated under paragraph (a), as the Minister responsible for that portfolio;

(c) if it becomes necessary for the purposes of the Constitution or in the interest of good government, vary any determination under paragraph (a), subject to subsection (9);

(d) terminate any appointment under paragraph (b)—

(i) if the President is requested to do so by the leader of the party of which the Minister in question is a member; or

(ii) if it becomes necessary for the purposes of the Constitution or in the interest of good government; or

(e) fill, when necessary, subject to paragraph (b), a vacancy in the office of Minister.

(11) Subsection (10) must be implemented in the spirit embodied in the concept of a government of national unity, and the President and the other functionaries concerned must in the implementation of that subsection seek to achieve consensus at all times: Provided that if consensus cannot be achieved on—

(a) the exercise of a power referred to in paragraph (a), (c) or (d)(ii) of that subsection, the President's decision prevails;

(b) the exercise of a power referred to in paragraph (b), (d)(i) or (e) of that subsection affecting a person who is not a member of the President's party, the decision of the leader of the party of which that person is a member prevails; and

(c) the exercise of a power referred to in paragraph (b) or (e) of that subsection affecting a person who is a member of the President's party, the President's decision prevails.

(12) If any determination of portfolio allocations is varied under subsection (10) (c), the affected Ministers must vacate their portfolios but are eligible, where applicable, for reappointment to other portfolios allocated to their respective parties in terms of the varied determination.

(13) The President—

(a) in consultation with the Executive Deputy Presidents and the leaders of the participating parties, must—

(i) determine a specific portfolio for a Minister referred to in subsection (1) (b) should it become necessary pursuant to a decision of the President under that subsection;

(ii) appoint in respect of that portfolio a person who is not a member of the National Assembly, as the Minister responsible for that portfolio; and

(iii) fill, if necessary, a vacancy in respect of that portfolio; or

(b) after consultation with the Executive Deputy Presidents and the leaders of the participating parties, must terminate any appointment under paragraph (a) if it becomes necessary for the purposes of the Constitution or in the interest of good government.

(14) Meetings of the Cabinet must be presided over by the President, or, if the President so instructs, by an Executive Deputy President: Provided that the Executive Deputy Presidents preside over meetings of the Cabinet in turn unless the exigencies of government and the spirit embodied in the concept of a government of national unity otherwise demand.

(15) The Cabinet must function in a manner which gives consideration to the consensus-seeking spirit embodied in the concept of a government of national unity as well as the need for effective government.".

5. Section 93 of the new Constitution is deemed to read as follows:

"Appointment of Deputy Ministers

93. (1) The President may, after consultation with the Executive Deputy Presidents and the leaders of the parties participating in the Cabinet, establish deputy ministerial posts.

(2) A party is entitled to be allocated one or more of the deputy ministerial posts in the same proportion and according to the same formula that portfolios in the Cabinet are allocated.

(3) The provisions of section 91(10) to (12) apply, with the necessary changes, in respect of Deputy Ministers, and in such application a reference in that section to a Minister or a portfolio must be read as a reference to a Deputy Minister or a deputy ministerial post, respectively.

(4) If a person is appointed as the Deputy Minister of any portfolio entrusted to a Minister—

(a) that Deputy Minister must exercise and perform on behalf of the relevant Minister any of the powers and functions assigned to that Minister in terms of any legislation or otherwise which may, subject to the directions of the President, be assigned to that Deputy Minister by that Minister; and

(b) any reference in any legislation to that Minister must be construed as including a reference to the Deputy Minister acting in terms of an assignment under paragraph (a) by the Minister for whom that Deputy Minister acts.

(5) Whenever a Deputy Minister is absent or for any reason unable to exercise or perform any of the powers or functions of office, the President may appoint any other Deputy Minister or any other person to act in the said Deputy Minister's stead, either generally or in the exercise or performance of any specific power or function.".

6. Section 96 of the new Constitution is deemed to contain the following additional subsections:

"(3) Ministers are accountable individually to the President and to the National Assembly for the administration of their portfolios, and all members of the Cabinet are correspondingly accountable collectively for the performance of the functions of the national government and for its policies.

(4) Ministers must administer their portfolios in accordance with the policy determined by the Cabinet.

(5) If a Minister fails to administer the portfolio in accordance with the policy of the Cabinet, the President may require the Minister concerned to bring the administration of the portfolio into conformity with that policy.

(6) If the Minister concerned fails to comply with a requirement of the President under subsection (5), the President may remove the Minister from office—

(a) if it is a Minister referred to in section 91(1)(a), after consultation with the Minister and, if the Minister is not a member of the President's party or is not the leader of a participating party, also after consultation with the leader of that Minister's party; or

(b) if it is a Minister referred to in section 91(1)(b), after consultation with the Executive Deputy Presidents and the leaders of the participating parties.".

ANNEXURE C

Government of National Unity: Provincial Sphere

1. Section 132 of the new Constitution is deemed to read as follows:

"Executive Councils

132. (1) The Executive Council of a province consists of the Premier and not more than 10 members appointed by the Premier in accordance with this section.

(2) A party holding at least 10 per cent of the seats in a provincial legislature and which has decided to participate in the government of national unity, is entitled to be allocated one or more of the Executive Council portfolios in proportion to the number of seats held by it in the legislature relative to the number of seats held by the other participating parties.

(3) Executive Council portfolios must be allocated to the respective participating parties according to the same formula set out in section 91(9), and in applying that formula a reference in that section to—

(a) the Cabinet, must be read as a reference to an Executive Council;

(b) a Minister, must be read as a reference to a member of an Executive Council; and

(c) the National Assembly, must be read as a reference to the provincial legislature.

(4) The Premier of a province after consultation with the leaders of the participating parties must—

(a) determine the specific portfolios to be allocated to the respective participating parties in accordance with the number of portfolios allocated to them in terms of subsection (3);

(b) appoint in respect of each such portfolio a member of the provincial legislature who is a member of the party to which that portfolio was allocated under paragraph (a), as the member of the Executive Council responsible for that portfolio;

(c) if it becomes necessary for the purposes of the Constitution or in the interest of good government, vary any determination under paragraph (a), subject to subsection (3);

(d) terminate any appointment under paragraph (b)—

(i) if the Premier is requested to do so by the leader of the party of which the Executive Council member in question is a member; or

(ii) if it becomes necessary for the purposes of the Constitution or in the interest of good government; or

(e) fill, when necessary, subject to paragraph (b), a vacancy in the office of a member of the Executive Council.

(5) Subsection (4) must be implemented in the spirit embodied in the concept of a government of national unity, and the Premier and the other functionaries concerned must in the implementation of that subsection seek to achieve consensus at all times: Provided that if consensus cannot be achieved on—

(a) the exercise of a power referred to in paragraph (a), (c) or (d)(ii) of that subsection, the Premier's decision prevails;

(b) the exercise of a power referred to in paragraph (b), (d)(i) or (e) of that subsection affecting a person who is not a member of the Premier's party, the decision of the leader of the party of which such person is a member prevails; and

(c) the exercise of a power referred to in paragraph (b) or (e) of that subsection affecting a person who is a member of the Premier's party, the Premier's decision prevails.

(6) If any determination of portfolio allocations is varied under subsection (4) (c), the affected members must vacate their portfolios but are eligible, where applicable, for reappointment to other portfolios allocated to their respective parties in terms of the varied determination.

(7) Meetings of an Executive Council must be presided over by the Premier of the province.

(8) An Executive Council must function in a manner which gives consideration to the consensus-seeking spirit embodied in the concept of a government of national unity, as well as the need f or effective government.".

2. Section 136 of the new Constitution is deemed to contain the following additional subsections:

"(3) Members of Executive Councils are accountable individually to the Premier and to the provincial legislature for the administration of their portfolios, and all members of the Executive Council are correspondingly accountable collectively for the performance of the functions of the provincial government and for its policies.

(4) Members of Executive Councils must administer their portfolios in accordance with the policy determined by the Council.

(5) If a member of an Executive Council fails to administer the portfolio in accordance with the policy of the Council, the Premier may require the member concerned to bring the administration of the portfolio into conformity with that policy.

(6) If the member concerned fails to comply with a requirement of the Premier under subsection (5), the Premier may remove the member from office after consultation with the member, and if the member is not a member of the Premier's party or is not the leader of a participating party, also after consultation with the leader of that member's party.".

ANNEXURE D

Public Administration and Security Services: Amendments to Sections of the Previous Constitution

1. The amendment of section 218 of the previous Constitution—

(a) by replacing in subsection (1) the words preceding paragraph (a) with the following words:

"(1) Subject to the directions of the Minister of Safety and Security, the National Commissioner shall be responsible for—";

(b) by replacing paragraph (b) of subsection (1) with the following paragraph:

"(b) the appointment of provincial commissioners;";

(c) by replacing paragraph (d) of subsection (1) with the following paragraph:

"(d) the investigation and prevention of organised crime or crime which requires national investigation and prevention or specialised skills;"; and

(d) by replacing paragraph (k) of subsection (1) with the following paragraph:

"(k) the establishment and maintenance of a national public order policing unit to be deployed in support of and at the request of the Provincial Commissioner;".

2. The amendment of section 219 of the previous Constitution by replacing in subsection (1) the words preceding paragraph (a) with the following words:

"(1) Subject to section 218(1), a Provincial Commissioner shall be responsible for—".

3. The amendment of section 224 of the previous Constitution by replacing the proviso to subsection (2) with the following proviso:

"Provided that this subsection shall also apply to members of any armed force which submitted its personnel list after the commencement of the Constitution of the Republic of South Africa, 993 (Act 200 of 1993), but before the adoption of the new constitutional text as envisaged in section 73 of that Constitution, if the political organisation under whose authority and control it stands or with which it is associated and whose objectives it promotes did participate in the Transitional Executive Council or did take part in the first election of the National Assembly and the provincial legislatures under the said Constitution.".

4. The amendment of section 227 of the previous Constitution by replacing subsection (2) with the following subsection:

"(2) The National Defence Force shall exercise its powers and perform its functions solely in the national interest in terms of Chapter 11 of the Constitution of the Republic of South Africa, 1996."

5. The amendment of section 236 of the previous Constitution—

(a) by replacing subsection (1) with the following subsection—
"(1) A public service, department of state, administration or security service which immediately before the commencement of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as "the new Constitution"), performed governmental functions, continues to function in terms of the legislation applicable to it until it is abolished or incorporated or integrated into any appropriate institution or is rationalised or consolidated with any other institution.";

(b) by replacing subsection (6) with the following subsection:
"(6) (a) The President may appoint a commission to review the conclusion or amendment of a contract, the appointment or promotion, or the award of a term or condition of service or other benefit, which occurred between 27 April 1993 and 30 September 1994 in respect of any person referred to in subsection (2) or any class of such persons.
(b) The commission may reverse or alter a contract, appointment, promotion or award if not proper or justifiable in the circumstances of the case."; and
(c) by replacing "this Constitution", wherever this occurs in section 236, with "the new Constitution".

6. The amendment of section 237 of the previous Constitution—

(a) by replacing paragraph (a) of subsection (1) with the following paragraph:
"(a) The rationalisation of all institutions referred to in section 236(1), excluding military forces referred to in section 224(2), shall after the commencement of the Constitution of the Republic of South Africa, 1996, continue, with a view to establishing—
(i) an effective administration in the national sphere of government to deal with matters within the jurisdiction of the national sphere; and
(ii) an effective administration for each province to deal with matters within the jurisdiction of each provincial government."; and

(b) by replacing subparagraph (i) of subsection (2)(a) with the following subparagraph:

"(i) institutions referred to in section 236(1), excluding military forces, shall rest with the national government, which shall exercise such responsibility in co-operation with the provincial governments;".

7. The amendment of section 239 of the previous Constitution by replacing subsection (4) with the following subsection:

"(4) Subject to and in accordance with any applicable law, the assets, rights, duties and liabilities of all forces referred to in section 224(2) shall devolve upon the National Defence Force in accordance with the directions of the Minister of Defence.".

SCHEDULE 6A

[Schedule 6A inserted by s. 6 of Constitution Tenth Amendment Act of 2003 and repealed by s. 6 of the Constitution Fourteenth Amendment Act of 2008.]

SCHEDULE 6B

[Schedule 6B, previously Schedule 6A, inserted by s. 2 of the Constitution Eighth Amendment Act of 2002, amended by s. 5 of the Constitution Tenth Amendment Act of 2003, renumbered by s. 6 of the Constitution Tenth Amendment Act of 2003 and repealed by s. 5 of the Constitution Fifteenth Amendment Act of 2008.]

SCHEDULE 7

LAWS REPEALED

NUMBER AND YEAR OF LAW	TITLE
Act No. 200 of 1993	Constitution of the Republic of South Africa, 1993
Act No. 2 of 1994	Constitution of the Republic of South Africa Amendment Act, 1994
Act No. 3 of 1994	Constitution of the Republic of South Africa Second Amendment Act, 1994
Act No. 13 of 1994	Constitution of the Republic of South Africa Third Amendment Act, 1994
Act No. 14 of 1994	Constitution of the Republic of South Africa Fourth Amendment Act, 1994
Act No. 24 of 1994	Constitution of the Republic of South Africa Sixth Amendment Act, 1994
Act No. 29 of 1994	Constitution of the Republic of South Africa Fifth Amendment Act, 1994
Act No. 20 of 1995	Constitution of the Republic of South Africa Amendment Act, 1995
Act No. 44 of 1995	Constitution of the Republic of South Africa Second Amendment Act, 1995
Act No. 7 of 1996	Constitution of the Republic of South Africa Amendment Act, 1996
Act No. 26 of 1996	Constitution of the Republic of South Africa Third Amendment Act, 1996

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GOVERNMENT GAZETTE

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No. 18491

OFFICE OF THE PRESIDENT

No. 1631. 5 December 1997

It is hereby notified that the President has assented to the following Act which is hereby published for general information:—

No. 75 of 1997: Basic Conditions of Employment Act. 1997.

KANTOOR VAN DIE PRESIDENT

No. 1631. 5 Desember 1997

Hierby word bekend gemaak dat die President sy goedkeuring geheg het aan die onderstaande Wet wat hierby ter algemene inligting gepubliseer word:—

No. 75 van 1997: Wet op Basiese Diensvoorwaardes. 1997.

ACT

To give effect to the right to fair labour practices referred to in section 23(1) of the Constitution by establishing and making provision for the regulation of basic conditions of employment; and thereby to comply with the obligations of the Republic as a member state of the International Labour Organisation; and to provide for matters connected therewith.

(English text signed by the President.)
(Assented to 26 November 1997.)

BE IT ENACTED by the Parliament of the Republic of South Africa as follows:—

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CHAPTER ONE

Definitions, purpose and application of this Act

Definitions

1. In this Act, unless the context indicates otherwise—
"agreement" includes a collective agreement;
"area" includes any number of areas, whether or not contiguous;

"bargaining council" means a bargaining council registered in terms of the Labour Relations Act. 1995, and, in relation to the public service, includes the bargaining councils referred to in section 35 of that Act;

"basic condition of employment" means a provision of this Act or sectoral determination that stipulates a minimum term or condition of employment;

"CCMA" means the Commission for Conciliation. Mediation and Arbitration established in terms of section 112 of the Labour Relations Act, 1995;

"child" means a person who is under 18 years of age; "

"code of good practice" means a code of good practice issued by the Minister in terms of section 87 of this Act;

"collective agreement" means a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and. on the other hand—

(a) one or more employers;

(b) one or more registered employers' organisations; or

(c) one or more employers and one or more registered employers' organisation:

"Commission" means the Employment Conditions Commission established by section 59(1);

"compliance order" means a compliance order issued by a labour inspector in terms of section 69(1);

"Constitution" means the Constitution of the Republic of South Africa. 1996 (Act No. 108 of 1996);

"council" includes a bargaining council and a statutory council;

"Department" means the Department of Labour:

"Director-General" means the Director-General of Labour:

"dispute" includes an alleged dispute;

"'domestic worker" means an employee who performs domestic work in the home of his or her employer and includes—

(a) a gardener:

(b) a person employed by a household as driver of a motor vehicle: and

(c) a person who takes care of children, the aged, the sick. the frail or the disabled. but does not include a farm worker;

"employee" means—

(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive. any remuneration; and

(b) any other person who in any manner assists in carrying on or conducting the business of an employer.

and "employed" and "employment" have a corresponding meaning; [1]

"employers' organisation" means any number of employers associated together for the purpose. whether by itself or with other purposes, of regulating relations between employers and employees or trade unions;

"employment law" includes this Act. any other Act the administration of which has been assigned to the Minister, and any of the following Acts:

(a) The Unemployment Insurance Act, 1966 (Act No. 30 of 1966);

(b) the Manpower Training Act, 1981 (Act No. 56 of 1981);

(c) the Guidance and Placement Act, 1981 (Act No. 62 of 1981);

(d) the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993);

(e) the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993);

"farm worker" means an employee who is employed mainly in or in connection with farming activities, and includes an employee who wholly or mainly performs domestic work in a home on a farm;

"Labour Appeal Court" means the Labour Appeal Court established by section 167 of the Labour Relations Act. 1995;

"Labour Court" means the Labour Court established by section 151 of the Labour Relations Act, 1995:

1, "Employee" is given a specific meaning in section 8X1).

"labour inspector" means a labour inspector appointed under section 63, and includes any person designated by the Minister under that section to perform any function of a labour inspector;

"Labour Relations Act. 1995" means the Labour Relations Act, 1995 (Act No. 66 of 1995);

"medical practitioner" means a person entitled to practise as a medical practitioner in terms of section 17 of the Medical, Dental and Supplementary Health Service Professions Act, 1974 (Act No. 56 of 1974);

"midwife" means a person registered or enrolled to practise as a midwife in terms of section 16 of the Nursing Act, 1978 (Act No. 50 of 1978);

"Minister" means the Minister of Labour;

"month" means a calendar month:

"NEDLAC" means the National Economic, Development and Labour Council established by section 2 of the National Economic. Development and Labour Council Act. 1994 (Act No. 35 of 1994);

"ordinary hours of work" means the hours of work permitted in terms of section 9 or in terms of any agreement in terms of sections 11 or 12;

"overtime" means the time that an employee works during a day or a week in excess of ordinary hours of work;

"prescribe" means to prescribe by regulation and "prescribed" has a corresponding meaning:

"public holiday" means any day that is a public holiday in terms of the Public Holidays Act, 1994 (Act No. 36 of 1994);

"public service" means the public service referred to in section 1 (1) of the Public Service Act. 1994 (Proclamation No. 103 of 1994), and includes any organisational component contemplated in section 7(4) of that Act and specified in the first column of Schedule 2 to that Act. but excluding—

(a) the members of the National Defence Force;

(b) the National Intelligence Agency; and

(c) the South African Secret Service;

"registered employers' organisation" means an employers' organisation registered under section 96 of the Labour Relations Act, 1995;

"registered trade union" means a trade union registered under section 96 of the Labour Relations Act, 1995;

"remuneration" means any payment in money or in kind, or both in money and in kind. made or owing to any person in return for that person working for any other person. including the State, and "remunerate" has a corresponding meaning;[2]

"sector" means an industry or a service or a part of an industry or a service:

"sectoral determination" means a sectoral determination made under Chapter Eight:

"senior managerial employee" means an employee who has the authority to hire. discipline and dismiss employees and to represent the employer internally and externally;

"serve" means to send by registered post, telegram, telex. telefax or deliver by hand:

"statutory council" means a council established under Part E of Chapter III of the Labour Relations Act, 1995;

"temporary employment service" means any person who, for reward, procures for, or provides to, a client, other persons—

(a) who render services to, or perform work for, the client; and

(b) who are remunerated by the temporary employment service;

"this Act" includes the Schedules and any regulation made under this Act. but does not include the headings or footnotes;

"trade union'" means an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers' organisations;

"trade union official" includes an official of a federation of trade unions;

"trade union representative" means a trade union representative who is entitled to exercise the rights contemplated in section 14 of the Labour Relations Act, 1995;

2. "Remuneration" is given a specific meaning in section 35(5).

"wage" means the amount of money paid or payable to an employee in respect of ordinary hours of work or. if they are shorter, the hours an employee ordinarily works in a day or week;

"week" in relation to an employee, means the period of seven days within which the working week of that employee ordinarily falls;

"workplace" means any place where employees work;

"workplace forum" means a workplace forum established under Chapter V of the Labour Relations Act, 1995.

Purpose of this Act

2. The purpose of this Act is to advance economic development and social justice by fulfilling the primary objects of this Act which are—

(a) to give effect to and regulate the right to fair labour practices conferred by section 23(1) of the Constitution—

(i) by establishing and enforcing basic conditions of employment; and

(ii) by regulating the variation of basic conditions of employment;

(b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation.

Application of this Act

3. (1) This Act applies to all employees and employers except—

(u) members of the National Defence Force, the National Intelligence Agency and the South African Secret Service; and

(b) unpaid volunteers working for an organisation serving a charitable purpose.

(2) This Act applies to persons undergoing vocational training except to the extent that any term or condition of their employment is regulated by the provisions of any other law.

(3) This Act, except section 41, does not apply to persons employed on vessels at sea in respect of which the Merchant Shipping Act. 1951 (Act No. 57 of 1951), applies except to the extent provided for in a sectoral determination.

Inclusion of provisions in contracts of employment

4. A basic condition of employment constitutes a term of any contract of employment except to the extent that—

(a) any other law provides a term that is more favorable to the employee;

(b) the basic condition of employment has been replaced. varied. or excluded in accordance with the provisions of this Act; or

(c) a term of the contract of employment is more favorable to the employee than the basic condition of employment.

This Act not affected by agreements

5. This Act or anything done under it takes precedence *over* any agreement. whether entered into before or after the commencement of this Act.

CHAPTER TWO

Regulation of working time

Application of this Chapter

6. (1) This Chapter. except section 7, does not apply to—

(a) senior managerial employees;

(b) employees engaged as sales staff who travel to the premises of customers and who regulate their own hours of work;

(c) employees who work less than 24 hours a month for an employer.

(2) Sections 9.10(1).14(1).15(1).17(2) **and** 18(1) **do not** apply **to** work which is required to be done without delay owing to circumstances for which the employer could not reasonably have been expected to make provision and which cannot be performed by employees during their ordinary hours of work.

(3) The Minister must. on the advice of the Commission. make a determination that excludes the application of this Chapter or any provision of it to any category of employees earning in excess of an amount stated in that determination.

(4) Before the Minister issues a notice in terms of subsection"(3). the Minister must—

(a) publish in the *Gazette* a draft of the proposed notice; and

(b) invite interested persons to submit written representations on the proposed notice within a reasonable period.

Regulation of working time

7. Every employer must regulate the working time of each employee—

(a) in accordance with the provisions of any Act governing occupational health and safety;

(b) with due regard to the health and safety of employees;

(c) with due regard to the Code of Good Practice on the Regulation of Working Time[3] issued under section 87(1)*(a)*; and

(d) with due regard to the family responsibilities of employees.

Interpretation of day

8. For the purposes of sections 9. 10 and 11. "day'" means a period of 24 hours measured from the time when the employee normally commences work.

Ordinary hours of work

9. (1) Subject to this Chapter. an employer may not require or permit an employee to work more than—

(a) 45 hours in any week: and

(b) nine hours in any day if the employee works for five days or fewer in a week: or

(c) eight hours in any day if the employee works on more than five days in a week.

(2) An employee's ordinary hours of work in terms of subsection (I) may by agreement be extended by Up to 15 minutes in a day but not more than 60 minutes in a week to enable an employee whose duties include serving members of the public to continue performing those duties after the completion of ordinary hours of work.

(3) Schedule 1 establishes procedures for the progressive reduction of the maximum ordinary hours of work to a maximum of 40 ordinary hours of work per week and eight ordinary hours of work per day.

Overtime

10. (1) Subject to this Chapter. an employer may not require or permit an employee—

(a) to work overtime except in accordance with an agreement;

(b) to work more than—

(i) three hours' overtime a day; or

(ii) ten hours' overtime a week.

(2) An employer must pay an employee at least one and one-half times the employee's wage for overtime worked.

(3) Despite subsection (2). an agreement may provide for an employer to-

3. The Code of Good Practice issued by the Minister of Labour under section 87(1)*(a)* will contain provisions concerning the arrangement of work and, in particular, its impact upon the health. safety and welfare of employees. Issues that would be included are shift work, night work, rest periods during working time, family responsibilities and work by children.

(a) pay an employee not less than the employee's ordinary wage for overtime worked and grant the employee at least 30 minutes' time off on full pay for every hour of overtime worked; or

(b) grant an employee at least 90 minutes' paid time off for each hour of overtime worked,

(4) *(a)* An employer must grant paid time off in terms of subsection (3) within one month of the employee becoming entitled to it.

(b) An agreement in writing may increase the period contemplated by paragraph *(a)* to 12 months.

(5) An agreement concluded in terms of subsection (1) with an employee when the employee commences employment. or during the first three months of employment. lapses after one year.

Compressed working week

11. (1) An agreement in writing may require or permit an employee to work up to twelve hours in a day, inclusive of the meal intervals required in terms of section 14. without receiving overtime pay.

(2) An agreement in terms of subsection (1) may not require or permit an employee to w ork—

(a) more than 45 ordinary hours of work in any week;

(b) more than ten hours' overtime in any week: or

(c) on more than five days in any week.

Averaging of hours of work

12. (1) Despite sections 9(1) and (2) and 10(1)*(b)*. the ordinary hours of work and overtime of an employee may be averaged over a period of up to four months in terms of a collective agreement.

(2) An employer may not require or permit an employee who is bound by a collective agreement in terms of subsection (1) to work more than—

(u) an average of 45 ordinary hours of work in a week over the agreed period;

(b) an average of five hours' overtime in a week over the agreed period.

(3) A collective agreement in terms of subsection (1) lapses after 12 months.

(4) Subsection (3) only applies to the first two collective agreements concluded in terms of subsection (1).

Determination of hours of work by Minister

13. (1) Despite this Chapter, the Minister, on grounds of health and safety, may prescribe by regulation the maximum permitted hours of work, including overtime, that any category of employee may work—

(a) daily, weekly or during any other period specified in the regulation: and

(b) during a continuous period without a break.

(2) A regulation in terms of subsection (1) may not prescribe maximum hours in excess of those permitted in sections 9 and 10.

(3) A regulation in terms of subsection (1) maybe made only—

(a) on the advice of the chief inspector appointed in terms of section 27 of the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993), or the chief inspector appointed in terms of section 48 of the Mine Health and Safety Act. 1996 (Act No. 29 of 1996); and

(b) after consulting the Commission.

Meal intervals

14. (1) An employer must give an employee who works continuously for more than five hours a meal interval of at least one continuous hour.

(2) During a meal interval the employee maybe required or permitted to perform only duties that cannot be left unattended and cannot be performed by another employee.

(3) An employee must be remunerated—

(a) for a meal interval in which the employee is required to work or is required to be available for work: and

(b) for any portion of a meal interval that is in excess of 75 minutes. unless the employee lives on the premises at which the workplace is situated.

(4) For the purposes of subsection (1), work is continuous unless it is interrupted by an interval of at least 60 minutes.

(5) An agreement in writing may—

(a) reduce the meal interval to not less than 30 minutes;

(b) dispense with a meal interval for an employee who works fewer than six hours on a day.

Daily and weekly rest period

15. (1) An employer must allow an employee—

(a) a daily rest period of at least twelve consecutive hours between ending and recommencing work; and

(b) a weekly rest period of at least 36 consecutive hours which. unless otherwise agreed, must include Sunday.

(2) A daily rest period in terms of subsection (1)*(a)* may. by written agreement. be reduced to 10 hours for an employee—

(a) who lives on the premises at which the workplace is situated; and

(b) whose meal interval lasts for at least three hours.

(3) Despite subsection (1)*(b)*. an agreement in writing may provide for—

(a) a rest period of at least 60 consecutive hours every two weeks; or

(b) an employee's weekly rest period to be reduced by up to eight hours in any week if the rest period in the following week is extended equivalently.

Pay for work on Sundays

16. (1) An employer must pay an employee who works on a Sunday at double the employee's wage for each hour worked, unless the employee ordinarily works on a Sunday. in which case the employer must pay the employee at one and one-half times the employee's wage for each hour worked.

(2) If an employee works less than the employees ordinary shift on a Sunday and the payment that the employee is entitled to in terms of subsection (1) is less than the employee's ordinary daily wage, the employer must pay the employee the employee's ordinary daily wage.

(3) Despite subsections (l) and (2), an agreement may permit an employer to grant an employee who works on a Sunday paid time off equivalent to the difference in value between the pay received by the employee for working on the Sunday and the pay that the employee is entitled to in terms of subsections (1) and (2).

(4) Any time worked on a Sunday by an employee who does not ordinarily work on a Sunday is not taken into account in calculating an employee's ordinary hours of work in terms of section 9(1) and (2). but is taken into account in calculating the overtime worked by the employee in terms of section 10(1)*(b)*.

(5) If a shift worked by an employee falls on a Sunday and another day. the whole shift is deemed to have been worked on the Sunday. unless the greater portion of the shift was worked on the other day. in which case the whole shift is deemed to have been worked on the other day.

(6) *(a)* An employer must grant paid time off in terms of subsection (3) within one month of the employee becoming entitled to it.

(b) An agreement in writing may increase the period contemplated by paragraph *(a)* to 12 months.

Night work

17. (1) In this section. "night work" means work performed after 18:00 and before 06:00 the next day.

(2) An employer may only require or permit an employee to perform night work, if so agreed, and if—

(a) the employee is compensated by the payment of an allowance, which may be a shift allowance, or by a reduction of working hours; and

(b) transportation is available between the employee's place of residence and the workplace at the commencement and conch, sion of the employee's shift.

(3) An employer who requires an employee to perform work on a regular basis after 23:00 and before 06:00 the next day must—

(a) inform the employee in writing, or orally if the employee is not able to understand a written communication, in a language that the employee understands—

(i) of any health and safety hazards associated with the work that the employee is required to perform; and

(ii) of the employee's right to undergo a medical examination in terms of paragraph *(b)*;

(b) at the request of the employee, enable the employee to undergo a medical examination. for the account of the employer, concerning those hazards—

(i) before the employee starts, or within a reasonable period of the employee starting, such work; and

(ii) at appropriate intervals while the employee continues to perform such work: and

(c) transfer the employee to suitable day work within a reasonable time if—

(i) the employee suffers from a health condition associated with the performance of night work; and

(ii) it is practicable for the employer to do so.

(4) For the purposes of subsection (3), an employee works on a regular basis if the employee works for a period of longer than one hour after 23:00 and before 06:00 at least five times per month or 50 times per year.

(5) The Minister may. after consulting the Commission. make regulations relating to the conduct of medical examinations for employees who perform night work.[4]

Public holidays[5]

18. (1) An employer may not require an employee to work on a public holiday except in accordance with an agreement.

(2) If a public holiday falls on a day on which an employee would ordinarily work. an employer must pay—

(a) an employee who does not work on the public holiday, at least the wage that the employee would ordinarily have received for work on that day;

(b) an employee who does work on the public holiday—

(i) at least double the amount referred to in paragraph *(a):* or

(ii) if it is greater. the amount referred to in paragraph *(a)* plus the amount earned by the employee for the time worked on that day.

(3) If an employee works on a public holiday on which the employee would not ordinarily work, the employer must pay that employee an amount equal to-

(a) the employee's ordinary daily wage; plus

(b) the amount earned by the employee for the work performed that day, whether calculated by reference to time worked or any other method.

(4) An employer must pay an employee for a public holiday on the employee's usual pay day.

(5) If a shift worked by an employee falls on a public holiday and another day, the whole shift is deemed to have been worked on the public holiday, but if the greater portion of the shift was worked on the other day, the whole shift is deemed to have been worked on the other day.

4. Section 90 protects the confidentiality of any medical examination conducted in terms of this Act.

5. In terms of section 2(2) of the Public Holidays Act, 1994 (Act No. 36 of 1994), a public holiday is exchangeable for any other day which is fixed by agreement or agreed to between the employer and the employee,

CHAPTER THREE

Leave

Application of this Chapter

19. (1) This Chapter does not apply to an employee who works less than 24 hours a month for an employer.

(2) Unless an agreement provides otherwise. this Chapter does not apply to leave granted to an employee in excess of the employee's entitlement under this Chapter.

Annual leave

20. (1) In this Chapter, "annual leave cycle" means the period of 12 months' employment with the same employer immediate! following-

(a) an employee's comm-encement of employment: or

(b) the completion of that employee's prior leave cycle.

(2) An employer must grant an employee at least—

(a) 21 consecutive days' annual leave on full remuneration in respect of each annual leave cycle; or

(b) by agreement, one day of annual leave on full remuneration for every 17 days on which the employee worked or was entitled to be paid;

(c) by agreement, one hour of annual leave on full remuneration for every 17 hours on which the employee worked or was entitled to be paid.

(3) An employee is entitled to take leave accumulated in an annual leave cycle in terms of subsection (2) on consecutive days.

(4) An employer must grant annual leave not later than six months after the end of the annual leave cycle.

(5) An employer may not require or permit an employee to take annual leave during—

(a) any other period of leave to which the employee is entitled in terms of this Chapter; or

(b) any period of notice of termination of employment.

(6) Despite subsection (5), an employer must permit an employee, at the employee's written request. to take leave during a period of unpaid leave.

(7) An employer may reduce an employee's entitlement to annual leave by the number of days of occasional leave on full remuneration granted to the employee at the employee's request in that leave cycle.

(8) An employer must grant an employee an additional day of paid leave if a public holiday falls on a day during an employee's annual leave on which the employee would ordinarily have worked.

(9) An employer may not require or permit an employee to work for the employer during any period of annual leave.

(10) Annual leave must be taken—

(a) in accordance with an agreement between the employer and employee; or

(b) if there is no agreement in terms of paragraph *(a).* at a time determined by the employer in accordance with this section.

(11) An employer may not pay an employee instead of granting paid leave in terms of this section except—

(a) on termination of employment; and

(b) in accordance with section *40(b)* and *(c).*

Pay for annual leave

21. (1) An employer must pay an employee leave pay at least equivalent to the remuneration that the employee would have received for working for a period equal to the period of annual leave, calculated—

(a) at the employee's rate of remuneration immediately before the beginning of the period of annual leave: and

(b) in accordance with section 35.

(2) An employer must pay an employee leave pay—

(a) before the beginning of the period of leave; or

(b) by agreement. on the employee's usual pay day.

Sick leave

22. (1) In this Chapter. "sick leave cycle" means the period of 36 months' employment with the same employer immediately following—

(a) an employee's commencement of employment; or

(b) the completion of that employee's prior sick leave cycle.

(2) During every sick leave cycle. an employee is entitled to an amount of paid sick leave equal to the number of days the employee would normally work during a period of six weeks.

(3) Despite subsection (2). during the first six months of employment. an employee is entitled to one day's paid sick leave for every 26 days worked.

(4) During an employee's first sick leave cycle. an employer may reduce the employee's entitlement to sick leave in terms of subsection (2) by the number of days' sick leave taken in terms of subsection (3).

(5) Subject to section 23. an employer must pay an employee for a day's sick leave—

(a) the wage the employee would ordinarily have received for work on that day; and

(b) on the employee's usual pay day.

(6) An agreement may reduce the pay to which an employee is entitled in respect of any day's absence in terms of this section if—

(a) the number of days of paid sick leave is increased at least commensurately with any reduction in the daily amount of sick pay: and

(b) the employee's entitlement to pay—

(i) for any day's sick leave is at least 75 per cent of the wage payable to the employee for the ordinary hours the employee would have worked on that day: and

(ii) for sick leave over the sick leave cycle is at least equivalent to the employee's entitlement in terms of subsection (2).

Proof of incapacity

23. (1) An employer is not required to pay an employee in terms of section 22 if the employee has been absent from work for more than two consecutive days or on more than two occasions during an eight-week period and, on request by the employer. does not produce a medical certificate stating that the employee was unable to work for the duration of the employee's absence on account of sickness or injury.

(2) The medical certificate must be issued and signed by a medical practitioner or any other person who is certified to diagnose and treat patients and who is registered with a professional council established by an Act of Parliament.

(3) If it is not reasonably practicable for an employee who lives on the employer's premises to obtain a medical certificate, the employer may not withhold payment in terms of subsection (1) unless the employer provides reasonable assistance to the employee to obtain the certificate.

Application to occupational accidents or diseases

24. Sections 22 and 23 do not apply to an inability to work caused by an accident or occupational disease as defined in the Compensation for Occupational Injuries and Diseases Act. 1993 (Act No. 130 of 1993), or the Occupational Diseases in Mines and Works Act, 1973 (Act No. 78 of 1973). except in respect of any period during which no compensation is payable in terms of those Acts.

Maternity leave[6]

25. (1) An employee is entitled to at least four consecutive months' maternity leave.

(2) An employee may commence maternity leave—

(a) at any time from four weeks before the expected date of birth, unless otherwise agreed; or

(b) on a date from which a medical practitioner or a midwife certifies that it is necessary for the employee's health or that of her unborn child.

(3) No employee may work for six weeks after the birth of her child. unless a medical practitioner or midwife certifies that she is fit to do so.

(4) An employee who has a miscarriage during the third trimester of pregnancy or bears a stillborn child is entitled to maternity leave for six weeks after the miscarriage or stillbirth. whether or not the employee had commenced maternity leave at the time of the miscarriage or stillbirth.

(5) An employee must notify an employer in writing. unless the employee is unable to do so. of the date on which the employee intends to—

(a) commence maternity leave; and

(b) return to work after maternity leave.

(6) Notification in terms of subsection (5) must be given—

(a) at least four weeks before the employee intends to commence maternity leave: or

(b) if it is not reasonably practicable to do so. as soon as is reasonably practicable.

(7) The payment of maternity benefits will be determined by the Minister subject to the provisions of the Unemployment Insurance Act. 1966 (Act No. 30 of 1966).[7]

Protection of employees before and after birth of a child

26. (1) No employer may require or permit a pregnant employee or an employee who is nursing her child to perform work that is hazardous to her health or the health of her child.[8]

(2) During an employee's pregnancy. and for a period of six months after the birth of her child. her employer must offer her suitable, alternative employment on terms and conditions that are no less favorable than her ordinary terms and conditions of employment, if—

(a) the employee is required to perform night work. as defined in section 17(1) or her work poses a danger to her health or safety or that of her child; and

(b) it is practicable for the employer to do so.

Family responsibility leave

27. (1) This section applies to an employee—

(a) who has been in employment with an employer for longer than four months; and

(b) who works for at least four days a week for that employer.

(2) An employer must grant an employee, during each annual leave cycle. at the request of the employee. three days' paid leave. which the employee is entitled to take—

(a) when the employee's child is born;

(b) when the employee's child is sick; or

6. In terms of' section 187(1)(*e*) of the Labour Relations Act, 1995. the dismissal of an employee on account of her pregnancy. intended pregnancy, or any reason related to her pregnancy, is automatically unfair. The definition of dismissal in section 186 of the Labour Relations Act, 1995, includes the refusal to allow an employee to resume work after she has taken maternity leave in terms of any law. collective agreement or her contract.

7. Sections 34 and 37 of the Unemployment Insurance Act, 1966 (Act No. 30 of 1966), provide for the payment of maternity leave. Legislative amendments will be proposed to Cabinet to improve these benefits and to provide that the payment to an employee of maternity benefits does not adversely affect her right to unemployment benefits.

8. The Minister must issue a Code of Good Practice on the Protection of Employees during Pregnancy and after the Birth of a Child in terms of section 87(1)(*b*).

(c) in the event of the death of—

(i) the employee's spouse or life partner; or

(ii) the employee's parent, adoptive parent, grandparent, child, adopted child, grandchild or sibling.

(3) Subject to subsection (5), an employer must pay an employee for a day's family responsibility leave—

(a) the wage the employee would ordinarily have received for work on that day; and

(b) on the employee's usual pay day.

(4) An employee may take family responsibility leave in respect of the whole or a part of a day.

(5) Before paying an employee for leave in terms of this section, an employer may require reasonable proof of an event contemplated in subsection (1) for which the leave was required.

(6) An employee's unused entitlement to leave in terms of this section lapses at the end of the annual leave cycle in which it accrues.

(7) A collective agreement may vary the number of days and the circumstances under which leave is to be granted in terms of this section.

CHAPTER FOUR

Particulars of employment and remuneration

Application of this Chapter

28. (1) This Chapter does not apply to an employee who works less than 24 hours a month for an employer.

(2) Sections 29(1)(*n*), (*o*) and (*p*), 30.31 and 33 do not apply to—

(a) an employer who employs fewer than five employees; and

(b) the employment of a domestic worker.

Written particulars of employment

29. (1) An employer must supply an employee, when the employee commences employment, with the following particulars in writing—

(a) the full name and address of the employer;

(b) the name and occupation of the employee. or a brief description of the work for which the employee is employed;

(c) the place of work, and. where the employee is required or permitted to work at various places. an indication of this;

(d) the date on which the employment began;

(e) the employee's ordinary hours of work and days of work;

(f) the employee's wage or the rate and method of calculating wages:

(g) the rate of pay for overtime work;

(h) any other cash payments that the employee is entitled to;

(i) any payment in kind that the employee is entitled to and the value of the payment in kind;

(j) how frequently remuneration will be paid;

(k) any deductions to be made from the employee's remuneration;

(l) the leave to which the employee is entitled;

(m) the period of notice required to terminate employment, or if employment is for a specified period, the date when employment is to terminate;

(n) a description of any council or sectoral determination which covers the employer's business;

(o) any period of employment with a previous employer that counts towards the employees period of employment;

(p) a list of any other documents that form part of the contract of employment. indicating a place that is reasonably accessible to the employee where a copy of each may be obtained.

(2) When any matter listed in subsection (1) changes—

(a) the written particulars must be revised to reflect the change; and

(b) the employee must be supplied with a copy of the document reflecting the change.

(3) If an employee is not able to understand the written particulars. the employer must ensure that they are explained to the employee in a language and in a manner that the employee understands.

(4) Written particulars in terms of this section must be kept by the employer for a period of three years after the termination of employment.

Informing employees of their rights

30. An employer must display at the workplace where it can be read by employees a statement in the prescribed form of the employee's rights under this Act in the official languages which are spoken in the workplace.

Keeping of records

31. (1 **)** Every employer must keep a record containing at least the following information:

(a) The employee's name and occupation;

(b) the time worked by each employee;

f *c)* the remuneration paid to each employee;

(d) the date of birth of any employee under 18 years of age: and

(e) any other prescribed information.

(2) A record in terms of subsection (1) must be kept by the employer for a period of three years from the date of the last entry in the record.

(3) No person may make a false entry in a record maintained in terms of subsection (1).

(4) An employer who keeps a record in terms of this section is not required to keep any other record of time worked and remuneration paid as required by any other employment law.

Payment of remuneration

32. (1) An employer must pay to an employee any remuneration that is paid in money—

(a) in South African currency;

(b) daily. weekly, fortnightly or monthly; and

(c) in cash. by cheque or by direct deposit into an account designated by the employee.

(2) Any remuneration paid in cash or by cheque must be given to each employee—

(a) at the workplace or at a place agreed to by the employee;

(b) during the employee's working hours or within 15 minutes of the commencement or conclusion of those hours; and

(c) in a sealed envelope which becomes the property of the employee.

(3) An employer must pay remuneration not later than seven days after—

(a) the completion of the period for which the remuneration is payable; or

(b) the termination of the contract of employment.

(4) Subsection (3)*(b)* does not apply to any pension or provident fund payment to an employee that is made in terms of the rules of the fund.

Information about remuneration

33. (1) An employer must give an employee the following information in writing on each day the employee is paid:

(a) The employer's name and address;

(b) the employee's name and occupation;

(c) the period for which the payment is made;

(d) the employee's remuneration in money;

(e) the amount and purpose of any deduction made from the remuneration:

(f) the actual amount paid to the employee; and

(g) if relevant to the calculation of that employee's remuneration—

(i) the employee's rate of remuneration and overtime rate;
(ii) the number of ordinary and overtime hours worked by the employee during the period for which the payment is made;
(iii) the number of hours worked by the employee on a Sunday or public holiday during that period; and
(iv) if an agreement to average working time has been concluded in terms of section 12. the total number of ordinary and overtime hours worked by the employee in the period of averaging.

(2) The written information required in terms of subsection (1) must be given to each employee-

(a) at the workplace or at a place agreed to by the employee; and
(b) during the employee's ordinary working hours or within 15 minutes of the commencement or conclusion of those hours.

Deductions and other acts concerning remuneration

34. (I) An employer may not make any deduction from an employee's remuneration unless—

(a) subject to subsection (2), the employee in writing agrees to the deduction in respect of a debt specified in the agreement; or
(b) the deduction is required or permitted in terms of a law. collective agreement. court order or arbitration award.

(2) A deduction in terms of subsection (1)*(a)* may be made to reimburse an employer for loss or damage only if—

(a) the loss or damage occurred in the course of employment and was due to the fault of the employee;
(b) the employer has followed a fair procedure and has given the employee a reasonable opportunity to show why the deductions should not be made;
(c) the total amount of the debt does not exceed the actual amount of the loss or damage; and
(d) the total deductions from the employee's remuneration in terms of this subsection do not exceed one-quarter of the employee's remuneration in money.

(3) A deduction in terms of subsection(1)(a) in respect of any goods purchased by the employee must specify the nature and quantity of the goods.

(4) An employer who deducts an amount from an employee's remuneration in terms of subsection (1) for payment to another person must pay the amount to the person in accordance with the time period and other requirements specified in the agreement. law. court order or arbitration award.

(5) An employer may not require or permit an employee to—

(a) repay any remuneration except for overpayments previously made by the employer resulting from an error in calculating the employee's remuneration; or
(b) acknowledge receipt of an amount greater than the remuneration actually received.

Calculation of remuneration and wages

35. (1) An employee's wage is calculated by reference to the number of hours the employee ordinarily works.

(2) For the purposes of calculating the wage of an employee by time. an employee is deemed ordinarily to work—

(a) 45 hours in a week. unless the employee ordinarily works a lesser number of hours in a week;
(b) nine hours in a day, or seven and a half hours in the case of an employee who works for more than five days a week, or the number of hours that an employee works in a day in terms of an agreement concluded in accordance with section 11, unless the employee ordinarily works a lesser number of hours in a day.

(3) An employee's monthly remuneration or wage is four and one-third times the employee's weekly remuneration or wage, respectively.

(4) If an employee's remuneration or wage is calculated, either wholly or in part, on a basis other than time or if an employee's remuneration or wage fluctuates significantly from period to period, any payment to that employee in terms of this Act must be calculated by reference to the employee's remuneration or wage during—

(a) the preceding 13 weeks; or

(b) if the employee has been in employment for a shorter period, that period.

(5) For the purposes of calculating an employee's annual leave pay in terms of section 21. notice pay in terms of section 38 or severance pay in" terms of section 41. an employee's remuneration—

(a) includes the cash value of any payment in kind that forms part of the employee's remuneration unless the employee receives that payment in kind; but

(b) excludes—

(i) gratuities:

(ii) allowances paid to an employee for the purposes of enabling an employee to work; and

(iii) any discretionary payments not related to the employee's hours of work or work performance.

CHAPTER FIVE

Termination of employment

Application of this Chapter

36. This Chapter does not apply to an employee who works less than 24 hours in a month for an employer.

Notice of termination of employment

37. (1) Subject to section 38, a contract of employment terminable at the instance of a party to the contract may be terminated only on notice of not less than—

(a) one week. if the employee has been employed for four weeks or less;

(b) two weeks. if the employee has been employed for more than four weeks but not more than one year:

(c) four weeks, if the employee—

(i) has been employed for one year or more: or

(ii) is a farm worker or domestic worker who has been employed for more than four weeks.

(2) A collective agreement may permit a notice period shorter than that required by subsection (1).

(3) No agreement may require or permit an employee to give a period of notice longer than that required of the employer.

(4) *(a)* Notice of termination of a contract of employment must be given in writing. except when it is given by an illiterate employee.

(b) If an employee who receives notice of termination is not able to understand it. the notice must be explained orally by, or on behalf of. the employer to the employee in an official language the employee reasonably understands.

(5) Notice of termination of a contract of employment given by an employer must—

(a) not be given during any period of leave to which the employee is entitled in terms of Chapter Three; and

(b) not run concurrently with any period of leave to which the employee is entitled in terms of Chapter Three, except sick leave.

(6) Nothing in this section affects the right—

(a) of a dismissed employee to dispute the lawfulness or fairness of the dismissal in terms of Chapter VIII of the Labour Relations Act, 1995, or any other law; and

(b) of an employer or an employee to terminate a contract of employment without notice for any cause recognised by law.

Payment instead of notice

38. (1) Instead of giving an employee notice in terms of section 37, an employer may pay the employee the remuneration the employee would have received, calculated in accordance with section 35, if the employee had worked during the notice period.

(2) If an employee gives notice of termination of employment, and the employer waives any part of the notice, the employer must pay the remuneration referred to in subsection (1), unless the employer and employee agree otherwise.

Employees in accommodation provided by employers

39. (1) If the employer of an employee who resides in accommodation that is situated on the premises of the employer or that is supplied by the employer terminates the contract of employment of that employee—

(a) before the date on which the employer was entitled to do so in terms of section 37; or

(b) in terms of section 38,

the employer is required to provide the employee with accommodation for a period of one month, or if it is a longer period, until the contract of employment could lawfully have been terminated.

(2) If an employee elects to remain in accommodation in terms of subsection (1) after the employer has terminated the employees contract of employment in terms of section 38. the remuneration that the employer is required to pay in terms of section 38 is reduced by that portion of the remuneration that represents the agreed value of the accommodation for the period that the employee remains in the accommodation.

Payments on termination

40. On termination of employment, an employer must pay an employee—

(a) for any paid time off that the employee is entitled to in terms of section 10(3) or 16(3) that the employee has not taken;

(b) remuneration calculated in accordance with section 21(1) for any period of annual leave due in terms of section 20(2) that the employee has not taken; and

(c) if the employee has been in employment longer than four months. in respect of the employee-s annual leave entitlement during an incomplete annual leave cycle as defined in section 20(1)—

(i) one day's remuneration in respect of every 17 days on which the employee worked or was entitled to be paid; or

(ii) remuneration calculated on any basis that is at least as favorable to the employee as that calculated in terms of subparagraph (i).

Severance pay

41. (1) For the purposes of this section. "operational requirements" means requirements based on the economic, technological, structural or similar needs of an employer.

(2) An employer must pay an employee who is dismissed for reasons based on the employer's operational requirements severance pay equal to at least one week's remuneration for each completed year of continuous service with that employer, calculated in accordance with section 35.

(3) The Minister may vary the amount of severance pay in terms of subsection (2) by notice in the *Gazette.* This variation may only be done after consulting NEDLAC and the Public Service Co-ordinating Bargaining Council established under Schedule 1 of the Labour Relations Act. 1995.

(4) An employee who unreasonably refuses to accept the employer's offer of alternative employment with that employer or any other employer, is not entitled to severance pay in terms of subsection (2).

(5) The payment of severance pay in compliance with this section does not affect an employee's right to any other amount payable according to law.

(6) If there is a dispute only about the entitlement to severance pay in terms of this section, the employee may refer the dispute in writing to—

(a) a council, if the parties to the dispute fall within the registered scope of that council; or

(b) the CCMA, if no council has jurisdiction.

(7) The employee who refers the dispute to the council or the CCMA must satisfy it that a copy of the referral has been served on all the other parties to the dispute.

(8) The council or the CCMA must attempt to resolve the dispute through conciliation.

(9) If the dispute remains unresolved, the employee may refer it to arbitration.

(10) If the Labour Court is adjudicating a dispute about a dismissal based on the employer's operational requirements, the Court may inquire into and determine the amount of any severance pay to which the dismissed employee may be entitled and the Court may make an order directing the employer to pay that amount.

Certificate of service

42. On termination of employment an employee is entitled to a certificate of service stating—

(a) the employee's full name:

(b) the name and address of the employer:

(c) a description of any council or sectoral employment standard by which the employer's business is covered;

(d) the date of commencement and date of termination of employment;

(e) the title of the job or a brief description of the work for which the employee was employed at date of termination:

(f) the remuneration at date of termination: and

(g) if the employee so requests. the reason for termination of employment.

CHAPTER SIX

Prohibition of employment of children and forced labour

Prohibition of employment of children

43. (1) No person may employ a child—

(a) who is under 15 years of age; or

(b) who is under the minimum school-leaving age in terms of any law. if this is 15 or older. "

(2) No person may employ a child in employment—

(a) that is inappropriate for a person of that age;

(b) that places at risk the child's well-being. education. physical or mental health. or spiritual. moral or social development.

(3) A person who employs a child in contravention of subsection (1) or (2) commits an offence.

Employment of children of 15 years or older

44. (1) Subject to section 43(2), the Minister may, on the advice of the Commission. make regulations to prohibit or place conditions on the employment of children who are at least 15 years of age and no longer subject to compulsory schooling in terms of any law.

(2) A person who employs a child in contravention of subsection (1) commits an offence.

9. Section 31(1) of the South African Schools Act, 1996 (Act No, 84 of 1996), requires *every* parent to cause every learner for whom he or she is responsible to attend school until the last school day of the year in which the learner reaches the age of 15 or the ninth grade, whichever is the first.

Medical examinations

45. The Minister may, after consulting the Commission. make regulations relating to the conduct of medical examinations of children in employment. [10]

Prohibitions

46. It is an offence to-

(a) assist an employer to employ a child in contravention of this Act; or

(b) discriminate against a person who refuses to permit a child to be employed in contravention of this Act.

Evidence of age

47. In any **proceedings** in terms of this Act, if the age of an employee is a relevant factor for which insufficient evidence is available. it is for the party who alleges that the employment complied with the provisions of this Chapter to prove that it was reasonable for that party to believe, after investigation. that the person was not below the permitted age in terms of section 43 or 44.

Prohibition of forced labour

48. (1) Subject to the Constitution, all forced labour **is prohibited.**

(2) No **person may for his** or her own benefit or for the benefit of someone else. cause. demand or impose forced labour in contravention of subsection (1).

(3) A person who contravenes subsection (1) or (2) commits an offence.

CHAPTER SEVEN

Variation of basic conditions of employment

Variation by agreement

49. (1) A collective agreement concluded in a bargaining council may alter, replace or exclude any basic condition of employment if the collective agreement is consistent with the purpose of this Act and the collective agreement does not—

(a) reduce the protection afforded to employees by sections 7. 9 and any regulation made in terms of section 13;

(b) reduce the protection afforded to employees who perform night work in terms of section 17(3) and (4);

(c) reduce an employee's annual leave in terms of section 20 to less than two weeks;

(d) reduce an employee's entitlement to maternity leave in terms of section 25;

(e) reduce an employee's entitlement to sick leave in terms of sections 22 to 24;

(f) conflict with the provisions of Chapter Six

(2) A collective agreement. other than an agreement contemplated in subsection (1), may replace or exclude a basic condition of employment. to the extent permitted by this Act or a sectoral determination.

(3) An employer and an employee may agree to replace or exclude a basic condition of employment to the extent permitted by this Act or a sectoral determination.

(4) No provision in this Act or a sectoral determination may be interpreted as permitting—

(a) a contract of employment or agreement between an employer and an employee contrary to the provisions of a collective agreement;

(b) a collective agreement contrary to the provisions of a collective agreement concluded in a bargaining council,

10. Section 90(3) protects the confidentiality of any medical examination conducted in terms of this Act

Variation by Minister

50. (1) The Minister may. if it is consistent with the purpose of this Act, make a determination to replace or exclude any basic condition of employment provided for in this Act in respect of—

(a) any category of employees or category of employers; or

(b) any employer or employee in respect of whom an application is made by—

(i) the employer;

(ii) the registered employers' organisation:

(iii) the employer and the registered employers' organisation.

(2) A determination in terms of subsection (1)—

(a) may not be made in respect of sections 7.9. 17(3) and (4). 43(2).44 or 48 or a regulation made in terms of section 13: and

(b) may only be made in respect of section 43(1) to allow the employment of children in the performance of advertising. sports, artistic or cultural activities.

(3) A determination in terms of subsection 1*(a)* must—

(a) be made on the advice of the Commission: and

(b) be issued by a notice in the *Gazette.*

(4) The Minister may request the Commission—

(a) to advise on any application made in terms of subsection (1)*(b)*;

(b) to prepare guidelines for the consideration of applications made in terms of subsection (1)(b).

(5) A determination in terms of subsection (1) that applies to the public service must be made by the Minister with the concurrence of the Minister for the Public Service and Administration.

(6) If a determination in terms of subsection (1) concerns the employment of children. the Minister must consult with the Minister for Welfare and Population Development before making the determination.

(7) *(a)* A determination in terms of subsection (1)*(b)* may be issued if the application has the consent of every registered trade union that represents the employees in respect of whom the determination is to apply.

(b) If no consent contemplated in paragraph *(a)* is obtained. a determination in terms of subsection (1)(b) may be issued if—

(i) the employer or employers' organisation has served a copy of the application, together with a notice stating that representations may be made to the Minister, on any registered trade union that represents employees affected by the application; and

(ii) in the case where the majority of employees are not represented by a registered trade union. the employer or employer's organisation has taken reasonable steps to bring the application and the fact that representations may be made to the Minister. to the attention of those employees.

(8) A determination made in terms of subsection (1)*(b)*—

(a) may be issued on any conditions and for a period determined by the Minister:

(b) may take effect on a date earlier than the date on which the determination is given. but not earlier than the date on which application was made;

(c) must be issued in a notice in the prescribed form if the determination is made in respect of an application made by an employer;

(d) must be published in a notice in the *Gazette* if the determination is made in respect of an application made by an employers' organisation.

(9)*(a)* The Minister may on application by any affected party and after allowing other affected parties a reasonable opportunity to make representations. amend or withdraw a determination issued in terms of subsection (1).

(b) For the purposes of paragraph *(a).* an affected party is—

(i) an employer or employer's organisation that is covered by the determination;

(ii) a registered trade union representing employees covered by the determination. or an employee covered by the determination who is not a member of a registered trade union.

(10) An employer in respect of whom a determination has been made. or whose employees are covered by a determination in terms of subsection (1). must—

(a) display a copy of the notice conspicuously at the workplace where it can be read by the employees to whom the determination applies;

(b) notify each employee in writing of the fact of the determination and of where a copy of the notice has been displayed; and

(c) give a copy of the notice to every—

(i) registered trade union representing those employees;

(ii) trade union representative representing those employees; and

(iii) employee who requests a copy.

CHAPTER EIGHT

Sectoral determinations

Sectoral determination

51. (1) The Minister may make a sectoral determination establishing basic conditions of employment for employees in a sector and area.

(2) A sectoral determination must be made in accordance with this Chapter and by notice in the *Gazette.*

Investigation

52. (1) Before making a sectoral **determination, the Minister must direct the Director-General to investigate conditions of employment** in the sector and area concerned.

(2) The Minister must determine terms of reference for the investigation. which must include—

(a) the sector and area to be investigated:

(b) the categories or classes of employees to be included in the investigation; and

(c) the matters to be investigated, which may include any matter listed in section 55(4).

(3) The Minister must publish a notice in the *Gazette* setting out the terms of reference of the investigation and inviting written representations by members of the public.

(4) If an organisation representing employers or employees in a sector and area makes a written request to the Minister to investigate conditions of employment in that sector and area. the Minister must either—

(a) direct the Director-General to conduct an investigation; or

(b) request the Commission to advise the Minister on whether the requested investigation ought to be conducted.

Conduct of investigation

53. (1) For the purposes of conducting an investigation in terms of section 52(1), the Director-General may—

(a) **question any person who may be able to provide information relevant to any investigation; or**

(b) **require,** in writing, any employer or employee in a sector and area that is being investigated or any other person to furnish any information, book, document or object that is material to the investigation within a specified period, which must be reasonable.

(2) A person may not refuse to answer any relevant question by the Director-General that he or she is legally obliged to answer. [11]

Preparation of report

54. (1) On completion of an investigation. and after considering any **representations made by members of the** public, **the Director-General must prepare a report.**

11. An answer by a person to a question put to him or her by a person conducting an investigation may not be used in any criminal proceedings except proceedings in respect of a charge of perjury or making a false statement (s. 91).

(2) A copy of the report must be submitted to the Commission for its consideration.

(3) When advising the Minister on the publication of a sectoral determination. the Commission must consider in respect of the sector and area concerned—

(a) the report prepared in terms of subsection (1):

(b) the ability of employers to carry on their business successfully:

(c) the operation of small. medium or micro-enterprises. and new enterprises;

(d) the cost of living;

(e) the alleviation of poverty;

(f) conditions of employment;

(g) wage differentials and inequality;

(h) the likely impact of any proposed condition of employment on current employment or the creation of employment;

(i) the possible impact of any proposed conditions of employment on the health. safety or welfare of employees:

(j) any other relevant information made available to the Commission.

(4) The Commission must prepare a report for the Minister containing recommendations on the matters which should be included in a sectoral determination for the relevant sector and area.

Making of sectoral determination

55. (1) After considering the report and recommendations of the Commission contemplated in section 54(4). the Minister may make a sectoral determination for one or more sector and area.

(2) If the Minister does not accept a recommendation of the Commission made in terms of section 54(4), the Minister must refer the matter to the Commission for its reconsideration indicating the matters on which the Minister disagrees with the Commission.

(3) After considering the further report and recommendations of the Commission. the Minister may make a sectoral determination.

(4) A sectoral determination may in respect to the sector and area concerned—

(a) set minimum terms and conditions of employment, including minimum rates of remuneration;

(b) provide for the adjustment of minimum rates of remuneration;

(c) regulate the manner. timing and other conditions of payment of remuneration;

(d) prohibit or regulate payment of remuneration in kind:

(e) require employers to keep employment records;

(f) require employers to provide records to their employees;

(g) prohibit or regulate task-based work. piecework, home work and contract work;

(h) set minimum standards for housing and sanitation for employees who reside on their employers' premises;

(i) regulate payment of traveling and other work-related allowances;

(j) specify minimum conditions of employment for trainees:

(k) specify minimum conditions of employment for persons other than employees;

(l) regulate training and education schemes;

(m) regulate pension. provident. medical aid, sick pay. holiday and unemployment schemes or funds; and

(n) regulate any other matter concerning remuneration or other terms or conditions of employment.

(5) Any provisions of a sectoral determination may apply to all or some of the employers and employees in the sector and area concerned.

(6) A sectoral determination in terms of subsectio (I)—

(a) may not be made in respect of section 7.43(2) or 44:

(b) may only be made in respect of section 43(1) to allow the employment of children in the performance of advertising. sports, artistic or cultural activities;

(c) may not reduce the protection afforded to employees by sections 9 and 17 (3) and (4) or a regulation made in terms of section 13.

(7) The Minister may not publish a sectoral determination—

(a) covering employees and employers who are bound by a collective agreement concluded at a bargaining council;

(b) regulating any matter in a sector and area in which a statutory council is established and in respect of which that statutory council has concluded a collective agreement;

(c) regulating any matter regulated by a sectoral determination for a sector and area which has been in effect for less than 12 months.

Period of operation of sectoral determination

56. (1) The provisions of a sectoral determination remain binding until they are amended or superseded by a new or amended sectoral determination. or they are cancelled or suspended by the Minister.

(2) If a collective agreement contemplated in section *55(6)(a)* or *(b)* is concluded. the provisions of a sectoral determination cease to be binding upon employers and employees covered by the agreement.

(3) The Minister may. by notice in the *Gazette*—

(a) cancel or suspend any provision of a sectoral determination. either in the sector and area as a whole or in part of the sector or in a specific area: or

(b) correct or clarify the meaning of any provision of a sectoral determination as previously published.

(4) Before publishing a notice of cancellation or suspension in terms of subsection (3)*(a)* the Minister must, by notice in the *Gazette*, announce the intention to do so. and allow an opportunity for public comment.

Legal effect of sectoral determination

57. If a matter regulated in this Act is also regulated in terms of a sectoral **determination, the provision in the**sectoral **determination prevails.**

Employer to keep a copy of sectoral determination

58. Unless a sectoral determination provides otherwise. every employer on whom the sectoral determination is binding must—

(a) keep a copy of that sectoral determination available in the workplace at all times;

(b) make that copy available for inspection by an employee: and

(c) give a copy of that sectoral determination—

(i) to an employee who has paid the prescribed fee; and

(ii) free of charge. on request, to an employee who is a trade union representative or a member of a workplace forum.

CHAPTER NINE

Employment Conditions Commission

Establishment and functions of Employment Conditions Commission

59. (1) The Employment Conditions Commission is hereby established.

(2) **The** functions of **the** Commission are **to advise the** Minister—

'*(a)* on sectoral determinations in terms of Chapter Eight;

(b) on any matter concerning basic conditions of employment;

(c) on any matter arising out of the application of this Act;

(d) on the effect of the policies of the government on employment;

(e) on trends in collective bargaining and whether any of those trends undermine the purpose of this Act;

(f) and the Minister for Welfare and Population Development, on any matter concerning the employment of children, including the review of section 43:

(g) and the Minister for the Public Service and Administration, on any matter concerning basic conditions of employment in the public service.

(3) The Commission may draw up rules for the conduct of its meetings and public hearings.

(4) Subject to the laws governing the public service, the Minister must provide the Commission with the staff that the Minister considers necessary for the performance of its functions,

(5) The Minister must direct the Director-General to undertake research that is required to enable the Commission to perform its functions.

(6) The expenses of the Commission are to be met by money appropriated by Parliament for that purpose and which is subject to audit by the Auditor-General, referred to in section 188 of the Constitution.

Composition of Commission

60. (1) The Minister must. after consultation with NEDLAC, appoint as members of the Commission three persons who are knowledgeable about the labour market and conditions of employment. including the conditions of employment of vulnerable and unorganised workers. and designate one of them as the chairperson.

(2) The Minister must, in addition, appoint two more members to the Commission—

(a) one of whom must be nominated by the voting members of NEDLAC representing organised labour;

(b) one of whom must be nominated by the voting members of NEDLAC representing organised business.

(3) The chairperson and members of the Commission—

(u) must be citizens or permanent residents of the Republic;

(b) must act impartially when performing any function of the Commission;

(c) may not engage in any activity that may undermine the integrity of the Commission; and

(d) must recuse themselves from advising the Minister on any matter in respect of which they have a direct financial interest or any other conflict of interest.

(4) The Minister must determine—

(a) the term of office of the chairperson and members of the Commission. which may not be more than three years:

(b) with the concurrence of the Minister of Finance. the remuneration and allowances to be paid to members of the Commission; and

(c) any other conditions of appointment not provided for in this section.

(5) The Minister must appoint a member to act as chairperson whenever—

(a) the chairperson is absent from the Republic or from duty, or for any reason is temporarily unable to function as chairperson; or

(b) the office of chairperson is vacant.

(6) A person whose period of office as the chairperson or a member of the Commission has expired is eligible for reappointment.

(7) The chairperson or a member of the Commission may resign in writing.

(8) The Minister may remove the chairperson or a member of the Commission from office for—

(a) serious misconduct;

(b) permanent incapacity; or

(c) engaging in any activity that may undermine the integrity of the Commission.

Public hearings

61. The Commission may hold public hearings at which it may permit members of the public to make oral representations on any matter that the Commission is considering in terms of section 59(2).

Report by Commission

62. (1) The Commission's advice to the Minister must be in the form of a written report.

(2) The Commission must, when performing any function in terms of section *59(2)(b)*

to *(e)*. take into account the considerations set out in section 54(3) to the extent that they are appropriate.

(3) The members of the Commission must endeavour to prepare a unanimous report to the Minister. If the members are not able to prepare a unanimous report, each member is entitled to have his or her views reflected in the report.

CHAPTER TEN

Monitoring, enforcement and legal proceedings

PART A

Monitoring and enforcement

Appointment of labour inspectors

63. (1) The Minister may—

(a) appoint any person in the public service as a labour inspector;

(b) designate any person in the public service. or any person appointed as a designated agent of a bargaining council in terms of section 33 of the Labour Relations Act, 1995, to perform any of the functions of a labour inspector.

(2) Any person appointed under subsection (1) must perform his or her functions in terms of this Chapter. subject to the direction and control of the Minister.

(3) The Minister must provide each labour inspector with a signed certificate in the prescribed form stating—

(a) that the person is a labour inspector;

(b) which legislation that labour inspector may monitor and enforce; and

(c) which of the functions of a labour inspector that person may perform.

Functions of labour inspectors

64. (1) A labour inspector appointed under section 63(1) may promote, monitor and enforce compliance with an employment law by—

(a) advising employees and employers of their rights and obligations in terms of an employment law;

(b) conducting inspections in terms of this Chapter;

(c) investigating complaints made to a labour inspector;

(d) endeavouring to secure compliance with an employment law by securing undertakings or issuing compliance orders; and

(e) performing any other prescribed function.

(2) A labour inspector may not perform any function in terms of this Act in respect of an undertaking in respect of which the labour inspector has, or may reasonably be perceived to have. any personal, financial or similar interest.

Powers of entry

65. (1) In order to monitor and enforce compliance with an employment law, a labour inspector may. without warrant or notice. at any reasonable time. enter—

(a) any workplace or any other place where an employer carries on business or keeps employment records, that is not a home;

(b) any premises used for training in terms of the Manpower Training Act, 1981 (Act No. 56 of 1981); or

(c) any private employment office registered under section 15 of the Guidance and Placement Act, 1981 (Act No. 62 of 1981).

(2) A labour inspector may enter a home or any place other than a place referred to in subsection (1) only—

(a) with the consent of the owner or occupier; or

(b) if authorised to do so in writing in terms of subsection (3).

(3) The Labour Court may issue an authorisation contemplated in subsection (2) only on written application by a labour inspector who states under oath or affirmation the

reasons for the need to enter a place in order to monitor or enforce compliance with any employment law.

(4) If it is practical to do so, the employer and a trade union representative must be notified that the labour inspector is present at a workplace and of the reason for the inspection.

Powers to question and inspect

66. (1) In order to monitor or enforce compliance with an employment law, a labour inspector may—

(a) require a person to disclose information. either orally or in writing. and either alone or in the presence of witnesses, on any matter to which an employment law relates. and require that the disclosure be made under oath or affirmation:

(b) inspect. and question a person about. any record or document to which an employment law relates;

(c) copy any record or document referred to in paragraph *(b)*, or remove these to make copies or extracts;

(d) require a person to produce or deliver to a place specified by the labour inspector any record or document referred to in paragraph *(b)* for inspection;

(e) inspect. question a person about, and if necessary remove, any article, substance or machinery present at a place referred to in section 65;

(f) inspector question a person about any work performed; and

(g) perform any other prescribed function necessary for monitoring or enforcing compliance with an employment law.

(2) A labour inspector may be accompanied by an interpreter and any other person reasonably required to assist in conducting the inspection.

(3) A labour inspector must—

(a) produce on request the certificate referred to in section 63(3);

(b) provide a receipt for any record, document, article. substance or machinery removed in terms of subsection (1)*(c)* or (e); and

(c) return anything removed within a reasonable period of time.

(4) The powers provided for in this Part are in addition to any power of a labour inspector in terms of any other employment law.

Co-operation with labour inspectors

67. (1) Any person who is questioned by a labour inspector in terms of section 66 must answer all relevant questions lawfully put to that person truthfully and to the best of his or her ability.] [2]

(2) Every employer and each employee must provide any facility and assistance at a workplace that is reasonably required by a labour inspector to perform the labour inspector's functions effectively.

Securing an undertaking

68. (1) A labour inspector who has reasonable grounds to believe that an employer has not complied with any provision of this Act must endeavour to secure a written undertaking by the employer to comply with the provision.

(2) In endeavoring to secure the undertaking, the labour inspector—

(a) may seek to obtain agreement between the employer and employee as to any amount owed to the employee in terms of this Act;

(b) may arrange for payment to an employee of any amount paid as a result of an undertaking;

(c) may, at the written request of an employee, receive payment on behalf of the employee; and

(d) must provide a receipt for any payment received in terms of paragraph (c).

12. An answer bv a person to a question of a labour inspector may not be used in any criminal proceedings except proceedings in respect of a charge operjury or making a false statement(s. 91).

Compliance order

69. (1) A labour inspector who has reasonable grounds to believe that an employer has not complied with a provision of this Act may issue a compliance order.

(2) A compliance order must set out—

(a) the name of the employer. and the location of every workplace. to which it applies;

(b) any provision of this Act that the employer has not complied with, and details of the conduct constituting non-compliance;

(c) any amount that the employer is required to pay to an employee;

(d) any written undertaking by the employer in terms of section 68(1) and any failure by the employer to comply with a written undertaking;

(e) any steps that the employer is required to take including, if necessary. the cessation of the contravention in question and the period within which those steps must be taken; and

(f) the maximum fine that may be imposed upon the employer in accordance with Schedule Two for a failure to comply with a provision of this Act.

(3) A labour inspector must deliver a copy of the compliance order to the employer named in it, and to each employee affected by it or. if this is impractical, a representative of the employees.

(4) The employer must display a copy of the compliance order prominently at a place accessible to the affected employees at each workplace named in it.

(5) An employer must comply with the compliance order within the time period stated in the order unless the employer objects in terms of section *71*.

Limitations

70. A labour inspector may not issue a compliance order in respect of any amount payable to an employee as a result of a failure to comply with a provision of this Act if—

(a) the employee is covered by a collective agreement that provides for resolution by arbitration of disputes concerning amounts owing in terms of this Act:

(b) the employee is employed in a category of employees mentioned in section 6(1 *)(a)* or in respect of which a notice has been issued in terms of section 6(3);

(c) any proceedings have been instituted for the recovery of that amount or. if proceedings have been instituted. those proceedings have been withdrawn; or

(d) that amount has been payable for longer than 12 months.

Objections to compliance order

71. (1) An employer may object to a compliance order by making representations in Writing to the Director-General within 21 days of receipt of that order.

(2) If the employer shows good cause at any time, the Director-General may permit the employer to object after the period of 21 days has expired.

(3) After considering any representations by the employer and any other relevant information, the Director-General—

(a) may confirm, modify or cancel an order or any part of an order: and

(b) must specify the period within which the employer must comply with any part of an order that is confirmed or modified.

(4) The information that the Director-General must consider includes—

(a) any evidence concerning the employer's compliance record;

(b) the likelihood that the employer was aware of the relevant provisions; and

(c) the steps taken by the employer to ensure compliance with the relevant provision.

(5) The Director-General must serve a copy of the order made in terms of subsection (3) on the employer and on each employee affected by it or, if this is impractical. on a representative of the employees.

(6) If the Director-General confirms or modifies the order or any part of the order, the employer must comply with that order within the time period specified in that order.

Appeals from order of Director-General

72. (1) An employer may appeal to the Labour Court against an order of the Director-General within 21 days of receipt of that order.

(2) The order is suspended pending the final determination of the appeal by the Labour Court or any appeal from the Labour Court.

(3) If the employer shows good cause at any time. the Labour Court may permit the employer to appeal after the period of 21 days has expired.

Order may be made order of Labour Court

73. (1) The Director-General may apply to the Labour Court for a compliance order to be made an order of the Labour Court in terms of section 158(1)*(c)* of the Labour Relations Act, 1995. if the employer has not complied with the order and has not lodged an objection against the order in terms of section 71 (1).

(2) The Director-General may apply to the Labour Court for an order of the Director-General in terms of section 71 (3) to be made an order of the Labour Court in terms of section 158(1)(c) of the Labour Relations Act. 1995. if the employer has not complied with the order and has not appealed against the order in terms of section 72(1).

(3) For the purposes of section 158(1)(c) of the Labour Relations Act, 1995. a compliance order or an order in terms of section 71 (3) is deemed to be an arbitration award.

PART B

Legal proceedings

Consolidation of proceedings

74. (1) A dispute concerning a contravention of this Act maybe instituted jointly with proceedings instituted by an employee under Part C of this Chapter.

(2) If an employee institutes proceedings for unfair dismissal. the Labour Court or the arbitrator hearing the matter may also determine any claim for an amount that is owing to that employee in terms of this Act if—

(a) the claim is referred in compliance with section 191 of the Labour Relations Act. 1995;

(b) the amount has not been owing to the employee for longer than one year; and

(c) no compliance order has been made and no other legal proceedings have been instituted to recover the amount.

(3) A dispute concerning any amount that is owing to an employee as a result of a contravention of this Act may be initiated jointly with a dispute instituted by that employee over the entitlement to severance pay in terms of section 41(6).

Payment of interest

75. An employer must pay interest on any amount due and payable in terms of the Prescribed Rate of Interest Act. 1975 (Act No. 55 of 1975), to any person to whom a payment should have been made.

Proof of compliance

76. (1) In any proceedings concerning a contravention of this Act or any sectoral determination it is for an employer—

(a) to prove that a record maintained by or for that employer is valid and accurate;

(b) who has failed to keep any record required by this Act that is relevant to those proceedings. to prove compliance with any provision of this Act.

Jurisdiction of Labour Court

77. (1) Subject to the Constitution and the jurisdiction of the Labour Appeal Court. and except where this Act provides otherwise. the Labour Court has exclusive jurisdiction in respect of all matters in terms of this Act. except in respect of an offence specified in sections 43.44.46, 48.90 and 92.

(2) The Labour Court may review the performance or purported performance of any function provided for in this Actor any actor omission of any person in terms of this Act on any grounds that are permissible in law.

(3) The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment. irrespective of whether any basic condition of employment constitutes a term of that contract.

(4) Subsection (1) does not prevent any person relying upon a provision of this Act to establish that a basic condition of employment constitutes a term of a contract of employment in any proceedings in a civil court or an arbitration held in terms of an agreement.

(5) If proceedings concerning any matter contemplated in terms of subsection(1) are instituted in a court that does not have jurisdiction in respect of that matter. that court may at any stage during proceedings refer that matter to the Labour Court.

PART C

Protection of employees against discrimination

Rights of employees

78. (1) Every employee has the right to—

(a) make a complaint to a trade union representative, a trade union official or a labour inspector concerning any alleged failure or refusal by an employer to comply with this Act;

(b) discuss his or her conditions of employment with his or her fellow employees. his or her employer or any other person;

(c) refuse to comply with an instruction that is contrary to this Actor any sectoral determination;

(d) refuse to agree to any term or condition of employment that is contrary to this Act or any sectoral determination;

(e) inspect any record kept in terms of this Act that relates to the employment of that employee;

(f) participate in proceedings in terms of this Act:

(g) request a trade union representative or a labour inspector to inspect any record kept in terms of this Act and that relates to the employment of that employee.

(2) Every trade union representative has the right. at the request of an employee. to inspect any record kept in terms of this Act that relates to the employment of that employee.

Protection of rights

79. (1) In this section. "employee" includes a former employee or an applicant for employment.

(2) No person may discriminate against an employee for exercising a right conferred by this Part and no person may do. or threaten to do, any of the following:

(a) Require an employee not to exercise a right conferred by this Part:

(b) prevent an employee from exercising a right conferred by this Part: or

(c) prejudice an employee because of a past. present or anticipated—

(i) failure or refusal to do anything that an employer may not lawfully permit or require an employee to do;

(ii) disclosure of information that the employee is lawfully entitled or required to give to another person; or

(iii) exercise of a right conferred by this Part.

(3) No person may favour, or promise to favour, an employee in exchange for the employee not exercising a right conferred by this Part. However. nothing in this section precludes the parties to a dispute from concluding an agreement to settle the dispute.

Procedure for disputes

80. (1) If there is a dispute about the interpretation or application of this Part, any party to the dispute may refer the dispute in writing to—

(a) a council, if the parties to the dispute fall within the registered scope of that council; or

(b) the CCMA, if no council has jurisdiction.

(2) The party who refers a dispute must satisfy the council or the CCMA that a copy of the referral has been served on all the other parties to the dispute.

(3) The council or the CCMA must attempt to resolve a dispute through conciliation.

(4) If a dispute remains unresolved, any party to the dispute may refer it to the Labour Court for adjudication.

(5) In respect of a dispute in terms of this Part, the relevant provisions of Part C of Chapter VII of the Labour Relations Act, 1995, apply with the changes required by the context.

Burden of proof

81. In any proceeding **in terms of this** Part—

(a) an employee who alleges that a right or protection conferred by this Part has been infringed, must prove the facts of the conduct said to constitute such infringement; and

(b) the party who allegedly engaged in the conduct in question must then prove that the conduct did not infringe any provision of this Part.

CHAPTER ELEVEN

General

Temporary employment services

82. (1) For the purposes of this Act. a person whose services have been procured for. or provided to, a client by a temporary employment service is the employee of that temporary employment service. and the temporary employment service is that person's employer.

(2) Despite subsection (1). a person who is an independent contractor is not an employee of a temporary employment service. nor is the temporary employment service the employer of that person.

(3) The temporary employment service and the client are jointly and severally liable if the temporary employment service. in respect of any employee who provides services to that client. does not comply with this Act or a sectoral determination.

Deeming of persons as employees

83. (1) The Minister may, on the advice of the Commission and by notice in the *Gazette,* deem any category of persons specified in the notice to be employees for purposes of this Act or any sectoral determination.

(2) Before the Minister issues a notice under subsection (]), the Minister must—

(a) publish a draft of the proposed notice in the *Gazette;* and

(b) invite interested persons to submit written representations on the proposed notice within a reasonable period.

Duration of employment

84. (1) For the purposes of determining the length of an employee's employment with an employer for any provision of this Act, previous employment with the same employer must be taken into account if the break between the periods of employment is less than one year.

(2) Any payment made or any leave granted in terms of this Act to an employee contemplated in subsection (1) during a previous period of employment must be taken into account in determining the employee's entitlement to leave or to a payment in terms of this Act.

Delegation

85. (1) The Minister may in writing delegate or assign to the Director-General or any employee in the public service of the rank of assistant director or of a higher rank. any power or duty conferred or imposed upon the Minister in terms of this Act. except the Minister's powers in terms of sections 6(3). 55(1). 60. 83, 87 and 95(2) and the Minister's power to make regulations.

(2) A delegation or assignment in terms of subsection (1) does not limit or restrict the Minister's authority to exercise or perform the delegated or assigned power or duty.

(3) Any person to whom a power or duty is delegated or assigned in terms of subsection (1) must exercise or perform that power or duty subject to the direction of the Minister.

(4) The Minister may at any time—

(a) withdraw a delegation or assignment made in terms of subsection (1); and

(b) withdraw or amend any decision made by a person exercising or performing a power or duty delegated or assigned in terms of subsection (1).

(5) The Director-General may in writing delegate or assign any power or duty conferred or imposed upon the Director-General by Chapter Ten of this Act to any employee in the Department of the rank of' assistant director or of a higher rank.

(6) Subsections (2). (3) and (4) apply with changes required by the context to any delegations or assignments by the Director-General under subsection (5).

Regulations

86. (1) The Minister may by notice in the *Gazette*, after consulting the Commission. make regulations regarding any matter that may be necessary or expedient to prescribe in order to achieve tbe objects of this Act.

(2) A regulation regarding state revenue or expenditure may be made only with the concurrence of the Minister of Finance.

Codes of Good Practice

87. (1) The Minister. after consulting NEDLAC—

(a) must issue a Code of Good Practice on the Arrangement of Working Time:

(b) must issue a Code of Good Practice on the Protection of Employees during Pregnancy and after the Birth of a Child;

(c) may issue other codes of good practice; and

(d) may change or replace any code of good practice.

(2) Any code of good practice or any change to or replacement of a code of good practice must be published in the *Gazette*.

(3) Any person interpreting or applying this Act must take into account relevant codes of good practice.

Minister's power to add and change footnotes

88. The Minister may, by notice in the *Gazette*. add to, change or replace any footnote in this Act.

Representation of employees or employers

89. (1) A registered trade union or registered employers' organisation may act in any one or more of the following capacities in any dispute to which any of its members is a party:

(a) In its own interest:

(b) on behalf of any of its members:

(c) in the interest of any of its members.

(2) A registered trade union or a registered employers' organisation is entitled to be a party to any proceedings in terms of this Act if one or more of its members is a party to these proceedings.

Confidentiality

90. (1) It is an offence for any person to disclose information which that person acquired while exercising or performing any power or duty in terms of this Act and which relates to the financial or business affairs of any other person. except if the information is disclosed in compliance with the provisions of any law—

(a) to enable a person to perform a function or exercise a power in terms of an employment law;

(b) for the purposes of the proper administration of this Act;

(c) for the purposes of the administration of justice.

(2) Subsection (1) does not prevent the disclosure of any information concerning an employer's compliance or non-compliance with the provisions of any employment law.

(3) The record of any medical examination performed in terms of this Act must be kept confidential and may be made available only—

(a) in accordance with the ethics of medical practice:

(b) if required by law or court order: or

(c) if the employee has in writing consented to the release of that information.

Answers not to be used in criminal prosecutions

91. No answer-b} any **person [o a question** by *a* person conducing an investigation in terms of section 53 or by a labour inspector in terms of section 66 may be used against that person in any criminal proceedings except proceedings in respect of a charge of perjury or making a false statement.

Obstruction, undue influence and fraud

92. It is an offence to—

(a) obstruct or attempt to influence improper]) a person who is performing a function in terms of this Act;

(b) obtain or attempt to obtain any prescribed document by means of fraud. false pretences. or by presenting or submitting a false or forged document;

(c) pretend to be a labour inspector or any other person performing a function in terms of this Act;

(d) refuse or fail to answer fully any lawful question put by a labour inspector or any other person performing a function in terms of this Act:

(e) refuse or fail to comply with any lawful request of. or lawful order by. a labour inspector or any other person performing a function in terms of this Act;

(f) hinder or obstruct a labour inspector or any other person performing a function in terms of this Act.

Penalties

93. (1) Any magistrates' court has jurisdiction to impose a penalty for an offence **provided for in this Act.**

(2) **Any person convicted of an** offence **in terms of** any **section mentioned** in the first

column of the table below may be sentenced to a fine or imprisonment for a period not longer than the period mentioned in the second column of that table opposite the number of that section.

OFFENCES AND PENALTIES

Section under which convicted	Maximum term of imprisonment
Section 43	3 years
I Section 44	13 years
Section 46	3 years
Section 48	3 years
Section 90(I) and (3)	1 year
Swim 92	1 year

This Act binds the State

94. This Act binds the State except in so far as criminal liability is concerned.

Transitional arrangements and amendment and repeal of laws

95. (1) The provisions of Schedule Three apply to the transition from other laws to this Act.

(2) The Minister may for the purposes of regulating the transition from any law to this Act add to or change Schedule Three.

(3) Any addition or change to Schedule Three must be tabled in the National Assembly and takes effect—

(a) if the National Assembly does not pass a resolution that the addition or change is not binding within 14 days of the date of the tabling; and

(b) on publication in the *Gazette.*

(4) Section 186 of the Labour Relations Act, 1995. is hereby amended by the deletion of subparagraph (ii) of paragraph *(c).*

(5) The laws mentioned in the first two columns of Schedule Four are hereby repealed to the extent indicated opposite that law in the third column of that Schedule.

(6) The repeal of any law by subsection (5) does not affect any transitional arrangement provided for in Schedule Three.

Short title and commencement

96. This is the Basic Conditions of Employment Act, 1997. and comes into effect on a date to be fixed by the President by proclamation in the *Gazette.*

SCHEDULE ONE

PROCEDURES FOR PROGRESSIVE REDUCTION OF MAXIMUM WORKING HOURS

Goal

1. This Schedule records the procedures to be adopted to reduce the working hours of employees to the goal of a 40 hour working week and an eight hour working day—

(a) through collective bargaining and the publication of sectoral determinations;

(b) having due regard to the impact of a reduction of working hours on existing employment and opportunities for employment creation. economic efficiency and the health. safety and welfare of employees.

Collective bargaining

2. When during negotiations on terms and conditions of employment, a party to the negotiations introduces the reduction of maximum working hours as a subject for negotiation. the parties must negotiate on that issue.

Role of Employment Conditions Commission

3. The Commission may investigate the possibility} of reducing working hours in a particular sector and area and make recommendations to the Minister thereon.

investigation by Department of Labour

*4. (*1*)* The Department of Labour must. after consultation with the Commission. conduct an investigation as to how the reduction of weekly working hours to a level of 40 hours per week may be achieved.

(2) The investigation must be completed and the report submitted to the Minister not later than 18 months after the Act has come into operation.

Reports

5. (I) The Department of Labour must, after consultation with the Commission—

(a) monitor and review progress made in reducing working hours:

(b) prepare and publish a report for the Minister on the progress made in the reduction of working hours.

(2) The Department must publish reports every two years.

(3) The reports must be tabled at Nedlac and in Parliament by the Minister.

(4) The Minister may prescribe the returns to be submitted by employers. trade unions and councils on any matter concerning this Schedule.

SCHEDULE TWO

MAXIMUM PERMISSIBLE FINES THAT MAY BE IMPOSED FOR FAILURE TO COMPLY WITH THIS ACT

1. This Schedule sets out the maximum fine that may be imposed in terms of Chapter Ten for a failure to comply with a provision of this Act.

2. The maximum fine that may be imposed—

(a) for a failure to comply with a provision of this Act not involving a failure to pay an amount due to an employee in terms of any basic condition of employment. is the fine determined in terms of Table One or Table Two;

(b) involving a failure to pay an amount due to an employee. is the greater of the amount determined in terms of Table One or Table Two.

TABLE ONE: MAXIMUM PERMISSIBLE FINE NOT INVOLVING AN UNDERPAYMENT

No previous failure to comply	R 100 per employee in respect of whom the failure to comply occurs
A previous failure to comply in respect of the same provisicm	R200 per employee in respect of whom the failure to comply occurs
A previous failure to comply within the previous 12 months or two previous failures to comply in respect of the same provision within three years	R300 per employee in respect of whom the failure to comply occurs
Three previous failures to comply in respect of the same provision within three years	R400 per employee in respect of whom the failure to comply occurs
Four previous failures to comply in respect of the same prov ision within three years	R500 per employee in respect of whom the failure to comply occurs

TABLE TWO: MAXIMUM PERMISSIBLE FINE INVOLUTING AN UNDERPAYMENT

No previous failure to comply	25% of [he amount due. including any interest owing on the amount at the date of the order
A previous failure to comply in respect of the same provision within three years	50% of the amount due, including any interest owing on the amount at the date of the order
.4 previous failure to comply in respect of the same provision within a year. 01 two previous failures to comply in respect of [he same provision within three years	75% of the amount due. including any interest owing on the amount at the date of the order
Three previous failures to comply in respect of the same provision within three years	1 00% of the amount due, including any interest owing on the amount at the date of the order
Four or more previous failures to comply m respect of the same provision within three years	200% of the amount due. including any interest owing on the amount at the date of the order

SCHEDULE THREE

TRANSITIONAL PROVISIONS

Definitions

1. For the purposes of this Schedule—

"Basic Conditions of Employment Act, 1983" means the Basic Conditions of Employment Act. 1983 (Act No. 3 of 1983):

"domestic worker" means an employee defined as a "domestic servant" in section 1(1) of the Basic Conditions of Employment Act. 1983;

"farm worker" means an employee who is employed mainly in or in connection with farming activities. and includes an employee who wholly or mainly performs domestic work in home premises on a farm;

"mineworker" means an employee employed at a mine whose hours of work are prescribed in terms of any regulation that is in force in terms of item 4 of Schedule 4 to the Mine Health and Safety Act, 1996 (Act No. 29 of 1996):

"security guard" means an employee defined as a "guard" or a "security guard" in terms of the Basic Conditions of Employment Act. 1983;

"Wage Act. 1957" means the Wage Act, 1957 (Act No. 5 of 1957);

"wage determination" means a wage determination made in terms of section 14 of the Wage Act, *1957.*

Application to public service

2. This Act, except section41. does not apply to the public service for 18 months after the commencement of this Act, unless a bargaining council concludes a collective agreement that a provision of this Act will apply from an earlier date.

Application to farm workers

3. (1) Sections 6A. 10(2A) and 14(4A) of the Basic Conditions of Employment Act, 1983, continue to apply to the employment of a farm worker until such time as the matters regulated by those provisions are regulated by a sectoral determination applicable to the farm worker.

(2) Until regulated by a sectoral determination, section 17[3) applies to farm workers who work after 20:00 and before 04:00 at least five times per month or 50 times per year.

Payment in kind of domestic workers and farm workers

4. (1) The definition of "wage" in section 1 (1) of the Basic Conditions of Employment Act, 1983. and the definition of "payment in kind" in the regulations published under that Act continue to apply to the employment of domestic workers and farm workers, until regulated by a sectoral determination.

(2) The Minister may, by notice in the *Gazette*. amend any cash amount prescribed in the definition of "payment in kind" in accordance with section 37 of the Basic Conditions of Employment Act. 1983. as if that section had not been repealed.

Ordinary hours of work

5. An employer may require or permit an employee who is employed as a farm worker, mineworker or security guard to work ordinary hours of work in excess of those prescribed by section 9(1) and (2) for the period specified in column two of Table One: Provided that—

(a) any condition in column two of Table One is complied with;

(b) the employee's hours of work do not exceed any limit on hours of work in any law or any wage-regulating measure applicable to that category of employee immediately before this Act came into effect;

(c) the employee and his or her employer do not conclude an agreement in terms of sections 11 and 12.

TABLE ONE

Farm workers	For a period of 12 months after the commencement date of this Act, provided [hat the employee's ordinary hours of work do not exceed 48 hours per week.
Mineworkers	For a period of 12 months after the commencement date of this Act. provided that the employee's total hours of work do not exceed any limit on hours or work prescribed in any applicable regulation that is in force in terms of item 4 of Schedule 4 to the Mine Health and Safety Act, 1996 (Act No. 29 of 1996).
Security guards	For a period of 12 months after the commencement date of this Act, provided that tbe employee's ordinary hours of work do not exceed 55 hours per week: and thereafter for a further period of 12 months provided that the employee's ordinary hours of work do not exceed 50 hours per week.

Leave pay

6. (1) The entitlement in terms of section 20(2) of an employee employed continuously before and after the commencement of this Act takes effect on the date on which. but for the enactment of this Act. the employee would next have commenced a leave cycle in terms of section 12 of the Basic Conditions of Employment Act, 1983, or any wage determination.

(2) Any accrued leave to which an employee was entitled in terms of section 12 of the Basic Conditions of Employment Act, 1983, or a wage determination, but which has not been granted by the date on which section 20(2) takes effect with respect to that employee, must be added to the paid leave earned by that employee in terms of this Act.

(3) Section 22(3) does not apply to any leave earned by the employee in respect of any period prior to the date on which this Act takes effect.

Pay for sick leave

7. (1) Table Two applies in respect of any employee, as defined in the Basic Conditions of Employment Act. 1983. in employment at the commencement of this Act.

(2) An employee listed in column one who was in continuous employment before the commencement of this Act for the period set out in column two becomes entitled to the rights under section 22(2) on the date listed in column three and section 22(3) on the date listed in column four.

TABLE TWO

TRANSITIONAL ARRANGEMENTS IN RELATION TO SICK LEAVE

Employees as defined in the Basic Conditions of Employment Act, 1983	**Period of continuous employment before** commencement date of this Act	**Date of entitlement to six weeks'** paid sick leave over 36-months **sick *leave* cycle in terms of section 22(2)**	**Date of entitlement to** one **day's** paid sick leave every **26** days **worked during the first six consecutive months of employment in terms of section 22(3)**
Employees and regular day workers	Less than six months	Six months after commencement date of employment	Date on which employee began employment
Casual employees	Less than six months	Six months after commencement date of employment	Commencement date of this Act
Regular day workers and casual employees	More than six months	Commencement date of this Act	Not applicable
Employees (other than casual workers and regular day workers)	Between six and 12 months	Commencement date of this Act	Not applicable
Employees	More than 12 months	At conclusion of current sick leave cycle in terms of section 13(1) of the Basic Conditions of Employment Act, 1983	Not applicable

(3) Any period of paid sick leave granted to an employee in accordance with Table Two. may be deducted from the employee's entitlement in terms of either section 22(2) or section 22(3), if—

(a) it was taken before the commencement of this Act: or

(b) it was taken during the period that the relevant section was in effect with respect to that employee.

Exemptions

8. Any exemption granted under section 34 of the Basic Conditions of Employment Act, 1983, in force immediate y before the commencement of this Act remains in force for the period for which the exemption was granted, or if the exemption was granted for an indefinite period, for a period of six months after the commencement of this Act as if that Act had not been repealed, unless it is withdrawn by the Minister, before the end of such period.

Wage determinations

9. Any wage determination and any amendment to a wage determination made in terms of section 15 of the Wage Act. 1957, in force immediately before the commencement of this Act remains in force for the period of its operation in terms of section 18 of that Act. and may be extended or amended as if that Act had not been repealed.

Exemptions to wage determination

10. Any licence of exemption granted to a wage determination in terms of section 19 of the Wage Act. 1957, in force immediately before the commencement of this Act remains in force for the period of operation of the determination, or until withdrawn in terms of section 19(5) of that Act, as if that Act had not been repealed.

Agreements

11. (1) Any agreement entered into before the commencement of this Act which is permitted by this Act remains valid and binding.

(2) **Any provision in a collective agreement concluded in a bargaining council that was in force immediately before this Act came into effect remains in effect** for—

(a) six months after the commencement date of this Act in the case of a provision contemplated by section 49(1)*(a)* to *(d)*; and

(b) 18 months after the commencement date of this Act in the case of a provision contemplated by section 49(1)*(e)*.

SCHEDULE FOUR

LAWS REPEALED BY SECTION 95(5)

Number and year of law	Short title	Extent of repeal
Act No. **5** of **1957**	Wage Act. 1957	The whole
Act No. 48 of 1981	Wage Amendment Act. 1981	The whole
Act No. 3 of 1983	Basic Conditions of Employment Act. 1983	The whole
Act **No.** 26 of 1984	Wage **Amendment** Act. **1984**	**The whole**
Act No. 27 of 1984	Basic Conditions of Employment Amendment Act. 1984	The whole
Act No. 104 of 1992	Basic Conditions of Employment Amendment Act. 1992	The whole
Act No. 137 of 1993	Basic Conditions of Employment Amendment Act. 1993	The whole
Act No. 147 of 1993	Agricultural Labour Act, 1993	Chapter 2
Act No. 50 of 1994	Agricultural Labour Amendment Act. 1994	Section 2
Act No. **66 of** 1995	Labour Relations Act, 1995	Section 196

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Department of Labour

REPUBLIC OF SOUTH AFRICA

No. 130 of 1993: Compensation for Occupational Injuries and Diseases Act
as amended by
Compensation for Occupational Injuries and Diseases Amendment Act, No 61 of 1997

ACT

To provide for compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment, or for death resulting from such injuries or diseases; and to provide for matters connected therewith.

_____

(Afrikaans text signed by the Acting State President.)
(Assented to 24 September 1993)

_____

BE IT ENACTED by the State President and the Parliament of the Republic of South Africa, as follows:-

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CHAPTER I

INTERPRETATION OF ACT

1. Definitions

In this Act, unless the context indicates otherwise-

(i) "accident" means an accident arising out of and in the course of an employee's employment and resulting in a personal injury, illness or the death of the employee;(xxiv)

(ii) "**actuary**" means any Fellow of an institute, faculty, society or chapter of actuaries approved by the Minister; (v)

(iii) "**airman**" means an employee employed in any capacity in an aircraft; (xlii)

(iv) "annual earnings" means-

(a) the amount referred to in section 82(1)(a) if accepted by the Director-General as correct;

(b) the amount determined by the Director-General if in his opinion the amount referred to in paragraph (a) is less than the amount 1 actually paid; or

(c) the estimated amount referred to in section 82(5); (xvii)

(v) "**assessment**" means an assessment made in terms of section 83 ; (ii)

(vi) "**assessor**" means a person appointed under section 8 as an assessor; (vii)

(vii) "**Board**" means the Compensation Board established by section 10; (xxviii)

(viii) "**business**" means any industry, undertaking, trade or occupation or any activity in which any employee is employed; (x)

(ix) "**chiropractor**" means a person registered as a chiropractor in terms 2 of the Associated Health Service Professions Act, 1982 (Act No. 63 of 1982); (xii)

(x) "**commissioner**" means the Compensation Commissioner appointed under section 2(1)(a); (xviii)

(xi) "**compensation**" means compensation in terms of this Act and, where applicable, medical aid or payment of the cost of such medical aid; (xl)

(xii) "**compensation fund**" means the fund established by section I5; (xli)

(xiii) "**continental shelf**" means the continental shelf referred to in section 7 of the Territorial Waters Act, 1963 (Act No. 87 of 1963); (xxxviii)

(xiv) "**contractor**" means a person referred to as a contractor in section 89 ; (i)

(xv) "dependant of an employee" means-

(a) a widow or widower who at the time of the employee's death was married to the employee according to civil law;

(b) a widow or widower who at the time of the employee's death was a party to a marriage to the employee according to indigenous law and custom, if neither the husband nor the wife was a party to a subsisting civil marriage;

(c) if there is no widow or widower referred to in paragraph *(a)* or *(b),* a person with whom the employee was in the at the time of the employee's death living as husband and wife;

(d) a child under the age of 18 years of the employee or of his or her spouse, and includes a posthumous child, a step-child, an adopted child and a child born out of "wedlock';

(e) a child over the age of 18 years of the employee or of his or her spouse, and a parent or any person who in the opinion of the Director-General was acting in the place of the parent, a brother, a sister, a half-brother or half-sister, a grandparent or a grandchild of the employee;

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(f) a parent of the employee or any person who in the opinion of the commissioner was acting in the place of the parent, and who was in the opinion of the Director-General at the time of the employee's death wholly or partly financially dependent upon the employee; (iv)

(xvi) "**Director-General**" means the Director-General of the Department of Labour;

(xvii) "**disablement**" means temporary partial disablement, temporary total disablement, permanent disablement or serious disfigurement, as the case may be; (vi)

(xviii) "**earnings**" means the remuneration of an employee at the time of the accident or the commencement of the occupational disease as calculated in terms of this Act; (xxxix)

(xix) "**employee**" means a person who has entered into or works under a contract of service or of apprenticeship or learnership, with an employer, whether the contract is express or implied, oral or in writing, and whether the remuneration is calculated by time or by work done, or is in cash or in kind, and includes-

(a) a casual employee employed for the purpose of the employer's business ;

(b) a director or member of a body corporate who has entered into a contract of service or of apprenticeship or learnership with the body corporate, in so far as he acts within the scope of his employment in terms of such contract;

(c) a person provided by a labour broker against payment to a client for the rendering of a service or the performance of work , and for which service or work such person is paid by the labour broker;

(d) in the case of a deceased employee, his dependants, and in the case of an employee who is a person under disability, a curator acting on behalf of that employee; but does not include-

(i) a person, including a person in the employ of the State, performing military service or undergoing training referred to in the Defence Act, 1957 (Act No. 44 of 1957), and who is not a member of the Permanent Force of the South African Defence Force;

(ii) a member of the Permanent Force of the South African Defence Force while on "service in defence of the Republic" as defined in section 1 of the Defence Act, 1957;

(iii) a member of the South African Police Force while employed in terms of section 7 of the Police Act, 1958 (Act No. 7 of 1958), on "service in defence of the Republic" as defined in section 1 of the Defence Act, 1957;

(iv) a person who contracts for the carrying out of work and himself engages other persons to perform such work;

(v) a domestic employee employed as such in a private household; (xlvii)

(xx) "**employer**" means any person, including the State, who employs an employee, and includes-

(a) any person controlling the business of an employer;

(b) if the services of an employee are lent or let or temporarily made available to some other person by his employer, such employer for such period as the employee works for that other person;

(c) a labour broker who against payment provides a person to a client for the rendering of a service or the performance of work , and for which service or work such person is paid by the labour broker; (xliv)

(xxi) "**employer individually liable**" means an employer who in terms of section 84(1)(a) is exempt from paying assessments to the compensation fund; (xlv)

(xxii) "**employers' organisation**" means an employers' organisation as defined in section 1 of the *Labour Relations Act, 1956* (Act No. 28 of 1956) ; (xlvi)

(xxiii) "**financial year**" means the period between the first day of March in any year and the last day of February in the following year, both dates included; (xi)

(xxiv) "**mandator**" means a person referred to as a mandator in section 89 : (xix)

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(xxv) "**medical aid**" means medical, surgical or hospital treatment, skilled nursing services, any remedial treatment approved by the Director-General, the supply and repair of any prosthesis or any device necessitated by disablement, and ambulance services where, in the opinion of the Director-General, they were essential; (xv)

(xxvi) "**medical practitioner**" means a person registered as a medical practitioner in terms of the *Medical, Dental and Supplementary Health Service Professions Act, 1974* (Act No. 56 of 1974) (xiv)

(xxvii) "**Minister**" means the Minister of Labour; (xx)

(xxviii) "**mutual association**" means a mutual association licensed under section 30; (xxiii)

(xxix) "**National Revenue Fund**" means the fund established by section 213 of the *Constitution of the Republic of South Africa, 1996* (Act No. 108 0f 1996)

(xxx) "**natural resources**" means the natural resources referred to in section 7 of the *Territorial Waters Act, 1963* (Act No. 87 of 1963); (xxi)

(xxxi) "**occupational disease**" means any disease contemplated in section 65(1)(a) or (b); (ix)

(xxxii) "**occupational injury**" means a personal injury sustained as a result of an accident; (viii)

(xxxiii) "**pension**" means a pension referred to in section 49 or 54; (xxvi)

(xxxiv) "**periodical payment**" means a periodical payment of compensation in respect of temporary disablement; (xxvii)

(xxxv) "**permanent disablement**", in relation to an employee and subject to section 49, means the permanent inability of such an employee to perform any work as a result of an accident or occupational disease for which compensation is payable;

(xxxvi) "**person under disability**" means a minor, a lunatic or any person who by law is subject to curatorship or tutorship; (xxii)

(xxxvii) "**prescribed**" means prescribed in terms of this Act or by regulation; (xliii)

(xxxviii) "**presiding officer**" means any officer appointed in terms of section 2(1)(a) or (b) and designated as such by the Director-General;

(xxxix) "**regulation**" means a regulation made in terms of this Act; (xxix)

(xl) "**reserve fund**" means the fund established by section 19; (xxx)

(xli) "**seaman**" means an employee employed in any capacity on board a ship by the owner or person in command of the ship; (xxxi)

(xlii) "**serious and wilful misconduct**" means-

(a) being under the influence of intoxicating liquor or a drug having a narcotic effect;

(b) a contravention of any law for the protection or the health of employees or for the prevention of accidents, if such contravention was committed wilfully or with a reckless disregard of the provisions of such law; or

(c) any other act or omission which the Director-General having regard to all the circumstances considers to be serious and wilful misconduct; (xiii)

(xliii) "**South African aircraft**" means an aircraft registered or licensed in the Republic in terms of a law governing the registration or licensing of aircraft, and the owner of which is resident m the Republic or has a place of business in the Republic; (xxxiii)

(xliv) "**South African ship**" means a vessel used in navigation which-

(a) is registered in the Republic in terms of any law governing the registration of ships and is not registered in any other state in terms of a similar law; or

(b) is owned or chartered by a person whose head office or place of business is in the Republic or by a person who resides in the Republic; (xxxiv)

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(xlv) "**tariff of assessment**" means the tariff of assessment referred to in section 83(1); (iii)

(xlvi) "**temporary partial disablement**", in relation to an employee, means the temporary partial inability of such employee as a result of an accident or occupational disease for which compensation is payable to perform the whole of the work at which he or she was employed at the time of such accident or at the commencement of such occupational disease or to resume work at a rate of earnings not less than that which he or she was receiving at the time of such accident or at the commencement of such occupational disease; (xxxvi)

(xlvii) "**temporary total disablement**", in relation to an employee, means the temporary total inability of such employee as a result of an accident or occupational disease for which compensation is payable to perform the work at which he was employed at the time of such accident or at the commencement of such occupational disease or work similar thereto; (xxxv)

(xlviii) "**this Act**" includes the Schedules thereto and any regulation; (xvi)

(xlix) "**trade union**" means a trade union as defined in section 1 of the *Labour Relations Act, 1956* (Act No. 28 of 1956), and includes an employees' organization recognized by law and functioning; (xxxvii)

(l) "**Workmen's Compensation Act**" means the *Workmen's Compensation Act, 1941* (Act No. 30 of 1941). (xxv)

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CHAPTER II

ADMINISTRATION OF ACT

2. Compensation Director-General and staff

(1) The Minister shall subject to such conditions as he or she may determine, in order to assist the Director-General in the performance of his or her functions in terms of or under this Act and subject to the laws governing the public service, appoint-

(a) an officer to be called the Compensation Commissioner; and

(b) such other officers and employees as the Minister or an officer designated by him or her deem necessary.

(2) The commissioner, and the officers and employees referred to in subsection (1)(b), shall be remunerated out of the National Revenue Fund, which shall be reimbursed out of the compensation fund for the expenditure concerned.

3. Delegation of powers and assignment of duties by Director-General

(1) The Director-General may, subject to such conditions as he or she may determine, delegate any of his or her powers or assign any of his or her duties to the commissioner, or an officer or employee referred to in section 2(1)(b), and may at any time cancel any such delegation or assignment.

(2) A delegation or assignment under subsection (1)-

(a) shall not divest the Director-General of the power delegated or duty assigned, and he or she may at any time amend or set aside any decision made thereunder; and

(b) shall not prevent the exercise of the power or the performance of the duty concerned by the Director-General himself or herself.

4. Functions of Director-General

(1) Subject to the provisions of this Act, the Director-General shall-

(a) *[deleted]*

(b) inquire into accidents and occupational diseases;

(c) adjudicate on claims and other matters coming before him for decision;

(d) issue an order for the payment of compensation in respect of an award made by him;

(e) whether a person is an employee, an employer, a mandator or a contractor for the purposes of this Act;

(f) decide any question relating to-

(i) a right to compensation;

(ii) the submission, consideration and adjudication of claims for compensation;

(iii) the calculation of earnings;

(iv) the degree of disablement of any employee;

(v) the amount and manner of payment of compensation;

(vi) the award, withholding, review, discontinuance, suspension, increase or reduction of compensation;

(vii) the liability for payment of compensation as contemplated in section 29;

(g) decide whether a person is a dependant of an employee and, if so, percentage of dependence , and, in the case where there is more than one dependant, which shall receive compensation and

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the allocation of compensation among them;

(h) consider and adjudicate upon claims in terms of section 62;

(i) decide upon-

(i) the need for, and the nature and sufficiency of, medical aid;

(ii) the reasonableness of the cost of medical aid, and the amount and manner of payment of such cost;

(j) decide upon the liability for assessment, tariffs of assessment, the amounts of assessments, the manner of payment of assessments and related matters;

(k) decide upon any other question falling within his functions in connection with the administration of this Act;

(l) administer the compensation fund and the reserve fund;

(m) recover amounts due to the compensation fund, including amounts which should not have been paid out in terms of this Act , or write off such amounts if, in his opinion, they cannot be recovered;

(n) after the conclusion of each financial year submit a report to the Minister regarding the administration of this Act during that year;

(o) record statistics and information regarding the occurrence and causes of accidents and occupational diseases, and the award of benefits in terms of this Act ;

(p) institute such inquiries and perform such other functions as may be prescribed, or as he may deem necessary for the administration of this Act.

(2) The Director-General may-

(a) for the administration of this Act enter into an agreement with any person for the performance of a particular task or of particular work or for the rendering of particular services on such conditions and for such remuneration as may be agreed upon;

(b) found, established or subsidized, or assist with the founding, establishment or subsidizing of, a body, organisation or scheme whose objects include on or more of the following:

(i) the prevention of accidents or of any disease which is due to the nature of a particular activity;

(ii) the promotion of the health or safety of employees;

(iii) the provision of facilities designed to assist injured employees and employees suffering from occupational diseases to return to their work or to reduce or remove any disability resulting from their injuries or diseases;

(iv) the carrying out of any activity which will contribute to the attainment of any of the objects referred to in subparagraphs (i), (ii) and (iii);

(c) purchase or otherwise acquire shares in any body, organization or scheme referred to in paragraph *(b) ,* and alienate any shares so acquired;

(d) apply unclaimed compensation for the general welfare of injured employees or employees suffering from occupational diseases;

(e) *[deleted]*

5. Power of Director-General to acquire and alienate immovable property and to raise money

(1) The Director-General may with the approval of the Minister-

(a) raise money by way of loans;

(b) purchase or otherwise acquire immovable property, and alienate such property.

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(2) Immovable property acquired under subsection (1) shall be held in the name of the Director-General in trust for the compensation fund.

6. Powers of Director-General regarding witnesses and subpoenas

(1) *(a)* The Director-General may subpoena any person who in his opinion is able to give information concerning the subject of any inquiry in terms of this Act, or who is suspected to have or in the opinion of the Director-General has in his possession or custody or under his control any book, document or thing which has a bearing on the inquiry, to appear before him at a time and place specified in the subpoena, to be interrogated or to produce such book, document or thing, and the Director-General may retain such book, document or thing for further investigation.

(b) An inquiry referred to in paragraph *(a)* shall take place in public unless the Director-General orders otherwise.

(2) The Director-General may call and administer an oath to, or accept an affirmation from, any person present at such an inquiry who was or could have been subpoenaed in terms of subsection (1), and the Director-General or an assessor may interrogate such person and order him to produce any book, document or thing in his possession or custody or under his control.

(3) A person who-

(a) has been duly subpoenaed under subsection (1) and who fails without sufficient cause to attend at the time and place specified in the subpoena; 2

(b) has been duly subpoenaed under subsection (1) or called under subsection (2) and who-

(i) fails to remain in attendance until excused by the Director-General from further attendance;

(ii) refuses to be sworn as a witness or to make an affirmation;

(iii) refuses or fails to answer fully and satisfactorily any question lawfully put to him under subsection (2);

(iv) refuses or fails to produce any book, document or thing in his possession or custody or under his control which he has been required to produce under subsection (1) or (2);

(c) hinders or obstructs the Director-General in the performance of any of his functions in terms of this section,

shall be guilty of an offence.

(4) A person who, after having been sworn as a witness or having made an affirmation, makes a false statement knowing it to be false, shall be guilty of an offence and shall upon conviction be liable to the penalty that may be imposed for perjury.

(5) The law relating to privilege as applicable to a witness testifying in a court of law shall be applicable at an inquiry referred to in subsection (1).

(6) If a person has been subpoenaed to appear before the Director-General and the Director-General is satisfied that such person has as a result of his appearance suffered any pecuniary loss or had to incur expense, the Director-General may pay out of the compensation fund the prescribed allowances or the amount of the loss or expense, whichever is the lesser.

(7) The Director-General may delegate any of his functions under this section to an assessor, an officer or employee referred to in section 1 of the Public Service Act, 1984 (Act No. 111 of 1984), or a medical practitioner, and in this section "Director-General" includes any such assessor, officer, employee or medical practitioner while acting within the scope of such delegation.

6A. The commissioner shall-

(a) receive notices of accidents and occupational diseases, claims for compensation, medical reports and accounts, objections applications, returns of earnings and payment due to the compensation fund;

(b) by notice in the *Gazette* prescribe the rules referred to in section 56(3)(c), as well as the forms to be used and the particulars to be furnished in connection with the notice of occupational injuries and diseases, claims for compensation or any other form or matter which he or she may deem it

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necessary for the administration of the Act.

7. Powers of authorized person

(1) The Director-General may authorize any assessor, any officer or employee referred to in section 1 of the *Public Service Act, 1984* (Act No. 111 of 1984), or any medical practitioner to investigate any matter that he may deem necessary for the performance of his functions.

(2) A person authorized under subsection (1) (in this section referred to as an "authorized person") shall be furnished with a certificate to that effect signed by the Director-General.

(3) An authorized person may-

(a) without previous notice, at all reasonable times enter any premises, and take an interpreter or other assistant or a police officer with him onto the premises;

(b) while he is on the premises, or at any time thereafter, question any person who is or was on the premises, either alone or in the presence of any other person on any matter to which this Act relates;

(c) order any person who has control over or custody of any book, document or thing on or in those premises to produce to him forthwith, or at such time and place as may be determined by him, such book, document or thing;

(d) at any time and place order any person who has the possession or custody of or is in the control of a book, document or thing relating to the business of an employer or previous employer, to produce forthwith or at such time and place as may be determined by him, such book, document or thing;

(e) seize any book, document or thing which in his opinion may serve as evidence in any matter in terms of this Act;

(f) examine or cause to be examined any book, document or thing produced to him or seized by him, and make extracts therefrom or copies thereof, and order any person who in his opinion is qualified thereto to explain any entry therein;

(g) order an employee to appear before him at such time and place as may be determined by him, and question that employee.

(4) An authorized person performing any function in terms of this section shall on demand produce the certificate referred to in subsection (2).

(5) Any person who-

(a) falsely holds himself out to be an authorized person;

(b) refuses or fails to answer fully and satisfactorily any question put to him by an authorized person in the performance of his functions;

(c) refuses or fails to comply with any lawful request of or order by an : authorized person;

(d) hinders or obstructs an authorized person in the performance of his functions,

shall be guilty of an offence.

8. Assessors

(1) The Minister may after consultation with the Board appoint so many persons as assessors as he may deem necessary to assist the Director-General in the hearing of any objection in terms of section 91.

(2) The assessors referred to in subsection (1) shall be persons who in the opinion of the Minister represent the interests of employees and employers, respectively, and to that end the Minister may consult any organization representing employees or employers.

(3) The number of assessors appointed to represent the interests of employees shall be equal to the number of assessors appointed to represent the interests of employers.

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(4) The Minister may in addition to the assessors referred to in subsection (1) appoint one or more medical practitioners, including a medical practitioner appointed under section 2(1)(b) as medical assessors.

(5) An assessor shall be appointed for such period and on such conditions as the Minister may determine, but the Minister may at any time terminate the appointment of an assessor who-

(a) has been guilty of misconduct or neglect of duty;

(b) is not able to perform his functions in terms of this Act properly; or

(c) in his opinion no longer represents the interests on the ground of which he was appointed.

(6) An assessor shall be paid the prescribed remuneration and travelling and subsistence allowances out of the compensation fund.

9. Benefits payable to assessors

(1) If an assessor, excluding an assessor in the employ of an employer contemplated in section 84(1)(a)(i)) meets with an accident arising out of and in the course of the performance by him or her of his or her functions as an assessor and resulting in a personal injury, illness or his or her death, he or she or his or her dependants, as the case may be, shall be entitled to the compensation as if he or she were an employee at the time of the accident.

(2) Compensation in terms of this section shall be paid by the Director-General out of the compensation fund.

10. Compensation Board

There is hereby established a board to be known as the Compensation Board.

11. Constitution of Board

(1) The Board shall consist of

(a) the Director-General or an officer contemplated in section 2(1)(a) or (b) designated by him or her, who shall act as chairperson;

(b) two persons appointed by the Minister, one of whom shall be appointed after consultation with the Minister of Health;

(c) the Chief Inspector of Occupational Health and Safety or his or her nominee;

(d) one person as a member and one person as an alternate member appointed by the Minister from a list of the names of not more than three persons nominated in order of preference by The Rand Mutual Assurance Company Limited;

(e) one person as a member and one person as an alternate member appointed by the Minister from a list of the names of not more than three persons nominated in order of preference by the Federated Employers' Mutual Assurance Company Limited;

(f) two persons as a members and up to two persons as an alternate members appointed by the Minister from a list of the names of not more than six persons nominated in order of preference by the South African Medical and Dental Council;

(g) three persons as a members and up to three persons as an alternate members appointed by the Minister to represent the interests of all employers from a list of the names of not more than ten persons nominated in order of preference by employers' organisations;

(h) five persons as a members and up to five persons as an alternate members appointed by the Minister to represent the interests of all employees from a list of the names of not more than 16 persons nominated in order of preference by employees' organisations.

(2) An assessor may not be appointed as a member or alternate member of the Board

(3) An alternate member may attend and may take part in the proceedings at any meeting of the Board whenever the member in whose stead he or she has been appointed as an alternate member, is absent from the meeting.

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12. Functions of Board

(1) The Board shall advise the Minister regarding-

(a) matters of policy arising out of or in connection with the application of this Act;

(b) the nature and extent of the benefits that shall be payable to employees or dependants of employees, including the adjustment of existing pensions;

(c) the appointment of assessors;

(d) the amendment of this Act.

(2) The Board may at the request of the Director-General advise him regarding the performance of a particular aspect of his functions.

13. Term of office and remuneration of members of Board

(1) The members of the Board appointed by the Minister shall be appointed for a period not exceeding four years and on such conditions as the Minister may determine, but the Minister may at any time terminate the appointment of any member who-

(a) has been guilty of misconduct or neglect of duty; or

(b) is not able to perform his functions in terms of this Act properly.

(2) The Minister may-

(a) at the request of a mutual association referred to in section 11(1)(d) or *(e)* terminate the appointment of a member representing such association; and

(b) terminate the appointment of a member referred to in section 11(1)(g) or *(h)* if in his opinion such member no longer represents the interests on the ground of which he was appointed.

(3) A member of the Board shall be paid the prescribed remuneration and travelling and subsistence allowances out of the compensation fund.

14. Meetings of Board

(1) The Board shall meet at the times and places determined by the chairman.

(2) If six or more of the members of the Board request the Director-General in writing with a statement of reasons to convene a meeting, the Director-General shall within 21 days after having received such request convene a meeting of the Board.

(3) A quorum for a meeting of the Board shall be nine members of the Board.

(4) The decision of more than 75 per cent of the members present at a meeting of the Board shall be the decision of the Board.

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Department of Labour

CHAPTER III:

COMPENSATION FUND AND RESERVE FUND

15. Compensation fund

(1) There is hereby established a fund to be known as the compensation fund.

(2) The compensation fund shall consist of

(a) any moneys vested in the compensation fund in terms of subsection (3);

(b) the assessments paid by employers in terms of this Act;

(c) any amounts paid by employers to the Director-General in terms of this Act;

(d) any penalties and fines imposed in terms of this Act other than by a court of law;

(e) any interest on investments of the compensation fund and the reserve fund;

(f) any amounts transferred from the reserve fund;

(g) the payments made to the Director-General in terms of section 88;

(h) any other amounts to which the compensation fund may become entitled.

(3)(a) The accident fund established by section 64 of the Workmen's Compensation Act shall, as from the commencement of this Act, cease to exist, and all amounts credited to the accident fund immediately before such commencement, shall as from such commencement vest in the compensation fund.

(b) All liabilities and rights, existing as well as accruing, of the accident fund shall devolve upon the compensation fund as from the commencement of this Act.

16. Application of compensation fund

(1) The compensation fund shall, subject to the provisions of this Act, be under the control of the Director-General and its moneys shall be applied by the Director-General to-

(a) the payment of compensation, the cost of medical aid or other pecuniary benefits to or on behalf of or in respect of employees in terms of this Act where no other person is liable for such payment;

(b) the maintenance of the reserve fund;

(c) the payment of expenses incurred in or in connection with the performance of his functions in terms of section 4(2);

(d) the reimbursement of the National Revenue Fund in respect of remuneration paid in terms of section 2(2);

(e) the payment of the prescribed remuneration and travelling and subsistence allowances to assessors;

(f) the payment of the cost of or in connection with the medical examination of employees;

(g) the payment of witness fees in terms of section 6(6);

(h) the payment of any other expenditure incurred by the Director-General in the performance of his functions in terms of this Act.

(2) The Director-General may transfer any surplus in the compensation fund to the reserve fund.

17. Valuation of compensation fund

(1) The assets and liabilities of the compensation fund shall from time to time, as the Director-General may consider necessary, but in any event at intervals of not more than three years, be valued by an actuary appointed by the Minister to 1 determine the sufficiency of the fund.

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(2) The result of the valuation referred to in subsection (l) shall be included in the next annual report of the Director-General succeeding the completion of the valuation.

18. Accounting

(1) The Director-General shall receive all money payable to or for the benefit of the compensation fund in terms of this Act, and shall be charged with the responsibility of accounting for all money received and the utilization thereof.

(2) The Director-General may transfer any part of the moneys in the compensation fund and the reserve fund to the Public Debt Director-Generals for investment.

19. Reserve fund

(1) There is hereby established a fund to be known as the reserve fund, consisting of cash or investments or both.

(2) The amount of the reserve fund shall be determined by the Director-General.

(3) The objects of the reserve fund are-

(a) to provide for unforeseen demands on the compensation fund;

(b) to stabilize the tariffs of assessment.

(4) Payments out of the reserve fund shall take place on the authorization of the commissioner.

(5) The reserve fund established in terms of section 66 of the Workmen's Compensation Act shall, as from the commencement of this Act, cease to exist, and all amounts credited to the said reserve fund immediately before such commencement shall as from such commencement vest in the reserve fund established by subsection (1).

20. Accounts and audit

(1) The Director-General shall keep such accounts, including an account with a bank contemplated in the Banks Act, 1990 (Act No. 94 0f 1990) and records as are necessary for the exercise of proper control over the compensation fund and the reserve fund, and shall prepare yearly balance sheets made up to the last day of the financial year, showing in all necessary detail the assets and liabilities and the revenue and expenditure of the funds.

(2) The accounts of the said funds shall be audited by the Auditor-General, and the cost of such audit shall be paid out of the compensation fund.

(3) The Director-General shall, as soon as possible after the completion of the balance sheets referred to in subsection (1), submit a copy thereof and a copy of the report referred to in section 4(1)(n) to the Minister, who shall table such copies 5 in Parliament within 30 days after receipt thereof, if Parliament is in ordinary session or, if Parliament is not in ordinary session, within 30 days of the commencement of its next ensuing ordinary session.

21. Income of funds exempt from tax

The income of the compensation fund and the reserve fund, including income from any investments, shall be exempt from income tax.

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Department of Labour

CHAPTER IV

COMPENSATION FOR OCCUPATIONAL INJURIES

22. Right of employee to compensation

(1) If an employee meets with an accident resulting in his disablement or death such employee or the dependants of such employee shall, subject to the provisions of this Act, be entitled to the benefits provided for and prescribed in this Act.

(2) No periodical payments shall be made in respect of temporary total disablement or temporary partial disablement which lasts for three days or less.

(3) (a) If an accident is attributable to the serious and wilful misconduct of the employee, no compensation shall be payable in terms of this Act, unless-

(i) the accident results in serious disablement; or

(ii) the employee dies in consequence thereof leaving a dependant wholly financially dependent upon him.

(b) Notwithstanding paragraph *(a)* the Director-General may, and the employer individually liable or mutual association concerned, as the case may be, shall, if ordered thereto by the Director-General, pay the cost of medical aid or such portion thereof as the Director-General may determine.

(4) For the purposes of this Act an accident shall be deemed to have arisen out of and in the course of the employment of an employee notwithstanding that the employee was at the time of the accident acting contrary to any law applicable to his employment or to any order by or on behalf of his employer, or that he was acting without any order of his employer, if the employee was, in the opinion of the Director-General, so acting for the purposes of or in the interests of or in connection with the business of his employer.

(5) For the purposes of this Act the conveyance of an employee free of charge to or from his place of employment for the purposes of his employment by means of a vehicle driven by the employer himself or one of his employees and specially provided by his employer for the purpose of such conveyance, shall be deemed to take place in the course of such employee's employment.

23. Accidents outside Republic

(1) (a) If an employer carries on business chiefly in the Republic and an employee of his ordinarily employed in the Republic, meets with an accident while temporarily employed outside the Republic, such employee shall, subject to paragraph *(c),* be entitled to compensation as if the accident had happened in the Republic.

(b) The amount of compensation contemplated in paragraph *(a)* shall be determined on the basis of the earnings which the employee, in the opinion of the Director-General, would have received if he had remained in the Republic.

(c) This subsection shall cease to apply to an employee after he has been employed outside the Republic for a continuous period of 12 months, save by agreement between the Director-General, the employee and the employer concerned, and subject to such conditions as the Director-General may determine.

(2) If an employee resident in the Republic meets with an accident while employed in, on or above the continental shelf, such employee shall be entitled to compensation as if the accident had happened in the Republic.

(3) (a) If an employer carries on business chiefly outside the Republic and an employee of his ordinarily employed outside the Republic, meets with an accident while temporarily employed in the Republic, such employee shall not be entitled to compensation unless the employer has previously agreed with the Director-General that such employee shall be entitled to compensation and, where applicable, has paid the necessary assessments in respect of him.

(b) An employee referred to in paragraph *(a)* who is so temporarily employed in the Republic for a continuous period of more than 12 months, shall be deemed to be ordinarily employed by such employer in the Republic.

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(4) If, in terms of the law of the state in which an accident happens, an employee, in the circumstances referred to in subsection (1), is entitled to compensation or if an employee meets with an accident in the circumstances referred to in subsection (2) or in the Republic and he would be entitled to compensation in terms of the law of any other state as well as in terms of this Act, he shall by written notice to the Director-General elect to claim compensation either in terms of this Act or in terms of the law of the other state.

24. Application of Act to seamen and airmen

This Act shall apply to a seaman or airman-

(a) while employed on a South African ship or aircraft;

(b) while, subject to section 23(3), employed in the Republic on any other ship or aircraft.

25. Accidents during training for or performance of emergency services

If an employee meets with an accident-

(a) while he is, with the consent of his employer, being trained in organized first aid, ambulance or rescue work, fire-fighting or any other emergency service;

(b) while he is engaged in or about his employer's mine, works or premises in organized first aid, ambulance or rescue work, fire-fighting or any other emergency service;

(c) while he is, with the consent of his employer, engaged in any organized first aid, ambulance or rescue work, fire-fighting or other emergency service on any mine, works or premises other than his employer's,

such accident shall, for the purposes of this Act, be deemed to have arisen out of and in the course of his employment.

26. Special circumstances in which Director-General may refuse award

If a right to compensation in terms of this Act arises owing to the death or disablement of an employee as a result of an accident, the Director-General may refuse to award the whole or a portion of such compensation and the Director-General, or, if authorized thereto by the Director-General, the employer individually liable or mutual association concerned, as the case may be, may also refuse to pay the whole or any portion of the cost of medical aid-

(a) if the employee at any time represented to the employer or the Director-General, knowing the information to be false, that he was not then suffering from or had not previously suffered from a serious injury or occupational disease or any other serious disease, and such an accident was caused by, or the death resulted from or the disablement resulted from or was aggravated by, such injury or disease; or

(b) if, in the opinion of the Director-General, the death was caused, or the disablement was caused, prolonged or aggravated, by the unreasonable refusal or wilful neglect of the employee to submit to medical aid in respect of any injury or disease, whether caused by the accident or existing before the accident.

27. Special circumstances in which Director-General may make award

If in a claim for compensation in terms of this Act it appears to the Director-General that the contract of service or apprenticeship or learnership of the employee concerned is invalid, he may deal with such claim as if the contract was valid at the time of the accident.

28. Employee requiring constant help

If the injury in respect of which compensation is payable causes disablement of such a nature that the employee is unable to perform the essential actions of life without the constant help of another person, the Director-General may in addition to any other benefits in terms of this Act grant an allowance towards the cost of such help.

29. Liability for payment of compensation

If an employee is entitled to compensation in terms of this Act, the Director-General or the employer individually liable or the mutual association concerned, as the case may be, shall be liable for the payment of

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such compensation.

30. Mutual associations

(1) The Minister may, for such period and subject to such conditions as he may determine, issue a licence to carry on the business of insurance of employers against their liabilities to employees in terms of this Act to a mutual association which was licensed on the date of commencement of this Act in terms of section 95(1) of the Workmen's Compensation Act: Provided that the Minister may, from time to time, order that, in addition to any securities deposited in terms of the Insurance Act, 1943 (Act No. 27 of 1943), and the Workmen's Compensation Act, securities considered by the Director-General to be sufficient to cover the liabilities of the mutual association in terms of this Act be deposited with the Director-General or his or her nominee.

(2) Subject to the provisions of subsection (4), a security so deposited shall be used solely for making good the default of the association concerned in respect of any liability of an employer in terms of this Act, and for payment of any expenses lawfully incurred in connection with such making good or the enforcement of such liability.

(3) The Minister may from time to time determine the conditions upon which, the manner in which and the period within which any such security shall be made available to a person entitled to payment therefrom.

(4) If the Minister is satisfied that the whole or any portion of such security is no longer necessary and that the association concerned is not in a position to incur a liability payable therefrom, he shall cause such security, or portion thereof, to be returned to such association.

(5) If an association has deposited with the Director-General or his or her nominee any such security and thereafter fails to meet in full any of its liabilities in terms of this Act, or is placed in liquidation, then, notwithstanding the provisions of any other law, such security shall vest in the Director-General for the purpose of the liabilities of the association in terms of this Act.

(6) If at any time the Minister is satisfied that a mutual association has failed to comply with any of the conditions imposed by him or her under subsection (1), he or she may suspend or withdraw the licence issued to that association under the said subsection.

31. Security for payment of compensation and cost of medical aid by employers individually liable

(1) The Director-General may order an employer individually liable to deposit 4 such securities as in the opinion of the Director-General are sufficient to cover the liabilities of the employer in terms of this Act.

(2) If an employer has deposited with the Director-General any such security and thereafter fails to meet in full his liabilities in terms of this Act, the Director-General may apply such security to pay those liabilities, and he may deposit any unused 5 balance in the compensation fund and apply it for the payment of future liabilities of that employer in terms of this Act.

32. Compensation may not be alienated or reduced

(1) Notwithstanding anything to the contrary in any other law contained, compensation shall not-

(a) be ceded or pledged;

(b) be capable of attachment or any form of execution under a judgement or order of a court of law;

(c) *[deleted]*

(d) be set off against any debt of the person entitled to the compensation.

(2) Notwithstanding subsection (1), the Director-General or the mutual association concerned, as the case may be, may pay compensation payable to an employee in whole or in part to the employer to the extent to which such employer has made payments to the employee in respect of disablement arising out of an occupational injury or disease.

33. Cession or relinquishment of benefits void

Any provision of an agreement existing at the commencement of this Act or concluded thereafter in terms of which an employee cedes or purports to cede or relinquishes or purports to relinquish any right to benefits in terms of this Act, shall be void.

34. Compensation not to form part of deceased employee's estate

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Compensation in terms of this Act owing to the death of an employee shall not form part of his estate.

35. Substitution of compensation for other legal remedies

(1) No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.

(2) For the purposes of subsection (1) a person referred to in section *56(1)(b), (c),* (d) and *(e)* shall be deemed to be an employer.

36. Recovery of damages and compensation paid from third parties

(1) If an occupational injury or disease in respect of which compensation is payable, was caused in circumstances resulting in some person other than the employer of the employee concerned (in this section referred to as the "third party") being liable for damages in respect of such injury or disease-

(a) the employee may claim compensation in terms of this Act and may also institute action for damages in a court of law against the third party; and

(b) the Director-General or the employer by whom compensation is payable may institute action in a court of law against the third party for the recovery of compensation that he is obliged to pay in terms of this Act.

(2) In awarding damages in an action referred to in subsection *(1)(a)* the court shall have regard to the compensation paid in terms of this Act.

(3) In an action referred to in subsection *(1)(b)* the amount recoverable shall not exceed the amount of damages, if any, which in the opinion of the court would have been awarded to the employee but for this Act.

(4) For the purposes of this section compensation includes the cost of medical aid already incurred and any amount paid or payable in terms of section 28, 54(2) or 72(2) and, in the case of a pension, the capitalized value as determined by the Director-General of the pension, irrespective of whether a lump sum is at any time paid in lieu of the whole or a portion of such pension in terms of section 52 or 60, and periodical payments or allowances, as the case may be.

37. Threats and compulsion

Any person who threatens an employee or in any manner compels or influences an employee to do something resulting in or directed at the deprivation of that employee's right to benefits in terms of this Act, shall be guilty of an offence.

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CHAPTER V

CLAIMS FOR COMPENSATION

38. Notice of accident by employee to employer

(1) Written or verbal notice of an accident shall, as soon as possible after such accident happened, be given by or on behalf of the employee concerned to the employer, and notice of the accident may also be given as soon as possible to the commissioner in the prescribed manner.

(2) Failure to give notice to an employer as required in subsection (1) shall not bar a right to compensation if it is proved that the employer had knowledge of the accident from any other source at or about the time of the accident.

(3) Subject to section 43, failure to give notice to an employer as required in subsection (l), or any error or inaccuracy in such notice, shall not bar a right to compensation if in the opinion of the Director-General-

(a) the compensation fund or the employer or mutual association concerned, as the case may be, is not or would not be seriously prejudiced by such failure, error or inaccuracy if notice is then given or the error or inaccuracy is corrected;

(b) such failure, error or inaccuracy was caused by an oversight, absence from the Republic or other reasonable cause.

(4) If a seaman or airman meets with an accident, the person in command or the owner of the ship or aircraft, as the case may be, shall for the purposes of this section and sections 39, 40, 41 and 43 be deemed to be the employer.

39. Notice of accident by employer to commissioner

(1) Subject to the provisions of this section an employer shall within seven days after having received notice of an accident or having learned in some other way that an employee has met with an accident, report the accident to the commissioner in the prescribed manner.

(2) For the purposes of subsection (1) an employer referred to in section 84(1)(a)(i) means, in the case of-

(a) the national and provincial spheres of government, the respective heads of department referred to in section 7(3) of the Public Service Act, 1994 (Proclamation No. 103 0f 1994);

(b) Parliament, the Secretary to Parliament;

(c) a provincial legislature, the Secretary of the provincial legislature in question.

(3) (a) An employer referred to in section 84(1)(a)(ii) shall within 60 days after the commencement of this Act and an employer referred to in section 84(1)(a)(iii) shall within 30 days after having been granted exemption under section 84(2) furnish the commissioner in the prescribed manner with the name of a person who shall be responsible to report on behalf of such employer accidents as required by subsection (1) (in this section referred to the "responsible person").

(b) If such employer individually liable thereafter designates some other person as the responsible person such employer shall within 30 days after such designation notify the commissioner thereof in the prescribed manner.

(4) Notwithstanding subsection (1) the Director-General may upon application authorize an employer individually liable to report accidents at such intervals and in such manner as the Director-General may determine.

(5) An employer referred to in section 84(1)(b) shall report accidents to the mutual association concerned in the prescribed manner.

(6) An employer, excluding an employer referred to in section 84(1)(a)(i), (ii) and (iii), who fails to comply with subsection (1) shall be guilty of an offence.

(7) For the purposes of this section an accident includes any injury reported by an employee to his employer, if the employee when reporting the injury alleges that it arose out of and in the course of his employment and irrespective of the fact that in the opinion of the employer the alleged accident did not so arise out of and in the course thereof.

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(8) If an employer, excluding an employer referred to in section 84(1)(a)(i), (ii) and (iii) fails to report in the prescribed manner an accident which has happened to an employee in his, her or its service within seven days after having received notice thereof or having learned thereof in some other manner, the Director-General may impose a fine of not more than the full amount of the compensation payable in respect of such accident upon him, her or it in addition to any other penalty to which he, she or it may be liable.

(9) If a fine is in terms of subsection (8) imposed upon an employer referred to in section 84(1)(b), and is paid to the Director-General or recovered by him, such fine shall be paid over to the mutual association concerned.

(10) For the purposes of subsection (8) compensation includes the cost of medical aid and any amount paid or payable in terms of section 28, 54(2) or 72(2) and, in the case of a pension, the capitalized value as determined by the Director-General of the pension, irrespective of whether a lump sum is at any time paid in lieu of the whole or a portion of such pension in terms of section 52 or 60, and periodical payments or allowances, as the case may be.

(11) If the Director-General is of the opinion that the failure referred to in subsection (8) was not wilful or was due to a cause over which the employer had no control or that the payment of the full amount of the compensation payable in 3l respect of such accident, including the capitalized value as determined in subsection (10), will probably result in the insolvency of the employer concerned or, in the case of an employer that is a company, its liquidation, the Director-General may on such conditions as he may think fit-

(a) reduce or remit any fine imposed by him;

(b) permit the employer to pay the fine in such instalments as he may determine.

(12) An employer shall at the request of an employee or the dependant of an employee furnish such employee or dependant with a copy of the notice of the accident furnished by the employer to the commissioner in respect of a claim for compensation by such employee or dependant.

40. Inquiry by Director-General into accident

(1) The Director-General shall, after having received notice of an accident or having learned in some other way that an employee has met with an accident, make such inquiry as he may deem necessary to enable him to decide upon any claim or liability in terms of this Act.

(2) An employee or employer shall, at the request of the Director-General, furnish such further particulars regarding the accident and injuries concerned as the Director-General may require.

(3) The Director-General shall, at the request of an injured employee or his employer, furnish such information as the Director-General may deem necessary to enable that employee or employer to comply with the provisions of this Act.

(4) An employer who fails to comply with the provisions of this section shall be guilty of an offence.

(5) Notwithstanding section 4(1)(c) , the Director-General may refuse to adjudicate on the claim of an employee who fails to comply with subsection (2).

41. Particulars in support of claim

(1) An employee who has met with an accident shall, when reporting the accident or thereafter at the request of the employer or commissioner, furnish such information and documents as may be prescribed or as the employer or commissioner may direct.

(2) Subject to section 62, an employer shall within seven days after having received a claim medical report or other documents or information concerning such claim send such claim, report, documents or information to the commissioner.

42. Employee to submit to medical examination

(1) An employee who claims compensation or to whom compensation has been paid or is payable shall when so required by the Director-General or the employer or mutual association concerned, as the case may be, after reasonable notice, submit himself at the time and place mentioned in the notice to an examination by the medical practitioner designated by the Director-General or the employer or mutual association concerned.

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(2) Such expenses incurred by the employee to comply with the provisions of this section as the Director-General may deem necessary and reasonable, and the prescribed remuneration for a medical examination in terms of this section, shall be paid by the party requiring the examination.

(3) If, in the opinion of any medical practitioner the employee is not capable of calling upon the designated medical practitioner, the employee shall inform the party requiring the examination thereof or cause him to be so informed, and the designated medical practitioner shall then examine the employee at a time and place as agreed upon.

(4) An employee shall be entitled at his own expense to have a medical practitioner or chiropractor of his choice present at an examination by a designated medical practitioner.

43. Claim for compensation

(1) (a) A claim for compensation in terms of this Act shall be lodged by or on behalf of the claimant in the prescribed manner with the commissioner or the employer or the mutual association concerned, as the case may be, within 12 months after the date of the accident or, in the case of death, within 12 months after the date of death.

(b) If a claim for compensation is not lodged as prescribed in paragraph *(a),* such claim for compensation shall not be considered in terms of this Act, except where the accident concerned has been reported in terms of section 39.

(2) Notwithstanding subsection (1)(a) a claim for compensation by any seaman or airman may be lodged with the person in command of the ship or aircraft concerned, as the case may be, except if such seaman or airman is himself the person in command.

(3) If any seaman or airman meets with an accident outside the Republic resulting in death, a claim for compensation shall be instituted within 12 months after news of the death has been received by any dependant claiming compensation.

(4) The provisions of section 38 shall apply *mutatis mutandis* in respect of any failure to institute a claim or in respect of any error or inaccuracy in a claim instituted in terms of this section.

44. Prescription

A right to benefits in terms of this Act shall lapse if the accident in question is not brought to the attention of the commissioner or of the employer or mutual association concerned, as the case may be, within 12 months after the date of such accident.

45. Consideration of claim

(1) The Director-General shall consider and adjudicate on a claim for compensation, and for that purpose may carry out such investigation as he may deem necessary or he may formally hear the claim.

(2) If the Director-General decides upon a formal hearing, he shall in the prescribed manner give notice of the date, time and place of the hearing to the claimant and employer.

(3) If the Director-General considers it necessary that any person including the claimant and the employer, should be present at a formal hearing to be interrogated, he may issue a subpoena for the appearance of such witness.

(4) Upon application by a person who in the opinion of the Director-General has a sufficient interest in the subject of a formal hearing, the Director-General shall issue a subpoena for the appearance of a person except if he is of the opinion that such person cannot further the investigation , in which case the Director-General shall issue a subpoena only if the party applying therefor deposits with the Director-General a sum sufficient to cover the necessary expenses to be incurred by the witness as well as the cost of the service of such subpoena.

(5) The provisions of section 6 shall apply *mutatis mutandis* to a person subpoenaed in terms of subsection (3) or (4).

(6) The Director-General may from time to time adjourn a formal hearing to a date, time and place determined by him.

(7) The Director-General shall keep or cause to be kept a record of the proceedings at a formal hearing, and upon payment of the prescribed fees any person may obtain a copy of such record.

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46. Appearance of parties

(1) (a) Every party to a claim for compensation or his representative may appear before the Director-General at a formal hearing.

(b) The Director-General may designate any person to investigate a claim, attend aformalhearing,cross-examinewitnesses,adducerebuttingevidenceandpresent arguments.

(2) No person other than an advocate or attorney shall be entitled to any fees or remuneration except such necessary expenses as the Director-General may allow.

(3) No fees or remuneration shall be claimed from an employee or employer except with the approval of the Director-General.

(4) (a) The Director-General may of his or her own motion or on an *ex parte* application by a party to a claim for compensation , order any attorney employed by such party or a representative who has allegedly, contrary to subsection (2), claimed fees or remuneration, to submit to him or her a statement showing what he or she has received or contracted to receive from his or her client, and to submit for taxation his or her bill of costs, including attorney and client costs, against such client.

(b) Upon such taxation the Director-General may allow such fees, costs and expenses as he may consider reasonable in the circumstances.

(c) If an amount has been paid in excess of the amount allowed upon taxation, the excess shall be refunded to the person concerned, and any agreement in terms of which such an excess is otherwise payable shall be void as to that excess.

(5) The provisions of subsections (2), (3) and (4) shall also apply to any act in connection with a claim for compensation which is not the subject of a formal hearing.

(6) Any person who agrees or attempts to collect any money contrary to the provisions of this section shall be guilty of an offence.

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CHAPTER VI

DETERMINATION AND CALCULATION OF COMPENSATION

47. Compensation for temporary total or partial disablement

(1) (a) Compensation for temporary total disablement shall be calculated on the basis set out in item 1 of Schedule 4 subject to the minimum and maximum amounts.

(b) *[deleted]*

(2) Compensation for temporary partial disablement shall consist of such portion of the amount calculated in terms of subsection (1) as the Director-General may consider equitable.

(3) (a) Notwithstanding section 29 the employer in whose service an employee is at the time of the accident shall be liable for the payment of the compensation referred to in subsection (1) for the first three months from the date of accident.

(b) After the expiry of the said three months, compensation so paid by such employer shall be repaid to the employer by the Director-General or mutual association concerned, as the case may be.

(c) An employer who fails to comply with paragraph (a) shall be guilty of an offence.

(4) Payment of compensation in terms of subsections (1) and (2) shall take place in the form of periodical payments at such times and intervals, but not exceeding one month, as the Director-General may determine.

(5) (a) Periodical payments shall take place for so long as the temporary total disablement continues, but not for a period exceeding 24 months.

(b) If such disablement continues for longer than 12 months, the Director-General may order the continuation of those payments for such further period as he may determine.

(6) Temporary total disablement continuing for more than 24 months may be treated by the Director-General as permanent disablement.

(7) (a) No periodical payments shall be payable for the period in respect of which the employer pays the cost of maintenance of an injured seaman in terms of the merchant shipping law.

(b) Notwithstanding paragraph *(a)* such payments may be made as the Director-General may deem equitable but not exceeding the amount contemplated in subsection (1).

48. Expiry of compensation for temporary total or partial disablement

(1) The right to compensation for temporary total or partial disablement shall expire-

(a) upon the termination of such disablement or if the employee resumes the work upon which he was employed at the time of the accident or occupational disease, or resumes any other work at the same or greater earnings;

(b) if the employee is awarded compensation for permanent disablement.

(2) Notwithstanding subsection (1) the Director-General may, and the employer individually liable or mutual association concerned, as the case may be, shall, if directed thereto by the Director-General, again award compensation for temporary total or partial disablement if-

(a) the disablement of the employee concerned recurs or deteriorates; or

(b) the employee receives further medical aid necessitating further absence from his service provided that such aid will in the opinion of the Director-General reduce his disablement.

(3) If the Director-General awards compensation under subsection (2), he may suspend or direct the employer individually liable or mutual association concerned, as the case may be, to suspend any pension payments to the employee concerned in respect of the same accident for so long as such employee is receiving periodical payments.

49. Compensation for permanent disablement

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(1) (a) Compensation for permanent disablement shall be calculated on the basis set out in items 2, 3, 4 and 5 of Schedule 4 subject to the minimum and maximum amounts.

(b) *[deleted]*

(2) (a) If an employee has sustained an injury set out in Schedule 2, he shall for the purposes of this Act be deemed to be permanently disabled to the degree set out in the second column of the said Schedule.

(b) If an employee has sustained an injury or serious mutilation not mentioned in Schedule 2 which leads to permanent disablement, the Director-General shall determine such percentage of disablement in respect thereof as in his opinion will not lead to a result contrary to the guidelines of Schedule 2.

(c) *(c)* If an injury or serious mutilation contemplated in paragraph (a) or (b) has unusually serious consequences for an employee as a result of the special nature of the employee's occupation, the Director-General may determine such higher percentage as he or she deems equitable.

(3) No payment for temporary disablement in terms of section 47 shall be deducted from compensation payable in terms of this section.

(4) For the purposes of this section "monthly pension' ' means, where it appears in the relevant items in Schedule 4, a pension payable monthly during the lifetime of the employee and which expires at the end of the month in which the employee dies.

50. Amendment of Schedule 2

The Minister may on the recommendation of the Director-General, and after consultation with the Board, amend Schedule 2 by notice in the Gazette in respect of injuries or categories of injuries as well as the percentage of disablement: Provided that at least 60 days before any such amendment a notice shall be published in the *Gazette*-

(a) of the intention to effect an amendment and the proposed content of the amendment; and

(b) inviting any person who wishes to comment on the proposed amendment to submit such comment in writing to the commissioner within the period mentioned in the notice.

51. Compensation for permanent disablement of employee in training or under 26 years of age

(1) If as a result of an accident an employee sustains permanent disablement and at the time of the accident-

(a) was an apprentice or in the process of being trained in any trade, occupation or profession; or

(b) was under 26 years of age, the commissioner shall determine the earnings of such employee in accordance with subsection (2) for the purpose of the calculation of compensation in terms of section 49.

(2) (a) In the case of an employee referred to in subsection (1) (a), his earnings shall be calculated on the basis of the earnings to which a recently qualified person or a person in the same occupation, trade or profession with five years more experience than the employee would have been entitled at the time of the accident, whichever calculation is more favourable to the employee.

(b) In the case of an employee referred to in subsection (1) *(b) ,* his earnings shall be calculated on the basis of the earnings to which a person of 26 years of age would normally have been entitled if at the time of the accident he had been performing the same work as the employee or a person in the same occupation, trade or profession with five years more experience than the employee , whichever calculation is more favourable to the employee.

52. Payment of lump sum in lieu of pension

(1) If a pension does not exceed a prescribed amount, the Director-General ' may, upon the application of the pensioner, pay or direct the payment of a lump sum in lieu of that pension or a portion thereof.

(2) (a) If a pension exceeds the prescribed amount, the Director-General may, upon the application of the pensioner, in lieu of a portion of that pension not exceeding the prescribed amount pay or direct the payment of a lump sum.

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(b) If the balance of the pension payable is less than the prescribed amount per month, the Director-General may pay or direct the payment of a lump sum in lieu of the whole of such pension.

(3) No pension or portion of a pension due to a child shall be paid in a lump sum.

(4) Any lump sum in terms of this section shall be calculated on the basis determined by the Director-General, and the payment thereof shall be subject to the control of the Director-General as referred to in section 59.

53. Compensation to employee previously in receipt of compensation

(1) In awarding compensation to an employee in respect of permanent disablement or in reviewing an award of compensation, the Director-General may take into account any compensation awarded in terms of this Act or any other law to the employee as a result of permanent disablement.

(2) If an employee has received compensation for permanent disablement in terms of this Act and subsequently meets with an accident resulting in further permanent disablement in respect of which compensation is payable in terms of this Act, the Director-General may calculate his compensation in respect of such further permanent disablement and, where applicable, also the first-mentioned compensation, on the basis of the earnings that he received at the time of any of the accidents concerned, whichever earnings are more favourable to the employee.

(3) Subject to section 56, an employee shall not be paid compensation in the form of a pension or pensions in respect of one or more accidents if it amounts to more than the pension payable in respect of 100 percent disablement.

54. Amount of compensation if employee dies

(1) If an employee dies as a result of an injury caused by an accident, compensation shall be payable as follows:

(a) If the employee leaves a dependant referred to in paragraph *(a), (b)* or *(c)* of the definition of "dependant of an employee" in section 1 (in this section referred to as the "widow or widower"), and there are no children, a lump sum as set out in item 6 of Schedule 4;

(b) if the employee leaves a widow or widower and a child referred to in paragraph *(d)* of the said definition, compensation to the widow or widower calculated in accordance with paragraph *(a)* of this subsection, and in respect of the child a pension calculated in accordance with paragraph *(c)* of this subsection: Provided that any pension payable in terms of this paragraph shall not in all exceed the pension for 100 per cent permanent disablement which would have been payable to the employee under section 49(1);

(c) if the employee leaves a child referred to in paragraph (d) of the said definition, or a child referred to in paragraph (e) of the said definition who in the opinion of the Director-General is unable to earn an income owing to a physical or mental disability, a pension as set out in item 8 of Schedule 4;

(i) if the employee at the time of his death does not leave a widow or widower or where such a widow or widower later dies, the aggregate amount of the pensions payable in terms of this paragraph may, in the discretion of the Director-General and subject to review by him from time to time, be increased by an amount not exceeding the pension which is or would have been payable in terms of paragraph *(a)* of this subsection to the widow or widower;

(ii) the pension payable in terms of this paragraph shall not in all exceed the pension which would have been awarded to the employee under section 49(1) in the case of 100 percent permanent disablement;

(iii) any increase or reduction of a pension in terms of this proviso shall be calculated in such manner as the Director-General may deem equitable, and the amount and manner of awarding may be reviewed by him from time to time;

(iv) the pension payable to a child referred to in paragraph (d) of the said definition shall lapse at the end of the month in which such child reaches the age of 18 years, except where such child is unable to earn an income owing to a physical or mental disability, or dies or marries before reaching the age of 18 years, or until the child completes secondary education, or while the child is undergoing tertiary education and it could reasonably have been expected that the employee would have contributed to the maintenance of that child, whichever occurs last;

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(v) the pension payable to a child referred to in paragraph (d) or *(e)* of the said definition who is unable to earn an income owing to a physical or mental disability, shall cease on a date determined by the Director-General when in his or her opinion it may reasonably have been expected that the employee would no longer have contributed towards the maintenance of that child;

(d) if the employee leaves no dependants referred to in paragraph *(a), (b)* or *(c)* of this subsection but a dependant referred to in paragraph *(e)* of the said definition, excluding a child over the age of 18 years who is unable to earn an income owing to a physical or mental disability, and-

(i) who was wholly financially dependent upon the employee, a monthly pension which in all shall not amount to more than 40 per cent of the pension which would have been payable to the employee under section 49(1) for 100 per cent permanent disablement, for so long as in the opinion of the Director-General it may reasonably have been expected that the employee would have contributed to the maintenance of that person; or

(ii) who was partly financially dependent upon the employee and there is no dependant as contemplated in subparagraph (i), a lump sum as set out in item 9 of Schedule 4.

(e) *[deleted]*

(2) The Director-General may pay out of the compensation fund such amount as he may deem reasonable, within the limits set out in item 10 of Schedule 4, for the funeral costs of an employee or direct the employer individually liable or mutual association concerned, as the case may be, to pay such costs.

(3) No amount shall be deducted from the compensation awarded in terms of this section to a dependant in respect of any compensation awarded to the employee himself in respect of the same or any other accident.

(4) A pension payable to a widow or widower in terms of this section shall lapse on the last day of the month in which she or he dies.

(5) If an employee leaves two or more dependants referred to in paragraph *(b), (d)* or *(e)* of the definition of "dependant of an employee" in section 1-

(a) the compensation payable to the dependants shall, notwithstanding the provisions of this section, be awarded in such manner as the Director-General may determine: Provided that the compensation payable in all shall not exceed the lump sum and pension which would have been payable in terms of this section if such employee had left only one such dependant;

(b) the Director-General may, if one of the dependants referred to in the said paragraph *(b)* dies, allocate the pension which was payable to that dependant to the children, if any, of such dependant or, if there are no children, to the other dependant or dependants referred to in the said paragraph *(b).*

(6) For the purposes of this section a dependant referred to in paragraph (a) , *(b)* or (d) of the definition of "dependant of an employee" in section 1 shall be deemed to have been wholly financially dependent upon the employee at the time of the accident unless the contrary is proved.

55. Amendment of Schedule 4

The Minister may on the recommendation of the Director-General and after consultation with the Board, amend Schedule 4 by notice in the Gazette in respect of the nature, extent, minimum and maximum amount of benefits: Provided that at least 60 days before any such amendment a notice shall be published in the *Gazette*-

(a) of the intention to effect an amendment and the proposed content of the amendment; and

(b) inviting any person who wishes to comment on the proposed amendment to submit such comment in writing to the commissioner within the period mentioned in the notice.

56. Increased compensation due to negligence of employer

(1) If an employee meets with an accident or contracts an occupational disease which is due to the negligence-

(a) of his employer;

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(b) of an employee charged by the employer with the management or control of the business or of any branch or department thereof;

(c) of an employee who has the right to engage or discharge employees on behalf of the employer;

(d) of an engineer appointed to be in general charge of machinery, or of a person appointed to assist such engineer in terms of any regulation made under the Minerals Act, 1991 (Act No. 50 of 1991); or

(e) of a person appointed to be in charge of machinery in terms of any regulation made under the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993),

the employee may, notwithstanding any provision to the contrary contained in this Act, apply to the commissioner for increased compensation in addition to the compensation normally payable in terms of this Act.

(2) For the purposes of subsection (1) an accident or occupational disease shall be deemed also to be due to the negligence of the employer if it was caused by a patent defect in the condition of the premises, place of employment, equipment, material or machinery used in the business concerned, which defect the employer or a person referred to in paragraph *(b), (c),* (d) or *(e)* of subsection (1) has failed to remedy or cause to be remedied.

(3) (a) An application for increased compensation in terms of this section shall be lodged with the commissioner in the prescribed manner within 24 months after the date of the accident or the commencement of the occupational disease , but the ' commissioner may extend that period by a further period not exceeding 12 months if he is satisfied that there are good reasons why the employee did not lodge his application within that period, and that neither the compensation fund nor the employer will unreasonably be prejudiced by the extension of such period.

(b) The commissioner shall, as soon as possible after receipt of such an application, send a copy thereof to the employer in whose employ the employee was at the time of the accident or the employer in whose employ the employee was when he contracted the occupational disease.

(c) The provisions of sections 6, 7, 45 and 46 shall, subject to such rules as the commissioner may prescribe for the facilitation of the consideration of applications in terms of this section, apply *mutatis mutandis* in respect of such an application.

(4) (a) If the Director-General is satisfied that the accident or occupational disease was due to negligence as referred to in subsection (1), he shall award the applicant such additional compensation as he may deem equitable.

(b) The amount of such additional compensation together with any other compensation awarded in terms of this Act shall not exceed the amount of the pecuniary loss which the applicant has in the opinion of the Director-General suffered or can reasonably be expected to suffer as a direct result of the said accident or occupational disease.

(5) The Director-General may deal with an application in terms of subsection (1) *mutatis mutandis* in accordance with the procedure prescribed in section 91 as if it were an objection in terms of that section.

(6) The presiding officer may in any proceedings in terms of this section make such an order as to costs and the payment thereof as he may deem fit.

(7) If increased compensation has been awarded in terms of this section the Director-General may for such period as he may deem necessary apply the provisions of section 85(2) in respect of the employer of the employee concerned.

57. Increase of monthly pensions

(1) The Minister may on the recommendation of the Director-General by notice in the *Gazette* increase the monthly pensions payable in terms of sections 49 and 54 by such percentage as he may so determine' Provided that at least 60 days before any such increase a notice shall be published in the *Gazette*-

(a) of the intention to increase the monthly pensions; and

(b) inviting any person who wishes to comment on the proposed increase to: submit such comment in writing to the commissioner within the period mentioned in the notice.

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(2) In determining the percentage referred to in subsection (1) the Minister may differentiate between accidents which happened on different dates.

58. Advances on compensation

In anticipation of the award of compensation the Director-General may, if in his opinion the interests or pressing need of the employee warrants it, advance to or on behalf of the employee such amount as he may deem equitable or direct the employer individually liable or mutual association concerned to advance it, subject to such conditions as the Director-General may determine.

59. Control over payment of compensation

(1) Compensation payable in terms of this Act may for reasons deemed by the Director-General to be sufficient, be-

(a) paid to the employee or the dependant of an employee entitled thereto, or to any other person on behalf of such enrolee or dependant, in instalments or in such other manner as he may deem fit;

(b) invested or applied to the advantage of the employee or the dependants of an employee;

(c) paid to the Master of the Supreme Court, a trustee or any other person to be applied in accordance with such conditions as may be determined by the Director-General;

(d) applied according to one or more of paragraphs *(a), (b)* and *(c).*

(2) Notwithstanding any provision to the contrary contained in this Act, if compensation is payable by an employer individually liable or a mutual association, as the case may be, the Director-General may direct such employer or mutual association to pay the whole or any portion of the compensation concerned to the Director-General to be dealt with in terms of subsection (1).

(3) (a) On the death of an employee or a dependant of an employee the unpaid balance of any compensation awarded shall not form part of his estate and shall be paid to such dependant as the Director-General may designate.

(b) Where there is no dependant, the Director-General may pay such balance or a portion thereof to the estate of the deceased.

60. Pensioner resident outside Republic

(1) If an employee or a dependant of an employee to whom a pension is payable in terms of this Act is resident outside the Republic or is absent from the Republic for a period or periods totalling more than six months, the Director-General may award a lump sum as determined by him in lieu of such pension, and upon payment of such lump sum the right to the pension shall expire.

(2) Before the Director-General exercises his power under subsection (1), he shall notify that employee or dependant of his intention and request him to submit any representations that he wishes to make for consideration to the Director-General within the period specified by the Director-General.

61. Recovery of compensation or other benefits

(1) If an employer individually liable or a mutual association that is liable for the payment of compensation or any other pecuniary benefit in terms of this Act, refuses or fails to *pay* such compensation or benefit, the Director-General may issue an order in the prescribed form for the payment thereof.

(2) The Director-General shall send a certified copy of the order referred to in subsection (1) to the clerk of the magistrate's court of the district in which the party referred to in subsection (1) has its place of business, and thereupon such order shall have the effect of a civil judgement of that magistrate's court and the Director-General shall have all the powers of a judgement creditor.

(3) Any amount recovered under subsection (2) shall be paid into the compensation fund and the provisions of section 59 shall apply *mutatis mutandis* in respect of such amount.

62. Provisional settlements

(1) Notwithstanding any provision to the contrary contained in this Act, the Director-General may, subject to such conditions as he may determine, authorize an employer individually liable or a mutual association to provisionally settle claims by employees for compensation or for the payment of the cost of medical aid.

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(2) An employer or association referred to in subsection (1) shall report provisional settlements to the Director-General at such intervals and with such particulars as the Director-General may determine, and the Director-General may confirm, amend or repudiate any such provisional settlement, or deal with the claim in accordance with section 45 as if the provisional settlement concerned had not been made.

63. Manner of calculating earnings

(1) In order to determine compensation, the Director-General shall calculate the earnings of an employee in such manner as in his opinion is best to determine the monthly rate at which the employee was being remunerated by his employer at the time of the accident, including-

(a) the value of any food or quarters or both supplied by the employer to the date of the accident;

(b) any overtime payment or other special remuneration in cash or in kind of a regular nature or for work ordinarily performed, but excluding-

(i) payment for intermittent overtime;

(ii) payment for non-recurrent occasional services;

(iii) amounts paid by an employer to an employee to cover any special expenses;

(iv) *ex gratia* payments whether by the employer or any other person.

(2) If an employee's remuneration is determined in accordance with a rate calculated upon work performed, his earnings shall be deemed to be his remuneration for similar work upon the same conditions of remuneration for as long a period as possible prior to the accident but not exceeding 12 months.

(3) If by reason of the short duration of the service of an employee with his employer it is impracticable to calculate his earnings in such service, his earnings shall , if possible , be calculated on the basis of the amount which the employee with similar work at the same conditions of remuneration earned with another employer during the 12 months immediately prior to the accident, or on the basis of the amount which during the 12 months immediately prior to the accident was earned by other employees of the first-mentioned employer with similar work and on the same conditions of remuneration, or would have been earned by the employee during the previous 12 months had he been so employed.

(4) If an employee has entered into contracts of service with two or more employers and has in terms of those contracts worked at one time for one employer and at another time for another employer, his earnings shall be calculated as if his earnings under all such contracts were earnings in the employment of the employer for whom he was working at the time of the accident.

(5) If in the opinion of the Director-General it is not practicable to calculate the earnings of an employee in accordance with the preceding provisions, the Director-General may calculate those earnings in such manner as he may deem equitable, but with due regard to the principles laid down in those provisions.

(6) This section shall not be construed as prohibiting the calculation of earnings on a weekly basis, but where earnings are so calculated the monthly earrings shall be calculated as equal to four and one-third times the amount of such weekly earnings.

64. Certain compensation to employers prohibited

(1) Any employer who deducts from the earnings of an employee any amount or receives any amount from him to compensate the employer directly or indirectly for any amount which the employer is liable to pay in terms of this Act, shall be guilty of an offence.

(2) Any court convicting an employer of contravening subsection (1) shall, in addition to any penalty it may impose, order the employer to pay to the commissioner within a specified period and in instalments or otherwise as the court may determine, such amount as he has received contrary to the provisions of subsection (1).

(3) The commissioner shall pay the amount received by him in terms of such an order to the employee from whose earnings that amount has been deducted or from whom the amount has been received.

(4) Upon application by the employer the court may at any time, on good cause shown, extend the period within which the amount referred to in subsection (2) is payable or amend the amount of the instalments.

(5) An order made under this section shall have the effect of a civil judgment of a magistrate's court in favour of the commissioner.

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CHAPTER VII

OCCUPATIONAL DISEASES

65. Compensation for occupational diseases

(1) Subject to the provisions of this Chapter, an employee shall be entitled to the compensation provided for and prescribed in this Act if it is proved to the satisfaction of the Director-General-

(a) that the employee has contracted a disease mentioned in the first column of Schedule 3 and that such disease has arisen out of and in the course of his or her employment; or

(b) that the employee has contracted a disease other than a disease contemplated in paragraph (a) and that such disease has arisen out of and in the course of his or her employment.

(2) If the employee has contracted a disease referred to in subsection (1) and the commissioner is of the opinion that the recovery of the employee is being delayed or that his temporary total disablement is being prolonged by reason of some other disease of which the employee is suffering, he may approve medical aid also for such other disease for so long as he may deem it necessary.

(3) If an employee has contracted a disease referred to in subsection (1) resulting in permanent disablement and that disease is aggravated by some other disease, the Director-General may in determining the degree of permanent disablement have regard to the effect of such other disease.

(4) Subject to section 66, a right to benefits in terms of this Chapter shall lapse if any disease referred to in subsection (1) is not brought to the attention of the commissioner or the employer or mutual association concerned, as the case may be, within 12 months from the commencement of that disease.

(5) For the purposes of this Act the commencement of a disease referred to in subsection (1) shall be deemed to be the date on which a medical practitioner diagnosed that disease for the first time or such earlier date as the Director-General may determine if it is more favourable to the employee.

(6) The provisions of this Act regarding an accident shall apply *mutatis mutandis* to a disease referred to in subsection (1), except where such provisions are clearly inappropriate.

66. Presumption regarding cause of occupational disease

If an employee who has contracted an occupational disease was employed in any work mentioned in Schedule 3 in respect of that disease, it shall be presumed, unless the contrary is proved, that such disease arose out of and in the course of his employment.

67. Calculation of compensation

(1) Compensation for a disease referred to in section 65(1) shall be calculated on the basis of the earnings of the employee calculated *mutatis mutandis* in accordance with the provisions of section 63 and the disablement of the employee at the time of the commencement of the disease or such earlier date as the Director-General may determine, if it is proved to his satisfaction that the employee was suffering from the disease at an earlier date, whichever earnings are more favourable to the employee.

(2) If an employee is no longer in employment at the time of the commencement of the said disease , his earnings shall be calculated on the basis of the earnings that he would probably have been earning had he still been working.

68. Notice of occupational disease by employee and employer

(1) An employee shall as soon as possible after the commencement of a disease referred to in section 65(1) give written notice thereof to his employer or to the employer where he was last employed, and he may also give written notice of the said disease in the prescribed manner to the commissioner.

(2) An employer shall within 14 days after having so received notice or having learned in some other way that an employee has contracted a disease referred to in section 65(1), report such disease in the prescribed manner to the commissioner or mutual association concerned, as the case may be, irrespective of whether he may be of the opinion that the employee did not contract such disease in his employ or in the employ of a previous employer.

(3) An employer who fails to comply with subsection (2) shall be guilty of an offence.

69. Amendment of Schedule 3

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The Minister may on the recommendation of the Director-General and after consultation with the Board and the chairpersons of the medical advisory panels, amend Schedule 3 by notice in the Gazette, also with retrospective effect, in respect of the description of the diseases and work: Provided that at least 60 days before any such amendment a notice shall be published in the *Gazette*-

(a) of the intention to effect an amendment and the proposed content of the amendment ; and

(b) in which any person who wishes to comment on the proposed amendment is invited to submit such comment in writing to the commissioner within the period mentioned in the notice.

70. Appointment of medical advisory panels

(1) The Director-General may on a regional basis appoint medical advisory panels which shall consist of as many members as he may deem necessary to-

(a) assist him with regard to the diagnosis of occupational diseases in individual cases;

(b) advise him regarding the inclusion of occupational diseases in Schedule 3;

(c) advise him regarding general policy concerning the diagnosis of, and disablement as a result of, occupational diseases.

(2) A member of a medical advisory panel shall be paid the prescribed remuneration and travelling and subsistence allowances out of the compensation fund.

(3) The Director-General shall designate a member of a medical advisory panel as chairman thereof.

(4) The members of medical advisory panels shall be appointed by the Director-General for such period and on such conditions as he may determine , but the Director-General may at any time terminate the appointment of any member who-

(a) has been guilty of misconduct or neglect of duty; or

(b) is not able to perform his functions in terms of this Act properly.

(5) The provisions of section 9 shall apply *mutatis mutandis* to members of medical advisory panels.

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Department of Labour

CHAPTER VIII

MEDICAL AID

71. First aid

[Repealed]

72. Conveyance of injured employee

(1) If an employee meets with an accident which necessitates his conveyance to a hospital or medical practitioner or from a hospital or medical practitioner to his residence, his employer shall forthwith make the necessary conveyance available.

(2) The Director-General or the employer individually liable or mutual association concerned, as the case may be, shall pay the reasonable cost (as determined by the Director-General) incurred in respect of that conveyance.

(3) Any employer who fails to comply with subsection (1) shall be guilty of an offence.

73. Medical expenses

(1) The Director-General or the employer individually liable or mutual association concerned, as the case may be, shall for a period of not more than two years from the date of an accident or the commencement of a disease referred to in section 65(1) pay the reasonable cost incurred by or on behalf of an employee in respect of medical aid necessitated by such accident or disease.

(2) If, in the opinion of the Director-General, further medical aid in addition to that referred to in subsection (1) will reduce the disablement from which the employee is suffering, he may pay the cost incurred in respect of such further aid or direct the employer individually liable or the mutual association concerned, as the case may be, to pay it.

74. Submission of medical report

(1) A medical practitioner or chiropractor shall within 14 days after having for the first time examined an employee injured in an accident or within 14 days after having diagnosed an occupational disease in an employee, furnish a medical report to the employer concerned in the prescribed manner: Provided that where the employee was at the time of the diagnosis of an occupational disease not employed, the medical report shall be furnished in the prescribed manner to the commissioner.

(2) If the commissioner or the employer individually liable or mutual association concerned, as the case may be, requires further medical reports regarding an employee, the medical practitioner or chiropractor who has treated or is treating the employee shall upon request furnish the desired reports in the manner and at the time and intervals specified or prescribed.

(3) If a medical practitioner or chiropractor fails to furnish a medical report as required in subsection (1) or (2) or in the opinion of the commissioner or the employer individually liable or mutual association concerned, as the case may be, fails to complete it in a satisfactory manner, such party may defer the payment of the cost of the medical aid concerned until the report has been furnished or completed in a satisfactory manner, and no action for the recovery of the said cost shall be instituted before the report has been so furnished or completed.

(4) No remuneration shall be payable to a medical practitioner or chiropractor for the completion and furnishing of a report referred to in subsection (1) or (2).

(5) A medical practitioner or chiropractor shall at the request of an employee or the dependant of an employee furnish such employee or dependant with a copy of the report referred to in subsection (1).

75. Director-General to decide on need for, and nature and sufficiency of, medical aid

All questions regarding the need for, and the nature and sufficiency of, any medical aid supplied or to be supplied in terms of this Chapter shall be decided by the Director-General.

76. Fees for medical aid

(1) Subject to the provisions of this section, the cost of medical aid shall be calculated in accordance with a tariff of fees determined by the Director-General.

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(2) The tariff of fees for medical aid affecting the Medical Association of South Africa, the Chiropractic Association of South Africa and the Dental Association of South Africa shall be determined after consultation with those associations.

(3) If the Director-General or an employer individually liable or a mutual association is liable in terms of this Act for the payment of the cost of medical aid-

(a) no amount in excess of that determined in the tariff of fees or, if no amount has been determined for particular medical aid, no amount in excess of that deemed reasonable by the Director-General, shall be recoverable for the medical aid concerned;

(b) no amount in respect of the said cost shall be recoverable from the employee or an employer other than an employer individually liable.

77. Contributions by employees towards cost of medical aid prohibited

(1) An employer who demands or receives from an employee a contribution towards the cost of medical aid supplied or to be supplied in terms of this Act, shall be guilty of an offence.

(2) If an employer has been convicted of contravening subsection (1), the Director-General may in the prescribed form issue an order against that employer for the payment of the amount that he received contrary to the provisions of subsection (1), and section 61(2) and (3) shall then apply *mutatis mutandis* in respect of such order and amount.

78. Medical aid provided by employers

(1) If an employer makes arrangements to provide to his employees injured in accidents medical aid which in the opinion of the Director-General is not less favourable to the employees than that provided for in this Chapter, the Director-General may, subject to such conditions as he may determine, approve such arrangements.

(2) If the Director-General has approved the arrangements referred to in subsection (1)-

(a) the employees concerned shall be entitled to medical aid in accordance with the arrangements;

(b) the employer concerned shall not be required to provide or pay for medical aid except in accordance with the said arrangements;

(c) the Director-General may reimburse an employer who is not individually liable so much out of the compensation fund or reduce his assessment to such an extent as he may deem equitable.

(3) The Director-General may at any time withdraw the approval or amend the conditions referred to in subsection (1).

79. Consultation of representative medical authorities by Director-General

The Director-General may consult the South African Medical and Dental Council referred to in the Medical, Dental and Supplementary Health Service Professions Act, 1974 (Act No. 56 of 1974), the Medical Association of South Africa, the Chiropractic Association of South Africa and any other representative medical authority concerning matters connected with or arising out of the application of the provisions of this Act with regard to medical aid, and may for that purpose disclose any information relating to a matter in respect of which the views of the Council, the Associations or other authority are required.

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Department of Labour

CHAPTER IX

OBLIGATIONS OF EMPLOYERS

80. Employer to register with commissioner and to furnish him with particulars

(1) An employer carrying on business in the Republic shall within the prescribed period and in the prescribed manner register with the commissioner, and shall furnish the commissioner with the prescribed particulars of his business, and shall within a period determined by the commissioner furnish such additional particulars as the commissioner may require.

(2) The particulars referred to in subsection (1) shall be furnished separately in respect of each business carried on by the employer.

(3) An employer shall within seven days of any change in the particulars so furnished notify the commissioner of such change.

(4) The Director-General may exempt employers referred to in section 84(1)(a) and *(b)* from the provisions of this section.

(5) Any person not resident in the Republic or any body corporate not registered in terms of any law governing the registration of bodies corporate in the : Republic, and carrying on business in the Republic or engaged in, on or above the continental shelf in activities in connection with surveys, research, prospecting or exploitation of natural resources, and employing an employee in connection therewith, shall furnish the commissioner with the address of his or its head office and the name and address of his or its chief officer in the Republic, and that officer : shall for the purposes of this Act be deemed to be the employer of the said employee.

(6) Any person who fails to comply with the provisions of this section shall be guilty of an offence.

81. Employer to keep record

(1) An employer shall keep a register or other record of the earnings and other prescribed particulars of all employees , and shall at all reasonable times produce such register or record or a microfilm or other microform reproduction thereof on demand to an authorised person referred to in section 7 for inspection.

(2) An employer shall retain the register, record or reproduction referred to in subsection (1) for a period of at least four years after the date of the last entry in that register or record.

(3) An employer who fails to comply with a provision of this section shall be guilty of an offence.

(4) A health and safety representative elected in terms of the Occupational Health and Safety Act, 1993(Act No. 85 of 1993), or the Mine Health and Safety Act, 1996 (Act No. 29 of 1996), and a trade union representative elected in terms of section 14 of the Labour Relations Act, 1995 (Act No. 66 of 1995), shall have the right to inspect, and where appropriate bring to the attention of the commissioner, any register, record or document which the employer must maintain, keep or complete in terms of this Act.

82. Employer to furnish returns of earnings

(1) Subject to subsection 1A, an employer, excluding an employer referred to in section 84(1)(a) and *(b)*, shall not later than the thirty-first day of March in each year furnish the commissioner with a return in the prescribed form, certified by him her or it as correct, showing-

(a) the amount of earnings up to the maximum contemplated in section 83(8) paid by him her or it to his her or its employees during the period with effect from the first day of March of the immediately preceding year up to and including the last day of February of the following year; and

(b) such further information as may be prescribed or as the Director-General may require.

(1) An employer who commences business after the last day of February of a particular year shall within seven days after such commencement furnish the commissioner with a return in the prescribed form, certified by him, her or it as correct, showing the estimated earnings of his, her or its employees for the period with effect from the commencement of the business up to and including the last day of February of the following year.

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(2) If an employer carries on business at more than one place or if he carries on more than one class of business, the commissioner may require a separate return for each place or class of business from him.

(3) If in a return referred to in subsection (1) the amount shown as earnings, excluding earnings exceeding the maximum contemplated in subsection 83(8), is less than the amount actually paid, the Director-General may impose upon and recover from the employer a fine not exceeding 10 per cent of the difference between the amount shown and the actual amount.

(4) The Director-General may reduce any fine referred to in subsection (3). (5) If an employer fails to furnish a return or if the estimate of the earnings which an employer expects to pay during a particular period is in the opinion of the Director-General too low, the Director-General may himself estimate the earnings concerned.

(5) An employer who fails to comply with the provisions of this section shall be guilty of an offence.

83. Assessment of employer

(1) Subject to the provisions of this section, an employer shall be assessed or provisionally assessed by the Director-General according to a tariff of assessment calculated on the basis of such percentage of the annual earnings of his her or its employees as the Director-General with due regard to the requirements of the compensation fund for the year of assessment may deem necessary.

(2) Notwithstanding subsection (1), the Director-General may-

(a) assess a particular employer or category of employers on such other basis as he may deem equitable;

(b) levy a minimum assessment in respect of a particular employer or category of employers.

(3) In determining the tariff of assessment the Director-General shall provide for the capitalized value of pensions.

(4) For the purposes of this section earnings shall be calculated in the prescribed manner.

(5) If the earnings actually paid by an employer in respect of a particular period differ from the earnings shown in respect of that period in the return concerned, the Director-General shall adjust his assessment accordingly.

(6) If an employer fails to furnish the Director-General within the prescribed period with a return in terms of section 82 in respect of a particular period, the Director-General may-

(a) assess the employer on the basis of the earnings estimated in accordance with section 82(5)

(b) impose upon and recover from the employer a fine not exceeding 10 per cent of the amount so assessed.

(c) where it later appears that the actual earnings were more than the earnings estimated under paragraph (a), recover the difference in the assessment from the employer, and may impose and recover a fine on such difference as contemplated in paragraph (b);

(d) where it later appears that the actual earnings were less than the earnings estimated under paragraph *(a),* make the necessary adjustment.

(7) An assessment of an employer shall be paid at such time and in such manner as the Director-General may determine.

(8) The Minister may, on recommendation of the Director-General and after consultation with the Board prescribe by notice in the Gazette a maximum amount of earnings on which an assessment of an employer shall be calculated by the Director-General.

84. Certain employers exempt from assessment

(1) No assessment in favour of the compensation fund shall be payable in respect of employees-

(a) in the employ of-

(i) the national and provincial spheres of government, including Parliament and provincial legislatures;

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(ii) a local authority which has obtained a certificate of exemption in terms of section 70(1)(a)(ii) of the Workmen's Compensation Act and has notified the Director-General in writing within 30 days after the commencement of this Act that it desires to continue with the arrangements according to the said certificate of exemption;

(iii) a municipality contemplated in section 10B of the Local Government transition Act, 1993 (Act No. 209 0f 1993), to which exemption has been granted in terms of subsection 2;

(b) whose employer has with the approval of the Director-General obtained from a mutual association a policy of insurance for the full extent of his potential liability in terms of this Act to all employees employed by him, for so long as he maintains such policy in force.

(2) The Director-General may upon application exempt any local authority referred to in subsection (1)(a)(ii) or any municipality referred to in subsection (1)(a)(iii) from the obligations of an employer in terms of this Act on such conditions as he or she may think fit.

(3) Notwithstanding the provisions of this section, the Director-General may on application by an employer referred to in subsection (1) permit such employer to pay assessments to the compensation fund in respect of his employees, and thereafter the provisions of this section shall cease to apply to such an employer.

85. Variation of tariff of assessment

(1) If in the opinion of the Director-General the business of an employer is designed, equipped, organized or conducted in a manner which is calculated to prevent accidents and the number of accidents and the expenditure in connection therewith are or are likely to be less than those usually occurring in comparable businesses, the Director-General may assess that employer at a lower tariff of assessment than the tariff of assessment for employers in like businesses.

(2) If the accident record of an employer during a particular period is in the opinion of the Director-General less favourable than those of employers in comparable businesses and the Director-General is of the opinion that such state of affairs will probably continue, the Director-General may assess such employer at a higher tariff of assessment than the tariff of assessment for employers in like businesses.

(3) If the accident record of an employer during a particular period is in the opinion of the Director-General more favourable than those of employers in comparable businesses, the Director-General may give such employer a rebate on any assessment paid or payable by him.

86. Assessment to be paid by employer to commissioner

(1) An assessment shall be paid by an employer to the commissioner within 30 days after the date of the notice of assessment or, with the approval of the commissioner, in such instalments and at such times and on such conditions as the commissioner may determine.

(2) Interest is payable on an overdue assessment at a rate determined by the Director-General, which shall not exceed the prevailing standard rate of interest as defined in section 1 of the Exchequer Act, 1975(Act No. 66 of 1975).

87. Failure to pay assessment or other moneys

(1) If an employer fails to pay an assessment in accordance with section 86, the Director-General may impose a fine at the prescribed percentage on the outstanding amount upon him.

(2) (a) If an employer fails to comply with the provisions of section 80(1) and an employee in his employ meets with an accident, the Director-General may, in addition to any other penalty to which such employer may be liable, impose a fine not exceeding the full amount of the compensation payable in respect of such accident upon him.

(b) If the Director-General is of the opinion that such failure was not wilful or was due to some cause over which the employer had no control, or that payment of the full amount of the capitalized value of a pension payable as compensation to the employee would probably lead to the insolvency of that employer or, in the case where the employer is a company, to its liquidation, the Director-General may-

(i) waive in whole or in part any fine imposed by him;

(ii) allow the employer to pay the penalty in such instalments as he may determine.

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(3) An employer who refuses or fails to pay any assessment, instalment or fine referred to in this section or any other money payable in terms of this Act, shall be guilty of an offence.

(4) (a) If an employer fails to pay any amount due to the commissioner, the commissioner may issue an order in the prescribed form for the payment thereof.

(b) The commissioner shall send a certified copy of the order referred to in paragraph *(a)* to the clerk of the magistrate's court of the district in which that employer is resident or where he has his place of business, and thereupon such order shall have the effect of a civil judgment of that magistrate's court, and the commissioner shall have all the powers of a judgment creditor.

(5) For the purposes of this section compensation includes the cost of medical aid, as well as any amount paid or payable in terms of section 28, 54(2) or 72(2) and, in the case of a pension, the capitalized value as determined by the Director-General of the pension, irrespective of whether a lump sum in lieu of the pension or a portion thereof is at any time paid under section 52 or 60, and periodical payments or allowances, as the case may be.

88. Contributions by employers individually liable and mutual associations

(1) Notwithstanding any provision to the contrary contained in this Act, the employers individually liable and the mutual associations shall pay annually to the Director-General in such manner and at such times as he may determine, such portion of the expenditure incurred by him in the administration of the provisions of this Act as he may deem equitable.

(2) (a) The Director-General shall as soon as possible after the end of each financial year estimate the loss suffered during that year as a result of compensation that became payable out of the compensation fund in respect of employees with regard to whom their employers failed to pay assessments.

(b) Such loss shall be estimated on the basis of the difference between the compensation referred to in paragraph *(a)* as calculated by the Director-General, together with any expenditure incurred or likely to be incurred in connection therewith, and the amounts recovered from the employers concerned or likely to be recovered whether by way of compensation, fines or otherwise.

(c) The loss for any particular financial year may be revised by the Director-General in subsequent years in the light of the amounts actually paid or recovered.

(d) The employers individually liable and the mutual associations shall pay to the Director-General, in such manner and at such times as he may determine, such portion of the said loss as he may deem equitable.

(3) The provisions of this Act with regard to the recovery of assessments shall apply *mutatis mutandis* to the recovery of an amount owing by an employer or mutual association in terms of this section.

(4) For the purposes of this section compensation includes the cost of medical aid, as well as any amount paid or payable in terms of section 28, 54(2) or 72(2) and, in the case of a pension, the capitalized value as determined by the Director-General of the pension, irrespective of whether a lump sum in lieu of the pension or a portion thereof is at any time paid under section 52 or 60, and periodical payments or allowances, as the case may be.

89. Mandators and contractors

(1) (a) If a person (the mandator) in the course of or for the purposes of his business enters into an agreement with any other person (the contractor) for the execution by or under the supervision of the contractor of the whole or any part of any work undertaken by the mandator, the contractor shall, in respect of his employees employed in the execution of the work concerned, register as an employer in accordance with the provisions of this Act and pay the necessary assessments.

(b) If a contractor fails so to register or pay any assessment, the said employees of the contractor shall be deemed to be the employees of the mandator, and the mandator shall pay the assessments in respect of those employees.

(2) If a mandator has paid an assessment or compensation for which he would not have been liable but for the provisions of subsection (1), such mandator may recover that assessment or compensation from the contractor.

(3) If a mandator has in terms of this section paid an assessment or compensation to the commissioner, he may set off the amount so paid by him against his debt to the contractor.

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(4) Notwithstanding the provisions of this section, the Director-General may recover compensation from the contractor instead of from the mandator, and if the full amount cannot be recovered from the one, the shortfall can be recovered from the other.

(5) A mandator shall not be liable in terms of this section in respect of any accident which happened at a place which is not on or about the premises on which the mandator undertook to execute the work, or which is not otherwise under his control or management.

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Department of Labour

CHAPTER X

LEGAL PROCEDURES

90. Review of decisions by Director-General

(1) The Director-General may after notice, if possible, to the party concerned and after giving him an opportunity to submit representations, at any time review any decision in connection with a claim for compensation or the award of compensation on the ground-

(a) that the employee has not submitted himself to an examination referred to in section 42;

(b) that the disablement giving rise to the award is prolonged or aggravated by the unreasonable refusal or failure of the employee to submit himself to medical aid;

(c) that compensation awarded in the form of a periodical payment or a pension is excessive or insufficient because of existing or changed circumstances;

(d) that the decision or award was based on an incorrect view or misrepresentation of the facts, or that the decision or award would have been otherwise in the light of evidence available at present but which was not available when the Director-General made the decision or award.

(2) The Director-General may, after he has considered the evidence and representations submitted to him and made such inquiry as he may deem necessary, confirm, amend or set aside his decision, and may suspend, discontinue, reduce or increase compensation awarded.

(3) For the purposes of this section compensation shall include medical aid.

91. Objections and appeal against decisions of Director-General

(1) Any person affected by a decision of the Director-General or a trade union or employers' organization of which that person was a member at the relevant time may, within 180 days after such decision, lodge an objection against that decision with the commissioner in the prescribed manner.

(2) (a) An objection lodged in terms of this section shall be considered and decided by the presiding officer assisted by two assessors designated by him, of whom one shall be an assessor representing employees and one an assessor representing employers.

(b) If the presiding officer considers it expedient, he may, notwithstanding paragraph *(a),* call in the assistance of a medical assessor.

(c) The provisions of sections 6, 7, 45 and 46 shall apply *mutatis mutandis* in respect of the consideration of an objection.

(3) (a) After considering an objection the presiding officer shall, provided that at least one of the assessors, excluding any medical assessor, agrees with him, confirm the decision in respect of which the objection was lodged or give such other decision as he may deem equitable.

(b) If neither of the assessors agrees with the view of the presiding officer, the presiding officer shall submit the dispute in terms of section 92 to the Supreme Court for decision.

(4) The presiding officer may in connection with proceedings in terms of this section make such order as to costs and the payment thereof as he may deem equitable.

(5) (a) Any person affected by a decision referred to in subsection (3)(a), may appeal to any provincial or local division of the Supreme Court having jurisdiction against a decision regarding-

(i) the interpretation of this Act or any other law;

(ii) the question whether an accident or occupational disease causing the disablement or death of an employee was attributable to his or her serious and wilful misconduct;

(iii) the question whether the amount of any compensation awarded is so excessive or so inadequate that the award thereof could not reasonably have been made;

(iv) the right to increased compensation in terms of section 56.

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(b) Subject to the provisions of this subsection, such an appeal shall be noted and prosecuted as if it were an appeal against a judgment of a magistrate's court in a civil case, and all rules applicable to such an appeal shall *mutatis mutandis* apply to an appeal in terms of this subsection.

(6) Except where the presiding officer orders otherwise, no obligation to pay any assessment, compensation or any other amount to the Director-General or to the compensation fund, or to pay any periodical payments to or on behalf of an employee under a decision of the presiding officer, shall be suspended or deferred by reason of the fact that an objection has been lodged against such decision in terms of subsection (1), or that an appeal has been noted in terms of subsection (5).

(7) (a) If during the hearing of an objection the presiding officer dies or becomes unable to act as presiding officer -

(i) the hearing may, with the consent of the person, trade union or employers' organisation contemplated in subsection (1), proceed before another presiding officer and the assessors concerned; or

(ii) the hearing shall start *de novo* if the consent contemplated in subparagraph(i) is not given.

(b) If during the hearing of an objection an assessor dies or becomes unable to act an assessor-

(i) the hearing may, with the consent of the person, trade union or employers' organisation contemplated in subsection (1), proceed before the presiding officer concerned and the remaining assessor; or

(ii) the hearing shall start *de novo* if the consent contemplated in subparagraph(i) is not given.

92. Director-General may state case for Supreme Court

(1) If any question of law arises in the performance of the functions of the Director-General, the Director-General may of his or her own motion or at the request of a party with a sufficient interest in any matter or proceedings before the Director-General, state a case for decision by a High Court having jurisdiction.

(2) The Director-General shall set out in the stated case-

(a) the facts that he found proved; and

(b) the view of the law which he has adopted in relation to those facts.

(3) If the Director-General has any doubt as to the correctness of a decision given by any provincial or local division of the Supreme Court regarding a question of law in connection with the application of this Act, he may submit such decision to the Appellate Division of the Supreme Court and cause the question of law to be argued so that the Appellate Division may decide such question of law for the future guidance of all courts.

93. Evidence

(1) The record of any decision or award made by the Director-General, and a copy of or extract from a record or document kept by the Director-General or lodged with him, which purports to be certified by the Director-General as a true copy or extract shall upon its mere production in a court of law be *prima facie* evidence of the content of such record or document.

(2) In any proceedings in terms of this Act, or in any court of law, any document purporting to be a sworn statement made by the Director-General or an authorized person referred to in section 7(2), and in which it is stated-

(a) that any person is an employer, a mandator, a contractor, an employee or a dependant of an employee in terms of this Act;

(b) that any person is or was required in terms of this Act to pay an amount to the Director-General or to an employee or other person specified in the statement;

(c) that an amount referred to in paragraph *(b),* or any portion thereof, has or has not been paid on a date specified in the statement;

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(d) that he has exercised a power under this Act, shall upon its mere production be *prima facie* evidence of the facts stated therein.

(3) The person presiding at the court or other proceedings referred to in subsection (1) or (2) may cause the person who has made a sworn statement referred to in subsection (2) to be subpoenaed to give *viva voce* evidence or cause written interrogatories to be sent to him for answering, and a document purporting to be a sworn statement with the answers of that person shall upon its mere production be *prima facie* evidence of the facts stated therein.

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CHAPTER XI

GENERAL

94. Arrangements with foreign states regarding compensation

The Minister may, by notice in the Gazette, issue directions to give effect to the provisions of any agreement between the Republic and any other state in which provision is made for reciprocity in matters regarding compensation to employees for accidents resulting in disablement or death, including directions-

(a) to determine in any case where an employee is entitled to compensation both in terms of this Act and in terms of the law of any such state under the law of which party such employee or his dependants shall be entitled to recover compensation;

(b) to authorize the Director-General to allow evidence taken in any such state, and to obtain and take evidence for use in such state or for the facilitation of proceedings for the recovery of compensation in terms of the law of any such state.

95. Certain documents exempt from stamp duty

Notwithstanding any provision to the contrary contained in any other law, any sworn statement, certificate, receipt or other document required or issued under this Act, shall be exempt from stamp duty.

96. Disclosure of information

(1) No person shall disclose any information obtained by him in the performance of his functions in terms of this Act, except-

(a) to the extent to which it may be necessary for the proper administration of a provision of this Act;

(b) for the purposes of the administration of justice; or

(c) at the request of the Minister or any other person entitled thereto.

(2) Any person who contravenes the provisions of subsection (1) shall be guilty of an offence.

97. Regulations

(1) The Minister may make regulations, after consultation with the Board, regarding -

(a) the place of meeting and the procedure to be followed at any meeting of the Director-General and assessors or at any proceedings in terms of this Act with which the assessors are concerned, or at any investigation in terms of this Act;

(b) subject to section 76, the fees payable to medical practitioners or chiropractors in respect of services rendered in terms of this Act;

(c) the procedure to be followed in paying assessments and fines to the Director-General;

(d) the persons to whom, the places where and the manner in which payment of assessments in terms of this Act shall be made;

(e) the determination of the amount and the conditions and manner of payment of benefits to assessors or classes of assessors;

(f) the disposal of moneys payable in terms of this Act to any person other than the Director-General and not claimed within the prescribed period by the person entitled thereto;

(g) any matter which shall or may be prescribed by regulation in terms of this Act;

(h) any other matter, whether or not connected with any matter mentioned in paragraphs *(a)* to *(g),* which he may deem necessary or expedient to prescribe in order to further the objects and purposes of this Act.

(2) Different regulations may be made under subsection (1) in respect of different classes of employers and employees and of different areas, and the Minister may, after consultation with the Board, in respect thereof differentiate in such manner as he or she may deem expedient.

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(3) Any person who contravenes or fails to comply wit any regulation made under subsection (1) shall be guilty of an offence and liable on conviction to a fine, or imprisonment for a period not exceeding six months.

98. False statements

Any person who in connection with a claim for compensation in terms of this Act, or in any return, notice, report or statement to be given, made or furnished in terms of this Act, makes or causes to be made any statement which is false in a material respect, knowing it to be false, shall be guilty of an offence.

99. Penalties

Any person who is convicted of an offence in terms of this Act shall be liable to a fine, or to imprisonment for a period not exceeding one year.

100. Repeal of laws

(1) Subject to the provisions of this section, the laws specified in Schedule 1 are hereby repealed to the extent set out in the third column thereof.

(2) Any regulation made, any direction, order or directive issued, any request made or any requirement prescribed and any other thing done under a provision of the Workmen s Compensation Act, and which could be made, issued, prescribed or done under a provision of this Act, shall be deemed to have been made, issued, prescribed or done under the last-mentioned provision.

(3) Any claim for compensation or medical aid under a law repealed by subsection (1) in respect of an accident that happened or a scheduled disease contracted prior to the commencement of this Act shall be dealt with in terms of the repealed law as if this Act had not been passed and any right or privilege acquired or accrued under such repealed law shall not be affected by such repeal.

101. Short title and commencement

(1) This Act shall be called the *Compensation for Occupational Injuries and Diseases Act, 1993*, and shall come into operation on a date fixed by the State President by proclamation in the *Gazette.*

(2) Different dates may be fixed under subsection (1) in respect of different provisions of this Act.

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SCHEDULE 1

LAWS REPEALED

No. and year of law	Title	Extent of repeal
Act No. 30 of 1941	Workmen's Compensation Act, 1941	The whole
Act No. 27 of 1945	Workmen's Compensation Amendment Act, 1945	The whole
Act No. 36 of 1949	Workmen's Compensation Amendment Act, 1949	The whole
Act No. 5 of 1951	Workmen's Compensation Amendment Act, 1951	'The whole
Act No. 51 of 1956	Workmen's Compensation Amendment Act, 1956	The whole
Act No. 7 of 1961	Workmen's Compensation Amendment Act, 1961	The whole
Act No. 21 of 1964	Workmen's Compensation Amendment Act, 1964	The whole
Act No. 58 of 1967	Workmen's Compensation Amendment Act, 1967	The whole
Act No. 9 of 1970	Workmen's Compensation Amendment Act, 1970	The whole
Act No. 27 of 1970	Second Black Laws Amendment Act, 1970	Section 2
Act No. 60 of 1971	Workmen's Compensation Amendment Act, 1971	The whole
Ate No. 11 of 1974	Workmen's Compensation Amendment Act, 1974	The whole
Act No. 28 of 1977	Workmen's Compensation Amendment Act, 1977	The whole
Act No. 8 of 1979	Workmen's Compensation Amendment Act, 1979	The whole
Act No. 24 of 1981	Workmen's Compensation Amendment Act, 1981	The whole
Act No. 29 of 1984	Workmen's Compensation Amendment Act, 1984	The whole
Act No. 35 of 1987	Workmen's Compensation Amendment Act, 1987	The whole
Act No. 40 of 1990	Workmen's Compensation Amendment Act, 1990	The whole

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SCHEDULE 2

Injury		Percentage of permanent disablement
Loss of two limbs		100
Loss of both hands, or of all fingers and both thumbs		100
Total loss of sight		100
Total paralysis		100
Injuries resulting in employee being permanently bedridden		100
Any other injury causing permanent total disablement		100
Loss of arm at shoulder		65
Loss of arm between elbow and shoulder		65
Loss of arm at elbow		55
Loss of arm between wrist and elbow		55
Loss of hand at wrist		50
Loss of four fingers and thumb of one hand		50
Loss of four fingers		40
Loss of thumb:	both phalanges	25
	one phalanx	15
Loss of index finger:	three phalanges	10
	two phalanges	8
	one phalanx	5
Loss of middle finger:	three phalanges	8
	two phalanges	6
	one phalanx	4
Loss of ring finger:	three phalanges	6
	two phalanges	5
	one phalanx	3
Loss of little finger:	three phalanges	4
	two phalanges	3
	one phalanx	2
Loss of metacarpals:	first, second or third (additional)	4
	fourth or fifth (additional)	2
Loss of leg:	at hip	70
	between knee and hip	45 to 70
	below knee	35 to 45
Loss of toes:	all	15
	big, both phalanges	7
	big, one phalanx	3
	toes other than big toes:	
	four toes	7
	three toes	5
	two toes	3
	one toe	1
Loss of eye:	whole eye	30
	sight	30
	sight except perception of light	30
Loss of hearing:	both ears	50
	one ear	7

Total permanent loss of the use of a limb shall be treated as the loss of the limb.

Any injury to the left arm or hand and, in the case of a left-handed employee, to the right arm or hand, may in the discretion of the Director-General be rated at ninety per cent of the above percentage.

If there are two or more injuries the sum of the percentages for such injuries may be increased, in the discretion of the Director-General.

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SCHEDULE 3

Diseases	Work
	(a) Any work involving the handling of or exposure to any of the following substances emanating from the workplace concerned:
Pneumoconiosis-fibrosis of the parenchyma of the lung	organic or inorganic fibrogenic dust
Pleural thickening causing significant impairment of function	asbestos or asbestos dust
Bronchopulmonary disease	metal carbides (hard metals)
Byssinosis	flax, cotton or sisal
Occupational asthma	the sensitizing agents-
	(1) isocyanates
	(2) platinum, nickel, cobalt, vanadium or chromium salts
	(3) hardening agents, including epoxy resins
	(4) acrylic acids or derived acrylates
	(5) soldering or welding fumes
	(6) substances from animals or insects
	(7) fungi or spores
	(8) proteolytic enzymes
	(9) organic dust
	(10) vapours or fumes of formaldehyde, anhydrides, amines or diamines
Extrinsic allergic alveolitis	moulds, fungal spores or any other allergenic proteinaceous material, 2,4 toluene-di-isocyanates
Any disease or pathological manifestations	beryllium, cadmium, phosphorus, chromium, manganese, arsenic, mercury, lead, fluorine, carbon disulfide, cyanide, halogen derivatives of aliphatic or aromatic hydrocarbons, benzene or its homologues, nitro- and amino-derivatives of benzene or its homologues, nitroglycerine or other nitric acid esters, hydrocarbons, trinitrotoluol, alcohols, glycols or ketones, acrylamide, or any compounds of the aforementioned substances
Erosion of the tissues of the oral cavity or nasal cavity	irritants, alkalis, acids or fumes thereof
Dysbarism, including decompression sickness, baro-trauma or osteonecrosis	abnormal atmospheric or water pressure
Any disease	ionising radiation from any source
Allergic or irritant contact dermatitis	dust, liquids or other external agents or factors
Mesothelioma of the pleura or peritoneum or other malignancy of the lung	asbestos or asbestos dust
Malignancy of the lung, skin, larynx, mouth cavity or bladder	coal-tar, pitch, asphalt or bitumen or volatiles thereof
Malignancy of the lung, mucous membrane of the nose or associated air sinuses	nickel or its compounds
Malignancy of the lung	hexavalant chromium compounds, or bis chloromethyl ether
Angiosarcoma of the liver	vinyl chloride monomer
Malignancy of the bladder	4-amino-diphenyl, benzidine, beta naphtylamine, 4-nitro-diphenyl
Leukaemia	benzene
Melanoma of the skin	polychlorinated biphenyls
Tuberculosis of the lung	(1) crystalline silica (alpha quartz)
	(2) mycobacterium tuberculosis or MOTTS (mycobacterium other than tuberculosis) transmitted to an employee during the performance of health care work from a patient suffering from active open tuberculosis
Brucellosis	brucella abortus, suis or mellitensis transmitted through contact with infected animals or their products
Anthrax	bacillus anthracis transmitted through contact with infected animals or their products
Q-fever	coxiella burneti emanating from infected animals or their products
Bovine tuberculosis	mycobacterium bovis transmitted through contact with infected animals or their products
Rift Valley Fever	virus transmitted by infected animals or their products
	(b) Any work involving the handling of or exposure to any of the following:
Hearing impairment	excessive noise

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Hand-arm vibration syndrome (Raynaud's phenomenon)	vibrating equipment
Any disease due to overstraining of muscular tendonous insertions	repetitive movements

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Department of Labour

SCHEDULE 4

MANNER OF CALCULATING COMPENSATION

(i) Item	(ii) Section	(iii) Nature and degree of disablement	(iv) Nature of benefits	(v) Manner of calculating benefits
1.	47(1)*(a)*	Temporary total disablement	Periodical payments	75% of an employee's monthly earnings at the time of the accident to a maximum compensation of R6 064,50 per month
2.	49(1)	Permanent disablement of 30%	Lump sum	15 times the monthly earnings of the employee at the time of the accident to a minimum and a maximum compensation of R12 375,00 and R67 950, 00, respectively
3.	49(1)	Permanent disablement of less than 30%	Lump sum	An amount which bears to a lump sum calculated under item 2 the same proportion as the degree of permanent disablement to 30%
4.	49(1)	Permanent disablement of 100%	Monthly pension	75% of an employee's monthly earnings at the time of the accident to a minimum and a maximum compensation of R618,75and R6 064,50 per month, respectively;
5.	49(1)	Permanent disablement of less than 100% but more than 30%	Monthly pension	A monthly pension which bears to a pension calculated under item 4 the same proportion as the degree of permanent disablement to 100%
6.	54(1)*(a)*	Fatal	Lump sum	Twice the employee's monthly pension that would have been payable to the employee under item 4 had he been totally permanently disabled
7.	54(1)*(b)*	Fatal	Monthly pension	40% of the monthly pension that would have been payable to the employee under item 4 had he been totally permanently disabled
8.	54(1)*(c)*	Fatal	Monthly pension	20% of the monthly pension that would have been payable to the employee under item 4 had he been totally permanently disabled, to each child
9.	54(1)*(e)*	Fatal	Lump sum	Percentage dependence as portion of R28 680,00
10.	54*(2)*	Fatal	Funeral costs	A reasonable amount for funeral costs to a maximum of R5 350, 00 or the actual amount, whichever is the lesser

Government Gazette

REPUBLIC OF SOUTH AFRICA

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THE PRESIDENCY

No. 98 15 January 2003

It is hereby notified that the President has assented to the following Act, which is hereby published for general information:–

No. 57 of 2002: Disaster Management Act, 2002.

AIDS HELPLINE: 0800-123-22 Prevention is the cure

(English text signed by the President.)
(Assented to 30 December 2002.)

ACT

To provide for—

- *** an integrated and co-ordinated disaster management policy that focuses on preventing or reducing the risk of disasters, mitigating the severity of disasters, emergency preparedness, rapid and effective response to disasters and post-disaster recovery;**
- *** the establishment of national, provincial and municipal disaster management centres;**
- *** disaster management volunteers; and**
- *** matters incidental thereto.**

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

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CHAPTER 1

INTERPRETATION, APPLICATION AND ADMINISTRATION OF ACT

Definitions

1. In this Act, unless the context indicates otherwise—

"Department" means the department of state referred to in section 8(2);

"disaster" means a progressive or sudden, widespread or localised, natural or human-caused occurrence which—

(a) causes or threatens to cause—

(i) death, injury or disease;

(ii) damage to property, infrastructure or the environment; or

(iii) disruption of the life of a community; and

(b) is of a magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources;

"disaster management" means a continuous and integrated multi-sectoral, multi-disciplinary process of planning and implementation of measures aimed at—

(a) preventing or reducing the risk of disasters;

(b) mitigating the severity or consequences of disasters;

(c) emergency preparedness;

(d) a rapid and effective response to disasters; and

(e) post-disaster recovery and rehabilitation;

"district municipality" means a municipality that has municipal executive and legislative authority in an area that includes more than one municipality, and which is described in section 155(1) of the Constitution as a category C municipality;

"emergency preparedness" means a state of readiness which enables organs of state and other institutions involved in disaster management, the private sector, communities and individuals to mobilise, organise, and provide relief measures to deal with an impending or current disaster or the effects of a disaster;

"integrated development plan", in relation to a municipality, means a plan envisaged in section 25 of the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000);

"local disaster" means a disaster classified as a local disaster in terms of section 23;

"local municipality" means a municipality that shares municipal executive and legislative authority in its area with a district municipality within whose area it falls, and which is described in section 155(1) of the Constitution as a category B municipality;

"MEC" means a Member of the Executive Council of a province;

"metropolitan municipality" means a municipality that has exclusive executive and legislative authority in its area, and which is described in section 155(1) of the Constitution as a category A municipality;

"Minister" means the Cabinet member designated in terms of section 3 to administer this Act;

"mitigation", in relation to a disaster, means measures aimed at reducing the impact or effects of a disaster;

"municipal disaster management centre" means a centre established in the administration of a municipality in terms of section 43;

"municipal entity" means a municipal entity defined in section 1 of the Local Government: Municipal Systems Act, 2000;

"municipal legislation" means municipal by-laws;

"municipal manager" means a person appointed as such in terms of section 82 of the Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998);

"municipal organ of state" means—

(a) a municipality;

(b) a department or other administrative unit within the administration of a municipality, including an internal business unit referred to in section 76*(a)*(ii) of the Local Government: Municipal Systems Act, 2000; or

(c) a municipal entity;

"National Centre" means the National Disaster Management Centre established by section 8(1);

"national disaster" means a disaster classified as a national disaster in terms of section 23;

"national disaster management framework" means the national disaster management framework prescribed in terms of section 6;

"national organ of state" means a national department or national public entity defined in section 1 of the Public Finance Management Act, 1999 (Act No. 1 of 1999);

"organ of state" means a national, provincial or municipal organ of state;

"post-disaster recovery and rehabilitation" means efforts, including development, aimed at creating a situation where—

(a) normality in conditions caused by a disaster is restored;

(b) the effects of a disaster are mitigated; or

(c) circumstances are created that will reduce the risk of a similar disaster occurring;

"prescribe" means prescribe by regulation in terms of section 59;

"prevention", in relation to a disaster, means measures aimed at stopping a disaster from occurring or preventing an occurrence from becoming a disaster;

"provincial disaster" means a disaster classified as a provincial disaster in terms of section 23;

"provincial disaster management centre" means a centre established in the administration of a province in terms of section 29(1);

"provincial organ of state" means a provincial department or provincial public entity defined in section 1 of the Public Finance Management Act, 1999 (Act No. 1 of 1999);

"response", in relation to a disaster, means measures taken during or immediately after a disaster in order to bring relief to people and communities affected by the disaster;

"statutory functionary" means a person performing a function assigned to that person by national, provincial or municipal legislation;

"this Act" includes any regulations made in terms of section 59;

"vulnerability" means the degree to which an individual, a household, a community or an area may be adversely affected by a disaster.

Application of Act

2. (1) This Act does not apply to an occurrence falling within the definition of "disaster" in section 1—

(a) if, and from the date on which, a state of emergency is declared to deal with that occurrence in terms of the State of Emergency Act, 1997 (Act No. 64 of 1997); or

(b) to the extent that that occurrence can be dealt with effectively in terms of other national legislation—

(i) aimed at reducing the risk, and addressing the consequences, of occurrences of that nature; and

(ii) identified by the Minister by notice in the *Gazette*.

(2) The Minister may, in consultation with Cabinet members responsible for the administration of national legislation referred to in subsection (1)*(b)*, issue guidelines on the application of that subsection.

(3) Where provincial legislation regulating disaster management in a province is inconsistent with this Act, this Act prevails over the provincial legislation subject to section 146 of the Constitution.

Administration of Act

3. This Act is administered by a Cabinet member designated by the President.

CHAPTER 2

INTERGOVERNMENTAL STRUCTURES AND POLICY FRAMEWORK

Intergovernmental Committee on Disaster Management

4. (1) The President must establish an Intergovernmental Committee on Disaster Management consisting of—

(a) Cabinet members involved in disaster management or the administration of legislation referred to in section 2(1)*(b)*;

(b) MECs of each province involved in disaster management or the implementation of legislation referred to in section 2(1)*(b)* in their respective provinces, selected by the Premier of the province concerned; and

(c) members of municipal councils, selected by the South African Local Government Association.

(2) The Minister is the chairperson of the Committee.

(3) The Committee—

(a) must give effect to the principles of co-operative government in Chapter 3 of the Constitution on issues relating to disaster management;

(b) is accountable and must report to Cabinet on the co-ordination of disaster management among the spheres of government;

(c) must advise and make recommendations to Cabinet—

(i) on issues relating to disaster management; and

(ii) on the establishment of a national framework for disaster management aimed at ensuring an integrated and uniform approach to disaster management in the Republic by all national, provincial and municipal

organs of state, statutory functionaries, non-governmental institutions involved in disaster management, the private sector, communities and individuals.

National Disaster Management Advisory Forum

5. (1) The Minister must establish a National Disaster Management Advisory Forum consisting of—

(a) the Head of the National Centre;

(b) a senior representative of each national department whose Minister is a member of the Intergovernmental Committee on Disaster Management, designated by that Minister;

(c) a senior representative of each provincial department whose MEC is a member of that Committee, designated by that MEC;

(d) municipal officials selected by the South African Local Government Association;

(e) representatives of other disaster management role-players designated by the Minister, which may include—

(i) organised business;

(ii) the Chamber of Mines;

(iii) organised labour;

(iv) the insurance industry;

(v) organised agriculture;

(vi) traditional leaders;

(vii) religious and welfare organisations;

(viii) medical, paramedical and hospital organisations;

(ix) organisations representing disaster management professions in South Africa;

(x) other relevant non-governmental and international organisations and relief agencies;

(xi) statutory bodies regulating safety standards in particular industries;

(xii) institutions of higher education; and

(xiii) institutions that can provide scientific and technological advice or support to disaster management;

(f) experts in disaster management designated by the Minister; and

(g) persons co-opted by the Forum for a specific period or specific discussions.

(2) The Head of the National Centre is the chairperson of the Forum.

(3) *(a)* The Forum is a body in which national, provincial and local government and other disaster management role-players consult one another and co-ordinate their actions on matters relating to disaster management.

(b) In performing the functions referred to in paragraph *(a)*, the Forum—

(i) must make recommendations concerning the national disaster management framework to the Intergovernmental Committee on Disaster Management; and

(ii) may advise any organ of state, statutory functionary, non-governmental organisation or community or the private sector on any matter relating to disaster management.

National disaster management framework

6. (1) The Minister, by notice in the *Gazette*—

(a) must prescribe a national disaster management framework, taking into account—

(i) any recommendations of the Intergovernmental Committee on Disaster Management made in terms of section 4; and

(ii) comments by the public submitted as a result of a publication in terms of subsection (2); and

(b) may, from time to time, amend the national disaster management framework.

(2) Before prescribing or amending the national disaster management framework, the Minister must publish particulars of the proposed framework or amendment in the *Gazette* for public comment.

Contents of national disaster management framework

7. (1) The national disaster management framework must provide a coherent, transparent and inclusive policy on disaster management appropriate for the Republic as a whole.

(2) The national disaster management framework must reflect a proportionate emphasis on disasters of different kinds, severity and magnitude that occur or may occur in southern Africa, place emphasis on measures that reduce the vulnerability of disaster-prone areas, communities and households, and must—

(a) guide the development and implementation of disaster management envisaged by this Act;

(b) establish prevention and mitigation as the core principles of disaster management;

(c) facilitate—

(i) South Africa's co-operation in international disaster management;

(ii) regional co-operation in disaster management in southern Africa; and

(iii) the establishment of joint standards of practice;

(d) give effect to the application of co-operative governance on issues concerning disasters and disaster management among the spheres of government and—

(i) determine the relationship between the sphere of government exercising primary responsibility for the co-ordination and management of a disaster in terms of sections 26(1), 40(1) and 54(1) or (2) and the spheres of government performing supportive roles;

(ii) allocate specific responsibilities in this regard to the different spheres;

(e) guide the development and implementation of disaster management within national, provincial and municipal organs of state on a cross-functional and multi-disciplinary basis and allocate responsibilities in this regard to different organs of state;

(f) facilitate—

(i) the involvement of the private sector, non-governmental organisations, traditional leaders, technical experts and volunteers in disaster management;

(ii) community participation in disaster management; and

(iii) partnerships for purposes of subparagraphs (i) and (ii) between organs of state and the private sector, non-governmental organisations and communities;

(g) facilitate disaster management capacity building, training and education, including in schools, and provide incentives for such capacity building, training and education;

(h) promote disaster management research;

(i) guide the development of a comprehensive information management system;

(j) take into account indigenous knowledge relating to disaster management;

(k) provide a framework within which organs of state may fund disaster management with specific emphasis on preventing or reducing the risk of disasters, including grants to contribute to post-disaster recovery and rehabilitation and payment to victims of disasters and their dependants;

(l) address the requirements for co-operation and co-ordination between the different spheres of government, the private sector, non-governmental organisations and communities; and

(m) provide key performance indicators in respect of the various aspects of disaster management.

CHAPTER 3

NATIONAL DISASTER MANAGEMENT

Part 1: National Disaster Management Centre

Establishment

8. (1) A National Disaster Management Centre is established as an institution within the public service.

(2) The National Centre forms part of, and functions within, a department of state for which the Minister is responsible.

Objective

9. The objective of the National Centre is to promote an integrated and co-ordinated system of disaster management, with special emphasis on prevention and mitigation, by national, provincial and municipal organs of state, statutory functionaries, other role-players involved in disaster management and communities.

Administration

Appointment of Head

10. (1) The Minister must, subject to subsection (2) and legislation governing the public service, appoint a person as the Head of the National Centre.

(2) A person appointed as the Head of the National Centre holds office in the Department on terms and conditions set out in a written employment contract which must include terms and conditions setting performance standards.

Acting Head

11. When the Head of the National Centre is absent or otherwise unable to perform the functions of office, or during a vacancy in the office of Head of the National Centre, the Director-General of the Department may designate another person in the service of, or seconded to, the Department to act as Head of the National Centre.

Responsibilities of Head

12. (1) The Head of the National Centre—

(a) is responsible for the exercise by the National Centre of its powers and the performance of its duties; and

(b) takes all decisions of the National Centre in the exercise of its powers and the performance of its duties, except decisions of the National Centre taken in consequence of a delegation or assignment in terms of section 14.

(2) The Head of the National Centre performs the functions of office subject to section 15(3).

Staff

13. (1) The staff of the National Centre consists of—

(a) the Head of the National Centre; and

(b) persons in the service of the Department designated by the Director-General of the Department to perform the duties of the National Centre.

(2) An employee of an organ of state or other organisation may be seconded to the National Centre by agreement between the Director-General of the Department and that organ of state or organisation.

(3) Persons seconded to the National Centre perform their functions of office subject to the control and direction of the Head of the National Centre.

Delegation or assignment

14. (1) The Head of the National Centre may, in writing, delegate any of the powers or assign any of the duties entrusted to the National Centre in terms of this Act to—

(a) a member of the staff of the National Centre;

(b) a provincial disaster management centre, by agreement with the MEC responsible for the department in which the centre is located; or

(c) a municipal disaster management centre, by agreement with the municipality concerned.

(2) A delegation or assignment in terms of subsection (1)—

(a) is subject to the limitations or conditions that the Head of the National Centre may impose; and

(b) does not divest the Head of the National Centre of the responsibility concerning the exercise of the delegated power or the performance of the assigned duty.

(3) The Head of the National Centre may confirm, vary or revoke any decision taken in consequence of a delegation or assignment in terms of subsection (1), but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.

Powers and duties of National Centre

General powers and duties

15. (1) The National Centre must, subject to other provisions of this Act, do all that is necessary to achieve its objective as set out in section 9, and, for this purpose—

(a) must specialise in issues concerning disasters and disaster management;

(b) must monitor whether organs of state and statutory functionaries comply with this Act and the national disaster management framework and must monitor progress with post-disaster recovery and rehabilitation;

(c) must act as a repository of, and conduit for, information concerning disasters, impending disasters and disaster management;

(d) may act as an advisory and consultative body on issues concerning disasters and disaster management to—

(i) organs of state and statutory functionaries;

(ii) the private sector and non-governmental organisations;

(iii) communities and individuals; and

(iv) other governments and institutions in southern Africa;

(e) must make recommendations regarding the funding of disaster management and initiate and facilitate efforts to make such funding available;

(f) must make recommendations to any relevant organ of state or statutory functionary—

(i) on draft legislation affecting this Act, the national disaster management framework or any other disaster management issue;

(ii) on the alignment of national, provincial or municipal legislation with this Act and the national disaster management framework; or

(iii) in the event of a national disaster, on whether a national state of disaster should be declared in terms of section 27;

(g) must promote the recruitment, training and participation of volunteers in disaster management;

(h) must promote disaster management capacity building, training and education throughout the Republic, including in schools, and, to the extent that it may be appropriate, in other southern African states;

(i) must promote research into all aspects of disaster management;

(j) may assist in the implementation of legislation referred to in section 2(1)(b) to the extent required by the administrator of such legislation and approved by the Minister; and

(k) may exercise any other powers conferred on it, and must perform any other duties assigned to it in terms of this Act.

(2) The National Centre may—

(a) engage in any lawful activity, whether alone or together with any other organisation in the Republic or elsewhere, aimed at promoting the effective exercise of its powers or the effective performance of its duties;

(b) exchange information relevant to disaster management with institutions performing functions similar to those of the National Centre in the Republic and elsewhere.

(3) The National Centre must exercise its powers and perform its duties—

(a) within the national disaster management framework;

(b) subject to the directions of the Minister;

(c) in accordance with the administrative instructions of the Director-General of the Department; and

(d) subject to the Public Finance Management Act, 1999 (Act No. 1 of 1999).

(4) The National Centre must liaise and co-ordinate its activities with the provincial and municipal disaster management centres.

Communication links with disaster management role-players

16. (1) The National Centre must—

(a) develop and maintain a directory of institutional role-players that are or should be involved in disaster management in southern Africa showing—

(i) their names, telephone and fax numbers and physical, postal and electronic addresses;

(ii) particulars of their involvement in disaster management; and

(iii) the nature, capacity and location of emergency and relief services under their control; and

(b) establish effective communication links with contact persons identified by those role-players.

(2) The directory must include particulars of—

(a) all national, provincial and municipal organs of state and statutory functionaries involved in disaster management;

(b) non-governmental organisations involved in disaster management;

(c) disaster management experts in South Africa;

(d) private sector organisations with specialised equipment, skills or knowledge relevant to disaster management;

(e) private sector voluntary agencies involved in disaster management; and

(f) foreign non-governmental organisations and international organisations involved in disaster management in southern Africa.

(3) The National Centre must establish communication links with foreign disaster management agencies, including institutions performing functions similar to those performed by the National Centre, to exchange information and to have access to international expertise in and assistance in respect of disaster management.

Disaster management information system

17. (1) The National Centre must act as a repository of, and conduit for, information concerning disasters and disaster management, and, must for this purpose—

(a) collect information on all aspects of disasters and disaster management;

(b) process and analyse such information;

(c) develop and maintain an electronic database envisaged in subsection (2); and

(d) take steps to disseminate such information, especially to communities that are vulnerable to disasters.

(2) The electronic database developed by the National Centre must contain extensive information concerning disasters that occur or may occur in southern Africa and disaster management issues, including information on—

(a) phenomena, occurrences, activities and circumstances that cause or aggravate disasters;

(b) risk factors underlying disasters and ways and means to reduce such risks;

(c) recurring occurrences that result in loss, but which are not classified as disasters in terms of this Act;

(d) prevention and mitigation;

(e) early warning systems;

(f) areas and communities that are particularly vulnerable to disasters;

(g) indigenous knowledge relating to disaster management;

(h) the directory of role-players referred to in section 16 and the names and particulars of their respective contact persons;

(i) emergency response resources and capacity in the national, provincial and local spheres of government and in the non-government sectors, including the location and size of, and other relevant information relating to—

(i) police stations;

(ii) hospitals, clinics and other health institutions;

(iii) emergency medical services;
(iv) school, church and public buildings and other facilities that could be used as emergency shelters or hospitals in the event of a disaster;
(v) fire-fighting services; and
(vi) airports, airstrips, harbours, seaports and railway stations;

(j) emergency response resources and capacity in neighbouring states and relevant international relief agencies;

(k) emergency preparedness in the different spheres of government;

(l) each disaster classified by the National Centre in terms of section 23, including the assessment of the National Centre of the disaster and the information recorded in the register referred to in subsection (1)*(c)* of that section; and

(m) research and training facilities for disaster management disciplines.

(3) The National Centre must take reasonable steps to ensure that the database is electronically accessible to any person free of charge.

(4) Subsection (3) does not prevent the National Centre from—

(a) establishing security safeguards to protect the database from abuse; and

(b) classifying parts of the database as restricted areas in consultation with the Minister, and limiting access to those parts to persons authorised by the Minister.

Gathering of information

18. (1) The National Centre may, in writing, request any organ of state or person in possession of information reasonably required by the National Centre for the purpose of section 16 or 17, to provide such information to the National Centre within a reasonable period determined by the National Centre.

(2) If an organ of state fails to comply with a request, the National Centre must report the failure to the Minister, who must take such steps as may be necessary to secure compliance with the request, including reporting the failure to Parliament.

Disaster management plans and strategies

19. The National Centre must—

(a) develop guidelines for the preparation, and regular review and updating, of disaster management plans and strategies by organs of state and other institutional role-players involved in disaster management;

(b) support and assist in the preparation, and regular review and updating, of these plans and strategies by organs of state and other institutional role-players involved in disaster management;

(c) assist in aligning these plans and strategies;

(d) assist in co-ordinating the implementation of these plans and strategies by the respective organs of state and other role-players;

(e) develop guidelines for the integration of the concept and principles of disaster management, and particularly strategies on prevention and mitigation, with national, provincial and municipal development plans, programmes and initiatives; and

(f) support and assist in the integration referred to in paragraph *(e)*.

Prevention and mitigation

20. (1) The National Centre, to the extent that it has the capacity, must give guidance to organs of state, the private sector, non-governmental organisations, communities and individuals to assess and prevent or reduce the risk of disasters, including—

(a) ways and means of—
(i) determining levels of risk;
(ii) assessing the vulnerability of communities and households to disasters that may occur;
(iii) increasing the capacity of communities and households to minimise the risk and impact of disasters that may occur; and

(iv) monitoring the likelihood of, and the state of alertness to, disasters that may occur;

(b) the development and implementation of appropriate prevention and mitigation methodologies;

(c) the integration of prevention and mitigation methodologies with development plans, programmes and initiatives; and

(d) the management of high-risk developments.

(2) The National Centre must promote formal and informal initiatives that encourage risk-avoidance behaviour by organs of state, the private sector, non-governmental organisations, communities and individuals.

Monitoring, measuring performance and evaluating disaster management plans and prevention, mitigation and response initiatives

21. The National Centre must—

(a) monitor—

(i) progress with the preparation and regular updating in terms of sections 25, 38, 39, 52 and 53 of disaster management plans and strategies by organs of state involved in disaster management;

(ii) formal and informal prevention, mitigation and response initiatives by organs of state, the private sector, non-governmental organisations and communities, including the integration of these initiatives with development plans; and

(iii) compliance with key performance indicators envisaged by section 7(2)*(m)*; and

(b) from time to time, measure performance and evaluate such progress and initiatives.

Giving of advice and guidance

22. The National Centre may give advice and guidance by—

(a) publishing guidelines and recommendations in the *Gazette* or a provincial gazette;

(b) interacting with specific role-players and individuals;

(c) disseminating information;

(d) conducting workshops;

(e) facilitating access to its electronic database; and

(f) acting in any other way approved by the Director-General of the Department.

Classification and recording of disasters

23. (1) When a disastrous event occurs or threatens to occur, the National Centre must, for the purpose of the proper application of this Act, determine whether the event should be regarded as a disaster in terms of this Act, and if so, the National Centre must immediately—

(a) assess the magnitude and severity or potential magnitude and severity of the disaster;

(b) classify the disaster as a local, provincial or national disaster in accordance with subsections (4), (5) and (6); and

(c) record the prescribed particulars concerning the disaster in the prescribed register.

(2) When assessing the magnitude and severity or potential magnitude and severity of a disaster, the National Centre—

(a) must consider any information and recommendations concerning the disaster received from a provincial or municipal disaster management centre in terms of section 35 or 49; and

(b) may enlist the assistance of an independent assessor to evaluate the disaster on site.

(3) The National Centre may reclassify a disaster classified in terms of subsection (1)*(b)* as a local, provincial or national disaster at any time after consultation with the relevant provincial or municipal disaster management centres, if the magnitude and severity or potential magnitude and severity of the disaster is greater or lesser than the initial assessment.

(4) A disaster is a local disaster if—

(a) it affects a single metropolitan, district or local municipality only; and

(b) the municipality concerned, or, if it is a district or local municipality, that municipality either alone or with the assistance of local municipalities in the area of the district municipality is able to deal with it effectively.

(5) A disaster is a provincial disaster if—

(a) it affects—

(i) more than one metropolitan or district municipality in the same province;

(ii) a single metropolitan or district municipality in the province and that metropolitan municipality, or that district municipality with the assistance of the local municipalities within its area, is unable to deal with it effectively; or

(iii) a cross-boundary municipality in respect of which only one province exercises executive authority as envisaged by section 90(3)(a) of the Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998); and

(b) the province concerned is able to deal with it effectively.

(6) A disaster is a national disaster if it affects—

(a) more than one province; or

(b) a single province which is unable to deal with it effectively.

(7) Until a disaster is classified in terms of this section, the disaster must be regarded as a local disaster.

(8) The classification of a disaster in terms of this section designates primary responsibility to a particular sphere of government for the co-ordination and management of the disaster, but an organ of state in another sphere may assist the sphere having primary responsibility to deal with the disaster and its consequences.

Annual reports

24. (1) The National Centre must submit a report annually to the Minister on—

(a) its activities during the year;

(b) the results of its monitoring of prevention and mitigation initiatives;

(c) disasters that occurred during the year in each province;

(d) the classification, magnitude and severity of these disasters;

(e) the effects they had;

(f) particular problems that were experienced—

(i) in dealing with these disasters; and

(ii) generally in implementing this Act and the national disaster management framework;

(g) the way in which these problems were addressed and any recommendations the National Centre wishes to make in this regard;

(h) progress with the preparation and regular updating in terms of sections 25, 38, 39, 52 and 53 of disaster management plans and strategies by organs of state involved in disaster management; and

(i) an evaluation of the implementation of such plans and strategies.

(2) The Minister must submit the report to Parliament within 30 days after receipt of the report from the National Centre.

(3) The National Centre must, at the same time that its report is submitted to the Minister in terms of subsection (1), submit a copy of that report to each provincial and municipal disaster management centre.

Part 2: Powers and duties of national government

Preparation of disaster management plans

25. (1) Each national organ of state indicated in the national disaster management framework must—

(a) prepare a disaster management plan setting out—

(i) the way in which the concept and principles of disaster management are to be applied in its functional area;

(ii) its role and responsibilities in terms of the national disaster management framework;

(iii) its role and responsibilities regarding emergency response and post-disaster recovery and rehabilitation;

(iv) its capacity to fulfil its role and responsibilities;

(v) particulars of its disaster management strategies; and

(vi) contingency strategies and emergency procedures in the event of a disaster, including measures to finance these strategies;

(b) co-ordinate and align the implementation of its plan with those of other organs of state and institutional role-players; and

(c) regularly review and update its plan.

(2) The disaster management plan of a national organ of state referred to in subsection (1) must form an integral part of its planning.

(3) *(a)* A national organ of state must submit a copy of its disaster management plan and of any amendment to the plan to the National Centre.

(b) If a national organ of state fails to submit a copy of its disaster management plan or of any amendment to the plan in terms of paragraph *(a)*, the National Centre must report the failure to the Minister, who must take such steps as may be necessary to secure compliance with that paragraph, including reporting the failure to Parliament.

Responsibilities in event of national disaster

26. (1) The national executive is primarily responsible for the co-ordination and management of national disasters irrespective of whether a national state of disaster has been declared in terms of section 27.

(2) The national executive must deal with a national disaster—

(a) in terms of existing legislation and contingency arrangements, if a national state of disaster has not been declared in terms of section 27(1); or

(b) in terms of existing legislation and contingency arrangements as augmented by regulations or directions made or issued in terms of section 27(2), if a national state of disaster has been declared.

(3) This section does not preclude a provincial or municipal organ of state from providing assistance to the national executive to deal with a national disaster and its consequences, and the national executive, in exercising its primary responsibility, must act in close co-operation with the other spheres of government.

Declaration of national state of disaster

27. (1) In the event of a national disaster, the Minister may, by notice in the *Gazette*, declare a national state of disaster if—

(a) existing legislation and contingency arrangements do not adequately provide for the national executive to deal effectively with the disaster; or

(b) other special circumstances warrant the declaration of a national state of disaster.

(2) If a national state of disaster has been declared in terms of subsection (1), the Minister may, subject to subsection (3), and after consulting the responsible Cabinet member, make regulations or issue directions or authorise the issue of directions concerning—

(a) the release of any available resources of the national government, including stores, equipment, vehicles and facilities;

(b) the release of personnel of a national organ of state for the rendering of emergency services;

(c) the implementation of all or any of the provisions of a national disaster management plan that are applicable in the circumstances;

(d) the evacuation to temporary shelters of all or part of the population from the disaster-stricken or threatened area if such action is necessary for the preservation of life;

(e) the regulation of traffic to, from or within the disaster-stricken or threatened area;

(f) the regulation of the movement of persons and goods to, from or within the disaster-stricken or threatened area;

(g) the control and occupancy of premises in the disaster-stricken or threatened area;

(h) the provision, control or use of temporary emergency accommodation;

(i) the suspension or limiting of the sale, dispensing or transportation of alcoholic beverages in the disaster-stricken or threatened area;

(j) the maintenance or installation of temporary lines of communication to, from or within the disaster area;

(k) the dissemination of information required for dealing with the disaster;

(l) emergency procurement procedures;

(m) the facilitation of response and post-disaster recovery and rehabilitation;

(n) other steps that may be necessary to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster; or

(o) steps to facilitate international assistance.

(3) The powers referred to in subsection (2) may be exercised only to the extent that this is necessary for the purpose of—

(a) assisting and protecting the public;

(b) providing relief to the public;

(c) protecting property;

(d) preventing or combating disruption; or

(e) dealing with the destructive and other effects of the disaster.

(4) Regulations made in terms of subsection (2) may include regulations prescribing penalties for any contravention of the regulations.

(5) A national state of disaster that has been declared in terms of subsection (1)—

(a) lapses three months after it has been declared;

(b) may be terminated by the Minister by notice in the *Gazette* before it lapses in terms of paragraph *(a)*; and

(c) may be extended by the Minister by notice in the *Gazette* for one month at a time before it lapses in terms of paragraph *(a)* or the existing extension is due to expire.

CHAPTER 4

PROVINCIAL DISASTER MANAGEMENT

Part 1: Provincial disaster management framework

Provincial disaster management framework

28. (1) Each province must establish and implement a framework for disaster management in the province aimed at ensuring an integrated and uniform approach to disaster management in the province by all provincial organs of state, provincial statutory functionaries, non-governmental organisations involved in disaster management in the province and by the private sector.

(2) A provincial disaster management framework must be consistent with the provisions of this Act and the national disaster management framework.

(3) *(a)* A provincial disaster management framework, or any amendment thereto, must be published in the relevant provincial gazette.

(b) Before establishing or amending a provincial disaster management framework, particulars of the proposed framework or amendment must be published in the relevant provincial gazette for public comment.

Part 2: Provincial disaster management centres

Establishment

29. (1) Each province must establish a disaster management centre.

(2) A provincial disaster management centre forms part of, and functions within, a department designated by the Premier in the provincial administration.

Powers and duties

30. (1) A provincial disaster management centre—

(a) must specialise in issues concerning disasters and disaster management in the province;

(b) must promote an integrated and co-ordinated approach to disaster management in the province, with special emphasis on prevention and mitigation, by—

(i) provincial organs of state in the province; and

(ii) other role-players involved in disaster management in the province;

(c) must act as a repository of, and conduit for, information concerning disasters, impending disasters and disaster management in the province;

(d) may act as an advisory and consultative body on issues concerning disasters and disaster management in the province to—

(i) organs of state and statutory functionaries;

(ii) the private sector and non-governmental organisations; and

(iii) communities and individuals;

(e) must make recommendations regarding the funding of disaster management in the province, and initiate and facilitate efforts to make such funding available;

(f) may make recommendations to any relevant organ of state or statutory functionary—

(i) on draft legislation affecting this Act, the national disaster management framework or any other disaster management issue;

(ii) on the alignment of provincial or municipal legislation with this Act and the national disaster management framework; or

(iii) in the event of a provincial disaster, on whether a provincial state of disaster should be declared in terms of section 41;

(g) must promote the recruitment, training and participation of volunteers in disaster management in the province;

(h) must promote disaster management capacity building, training and education, including in schools, in the province;

(i) may promote research into all aspects of disaster management in the province;

(j) may give advice and guidance by disseminating information regarding disaster management in the province, especially to communities that are vulnerable to disasters;

(k) may exercise any powers and must perform any duties delegated and assigned to it in terms of section 14; and

(l) may assist in the implementation of legislation referred to in section 2(1)(b) to the extent required by the administrator of such legislation and approved by the MEC responsible for the department in which the centre is located.

(2) A provincial disaster management centre may engage in any lawful activity in the province, whether alone or together with any other organisation, aimed at promoting the proper exercise of its powers or performance of its duties.

(3) A provincial disaster management centre must exercise its powers and perform its duties—

(a) within the national disaster management framework and the provincial disaster management framework referred to in section 28;

(b) subject to the policy directions of the MEC responsible for disaster management in the province acting within the national disaster management framework and the provincial disaster management framework;

(c) in accordance with the administrative instructions of the head of the provincial department in which it is located; and

(d) subject to the Public Finance Management Act, 1999.

(4) A provincial disaster management centre must liaise and co-ordinate its activities with the National Centre and the municipal disaster management centres in the province.

Head of provincial disaster management centre

31. (1) The MEC responsible for the department in which a provincial disaster management centre is located must, subject to subsection (2) and legislation governing the public service, appoint a person as the head of the provincial disaster management centre.

(2) A person appointed as the head of a provincial disaster management centre holds office on terms and conditions set out in a written employment contract which must include terms and conditions setting performance standards.

(3) The head of a provincial disaster management centre—

(a) is responsible for the exercise by the centre of its powers and the performance of its duties; and

(b) takes all decisions of the centre in the exercise of its powers and the performance of its duties, except decisions taken by another person in consequence of a delegation by the head of the centre.

(4) The head of a provincial disaster management centre performs the functions of office subject to section 30(3).

Assistance to National Centre

32. (1) A provincial disaster management centre must assist the National Centre, at the request of the National Centre, to—

(a) identify and establish communication links with provincial organs of state and other disaster management role-players in the province for the purposes of section 16;

(b) develop and maintain the disaster management electronic database envisaged in section 17 in so far as the database applies to the province; and

(c) develop guidelines in terms of section 19 for the—

(i) preparation and regular review of disaster management plans and strategies, including contingency plans and emergency procedures; and

(ii) the integration of the concept and principles of disaster management, and particularly prevention and mitigation strategies, with development plans and programmes.

(2) (a) A provincial disaster management centre may, in writing, request any provincial organ of state or person in possession of information reasonably required by that centre for the purpose of subsection (1)(a) or (b), to provide such information to the centre within a reasonable period determined by the centre.

(b) If a provincial organ of state fails to comply with a request, the provincial disaster management centre must report the failure to the MEC responsible for disaster management in the province, who must take such steps as may be necessary to secure compliance with the request, including reporting the failure to the provincial legislature.

Prevention and mitigation

33. (1) A provincial disaster management centre, to the extent that it has the capacity, must give guidance to organs of state, the private sector, non-governmental organisations, communities and individuals in the province to assess and prevent or reduce the risk of disasters, including—

(a) ways and means of—

(i) determining levels of risk;

(ii) assessing the vulnerability of communities and households to disasters that may occur;

(iii) increasing the capacity of communities and households to minimise the risk and impact of disasters that may occur; and

(iv) monitoring the likelihood of, and the state of alertness to, disasters that may occur;

(b) the development and implementation of appropriate prevention and mitigation methodologies;

(c) the integration of prevention and mitigation methodologies with development plans, programmes and initiatives; and

(d) the management of high-risk developments.

(2) A provincial disaster management centre must promote formal and informal initiatives that encourage risk-avoidance behaviour by organs of state, the private sector, non-governmental organisations, communities and individuals in the province.

Monitoring, measuring performance and evaluating disaster management plans and prevention, mitigation and response initiatives

34. A provincial disaster management centre must—

(a) monitor—

(i) progress with the preparation and regular updating in terms of sections 38, 39, 52 and 53 of disaster management plans and strategies by

provincial and municipal organs of state involved in disaster management in the province;

(ii) formal and informal prevention, mitigation and response initiatives by provincial and municipal organs of state, the private sector, non-governmental organisations and communities, including the integration of these initiatives with development plans; and

(iii) the compliance in the province with key performance indicators envisaged by section 7(2)*(m)*; and

(b) from time to time, measure performance and evaluate such progress and initiatives.

Disasters occurring or threatening to occur in provinces

35. (1) When a disastrous event occurs or threatens to occur in a province, the disaster management centre of the province concerned must determine whether the event should be regarded as a disaster in terms of this Act, and, if so, the centre must immediately—

(a) initiate efforts to assess the magnitude and severity or potential magnitude and severity of the disaster;

(b) inform the National Centre of the disaster and its initial assessment of the magnitude and severity or potential magnitude and severity of the disaster;

(c) alert disaster management role-players in the province that may be of assistance in the circumstances; and

(d) initiate the implementation of any contingency plans and emergency procedures that may be applicable in the circumstances.

(2) When informing the National Centre in terms of subsection (1)*(b)*, the provincial disaster management centre may make such recommendations regarding the classification of the disaster as may be appropriate.

Annual reports

36. (1) The disaster management centre of a province must submit a report annually to the MEC responsible for the provincial department in which the centre is located, on—

(a) its activities during the year;

(b) the results of the centre's monitoring of prevention and mitigation initiatives;

(c) disasters that occurred during the year in the province;

(d) the classification, magnitude and severity of these disasters;

(e) the effects they had;

(f) particular problems that were experienced—

(i) in dealing with these disasters; and

(ii) generally in implementing this Act and the national disaster management framework;

(g) the way in which these problems were addressed and any recommendations the centre wishes to make in this regard;

(h) progress with the preparation and regular updating in terms of sections 38 and 39 of disaster management plans and strategies by provincial organs of state involved in disaster management in the province; and

(i) an evaluation of the implementation of such plans.

(2) The MEC must submit the report to the provincial legislature within 30 days after receipt of the report from the provincial disaster management centre.

(3) The provincial disaster management centre must, at the same time that its report is submitted to the relevant MEC in terms of subsection (1), submit a copy of that report to the National Centre and to each municipal disaster management centre in the province.

Part 3: Powers and duties of provincial government

Provincial disaster management advisory forum

37. (1) The MEC responsible for disaster management in a province may establish a provincial disaster management advisory forum consisting of—

(a) the head of the provincial disaster management centre;
(b) a senior representative of each provincial department designated by the Premier of the province concerned;
(c) the heads of the respective municipal disaster management centres in the province;
(d) representatives of organised local government in the province;
(e) representatives of other disaster management role-players in the province designated by the MEC, which may include—
(i) organised business in the province;
(ii) representatives of mines in the province;
(iii) organised labour in the province;
(iv) organised agriculture in the province;
(v) traditional leaders;
(vi) the insurance industry in the province;
(vii) religious and welfare organisations in the province;
(viii) medical, paramedical and hospital organisations in the province;
(ix) other relevant non-governmental organisations and relief agencies in the province;
(x) institutions of higher education in the province;
(xi) institutions that can provide scientific and technological advice or support to disaster management;
(f) experts in disaster management designated by the MEC; and
(g) persons co-opted by the forum in question for a specific period or specific discussion.

(2) A forum envisaged by subsection (1) is a body in which a provincial government and relevant disaster management role-players in the province consult one another and co-ordinate their actions on matters relating to disaster management in the province.

Preparation of disaster management plans

38. (1) Each provincial organ of state indicated in the national or provincial disaster management framework must, within the applicable provincial disaster management framework—
(a) prepare a disaster management plan setting out—
(i) the way in which the concept and principles of disaster management are to be applied in its functional area;
(ii) its role and responsibilities in terms of the national or provincial disaster management framework;
(iii) its role and responsibilities regarding emergency response and post-disaster recovery and rehabilitation;
(iv) its capacity to fulfil its role and responsibilities;
(v) particulars of its disaster management strategies; and
(vi) contingency strategies and emergency procedures in the event of a disaster, including measures to finance these strategies;
(b) co-ordinate and align the implementation of its plan with those of other organs of state and institutional role-players; and
(c) regularly review and update its plan.

(2) The disaster management plan of a provincial organ of state referred to in subsection (1) must form an integral part of its planning.

(3) (a) A provincial organ of state must submit a copy of its disaster management plan and of any amendment to the plan to the National Centre and the relevant provincial disaster management centre.

(b) If a provincial organ of state fails to submit a copy of its disaster management plan or of any amendment to the plan in terms of paragraph (a), the National Centre or relevant provincial disaster management centre must report the failure to the MEC responsible for disaster management in the province, who must take such steps as may be necessary to secure compliance with that paragraph, including reporting the failure to the provincial legislature.

Disaster management plans for provinces

39. (1) Each province must—

(a) prepare a disaster management plan for the province as a whole;
(b) co-ordinate and align the implementation of its plan with those of other organs of state and institutional role-players; and
(c) regularly review and update its plan.

(2) A disaster management plan for a province must—
(a) form an integral part of development planning in the province;
(b) anticipate the types of disaster that are likely to occur in the province and their possible effects;
(c) guide the development of measures that reduce the vulnerability of disaster-prone areas, communities and households;
(d) seek to develop a system of incentives that will promote disaster management in the province;
(e) identify the areas or communities at risk;
(f) take into account indigenous knowledge relating to disaster management;
(g) promote disaster management research;
(h) identify and address weaknesses in capacity to deal with possible disasters;
(i) provide for appropriate prevention and mitigation strategies;
(j) facilitate maximum emergency preparedness; and
(k) contain contingency plans and emergency procedures in the event of a disaster, providing for—
(i) the allocation of responsibilities to the various role-players and co-ordination in the carrying out of those responsibilities;
(ii) prompt disaster response and relief;
(iii) the procurement of essential goods and services;
(iv) the establishment of strategic communication links;
(v) the dissemination of information; and
(vi) other matters that may be prescribed.

(3) Municipal organs of state in the province, to the extent required by the province, may be requested to co-operate with the province in preparing a disaster management plan for the province.

(4) A province must submit a copy of its disaster management plan, and of any amendment to the plan, to the National Centre and each municipal disaster management centre in the province.

Responsibilities in event of provincial disaster

40. (1) The executive of a province is primarily responsible for the co-ordination and management of provincial disasters that occur in the province, irrespective of whether a provincial state of disaster has been declared in terms of section 41.

(2) The provincial executive must deal with a provincial disaster—
(a) in terms of existing legislation and contingency arrangements, if a provincial state of disaster has not been declared in terms of section 41(1); or
(b) in terms of existing legislation and contingency arrangements as augmented by regulations or directions made or issued in terms of section 41(2), if a provincial state of disaster has been declared.

(3) This section does not preclude a national or municipal organ of state from providing assistance to a provincial executive to deal with a provincial disaster and its consequences.

Declaration of provincial state of disaster

41. (1) In the event of a provincial disaster, the Premier of a province, after consultation with the other MECs, may, by notice in the provincial gazette, declare a provincial state of disaster if—
(a) existing legislation and contingency arrangements do not adequately provide for the provincial executive to deal effectively with the disaster; or
(b) other special circumstances warrant the declaration of a provincial state of disaster.

(2) If a provincial state of disaster has been declared in terms of subsection (1), the Premier of the province concerned may, subject to subsection (3), make regulations or issue directions or authorise the issue of directions concerning—

(a) the release of any available resources of the provincial government, including stores, equipment, vehicles and facilities;
(b) the release of personnel of a provincial organ of state for the rendering of emergency services;
(c) the implementation of all or any of the provisions of a provincial disaster management plan that are applicable in the circumstances;
(d) the evacuation to temporary shelters of all or part of the population from the disaster-stricken or threatened area if such action is necessary for the preservation of life;
(e) the regulation of traffic to, from or within the disaster-stricken or threatened area;
(f) the regulation of the movement of persons and goods to, from or within the disaster-stricken or threatened area;
(g) the control and occupancy of premises in the disaster-stricken or threatened area;
(h) the provision, control or use of temporary emergency accommodation;
(i) the suspension or limiting of the sale, dispensing or transportation of alcoholic beverages in the disaster-stricken or threatened area;
(j) the maintenance or installation of temporary lines of communication to, from or within the disaster area;
(k) the dissemination of information required for dealing with the disaster;
(l) emergency procurement procedures;
(m) the facilitation of response and post-disaster recovery and rehabilitation;
(n) steps to facilitate international assistance; or
(o) other steps that may be necessary to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster.

(3) The powers referred to in subsection (2) may be exercised only to the extent that this is necessary for the purpose of—
(a) assisting and protecting the public;
(b) providing relief to the public;
(c) protecting property;
(d) preventing or combating disruption; or
(e) dealing with the destructive and other effects of the disaster.

(4) Regulations made in terms of subsection (2) may include regulations prescribing penalties for any contravention of the regulations.

(5) A provincial state of disaster that has been declared in terms of subsection (1)—
(a) lapses three months after it has so been declared;
(b) may be terminated by the Premier by notice in the provincial gazette before it lapses in terms of paragraph (a); and
(c) may be extended by the Premier by notice in the provincial gazette for one month at a time before it lapses in terms of paragraph (a) or the existing extension is due to expire.

CHAPTER 5

MUNICIPAL DISASTER MANAGEMENT

Part 1: Municipal disaster management framework

Municipal disaster management framework

42. (1) Each metropolitan and each district municipality must establish and implement a framework for disaster management in the municipality aimed at ensuring an integrated and uniform approach to disaster management in its area by—
(a) the municipality and statutory functionaries of the municipality, including, in the case of a district municipality, the local municipalities and statutory functionaries of the local municipalities in its area;
(b) all municipal entities operating in its area;
(c) all non-governmental institutions involved in disaster management in its area; and
(d) the private sector.

(2) A district municipality must establish its disaster management framework after consultation with the local municipalities in its area.

(3) A municipal disaster management framework must be consistent with the provisions of this Act, the national disaster management framework and the disaster management framework of the province concerned.

Part 2: Municipal disaster management centres

Establishment

43. (1) Each metropolitan and each district municipality must establish in its administration a disaster management centre for its municipal area.

(2) A district municipality—

(a) must establish its disaster management centre after consultation with the local municipalities within its area; and

(b) may operate such centre in partnership with those local municipalities.

Powers and duties

44. (1) A municipal disaster management centre—

(a) must specialise in issues concerning disasters and disaster management in the municipal area;

(b) must promote an integrated and co-ordinated approach to disaster management in the municipal area, with special emphasis on prevention and mitigation, by—

(i) departments and other internal units within the administration of the municipality, and, in the case of a district municipality, also by departments and other internal units within the administration of the local municipalities in the area of the district municipality;

(ii) all municipal entities operating in the municipal area; and

(iii) other role-players involved in disaster management in the municipal area;

(c) must act as a repository of, and conduit for, information concerning disasters, impending disasters and disaster management in the municipal area;

(d) may act as an advisory and consultative body on issues concerning disasters and disaster management in the municipal area for—

(i) organs of state and statutory functionaries;

(ii) the private sector and non-governmental organisations; and

(iii) communities and individuals;

(e) must make recommendations regarding the funding of disaster management in the municipal area, and initiate and facilitate efforts to make such funding available;

(f) may make recommendations to any relevant organ of state or statutory functionary—

(i) on draft legislation affecting this Act, the national disaster management framework or any other disaster management issue;

(ii) on the alignment of municipal legislation with this Act, the national disaster management framework and the relevant provincial disaster management framework; or

(iii) in the event of a local disaster, on whether a local state of disaster should be declared in terms of section 55;

(g) must promote the recruitment, training and participation of volunteers in disaster management in the municipal area;

(h) must promote disaster management capacity building, training and education, including in schools, in the municipal area;

(i) may promote research into all aspects of disaster management in the municipal area;

(j) may give advice and guidance by disseminating information regarding disaster management in the municipal area, especially to communities that are vulnerable to disasters;

(k) may exercise any powers and must perform any duties delegated and assigned to it in terms of section 14; and

(l) may assist in the implementation of legislation referred to in section 2(1)*(b)* to the extent required by the administrator of such legislation and approved by the municipal council.

(2) A municipal disaster management centre may engage in any lawful activity in the municipal area, whether alone or together with any other organisation, aimed at promoting the effective exercise of its powers and performance of its duties.

(3) A municipal disaster management centre must exercise its powers and perform its duties—

(a) within the national disaster management framework, the disaster management framework of the province concerned and the disaster management framework of its municipality;

(b) subject to the municipality's integrated development plan and other directions of the municipal council acting within the national disaster management framework, the disaster management framework of the province concerned and the disaster management framework of that municipality; and

(c) in accordance with the administrative instructions of the municipal manager.

(4) A municipal disaster management centre must liaise and co-ordinate its activities with the National Centre and the relevant provincial disaster management centre.

Head of municipal disaster management centre

45. (1) A municipal council must, subject to the applicable provisions of the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000), appoint a person as head of its municipal disaster management centre.

(2) The head of a municipal disaster management centre—

(a) is responsible for the exercise by the centre of its powers and the performance of its duties; and

(b) in accordance with the directions of the council, takes all decisions of the centre in the exercise of its powers and the performance of its duties, except decisions taken by another person in consequence of a delegation by the head of the centre.

(3) The head of a municipal disaster management centre performs the functions of office subject to section 44(3).

Assistance to National Centre and provincial disaster management centre

46. (1) A municipal disaster management centre must assist the National Centre and the relevant provincial disaster management centre at that centre's request to—

(a) identify and establish communication links with disaster management role-players in the municipal area for the purposes of section 16;

(b) develop and maintain the disaster management electronic database envisaged in section 17 in so far as the database applies to the municipality; and

(c) develop guidelines in terms of section 19 for the—

(i) preparation and regular review of disaster management plans and strategies, including contingency plans and emergency procedures; and

(ii) the integration of the concept and principles of disaster management, and particularly prevention and mitigation strategies, with development plans and programmes.

(2) *(a)* A municipal disaster management centre may, in writing, request any municipal organ of state or person in possession of information reasonably required by that centre for the purpose of subsection (1)*(a)* or *(b)*, to provide such information to the centre within a reasonable period determined by the centre.

(b) If a municipal organ of state fails to comply with a request, the municipal disaster management centre must report the failure to the executive mayor or mayor, as the case may be, of that municipality, who must take such steps as may be necessary to secure compliance with the request, including reporting the failure to the municipal council.

Prevention and mitigation

47. (1) A municipal disaster management centre, to the extent that it has the capacity, must give guidance to organs of state, the private sector, non-governmental organisations, communities and individuals in the municipal area to assess and prevent or reduce the risk of disasters, including—

(a) ways and means of—

(i) determining levels of risk;
(ii) assessing the vulnerability of communities and households to disasters that may occur;
(iii) increasing the capacity of communities and households to minimise the risk and impact of disasters that may occur; and
(iv) monitoring the likelihood of, and the state of alertness to, disasters that may occur;

(b) the development and implementation of appropriate prevention and mitigation methodologies;

(c) the integration of prevention and mitigation methodologies with development plans, programmes and initiatives; and

(d) the management of high-risk developments.

(2) A municipal disaster management centre must promote formal and informal initiatives that encourage risk-avoidance behaviour by organs of state, the private sector, non-governmental organisations, communities, households and individuals in the municipal area.

Monitoring, measuring performance and evaluating disaster management plans and prevention, mitigation and response initiatives

48. (1) A municipal disaster management centre must—

(a) monitor—

(i) progress with the preparation and regular updating in terms of sections 52 and 53 of disaster management plans and strategies by municipal organs of state involved in disaster management in the municipal area;
(ii) formal and informal prevention, mitigation and response initiatives by municipal organs of state, the private sector, non-governmental organisations and communities in the municipal area, including the integration of these initiatives with development plans; and
(iii) the compliance in the municipal area with key performance indicators envisaged by section 7(2)*(m)*; and

(b) from time to time, measure performance and evaluate such progress and initiatives.

Disaster occurring or threatening to occur in municipal areas

49. (1) When a disastrous event occurs or is threatening to occur in the area of a municipality, the disaster management centre of the municipality concerned must determine whether the event should be regarded as a disaster in terms of this Act, and, if so, must immediately—

(a) initiate efforts to assess the magnitude and severity or potential magnitude and severity of the disaster;

(b) inform the National Centre and the relevant provincial disaster management centre of the disaster and its initial assessment of the magnitude and severity or potential magnitude and severity of the disaster;

(c) alert disaster management role-players in the municipal area that may be of assistance in the circumstances; and

(d) initiate the implementation of any contingency plans and emergency procedures that may be applicable in the circumstances.

(2) When informing the National Centre and the relevant provincial disaster management centre in terms of subsection (1)*(b)*, the municipal disaster management centre may make such recommendations regarding the classification of the disaster as may be appropriate.

Annual reports

50. (1) The disaster management centre of a municipality must submit a report annually to the municipal council on—

(a) its activities during the year;

(b) the results of the centre's monitoring of prevention and mitigation initiatives;

(c) disasters that occurred during the year in the area of the municipality;

(d) the classification, magnitude and severity of these disasters;
(e) the effects they had;
(f) particular problems that were experienced—
  (i) in dealing with these disasters; and
  (ii) generally in implementing this Act, the national disaster management framework, the disaster management framework of the province concerned and the disaster management framework of its municipality;
(g) the way in which these problems were addressed and any recommendations the centre wishes to make in this regard;
(h) progress with the preparation and regular updating in terms of sections 52 and 53 of disaster management plans and strategies by municipal organs of state involved in disaster management in the municipal area; and
(i) an evaluation of the implementation of such plans.

(2) (a) A municipal disaster management centre must, at the same time that its report is submitted to the municipal council in terms of subsection (1), submit a copy of the report to the National Centre and the disaster management centre of the province concerned.

(b) The disaster management centre of a district municipality must, at the same time, also submit a copy of its report to each local municipality in the area of the district municipality.

(3) The disaster management centre of a district municipality that is operated in partnership with local municipalities within the area of the district municipality must prepare its report in consultation with those local municipalities.

Part 3: Powers and duties of municipalities and municipal entities

Municipal disaster management advisory forum

51. (1) A metropolitan or district municipality may establish a municipal disaster management advisory forum consisting of—
(a) the head of the municipal disaster management centre in the municipality;
(b) a senior representative of each department or component within the administration of the municipality designated by the executive mayor or mayor, as the case may be;
(c) if it is a district municipality, representatives of the local municipalities within the area of jurisdiction of the district municipality;
(d) representatives of other disaster management role-players in the municipality designated by the executive mayor or mayor, as the case may be, which may include—
  (i) organised business in the municipality;
  (ii) organised labour in the municipality;
  (iii) relevant community-based organisations;
  (iv) traditional leaders;
  (v) the insurance industry in the municipality;
  (vi) representatives of the agricultural sector in the municipality;
  (vii) religious and welfare organisations in the municipality;
  (viii) medical, paramedical and hospital organisations in the municipality;
  (ix) institutions of higher education;
  (x) institutions that can provide scientific and technological advice or support to disaster management;
  (xi) other relevant non-governmental organisations and relief agencies in the municipality;
(e) experts in disaster management designated by the executive mayor or mayor, as the case may be; and
(f) persons co-opted by the forum in question for a specific period or specific discussion.

(2) A forum envisaged by subsection (1) is a body in which a municipality and relevant disaster management role-players in the municipality consult one another and co-ordinate their actions on matters relating to disaster management in the municipality.

Preparation of disaster management plans by municipal entities

52. (1) Each municipal entity indicated in the national or the relevant provincial or municipal disaster management framework must—

(a) prepare a disaster management plan setting out—

(i) the way in which the concept and principles of disaster management are to be applied in its functional area;

(ii) its role and responsibilities in terms of the national, provincial or municipal disaster management frameworks;

(iii) its role and responsibilities regarding emergency response and post-disaster recovery and rehabilitation;

(iv) its capacity to fulfil its role and responsibilities;

(v) particulars of its disaster management strategies; and

(vi) contingency strategies and emergency procedures in the event of a disaster, including measures to finance these strategies;

(b) co-ordinate and align the implementation of its plan with those of other organs of state and institutional role-players; and

(c) regularly review and update its plan.

(2) *(a)* A municipal entity referred to in subsection (1) must submit a copy of its disaster management plan, and of any amendment to the plan, to the National Centre and the relevant provincial and municipal disaster management centres.

(b) If a municipal entity fails to submit a copy of its disaster management plan or of any amendment to the plan in terms of paragraph *(a)*, the National Centre or relevant provincial or municipal disaster management centre must report the failure to the executive mayor or mayor, as the case may be, of the municipality concerned, who must take such steps as may be necessary to secure compliance with that paragraph, including reporting the failure to the municipal council.

Disaster management plans for municipal areas

53. (1) Each municipality must, within the applicable municipal disaster management framework—

(a) prepare a disaster management plan for its area according to the circumstances prevailing in the area;

(b) co-ordinate and align the implementation of its plan with those of other organs of state and institutional role-players;

(c) regularly review and update its plan; and

(d) through appropriate mechanisms, processes and procedures established in terms of Chapter 4 of the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000), consult the local community on the preparation or amendment of its plan.

(2) A disaster management plan for a municipal area must—

(a) form an integral part of the municipality's integrated development plan;

(b) anticipate the types of disaster that are likely to occur in the municipal area and their possible effects;

(c) place emphasis on measures that reduce the vulnerability of disaster-prone areas, communities and households;

(d) seek to develop a system of incentives that will promote disaster management in the municipality;

(e) identify the areas, communities or households at risk;

(f) take into account indigenous knowledge relating to disaster management;

(g) promote disaster management research;

(h) identify and address weaknesses in capacity to deal with possible disasters;

(i) provide for appropriate prevention and mitigation strategies;

(j) facilitate maximum emergency preparedness; and

(k) contain contingency plans and emergency procedures in the event of a disaster, providing for—

(i) the allocation of responsibilities to the various role-players and co-ordination in the carrying out of those responsibilities;

(ii) prompt disaster response and relief;

(iii) the procurement of essential goods and services;
(iv) the establishment of strategic communication links;
(v) the dissemination of information; and
(vi) other matters that may be prescribed.

(3) A district municipality and the local municipalities within the area of the district municipality must prepare their disaster management plans after consulting each other.

(4) A municipality must submit a copy of its disaster management plan, and of any amendment to the plan, to the National Centre, the disaster management centre of the relevant province, and, if it is a district municipality or a local municipality, to every municipal disaster management centre within the area of the district municipality concerned.

Responsibilities in event of local disaster

54. (1) Irrespective of whether a local state of disaster has been declared in terms of section 55—

(a) the council of a metropolitan municipality is primarily responsible for the co-ordination and management of local disasters that occur in its area; and

(b) the council of a district municipality, acting after consultation with the relevant local municipality, is primarily responsible for the co-ordination and management of local disasters that occur in its area.

(2) A district municipality and the relevant local municipality may, despite subsection (1)*(b)*, agree that the council of the local municipality assumes primary responsibility for the co-ordination and management of a local disaster that has occurred or may occur in the area of the local municipality.

(3) The municipality having primary responsibility for the co-ordination and management of a local disaster must deal with a local disaster—

(a) in terms of existing legislation and contingency arrangements, if a local state of disaster has not been declared in terms of section 55(1); or

(b) in terms of existing legislation and contingency arrangements as augmented by by-laws or directions made or issued in terms of section 55(2), if a local state of disaster has been declared.

(4) This section does not preclude a national or provincial organ of state, or another municipality or municipal organ of state from providing assistance to a municipality to deal with a local disaster and its consequences.

Declaration of local state of disaster

55. (1) In the event of a local disaster the council of a municipality having primary responsibility for the co-ordination and management of the disaster may, by notice in the provincial gazette, declare a local state of disaster if—

(a) existing legislation and contingency arrangements do not adequately provide for that municipality to deal effectively with the disaster; or

(b) other special circumstances warrant the declaration of a local state of disaster.

(2) If a local state of disaster has been declared in terms of subsection (1), the municipal council concerned may, subject to subsection (3), make by-laws or issue directions, or authorise the issue of directions, concerning—

(a) the release of any available resources of the municipality, including stores, equipment, vehicles and facilities;

(b) the release of personnel of the municipality for the rendering of emergency services;

(c) the implementation of all or any of the provisions of a municipal disaster management plan that are applicable in the circumstances;

(d) the evacuation to temporary shelters of all or part of the population from the disaster-stricken or threatened area if such action is necessary for the preservation of life;

(e) the regulation of traffic to, from or within the disaster-stricken or threatened area;

(f) the regulation of the movement of persons and goods to, from or within the disaster-stricken or threatened area;

(g) the control and occupancy of premises in the disaster-stricken or threatened area;

(h) the provision, control or use of temporary emergency accommodation;

(*i*) the suspension or limiting of the sale, dispensing or transportation of alcoholic beverages in the disaster-stricken or threatened area;

(*j*) the maintenance or installation of temporary lines of communication to, from or within the disaster area;

(*k*) the dissemination of information required for dealing with the disaster;

(*l*) emergency procurement procedures;

(*m*) the facilitation of response and post-disaster recovery and rehabilitation; or

(*n*) other steps that may be necessary to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster.

(3) The powers referred to in subsection (2) may be exercised only to the extent that this is necessary for the purpose of—

(*a*) assisting and protecting the public;

(*b*) providing relief to the public;

(*c*) protecting property;

(*d*) preventing or combating disruption; or

(*e*) dealing with the destructive and other effects of the disaster.

(4) By-laws made in terms of subsection (2) may include by-laws prescribing penalties for any contravention of the by-laws.

(5) A municipal state of disaster that has been declared in terms of subsection (1)—

(*a*) lapses three months after it has so been declared;

(*b*) may be terminated by the council by notice in the provincial gazette before it lapses in terms of paragraph (*a*); and

(*c*) may be extended by the council by notice in the provincial gazette for one month at a time before it lapses in terms of paragraph (*a*) or the existing extension is due to expire.

CHAPTER 6

FUNDING OF POST-DISASTER RECOVERY AND REHABILITATION

Guiding principles

56. (1) This Chapter is subject to sections 16 and 25 of the Public Finance Management Act, 1999, which provide for the use of funds in emergency situations.

(2) When a disaster occurs the following principles apply:

(*a*) National, provincial and local organs of state may financially contribute to response efforts and post-disaster recovery and rehabilitation.

(*b*) The cost of repairing or replacing public sector infrastructure should be borne by the organ of state responsible for the maintenance of such infrastructure.

(3) The Minister may, in the national disaster management framework, prescribe a percentage of the budget, or any aspect of a budget, of a provincial organ of state or a municipal organ of state, as the case may be, as a threshold for accessing additional funding from the national government for response efforts.

(4) Any financial assistance provided by a national, provincial or municipal organ of state in terms of subsection (2)(*a*) must be in accordance with the national disaster management framework and any applicable post-disaster recovery and rehabilitation policy of the relevant sphere of government, and may take into account—

(*a*) whether any prevention and mitigation measures were taken, and if not, the reasons for the absence of such measures;

(*b*) whether the disaster could have been avoided or minimised had prevention and mitigation measures been taken;

(*c*) whether it is reasonable to expect that prevention and mitigation measures should have been taken in the circumstances;

(*d*) whether the damage caused by the disaster is covered by adequate insurance, and if not, the reasons for the absence or inadequacy of insurance cover;

(*e*) the extent of financial assistance available from community, public or other non-governmental support programmes; and

(*f*) the magnitude and severity of the disaster, the financial capacity of the victims of the disaster and their accessibility to commercial insurance.

National contributions to alleviate effects of local and provincial disasters

57. When a municipality or a province in the event of a local or provincial disaster requests the national government to financially contribute to post-disaster recovery and rehabilitation, the following factors may be taken into account:

(a) Whether any prevention and mitigation measures were taken or initiated by the municipality or province, and if not, the reasons for the absence of such measures;

(b) whether the disaster could have been avoided or minimised had prevention and mitigation measures been taken;

(c) whether it is reasonable to expect that prevention and mitigation measures should have been taken or initiated in the circumstances by the municipality or province;

(d) whether the damage caused by the disaster is covered by adequate insurance, and if not, the reasons for the absence or inadequacy of insurance cover; and

(e) the magnitude and severity of the disaster and whether or not available financial resources at local level, or if it is a provincial disaster, at provincial level, are exhausted.

CHAPTER 7

DISASTER MANAGEMENT VOLUNTEERS

Disaster management volunteers

58. (1) A metropolitan or a district municipality may establish a unit of volunteers to participate in disaster management in the municipality.

(2) Any person that meets the prescribed minimum requirements may apply to enrol as a volunteer in the unit of volunteers of a relevant municipality.

(3) *(a)* The National Centre must maintain a register of all volunteers enrolled in a unit of volunteers.

(b) A municipality that has established a unit of volunteers must submit the prescribed particulars of any person that has enrolled in terms of subsection (2) to the National Centre within 21 days of such a person's enrolment.

(4) A unit of volunteers may participate in exercises related to disaster management organised by one or more municipal disaster management centres, a provincial disaster management centre or the National Centre.

(5) The Minister may prescribe the following:

(a) The command structure of a unit of volunteers;

(b) components within a unit of volunteers;

(c) the requirements for, and recruitment of, a volunteer;

(d) the manner in which any member of a unit of volunteers is to be activated and deployed;

(e) the training of volunteers;

(f) the use of equipment by volunteers;

(g) the defraying of expenses incurred by volunteers;

(h) uniforms of volunteers;

(i) insignia to be worn by—

(i) different units of volunteers;

(ii) different components within a unit of volunteers; and

(iii) different positions of command within a unit of volunteers; and

(j) the transfer of a volunteer from one unit of volunteers to another unit of volunteers.

(6) This section does not preclude—

(a) a municipality from calling on persons who are not members of a unit of volunteers to assist the municipality in dealing with a disaster; or

(b) any number of persons from taking reasonable steps to deal with a disaster in an appropriate manner until a municipality takes responsibility for that disaster, and, where appropriate, to continue dealing with the disaster under the control of the municipality.

CHAPTER 8

MISCELLANEOUS

Regulations

59. (1) The Minister may make regulations not inconsistent with this Act—

(a) concerning any matter that—

(i) may or must be prescribed in terms of a provision of this Act; or

(ii) is necessary to prescribe for the effective carrying out of the objects of this Act; and

(b) providing for the payment, out of moneys appropriated by Parliament for this purpose, of compensation to any person, or the dependants of any person, whose death, bodily injury or disablement results from any event occurring in the course of the performance of any function entrusted to such person in terms of this Act.

(2) Regulations referred to in subsection (1)*(b)*—

(a) must—

(i) determine the basis upon which and the conditions subject to which compensation must be paid in terms of such regulations;

(ii) determine the authority responsible for the administration of such regulations;

(b) may, without derogating from the generality of the provisions of subsection (1)*(b)*—

(i) determine the persons who must be regarded as dependants for purposes of such regulations;

(ii) provide for the revision and, in appropriate cases, the discontinuance or reduction of any compensation payable in terms of such regulations;

(iii) prohibit the cession, assignment or attachment of any compensation payable in terms of such regulations, or the right to any such compensation;

(iv) determine that any compensation received in terms of such regulations must not form part of the estate of the recipient, should such estate be sequestrated;

(v) provide that if, in the opinion of the authority referred to in paragraph *(a)*(ii), it is for any reason undesirable to pay the whole amount of any compensation payable in terms of such regulations directly to the person entitled thereto, the said authority may direct that such compensation, or any part thereof, be paid to some other person, on such conditions as to its administration for the benefit of such first-mentioned person or his or her dependants as that authority may determine.

(3) The Minister may, in terms of subsection (1), prescribe a penalty of imprisonment for a period not exceeding six months or a fine for any contravention of, or failure to comply with, a regulation.

(4) Any regulations made by the Minister in terms of subsection (1) must be referred to the National Council of Provinces for purposes of section 146(6) of the Constitution.

Offences

60. (1) A person is guilty of an offence if that person fails to comply with a request made by the National Centre in terms of section 18(1) or by a provincial or municipal disaster management centre in terms of section 32(2)*(a)* or 46(2)*(a)*.

(2) A person convicted of an offence mentioned in subsection (1) is liable on conviction to a fine or to imprisonment not exceeding six months or to both a fine and such imprisonment.

Indemnity

61. The Minister, the National Centre, a provincial or municipal disaster management centre, an employee seconded or designated for the purpose of the National Centre or a

provincial or municipal disaster management centre, a representative of the National Centre or a provincial or municipal disaster management centre, or any other person exercising a power or performing a duty in terms of this Act, is not liable for anything done in good faith in terms of, or in furthering the objects of, this Act.

Scope of assistance by organs of state

62. Where an organ of state provides assistance to another organ of state for purposes of this Act, the officials and equipment of the organ of state providing assistance must, for purposes of conditions of employment, utilisation of equipment and insurance, be deemed to be deployed within the normal area of jurisdiction of the organ of state providing assistance.

Phasing in of certain provisions of Act

63. (1) *(a)* The Minister, by notice in the *Gazette*, may phase in the application of the provisions of this Act which place a financial or administrative burden on organs of state by determining the period within which, and the extent to which, an organ of state must comply with a particular provision of this Act.

(b) The period referred to in paragraph *(a)* may not exceed two years after the commencement of this Act.

(2) A notice in terms of subsection (1), may—

(a) differentiate between different organs of state;

(b) differentiate between provincial organs of state in the different provinces;

(c) apply to a specific municipal organ of state, subject to the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000); and

(d) determine different periods in respect of different organs of state identified in terms of paragraphs *(a)* to *(c)*.

Repeal of Act 67 of 1977

64. (1) *(a)* The Civil Protection Act, 1977 (Act No. 67 of 1977), to the extent that provisions of that Act have not been assigned to a province, is repealed.

(b) Provisions of that Act that were assigned to a province, continue to apply in the province until repealed by the provincial legislature.

(2) Despite the repeal of provisions of the Civil Protection Act, 1977, section 9 of that Act continues to apply to any death, injury or disablement, as described in that section, which occurred before the repeal of that section.

Short title and commencement

65. This Act is called the Disaster Management Act, 2002, and comes into operation on a date determined by the President by proclamation in the *Gazette*.

LABOUR RELATIONS ACT
NO. 66 OF 1995

[View Regulation]

[ASSENTED TO 29 NOVEMBER, 1995]
[DATE OF COMMENCEMENT: 11 NOVEMBER, 1996]

(Unless otherwise indicated)

(English text signed by the President)

This Act has been updated to *Government Gazette* 38512 dated 27 February, 2015.

as amended by

Labour Relations Amendment Act, No. 42 of 1996

Basic Conditions of Employment Act, No. 75 of 1997

Employment Equity Act, No. 55 of 1998

Labour Relations Amendment Act, No. 127 of 1998

Labour Relations Amendment Act, No. 12 of 2002

Intelligence Services Act, No. 65 of 2002
[with effect from 20 February, 2003]

Electronic Communications Security (Pty) Ltd Act, No. 68 of 2002
[with effect from 28 February, 2003]

General Intelligence Laws Amendment Act, No. 52 of 2003
[with effect from 28 February, 2003]

Prevention and Combating of Corrupt Activities Act, No. 12 of 2004
[with effect from 27 April, 2004]

Public Service Amendment Act, No. 30 of 2007
[with effect from 1 April, 2008]

Superior Courts Act, No. 10 of 2013
[with effect from 23 August, 2013, unless otherwise indicated]

General Intelligence Laws Amendment Act, No. 11 of 2013
[with effect from 29 July, 2013]

Labour Relations Amendment Act, No. 6 of 2014

Legal Aid South Africa Act, No. 39 of 2014
[with effect from 1 March, 2015]

proposed amendments by

Labour Relations Amendment Act, No. 6 of 2014 (provisions mentioned below not yet proclaimed)	
Proposed amendments by	*Sections to be amended*
S. 37 (*c*) of Act No. 6 of 2014	Inserts s. 198 (4F) in Act No. 66 of 1995

ACT

To change the law governing labour relations and, for that purpose-

to give effect to section 23 of the Constitution;

to regulate the organisational rights of trade unions;

to promote and facilitate collective bargaining at the workplace and at sectoral level;

to regulate the right to strike and the recourse to lock-out in conformity with the Constitution;

to promote employee participation in decision-making through the establishment of workplace forums;

to provide simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration (for which purpose the Commission for Conciliation, Mediation and Arbitration is established), and through independent alternative dispute resolution services accredited for that purpose;

to establish the Labour Court and Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the Act;

to provide for a simplified procedure for the registration of trade unions and employers' organisations, and to provide for their regulation to ensure democratic practices and proper financial control;

to give effect to the public international law obligations of the Republic relating to labour relations;

to amend and repeal certain laws relating to labour relations; and

to provide for incidental matters.

[Long title amended by s. 43 of Act No. 6 of 2014.]

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CHAPTER I
PURPOSE, APPLICATION AND INTERPRETATION

1. Purpose of this Act.-The purpose of *this Act*1 is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of *this Act*, which are-

(*a*) to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution of the Republic of South Africa, 1996;2

[Para. (*a*) substituted by s. 1 of Act No. 6 of 2014.]

Wording of Sections

(*b*) to give effect to obligations incurred by the *Republic* as a member state of the International Labour Organisation;

(*c*) to provide a framework within which *employees* and their *trade unions*, employers and *employers' organisations* can-

(i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and

(ii) formulate industrial policy; and

(*d*) to promote-

(i) orderly collective bargaining;

(ii) collective bargaining at sectoral level;

(iii) employee participation in decision-making in the workplace; and

(iv) the effective resolution of labour disputes.

Footnotes

1 An italicised word or phrase indicates that the word or phrase is defined in section 213 of this Act.

2 Section 27, which is in the Chapter on Fundamental Rights in the Constitution entrenches the following rights:

"(1) Every person shall have the right to fair labour practices.

(2) Workers shall have the right to form and join trade unions and employers shall have the right to form and join employers' organisations.

(3) Workers and employers shall have the right to organise and bargain collectively.

(4) Workers shall have the right to strike for the purpose of collective bargaining.

(5) Employers' recourse to the lockout for the purpose of collective bargaining shall not be impaired subject to subsection 33 (1)."

(Editorial Note: Wording published as per original *Government Gazette*. It is suggested that section 27, referred to in the footnote above, is intended to be section 23 of the Constitution. Kindly refer to the Constitution of the Republic of South Africa, 1996.)

2. Exclusion from application of this Act.-This Act does not apply to members of-

(*a*) the National Defence Force;

(*b*) the State Security Agency.

[S. 2 amended by s. 40 (1) of Act No. 65 of 2002 (Editorial Note: s. 40 (1) substituted by s. 51 of Act No. 11 of 2013), by s. 26 of Act No. 68 of 2002 (Editorial note: s. 26 repealed by s. 23 of Act No. 52 of 2003), by s. 25 (2) of Act No. 52 of 2003 and substituted by s. 53 of Act No. 11 of 2013.]

Wording of Sections

3. Interpretation of this Act.-Any person applying *this Act* must interpret its provisions-

(*a*) to give effect to its primary objects;

(*b*) in compliance with the Constitution; and

(*c*) in compliance with the public international law obligations of the *Republic*.

CHAPTER II
FREEDOM OF ASSOCIATION AND GENERAL PROTECTIONS

4. Employees' right to freedom of association.-(1) Every *employee* has the right-

(*a*) to participate in forming a *trade union* or federation of *trade unions*; and

(*b*) to join a *trade union*, subject to its constitution.

(2) Every member of a *trade union* has the right, subject to the constitution of that *trade union*-

(*a*) to participate in its lawful activities;

(*b*) to participate in the election of any of its *office-bearers*, *officials* or *trade union representatives*; and

(*c*) to stand for election and be eligible for appointment as an *office-bearer* or *official* and, if elected or appointed, to hold office; and

(*d*) to stand for election and be eligible for appointment as a *trade union representative* and, if elected or appointed, to carry out the functions of a *trade union representative* in terms of *this Act* or any *collective agreement*.

(3) Every member of a *trade union* that is a member of a federation of *trade unions* has the right, subject to

(*a*) to participate in its lawful activities;

(*b*) to participate in the election of any of its *office-bearers* or *officials*; and

(*c*) to stand for election and be eligible for appointment as an *office-bearer* or *official* and, if elected or appointed, to hold office.

5. Protection of employees and persons seeking employment.-(1) No person may discriminate against an *employee* for exercising any right conferred by *this Act*.

(2) Without limiting the general protection conferred by subsection (1), no person may do, or threaten to do, any of the following-

(*a*) require an *employee* or a person seeking employment-

(i) not to be a member of a *trade union* or *workplace forum*;

(ii) not to become a member of a *trade union* or *workplace forum*; or

(iii) to give up membership of a *trade union* or *workplace forum*;

(*b*) prevent an *employee* or a person seeking employment from exercising any right conferred by *this Act* or from participating in any proceedings in terms of *this Act*; or

(*c*) prejudice an *employee* or a person seeking employment because of past, present or anticipated-

(i) membership of a *trade union* or *workplace forum*;

(ii) participation in forming a *trade union* or federation of *trade unions* or establishing a *workplace forum*;

(iii) participation in the lawful activities of a *trade union*, federation of *trade unions* or *workplace forum*;

(iv) failure or refusal to do something that an employer may not lawfully permit or require an *employee* to do;

(v) disclosure of information that the *employee* is lawfully entitled or required to give to another person;

(vi) exercise of any right conferred by *this Act*; or

(vii) participation in any proceedings in terms of *this Act*.

(3) No person may advantage, or promise to advantage, an *employee* or a person seeking employment in exchange for that person not exercising any right conferred by *this Act* or not participating in any proceedings in terms of *this Act*. However, nothing in this section precludes the parties to a *dispute* from concluding an agreement to settle that *dispute*.

(4) A provision in any contract, whether entered into before or after the commencement of *this Act*, that directly or indirectly contradicts or limits any provision of section 4, or this section is invalid, unless the contractual provision is permitted by *this Act*.

6. Employers' right to freedom of association.-(1) Every employer has the right-

(*a*) to participate in forming an *employers' organisation* or a federation of *employers' organisations*; and

(*b*) to join an *employers' organisation*, subject to its constitution.

(2) Every member of an *employers' organisation* has the right, subject to the constitution of that *employers' organisation*-

(*a*) to participate in its lawful activities;

(*b*) to participate in the election of any of its *office-bearers* or *officials*; and

(*c*) if-

(i) a natural person, to stand for election and be eligible for appointment as an *office-bearer* or *official* and, if elected or appointed, to hold office; or

(ii) a juristic person, to have a representative stand for election, and be eligible for appointment, as an *office-bearer* or *official* and, if elected or appointed, to hold office.

(3) Every member of an *employers' organisation* that is a member of a federation of *employers' organisations* has the right, subject to the constitution of that federation-

(*a*) to participate in its lawful activities;

(*b*) to participate in the election of any of its *office-bearers* or *officials*; and

(*c*) if-

(i) a natural person, to stand for election and be eligible for appointment as an *office-bearer* or *official* and, if elected or appointed, to hold office;

(ii) a juristic person, to have a representative stand for election, and be eligible for appointment, as an *office-bearer* or *official* and, if elected or appointed, to hold office.

7. Protection of employers' rights.-(1) No person may discriminate against an employer for exercising any right conferred by *this Act*.

(2) Without limiting the general protection conferred by subsection (1), no person may do, or threaten to do, any of the following-

(*a*) require an employer-

(i) not to be a member of an *employers' organisation*;

(ii) not to become a member of an *employers' organisation*; or

(iii) to give up membership of an *employers' organisation*;

(*b*) prevent an employer from exercising any right conferred by *this Act* or from participating in any proceedings in terms of *this Act*; or

(*c*) prejudice an employer because of past, present or anticipated-

(i) membership of an *employers' organisation*;

(ii) participation in forming an *employers' organisation* or a federation of *employers' organisations*;

(iii) participation in the lawful activities of an *employers' organisation* or a federation of *employers' organisations*;

(iv) disclosure of information that the employer is lawfully entitled or required to give to another person;

(v) exercise of any right conferred by *this Act*; or

(vi) participation in any proceedings in terms of *this Act*.

(3) No person may advantage, or promise to advantage, an employer in exchange for that employer not exercising any right conferred by *this Act* or not participating in any proceedings in terms of *this Act*. However, nothing in this section precludes the parties to a *dispute* from concluding an agreement to settle that *dispute*.

(4) A provision in any contract, whether entered into before or after the commencement of *this Act*, that directly or indirectly contradicts or limits any provision of section 6, or this section, is invalid, unless the contractual provision is permitted by *this Act*.

8. Rights of trade unions and employers' organisations.-Every *trade union* and every *employers' organisation* has the right-

(*a*) subject to the provisions of Chapter VI-

(i) to determine its own constitution and rules; and

(ii) to hold elections for its *office-bearers*, *officials* and representatives;

(*b*) to plan and organise its administration and lawful activities;

(*c*) to participate in forming a federation of *trade unions* or a federation of *employers' organisations*;

(*d*) to join a federation of *trade unions* or a federation of *employers' organisations*, subject to its constitution, and to participate in its lawful activities; and

(*e*) to affiliate with, and participate in the affairs of, any international workers' organisation or

international employers' organisation or the International Labour Organisation, and contribute to, or receive financial assistance from, those organisations.

9. Procedure for disputes[3]**.**-(1) If there is a *dispute* about the interpretation or application of any provision of this Chapter, any party to the *dispute* may refer the *dispute* in writing to-

(*a*) a *council*, if the parties to the *dispute* fall within the *registered scope* of that *council*; or

(*b*) the Commission, if no *council* has jurisdiction.

(2) The party who refers the *dispute* must satisfy the *council* or the Commission that a copy of the referral has been *served* on all the other parties to the *dispute*.

(3) The *council* or the Commission must attempt to resolve the *dispute* through conciliation.

(4) If the *dispute* remains unresolved, any party to the *dispute* may refer it to the Labour Court for adjudication.

Footnotes

3 See flow diagram No. 1 in Schedule 4.

10. Burden of proof.-In any proceedings-

(*a*) a party who alleges that a right or protection conferred by this Chapter has been infringed must prove the facts of the conduct; and

(*b*) the party who engaged in that conduct must then prove that the conduct did not infringe any provision of this Chapter.

CHAPTER III
COLLECTIVE BARGAINING

Part A-Organisational Rights

11. Trade union representativeness.-In this Part, unless otherwise stated, "representative *trade union*" means a registered *trade union*, or two or more registered *trade unions* acting jointly, that are sufficiently representative of the *employees* employed by an employer in a *workplace*.

12. Trade union access to workplace.-(1) Any *office-bearer* or *official* of a representative *trade union is* entitled to enter the employer's premises in order to recruit members or communicate with members, or otherwise serve their interests.

(2) A representative *trade union is* entitled to hold meetings with *employees* outside their *working hours* at the employer's premises.

(3) The members of a representative *trade union* are entitled to vote at the employer's premises in any election or ballot contemplated by that *trade union's* constitution.

(4) The rights conferred by this section are subject to any conditions as to time and place that are reasonable and necessary to safeguard life or property or to prevent the undue disruption of work.

13. Deduction of trade union subscriptions or levies.-(1) Any *employee* who is a member of a representative *trade union* may authorise the employer in writing to deduct subscriptions or levies payable to that *trade union* from the *employee's* wages.

(2) An employer who receives an authorisation in terms of subsection (1) must begin making the authorised deduction as soon as possible and must remit the amount deducted to the representative *trade union* by not later than the 15th day of the month first following the date each deduction was made.

(3) An *employee* may revoke an authorisation given in terms of subsection (1) by giving the employer and the representative *trade union* one month's written notice or, if the *employee* works in the *public service*, three months' written notice.

(4) An employer who receives a notice in terms of subsection (3) must continue to make the authorised deduction until the notice period has expired and then must stop making the deduction.

(5) With each monthly remittance, the employer must give the representative *trade union*-

(*a*) a list of the names of every member from whose wages the employer has made the deductions that are included in the remittance;

(*b*) details of the amounts deducted and remitted and the period to which the deductions relate; and

(*c*) a copy of every notice of revocation in terms of subsection (3).

14. Trade union representatives.-(1) In this section, "representative *trade union*" means a registered *trade union*, or two or more registered *trade unions* acting jointly, that have as members the majority of the *employees* employed by an employer in a *workplace*.

(2) In any *workplace* in which at least 10 members of a representative *trade union* are employed, those members are entitled to elect from among themselves-

(*a*) if there are 10 members of the *trade union* employed in the *workplace*, one *trade union representative*;

(*b*) if there are more than 10 members of the *trade union* employed in the *work place*, two *trade union representatives*;

(*c*) if there are more than 50 members of the *trade union* employed in the *workplace*, two *trade union representatives* for the first 50 members, plus a further one *trade union representative* for every additional 50 members up to a maximum of seven *trade union representatives*;

(*d*) if there are more than 300 members of the *trade union* employed in the *workplace*, seven *trade union representatives* for the first 300 members, plus one additional *trade union representative* for every 100 additional members up to a maximum of 10 *trade union representatives*;

(*e*) if there are more than 600 members of the *trade union* employed in the *workplace*, 10 *trade union representatives* for the first 600 members, plus one additional *trade union representative* for every 200 additional members up to a maximum of 12 *trade union representatives*; and

(*f*) if there are more than 1 000 members of the *trade union* employed in the *workplace*, 12 *trade union representatives* for the first 1 000 members, plus one additional *trade union representative* for every 500 additional members up to a maximum of *20 trade union representatives*.

(3) The constitution of the representative *trade union* governs the nomination, election, terms of office and removal from office of a *trade union representative*.

(4) A *trade union representative* has the right to perform the following functions-

(*a*) at the request of an *employee* in the *workplace*, to assist and represent the *employee* in grievance and disciplinary proceedings;

(*b*) to monitor the employer's compliance with the workplace-related provisions of *this Act*, any law regulating terms and conditions of employment and any *collective agreement* binding on the employer;

(*c*) to report any alleged contravention of the workplace-related provisions of *this Act*, any law regulating terms and conditions of employment and any *collective agreement* binding on the employer to-

(i) the employer;

(ii) the representative *trade union*; and

(iii) any responsible authority or agency; and

(*d*) to perform any other function agreed to between the representative *trade union* and the employer.

(5) Subject to reasonable conditions, a *trade union representative* is entitled to take reasonable time off with pay during *working hours*-

(*a*) to perform the functions of a *trade union representative*; and

(*b*) to be trained in any subject relevant to the performance of the functions of a *trade union representative*.

15. Leave for trade union activities.-(1) An *employee* who is an *office-bearer* of a representative *trade union*, or of a federation of *trade unions* to which the representative *trade union* is affiliated, is entitled to take reasonable leave during w*orking hours* for the purpose of performing the functions of that office.

(2) The representative *trade union* and the employer may agree to the number of days of leave, the number of days of paid leave and the conditions attached to any leave.

(3) An arbitration award in terms of section 21 (7) regulating any of the matters referred to in subsection (2) remains in force for 12 months from the date of the award.

16. Disclosure of information.-(1) For the purposes of this section, "representative *trade union*" means a registered *trade union*, or two or more registered *trade unions* acting jointly, that have as members the majority of the *employees* employed by an employer in a *workplace*.

(2) Subject to subsection (5), an employer must disclose to a *trade union representative* all relevant information that will allow the *trade union representative* to perform effectively the functions referred to in section 14 (4).

(3) Subject to subsection (5), whenever an employer is consulting or bargaining with a representative *trade union*, the employer must disclose to the representative *trade union* all relevant information that will allow the representative *trade union* to engage effectively in consultation or collective bargaining.

(4) The employer must notify the *trade union representative* or the representative *trade union* in writing if any information disclosed in terms of subsection (2) or (3) is confidential.

(5) An employer is not required to disclose information-

(*a*) that is legally privileged;

(*b*) that the employer cannot disclose without contravening a prohibition imposed on the employer by any law or order of any court;

(*c*) that is confidential and, if disclosed, may cause substantial harm to an *employee* or the employer; or

(*d*) that is private personal information relating to an *employee*, unless that *employee* consents to the disclosure of that information.

(6) If there is a *dispute* about what information is required to be disclosed in terms of this section, any party to the *dispute* may refer the *dispute* in writing to the Commission.

(7) The party who refers the *dispute* to the Commission must satisfy it that a copy of the referral has been *served* on all the other parties to the *dispute*.

(8) The Commission must attempt to resolve the *dispute* through conciliation.

(9) If the *dispute* remains unresolved, any party to the *dispute* may request that the *dispute* be resolved through arbitration.

(10) In any *dispute* about the disclosure of information contemplated in subsection (6), the commissioner must first decide whether or not the information is relevant.

(11) If the commissioner decides that the information is relevant and if it is information contemplated in subsection (5) (*c*) or (*d*), the commissioner must balance the harm that the disclosure is likely to cause to an *employee* or employer against the harm that the failure to disclose the information is likely to cause to the ability of a *trade union representative* to perform effectively the functions referred to in section 14 (4) or the ability of a representative *trade union* to engage effectively in consultation or collective bargaining.

(12) If the commissioner decides that the balance of harm favours the disclosure of the information, the commissioner may order the disclosure of the information on terms designed to limit the harm likely to be caused to the *employee* or employer.

(13) When making an order in terms of subsection (12), the commissioner must take into account any breach of confidentiality in respect of information disclosed in terms of this section at that *workplace* and may refuse to order the disclosure of the information or any other confidential information which might otherwise be disclosed for a period specified in the arbitration award.

(14) In any *dispute* about an alleged breach of confidentiality, the commissioner may order that the right to disclosure of information in that *workplace* be withdrawn for a period specified in the arbitration award.

17. Restricted rights in the domestic sector.-(1) For the purposes of this section, "domestic sector" means the employment of *employees* engaged in domestic work in their employers' homes or on the property on which the home is situated.

(2) The rights conferred on representative *trade unions* by this Part in so far as they apply to the domestic sector are subject to the following limitations-

(*a*) the right of access to the premises of the employer conferred by section 12 on an *office-bearer* or *official* of a representative *trade union* does not include the right to enter the home of the employer,

unless the employer agrees; and

(*b*) the right to the disclosure of information conferred by section 16 does not apply in the domestic sector.

18. Right to establish thresholds of representativeness.-(1) An employer and a registered *trade union* whose members are a majority of the *employees* employed by that employer in a *workplace*, or the parties to a *bargaining council*, may conclude a *collective agreement* establishing a threshold of representativeness required in respect of one or more of the organisational rights referred to in sections 12, 13 and 15.

(2) A *collective agreement* concluded in terms of subsection (1) is not binding unless the thresholds of representativeness in the *collective agreement* are applied equally to any registered *trade union* seeking any of the organisational rights referred to in that subsection.

19. Certain organisational rights for trade union party to a council.-Registered *trade unions* that are parties to a *council* automatically have the rights contemplated in sections 12 and 13 in respect of all *workplaces* within the *registered scope* of the *council* regardless of their representativeness in any particular *workplace*.

20. Organisational rights in collective agreements.-Nothing in this Part precludes the conclusion of a *collective agreement* that regulates organisational rights.

21. Exercise of rights conferred by this Part4.-(1) Any registered *trade union* may notify an employer in writing that it seeks to exercise one or more of the rights conferred by this Part in a *workplace*.

(2) The notice referred to in subsection (1) must be accompanied by a certified copy of the *trade union's* certificate of registration and must specify-

(*a*) the *workplace* in respect of which the *trade union* seeks to exercise the rights;

(*b*) the representativeness of the *trade union* in that *workplace*, and the facts relied upon to demonstrate that it is a representative *trade union*; and

(*c*) the rights that the *trade union* seeks to exercise and the manner in which it seeks to exercise those rights.

(3) Within 30 days of receiving the notice, the employer must meet the registered *trade union* and endeavour to conclude a *collective agreement* as to the manner in which the *trade union* will exercise the rights in respect of that *workplace*.

(4) If a *collective agreement* is not concluded, either the registered *trade union* or the employer may refer the *dispute* in writing to the Commission.

(5) The party who refers the *dispute* to the Commission must satisfy it that a copy of the referral has been *served* on the other party to the *dispute*.

(6) The Commission must appoint a commissioner to attempt to resolve the *dispute* through conciliation.

(7) If the *dispute* remains unresolved, either party to the *dispute* may request that the *dispute* be resolved through arbitration.

(8) If the unresolved *dispute* is about whether or not the registered *trade union* is a representative *trade union*, the commissioner-

(*a*) must seek-

(i) to minimise the proliferation of *trade union* representation in a single *workplace* and, where possible, to encourage a system of a representative *trade union* in a *workplace*; and

(ii) to minimise the financial and administrative burden of requiring an employer to grant organisational rights to more than one registered *trade union*;

(*b*) must consider-

(i) the nature of the *workplace*;

(ii) the nature of the one or more organisational rights that the registered *trade union* seeks to exercise;

(iii) the nature of the *sector* in which the *workplace is* situated;

[Sub-para. (iii) amended by s. 2 (*a*) of Act No. 6 of 2014.]

(iv) the organisational history at the *workplace* or any other *workplace* of the employer; and

(v) the composition of the work-force in the *workplace* taking into account the extent to which there are *employees* assigned to work by temporary employment services, *employees* employed on fixed term contracts, part-time *employees* or *employees* in other categories of non-standard employment; and;

[Sub-par. (v) added by s. 2 (*a*) of Act No. 6 of 2014.]

(*c*) may withdraw any of the organisational rights conferred by this Part and which are exercised by any other registered *trade union* in respect of that *workplace*, if that other *trade union* has ceased to be a representative *trade union*.

(8A) Subject to the provisions of subsection (8), a commissioner may in an arbitration conducted in terms of subsection (7) grant a registered *trade union* that does not have as members the majority of *employees* employed by an employer in a *workplace*-

(*a*) the rights referred to in section 14, despite any provision to the contrary in that section, if-

(i) the *trade union* is entitled to all of the rights referred to in sections 12, 13 and 15 in that *workplace*; and

(ii) no other *trade union* has been granted the rights referred to in section 14 in that *workplace*.

(*b*) the rights referred to in section 16, despite any provision to the contrary in that section, if-

(i) the *trade union* is entitled to all of the rights referred to in sections 12, 13, 14 and 15 in that *workplace*; and

(ii) no other *trade union* has been granted the rights referred to in section 16 in that *workplace.*

[Sub-s. (8A) inserted by s. 2 (*b*) of Act No. 6 of 2014.]

(8B) A right granted in terms of subsection (8A) lapses if the *trade union* concerned is no longer the most representative *trade union* in the *workplace*.

[Sub-s. (8B) inserted by s. 2 (*b*) of Act No. 6 of 2014.]

(8C) Subject to the provisions of subsection (8), a commissioner may in an arbitration conducted in terms of subsection (7) grant the rights referred to in sections 12, 13 or 15 to a registered *trade union*, or two or more registered trade unions acting jointly, that does not meet thresholds of representativeness established by a *collective agreement* in terms of section 18, if-

(*a*) all parties to the *collective agreement* have been given an opportunity to participate in the arbitration proceedings; and

(*b*) the *trade union*, or *trade unions* acting jointly, represent a significant interest, or a substantial number of *employees*, in the *workplace*.

[Sub-s. (8C) inserted by s. 2 (*b*) of Act No. 6 of 2014.]

(8D) Subsection (8C) applies to any dispute which is referred to the Commission after the commencement of the Labour Relations Amendment Act, 2014, irrespective of whether the collective agreement contemplated in subsection (8C) was concluded prior to such commencement date.

[Sub-s. (8D) inserted by s. 2 (*b*) of Act No. 6 of 2014.]

(9) In order to determine the membership or support of the registered *trade union*, the commissioner may-

(*a*) make any necessary inquiries;

(*b*) where appropriate, conduct a ballot of the relevant *employees*; and

(*c*) take into account any other relevant information.

(10) The employer must co-operate with the commissioner when the commissioner acts in terms of subsection (9), and must make available to the commissioner any information and facilities that are reasonably necessary for the purposes of that subsection.

(11) An employer who alleges that a *trade union* is no longer a representative *trade union* may apply to the Commission to withdraw any of the organisational rights conferred by this Part, in which case the provisions of subsections (5) to (10) apply, read with the changes required by the context.

(12) If a *trade union* seeks to exercise the rights conferred by Part A in respect of *employees* of a temporary employment service, it may seek to exercise those rights in a *workplace* of either the temporary employment service or one or more clients of the temporary employment service, and if it exercises rights in a *workplace* of a client of the temporary employment service, any reference in Chapter III to the employer's premises must be read as including

the client's premises.

[Sub-s. (12) added by s. 2 (*c*) of Act No. 6 of 2014.]

Footnotes

4 See flow diagram No. 2 in Schedule 4.

22. Disputes about organisational rights.-(1) Any party to a *dispute* about the interpretation or application of any provision of this Part, other than a *dispute* contemplated in section 21, may refer the *dispute* in writing to the Commission.

(2) The party who refers a *dispute* to the Commission must satisfy it that a copy of the referral has been *served* on all the other parties to the *dispute*.

(3) The Commission must attempt to resolve the *dispute* through conciliation.

(4) If the *dispute* remains unresolved, any party to the *dispute* may request that the *dispute* be resolved through arbitration as soon as may be practicable.

(5) An arbitration award in terms of Part A may be made binding on the employer and in addition to-

(*a*) the extent that it applies to the *employees* of a temporary employment service, a client of the temporary employment service for whom an *employee* covered by the award is assigned to work; and

(*b*) any person other than the employer who controls access to the *workplace* to which the award applies, if that person has been given an opportunity to participate in the arbitration proceedings.

[Sub-s. (5) added by s. 3 of Act No. 6 of 2014.

Part B-Collective Agreements

23. Legal effect of collective agreement.-(1) A *collective agreement* binds-

(*a*) the parties to the *collective agreement*;

(*b*) each party to the *collective agreement* and the members of every other party to the *collective agreement*, in so far as the provisions are applicable between them;

(*c*) the members of a registered *trade union* and the employers who are members of a registered *employers' organisation* that are party to the *collective agreement* if the *collective agreement* regulates-

(i) terms and conditions of employment; or

(ii) the conduct of the employers in relation to their *employees* or the conduct of the *employees* in relation to their employers;

(*d*) *employees* who are not members of the registered *trade union* or *trade unions* party to the agreement if-

(i) the employees are identified in the agreement;

(ii) the agreement expressly binds the employees; and

(iii) that *trade union* or those *trade unions* have as their members the majority of *employees* employed by the employer in the *workplace*.

(2) A *collective agreement* binds for the whole period of the *collective agreement* every person bound in terms of subsection (1) (c) who was a member at the time it became binding, or who becomes a member after it became binding, whether or not that person continues to be a member of the registered *trade union* or registered *employers' organisation* for the duration of the *collective agreement*.

(3) Where applicable, a *collective agreement* varies any contract of employment between an *employee* and employer who are both bound by the *collective agreement*.

(4) Unless the *collective agreement* provides otherwise, any party to a *collective agreement* that is concluded for an indefinite period may terminate the agreement by giving reasonable notice in writing to the other parties.

[Sub-s. (4) substituted by s. 1 of Act No. 12 of 2002.]

Wording of Sections

24. Disputes about collective agreements.-(1) Every *collective agreement* excluding an agency shop agreement concluded in terms of section 25 or a closed shop agreement concluded in terms of section 26 or a settlement agreement contemplated in either section 142A or 158 (1) (*c*), must provide for a procedure to resolve any *dispute* about the interpretation or application of the *collective agreement*. The procedure must first require the parties to attempt to resolve the *dispute* through conciliation and, if the *dispute* remains unresolved, to resolve it through arbitration.

[Sub-s. (1) substituted by s. 2 (*a*) of Act No. 12 of 2002.]

Wording of Sections

(2) If there is a *dispute* about the interpretation or application of a *collective agreement*, any party to the *dispute* may refer the *dispute* in writing to the Commission if-

(*a*) the *collective agreement* does not provide for a procedure as required by subsection (1);

(*b*) the procedure provided for in the *collective agreement* is not operative; or

(*c*) any party to the *collective agreement* has frustrated the resolution of the *dispute* in terms of the *collective agreement*.

(3) The party who refers the *dispute* to the Commission must satisfy it that a copy of the referral has been *served* on all the other parties to the *dispute*.

(4) The Commission must attempt to resolve the *dispute* through conciliation.

(5) If the *dispute* remains unresolved, any party to the *dispute* may request that the *dispute* be resolved through arbitration.5

(6) If there is a *dispute* about the interpretation or application of an agency shop agreement concluded in terms of section 25 or a closed shop agreement concluded in terms of section 26, any party to the *dispute* may refer the *dispute* in writing to the Commission, and subsections (3) to (5) will apply to that dispute.6

(7) Any person bound by an arbitration award about the interpretation or application of section 25 (3) (*c*) and (*d*) or section 26 (3) (*d*) may appeal against that award to the Labour Court.

(8) If there is a *dispute* about the interpretation or application of a settlement agreement contemplated in either section 142A or 158 (1) (*c*), a party may refer the *dispute* to a *council* or the Commission and subsections (3) to (5), with the necessary changes, apply to that *dispute*.

[Sub-s. (8) added by s. 2 (*b*) of Act No. 12 of 2002.]

Footnotes

5 See flow diagram No. 3 in Schedule 4.

6 See flow diagram No. 4 in Schedule 4.

25. Agency shop agreements.-(1) A representative *trade union* and an employer or *employers' organisation* may conclude a *collective agreement*, to be known as an agency shop agreement, requiring the employer to deduct an agreed agency fee from the wages of *employees* identified in the agreement who are not members of the *trade union* but are eligible for membership thereof.

[Sub-s. (1) substituted by s. 1 (*a*) of Act No. 42 of 1996.]

Wording of Sections

(2) For the purposes of this section, "representative trade union" means a registered *trade union*, or two or more registered *trade unions* acting jointly, whose members are a majority of the *employees* employed-

(*a*) by an employer in a *workplace*; or

(*b*) by the members of an *employers' organisation* in a *sector* and *area* in respect of which the agency shop agreement applies.

(3) An agency shop agreement is binding only if it provides that-

(*a*) *employees* who are not members of the representative *trade union* are not compelled to become members of that *trade union*;

(*b*) the agreed agency fee must be equivalent to, or less than-

(i) the amount of the subscription payable by the members of the representative *trade union*;

(ii) if the subscription of the representative *trade union* is calculated as a percentage of an *employee's* salary, that percentage; or

(iii) if there are two or more registered *trade unions* party to the agreement, the highest amount of the subscription that would apply to an *employee*;

(*c*) the amount deducted must be paid into a separate account administered by the representative *trade union*; and

(*d*) no agency fee deducted may be-

(i) paid to a political party as an affiliation fee;

(ii) contributed in cash or kind to a political party or a person standing for election to any political office; or

(iii) used for any expenditure that does not advance or protect the socio-economic interests of *employees*.

[Para. (*d*) amended by s. 1 (*b*) of Act No. 42 of 1996.]

Wording of Sections

(4) (*a*) Despite the provisions of any law or contract, an employer may deduct the agreed agency fee from the wages of an *employee* without the *employee's* authorisation.

(*b*) Despite subsection (3) (*c*) a conscientious objector may request the employer to pay the amount deducted from that employee's wages into a fund administered by the Department of Labour.

(5) The provisions of sections 98 and 100 (*b*) and (*c*) apply, read with the changes required by the context, to the separate account referred to in subsection (3) (*c*).

(6) Any person may inspect the *auditor's* report, in so far as it relates to an account referred to in subsection (3) (*c*), in the *registrar's* office.

(7) The *registrar* must provide a certified copy of, or extract from, any of the documents referred to in subsection (6) to any person who has paid the prescribed fees.

(8) An employer or *employers' organisation* that alleges that a *trade union* is no longer a representative *trade union* in terms of subsection (1) must give the *trade union* written notice of the allegation, and must allow the *trade union* 90 days from the date of the notice to establish that it is a representative *trade union*.

(9) If, within the 90-day period, the *trade union* fails to establish that it is a representative *trade union*, the employer must give the *trade union* and the *employees* covered by the agency shop agreement 30 days' notice of termination, after which the agreement will terminate.

(10) If an agency shop agreement is terminated, the provisions of subsection (3) (*c*) and (*d*) and (5) apply until the money in the separate account is spent.

26. Closed shop agreements.-(1) A representative *trade union* and an employer or *employers' organisation* may conclude a *collective agreement*, to be known as a closed shop agreement, requiring all *employees* covered by the agreement to be members of the *trade union*.

(2) For the purposes of this section, "representative trade union" means a registered *trade union*, or two or more registered *trade unions* acting jointly, whose members are a majority of the *employees* employed-

(*a*) by an employer in a workplace; or

(*b*) by the members of an *employers' organisation* in a *sector* and *area* in respect of which the closed shop agreement applies.

(3) A closed shop agreement is binding only if-

(*a*) a ballot has been held of the *employees* to be covered by the agreement;

(*b*) two thirds of the *employees* who voted have voted in favour of the agreement;

(*c*) there is no provision in the agreement requiring membership of the representative *trade union* before employment commences; and

(*d*) it provides that no membership subscription or levy deducted may be-

(i) paid to a political party as an affiliation fee;

(ii) contributed in cash or kind to a political party or a person standing for election to any political office; or

(iii) used for any expenditure that does not advance or protect the socio-economic interests of *employees*.

[Para. (*d*) amended by s. 2 of Act No. 42 of 1996.]

Wording of Sections

(4) Despite subsection (3) (*b*), a closed shop agreement contemplated in subsection (2) (*b*) may be concluded between a registered *trade union* and a registered *employers' organisation* in respect of a *sector* and *area* to become binding in every workplace in which-

(*a*) a ballot has been held of the *employees* to be covered by the agreement; and

(*b*) two thirds of the *employees* who voted have voted in favour of the agreement.

(5) No *trade union* that is party to a closed shop agreement may refuse an *employee* membership or expel an *employee* from the *trade union* unless-

(*a*) the refusal or expulsion is in accordance with the *trade union's* constitution; and

(*b*) the reason for the refusal or expulsion is fair, including, but not limited to, conduct that undermines the *trade union's* collective exercise of its rights.

(6) It is not unfair to dismiss an *employee*-

(*a*) for refusing to join a *trade union* party to a closed shop agreement;

(*b*) who is refused membership of a *trade union* party to a closed shop agreement if the refusal is in accordance with the provisions of subsection (5); or

(*c*) who is expelled from a trade union party to a closed shop agreement if the expulsion is in accordance with the provisions of subsection (5).

(7) Despite subsection (6)-

(*a*) the *employees* at the time a closed shop agreement takes effect may not be dismissed for refusing to join a *trade union* party to the agreement; and

(*b*) *employees* may not be dismissed for refusing to join a *trade union* party to the agreement on grounds of conscientious objection.

(8) The *employees* referred to in subsection (7) may be required by the closed shop agreement to pay an agreed agency fee, in which case the provisions of section 25 (3) (*b*), (*c*) and (*d*) and (4) to (7) apply.

(9) If the Labour Court decides that a *dismissal* is unfair because the refusal of membership of or the expulsion from a *trade union* party to a closed shop agreement was unfair, the provisions of Chapter VIII apply, except that any order of compensation in terms of that Chapter must be made against the *trade union*.

(10) A registered *trade union* that represents a significant interest in, or a substantial number of, the *employees* covered by a closed shop agreement may notify the parties to the agreement of its intention to apply to become a party to the agreement and, within 30 days of the notice, the employer must convene a meeting of the parties and the registered *trade union* in order to consider the application.

(11) If the parties to a closed shop agreement do not admit the registered *trade union* as a party, the *trade union* may refer the *dispute* in writing to the Commission.

(12) The registered *trade union* must satisfy the Commission that a copy of the referral has been *served* on all the parties to the closed shop agreement.

(13) The Commission must attempt to resolve the *dispute* through conciliation.

(14) If the *dispute* remains unresolved, any party to the *dispute* may refer it to the Labour Court for adjudication.

(15) The representative *trade union* must conduct a ballot of the *employees* covered by the closed shop agreement to determine whether the agreement should be terminated if-

(*a*) one third of the *employees* covered by the agreement sign a petition calling for the termination of the agreement; and

(*b*) three years have elapsed since the date on which the agreement commenced or the last ballot was conducted in terms of this section.

(16) If a majority of the *employees* who voted, have voted to terminate the closed shop agreement, the agreement will be terminated.

(17) Unless a *collective agreement* provides otherwise, the ballot referred to in subsections (3) (*a*) and (15) must be conducted in accordance with the guidelines published by the Commission.

PART C-Bargaining Councils

27. Establishment of bargaining councils.-(1) One or more registered *trade unions* and one or more registered *employers' organisations* may establish a *bargaining council* for a *sector* and *area* by-

(*a*) adopting a constitution that meets the requirements of section 30; and

(*b*) obtaining registration of the *bargaining council* in terms of section 29.

(2) The State may be a party to any *bargaining council* established in terms of this section if it is an employer in the *sector* and *area* in respect of which the *bargaining council* is established.

(3) If the State is a party to a *bargaining council* in terms of subsection (2), any reference to a registered *employers' organisation* includes a reference to the State as a party.

(4) A *bargaining council* may be established for more than one *sector*.

[Sub-s. (4) added by s. 3 of Act No. 42 of 1996.]

28. Powers and functions of bargaining council.-(1) The powers and functions of a *bargaining council* in relation to its *registered scope* include the following-

(*a*) to conclude *collective agreements*;

(*b*) to enforce those *collective agreements*;

(*c*) to prevent and resolve labour *disputes*;

(*d*) to perform the dispute resolution functions referred to in section 51;

(*e*) to establish and administer a fund to be used for resolving *disputes*;

(*f*) to promote and establish training and education schemes;

(*g*) to establish and administer pension, provident, medical aid, sick pay, holiday, unemployment and training schemes or funds or any similar schemes or funds for the benefit of one or more of the parties to the *bargaining council* or their members;

(*h*) to develop proposals for submission to *NEDLAC* or any other appropriate forum on policy and legislation that may affect the *sector* and *area*;

(*i*) to determine by *collective agreement* the matters which may not be an *issue in dispute* for the purposes of a *strike* or a *lock-out* at the workplace;

(*j*) to confer on *workplace forums* additional matters for consultation;

(*k*) to provide industrial support services within the sector; and

[Para. (*k*) added by s. 3 (*b*) of Act No. 12 of 2002.]

(*l*) to extend the services and functions of the *bargaining council* to workers in the informal sector and home workers.

[Para. (*l*) added by s. 3 (*b*) of Act No. 12 of 2002.]

(2) From the date on which the Labour Relations Amendment Act, 1998, comes into operation, the provisions of the laws relating to pension, provident or medical aid schemes or funds must be complied with in establishing any pension, provident or medical aid scheme or fund in terms of subsection (1) (*g*).

[Sub-s. (2) added by s. 1 of Act No. 127 of 1998.]

(3) The laws relating to pension, provident or medical aid schemes or funds will apply in respect of any pension, provident or medical aid scheme or fund established in terms of subsection (1) (*g*) after the coming into operation of the Labour Relations Amendment Act, 1998.

[Sub-s. (3) added by s. 1 of Act No. 127 of 1998.]

29. Registration of bargaining councils.-(1) The parties referred to in section 27 may apply for registration of a *bargaining council* by submitting to the *registrar*-

(*a*) the *prescribed* form that has been properly completed;

(*b*) a copy of its constitution; and

(*c*) any other information that may assist the *registrar* to determine whether or not the *bargaining council* meets the requirements for registration.

(2) The *registrar* may require further information in support of the application.

(3) As soon as practicable after receiving the application, the *registrar* must publish a notice containing the material particulars of the application in the *Government Gazette* and send a copy of the notice to *NEDLAC*. The notice must inform the general public that they-

(*a*) may object to the application on any of the grounds referred to in subsection (4); and

(*b*) have 30 days from the date of the notice to *serve* any objection on the *registrar* and a copy on the applicant.

[Sub-s. (3) substituted by s. 4 (*a*) of Act No. 12 of 2002.]

Wording of Sections

(4) Any person who objects to the application must satisfy the *registrar* that a copy of the objection has been *served* on the applicant and that the objection is on any of the following grounds-

(*a*) the applicant has not complied with the provisions of this section;

(*b*) the *sector* and *area* in respect of which the application is made is not appropriate;

(*c*) the applicant is not sufficiently representative in the *sector* and *area* in respect of which the application is made.

(5) The *registrar* may require further information in support of the objection.

(6) The applicant may respond to an objection within 14 days of the expiry of the period referred to in subsection (3) (*b*), and must satisfy the *registrar* that a copy of that response has been *served* on the person who objected.

(7) The *registrar*, as soon as practicable, must send the application and any objections, responses and further information to *NEDLAC* to consider.

(8) *NEDLAC*, within 90 days of receiving the documents from the *registrar*, must-

(*a*) consider the appropriateness of the *sector* and *area* in respect of which the application is made;

(*b*) demarcate the appropriate *sector* and *area* in respect of which the *bargaining council* should be registered; and

(*c*) report to the *registrar* in writing.

(9) If *NEDLAC* fails to agree on a demarcation as required in subsection (8) (*b*), the *Minister* must demarcate the appropriate *sector* and *area* and advise the *registrar*.

(10) In determining the appropriateness of the *sector* and *area* for the demarcation contemplated in subsection (8) (*b*), *NEDLAC* or the *Minister* must seek to give effect to the primary objects of *this Act*.

(11) The registrar-

(*a*) must consider the application and any further information provided by the applicant;

(*b*) must determine whether-

(i) the applicant has complied with the provisions of this section;

(ii) the constitution of the *bargaining council* complies with section 30;

(iii) adequate provision is made in the constitution of the *bargaining council* for the representation of small and medium enterprises;

(iv) the parties to the *bargaining council* are sufficiently representative of the *sector* and *area* determined *by NEDLAC* or the *Minister*; and

(v) there is no other *council* registered for the *sector* and *area* in respect of which the application is made; and

(*c*) if satisfied that the applicant meets the requirements for registration, must register the *bargaining council* by entering the applicant's name in the register of *councils*.

(12) If the *registrar* is not satisfied that the applicant meets the requirements for registration, the *registrar*-

(*a*) must send the applicant a written notice of the decision and the reasons for that decision; and

(*b*) in that notice, must inform the applicant that it has 30 days from the date of the notice to meet those requirements.

(13) If, within that 30-day period, the applicant meets those requirements, the *registrar* must register the applicant by entering the applicant's name in the register of *councils*.

(14) If, after the 30-day period, the *registrar* concludes that the applicant has failed to meet the requirements for registration, the *registrar* must-

(*a*) refuse to register the applicant; and

(*b*) notify the applicant and any person that objected to the application of that decision in writing.

(15) After registering the applicant, the *registrar* must-

(*a*) issue a certificate of registration in the applicant's name that must specify the *registered scope* of the applicant; and

(*b*) send the registration certificate and a certified copy of the registered constitution to the applicant.

(16) Subsections (3) to (10) and (11) (*b*) (iii) and (iv) do not apply to the registration or amalgamation of *bargaining councils* in the public service.

[Sub-s. (16) added by s. 4 (*b*) of Act No. 12 of 2002.]

30. Constitution of bargaining council.-(1) The constitution of every *bargaining council* must at least provide for-

(*a*) the appointment of representatives of the parties to the *bargaining council*, of whom half must be appointed by the *trade unions* that are party to the *bargaining council* and the other half by the *employers' organisations* that are party to the *bargaining council*, and the appointment of alternates to the representatives;

(*b*) the representation of small and medium enterprises;

(*c*) the circumstances and manner in which representatives must vacate their seats and the procedure for replacing them;

(*d*) rules for the convening and conducting of meetings of representatives, including the quorum required for, and the minutes to be kept of, those meetings;

(*e*) the manner in which decisions are to be made;

(*f*) the appointment or election of *office-bearers* and *officials*, their functions, and the circumstances and manner in which they may be removed from office;

(*g*) the establishment and functioning of committees;

(*h*) the determination through arbitration of any *dispute* arising between the parties to the *bargaining council* about the interpretation or application of the *bargaining council's* constitution;

(*i*) the procedure to be followed if a *dispute* arises between the parties to the *bargaining council*;

(*j*) the procedure to be followed if a *dispute* arises between a registered *trade union* that is a party to the *bargaining council*, or its members, or both, on the one hand, and employers who belong to a registered *employers' organisation* that is a party to the *bargaining council*, on the other hand;

(*k*) the procedure for exemption from *collective agreements*;

(*l*) the banking and investment of its funds;

(*m*) the purposes for which its funds may be used;

(*n*) the delegation of its powers and functions;

(*o*) the admission of additional registered *trade unions* and registered *employers' organisations* as parties to the *bargaining council*, subject to the provisions of section 56;7

(*p*) a procedure for changing its constitution; and

(*q*) a procedure by which it may resolve to wind up.

[Sub-s. (1) amended by s. 5 (*a*) of Act No. 42 of 1996.]

Wording of Sections

(2) The requirements for the constitution of a *bargaining council* in subsection (1) apply to the constitution of a *bargaining council* in the *public service* except that-

(*a*) any reference to an "*employers' organisation*" must be read as a reference to the State as employer; and

(*b*) the requirement in subsection (1) (*b*) concerning the representation of small and medium enterprises does not apply.

(3) The constitution of the Public Service Co-ordinating Bargaining Council must include a procedure for establishing a *bargaining council* in a *sector* of the *public service* designated in terms of section 37 (1).

(4) The constitution of a *bargaining council* in the *public service* may include provisions for the establishment and functioning of chambers of a *bargaining council* on national and regional levels.

(5) The procedures for the resolution of *disputes* referred to in subsection (1) (*h*), (*i*) and (*j*) may not entrust dispute resolution functions to the Commission unless the governing body of the Commission has agreed thereto.

[Sub-s. (5) added by s. 5 (*b*) of Act No. 42 of 1996.]

Footnotes

7 Section 56 provides for a procedure for the admission of parties to a council.

31. Binding nature of collective agreement concluded in bargaining council.-Subject to the provisions of section 32 and the constitution of the *bargaining council*, a *collective agreement* concluded in a *bargaining council* binds-

(*a*) the parties to the *bargaining council* who are also parties to the *collective agreement*;

(*b*) each party to the *collective agreement* and the members of every other party to the *collective agreement* in so far as the provisions thereof apply to the relationship between such a party and the members of such other party; and

(*c*) the members of a registered *trade union* that is a party to the *collective agreement* and the employers who are members of a registered *employers' organisation* that is such a party, if the *collective agreement* regulates-

(i) terms and conditions of employment; or

(ii) the conduct of the employers in relation to their *employees* or the conduct of the *employees* in relation to their employers.

[S. 31 substituted by s. 6 of Act No. 42 of 1996.]

Wording of Sections

32. Extension of collective agreement concluded in bargaining council.-(1) A *bargaining council* may ask the *Minister* in writing to extend a *collective agreement* concluded in the *bargaining council* to any non-parties to the *collective agreement* that are within its *registered scope* and are identified in the request, if at a meeting of the *bargaining council*-

(*a*) one or more registered *trade unions* whose members constitute the majority of the members of the *trade unions* that are party to the *bargaining council* vote in favour of the extension; and

(*b*) one or more registered *employers*' *organisations*, whose members employ the majority of the *employees* employed by the members of the *employers' organisations* that are party to the *bargaining council*, vote in favour of the extension.

(2) Within 60 days of receiving the request, the *Minister* must extend the *collective agreement*, as requested, by publishing a notice in the *Government Gazette* declaring that, from a specified date and for a specified period, the *collective agreement* will be binding on the non-parties specified in the notice.

(3) A *collective agreement* may not be extended in terms of subsection (2) unless the *Minister* is satisfied that-

(*a*) the decision by the *bargaining council* to request the extension of the *collective agreement* complies with the provisions of subsection (1);

(*b*) the majority of all the *employees* who, upon extension of the *collective agreement*, will fall within the scope of the agreement, are members of the *trade unions* that are parties to the *bargaining council*;

[Para. (*b*) substituted by s. 7 (*a*) of Act No. 42 of 1996.]

Wording of Sections

(*c*) the members of the *employers' organisations* that are parties to the *bargaining council* will, upon the extension of the *collective agreement*, be found to employ the majority of all the *employees* who fall within the scope of the *collective agreement*;

[Para. (*c*) substituted by s. 7 (*a*) of Act No. 42 of 1996.]

Wording of Sections

(*d*) the non-parties specified in the request fall within the *bargaining council's registered scope*;

(*d*A) the *bargaining council* has in place an effective procedure to deal with applications by non-parties for exemptions from the provisions of the *collective agreement* and is able to decide an application for an exemption within 30 days;

[Para. (*d*A) inserted by s. 4 (*a*) of Act No. 6 of 2014.]

(*e*) provision is made in the *collective agreement* for an independent body to hear and decide, as soon as possible and not later than 30 days after the appeal is lodged, any appeal brought against-

(i) the *bargaining council's* refusal of a non-party's application for exemption from the provisions of the *collective agreement*;

(ii) the withdrawal of such an exemption by the *bargaining council*;

[Para. (e) substituted by s. 2 (*a*) of Act No. 127 of 1998 and amended by s. 4 (*b*) of Act No. 6 of 2014.]

Wording of Sections

(*f*) the *collective agreement* contains criteria that must be applied by the independent body when it considers an appeal, and that those criteria are fair and promote the primary objects of *this Act*; and

[Para. (*f*) substituted by s. 2 (*a*) of Act No. 127 of 1998.]

Wording of Sections

(*g*) the terms of the *collective agreement* do not discriminate against non-parties.

(3A) No representative, office-bearer or official of a *trade union* or *employers' organisation* party to the *bargaining council* may be a member of, or participate in the deliberations of, the appeal body established in terms of subsection (3) (*e*).

[Sub-s. (3A) inserted by s. 4 (*c*) of Act No. 6 of 2014.]

(4) . . . . . .

[Sub-s. (4) deleted by s. 2 (*b*) of Act No. 127 of 1998.]

Wording of Sections

(5) Despite subsection 3 (*b*) and (*c*), the *Minister* may extend a *collective agreement* in terms of subsection (2) if-

(*a*) the parties to the *bargaining council* are sufficiently representative within the *registered scope* of the *bargaining council*;

[Para. (*a*) substituted by s. 7 (*b*) of Act No. 42 of 1996, by s. 5 (*a*) of Act No. 12 of 2002 and amended by s. 4 (*d*) of Act No. 6 of 2014 .]

Wording of Sections

(*b*) the *Minister* is satisfied that failure to extend the agreement may undermine collective bargaining at *sectoral* level or in the *public service* as a whole;

[Para. (*b*) substituted by s. 7 (*b*) of Act No. 42 of 1996.]

Wording of Sections

(*c*) the *Minister* has published a notice in the *Government Gazette* stating that an application for an extension in terms of this subsection has been received, stating where a copy may be inspected or obtained, and inviting comment within a period of not less than 21 days from the date of the publication of the notice; and

[Para. (*c*) added by s. 4 (*d*) of Act No. 6 of 2014.]

(*d*) the *Minister* has considered all comments received during the period referred to in paragraph (*c*).

[Para. (*d*) added by s. 4 (*d*) of Act No. 6 of 2014.]

(5A) When determining whether the parties to the *bargaining council* are sufficiently representative for the purposes of subsection (5) (*a*), the *Minister* may take into account the composition of the workforce in the sector, including the extent to which there are *employees* assigned to work by temporary employment services, *employees* employed on fixed term contracts, part-time *employees* or *employees* in other categories of non-standard employment.

[Sub-s. (5A) inserted by s. 4 (*e*) of Act No. 6 of 2014.]

(6) (*a*) After a notice has been published in terms of subsection (2), the *Minister*, at the request of the *bargaining council*, may publish a further notice in the *Government Gazette*-

(i) extending the period specified in the earlier notice by a further period determined by the Minister; or

(ii) if the period specified in the earlier notice has expired, declaring a new date from which, and a further period during which, the provisions of the earlier notice will be effective.

(*b*) The provisions of subsections (3) and (5), read with the changes required by the context, apply in respect of the publication of any notice in terms of this subsection.

(7) The *Minister*, at the request of the *bargaining council*, must publish a notice in the *Government Gazette* cancelling all or part of any notice published in terms of subsection (2) or (6) from a date specified in the notice.

(8) Whenever any *collective agreement* in respect of which a notice has been published in terms of subsection

(2) or (6) is amended, amplified or replaced by a new *collective agreement*, the provisions of this section apply to that new *collective agreement*.

(9) For the purposes of extending *collective agreements* concluded in the Public Service Co-ordinating Bargaining Council or any *bargaining council* contemplated in section 37 (3) or (4)-

(*a*) any reference in this section to an *employers' organisation* must be read as a reference to the State as employer; and

(*b*) subsections (3) (*c*), (*e*) and (*f*) and (4) of this section will not apply.

[Sub-s. (9) added by s. 7 (*c*) of Act No. 42 of 1996.]

(10) If the parties to a *collective agreement* that has been extended in terms of this section terminate the agreement, they must notify the Minister in writing.

[Sub-s. (10) added by s. 5 (*b*) of Act No. 12 of 2002.]

(11) A *bargaining council* that has a *collective agreement* extended in terms of this section must ensure that the independent appeal body is able to determine appeals within the period specified in subsection (3) (*f*).

[Sub-s. (11) added by s. 4 (*f*) of Act No. 6 of 2014.]

33. Appointment and powers of designated agents of bargaining councils.-(1) The *Minister* may at the request of a *bargaining council* appoint any person as the designated agent of that *bargaining council* to promote, monitor and enforce compliance with any *collective agreement* concluded in that *bargaining council*.

[Sub-s. (1) substituted by s. 6 (*a*) of Act No. 12 of 2002.]

Wording of Sections

(1A) A designated agent may-

(*a*) secure compliance with the council's *collective agreements* by-

(i) publicising the contents of the agreements;

(ii) conducting inspections;

(iii) investigating complaints; or

(iv) any other means the council may adopt; and

(*b*) perform any other functions that are conferred or imposed on the agent by the council.

[Sub-s. (1A) inserted by s. 6 (*b*) of Act No. 12 of 2002.]

(2) A *bargaining council* must provide each designated agent with a certificate signed by the secretary of the bargaining council stating that the agent has been appointed in terms of *this Act* as a designated agent of that *bargaining council*.

(3) Within the *registered scope* of a *bargaining council*, a designated agent of the *bargaining council* has all the powers set out in Schedule 10.

[Sub-s. (3) substituted by s. 6 (*c*) of Act No. 12 of 2002.]

Wording of Sections

(4) The *bargaining council* may cancel the certificate provided to a designated agent in terms of subsection (2) and the agent then ceases to be a designated agent of the *bargaining council* and must immediately surrender the certificate to the secretary of the *bargaining council*.

33A. Enforcement of collective agreements by bargaining councils.-(1) Despite any other provision in this Act, a *bargaining council* may monitor and enforce compliance with its *collective agreements* in terms of this section or a *collective agreement* concluded by the parties to the council.

(2) For the purposes of this section, a *collective agreement* is deemed to include-

(*a*) any basic condition of employment which in terms of section 49 (1) of the *Basic Conditions of Employment Act* constitutes a term of employment of any employee covered by the *collective agreement*; and

(*b*) the rules of any fund or scheme established by the *bargaining council*.

(3) A *collective agreement* in terms of this section may authorise a designated agent appointed in terms of section 33 to issue a compliance order requiring any person bound by that *collective agreement* to comply with the *collective agreement* within a specified period.

(4) (*a*) The *council* may refer any unresolved *dispute* concerning compliance with any provision of a *collective agreement* to arbitration by an arbitrator appointed by the council.

(*b*) If a party to an arbitration in terms of this section, that is not a party to the council, objects to the appointment of an arbitrator in terms of paragraph (*a*), the Commission, on request by the council, must appoint an arbitrator.

(*c*) If an arbitrator is appointed in terms of subparagraph (*b*)-

(i) the Council remains liable for the payment of the arbitrator's fee; and

(ii) the arbitration is not conducted under the auspices of the Commission.

(5) An arbitrator conducting an arbitration in terms of this section has the powers of a commissioner in terms of section 142, read with the changes required by the context.

(6) Section 138, read with the changes required by the context, applies to any arbitration conducted in terms of this section.

(7) An arbitrator acting in terms of this section may determine any *dispute* concerning the interpretation or application of a *collective agreement*.

(8) An arbitrator conducting an arbitration in terms of this section may make an appropriate award, including-

(*a*) ordering any person to pay any amount owing in terms of a *collective agreement*;

(*b*) imposing a fine for a failure to comply with a *collective agreement* in accordance with subsection (13);

(*c*) charging a party an arbitration fee;

(*d*) ordering a party to pay the costs of the arbitration;

(*e*) confirming, varying or setting aside a compliance order issued by a designated agent in accordance with subsection (4);

(*f*) any award contemplated in section 138 (9).

(9) Interest on any amount that a person is obliged to pay in terms of a *collective agreement* accrues from the date on which the amount was due and payable at the rate prescribed in terms of section 1 of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), unless the arbitration award provides otherwise.

(10) An award in an arbitration conducted in terms of this section is final and binding and may be enforced in terms of section 143.

(11) Any reference in section 138 or 142 to the *director* must be read as a reference to the secretary of the *bargaining council*.

(12) If an employer upon whom a fine has been imposed in terms of this section files an application to review and set aside an award made in terms of subsection (8), any obligation to pay a fine is suspended pending the outcome of the application.

(13) (*a*) The Minister may, after consulting *NEDLAC*, publish in the *Government Gazette* a notice that sets out the maximum fines that may be imposed by an arbitrator acting in terms of this section.

(*b*) A notice in terms of paragraph (*a*) may specify the maximum fine that may be imposed-

(i) for a breach of a *collective agreement*-

(*aa*) not involving a failure to pay any amount of money;

(*bb*) involving a failure to pay any amount of money; and

(ii) for repeated breaches of the *collective agreement* contemplated in subparagraph (i).

[S. 33A inserted by s. 7 of Act No. 12 of 2002.]

34. Amalgamation of bargaining councils.-(1) Any *bargaining council* may resolve to amalgamate with one or more other *bargaining councils*.

(2) The amalgamating *bargaining councils* may apply to the *registrar* for registration of the amalgamated *bargaining council* and the *registrar* must treat the application as an application in terms of section 29.

(3) If the *registrar* has registered the amalgamated *bargaining council*, the *registrar* must cancel the registration of each of the amalgamating *bargaining councils* by removing their names from the register of *councils*.

(4) The registration of an amalgamated *bargaining council* takes effect from the date that the *registrar* enters its name in the register of *councils*.

(5) When the *registrar* has registered an amalgamated *bargaining council*-

(*a*) all the assets, rights, liabilities and obligations of the amalgamating *bargaining councils* devolve upon and vest in the amalgamated *bargaining council*; and

(*b*) all the *collective agreements* of the amalgamating *bargaining councils*, regardless of whether or not they were extended in terms of section 32, remain in force for the duration of those *collective agreements*, unless amended or terminated by the amalgamated *bargaining council*.

PART D-Bargaining Councils in the Public Service

35. Bargaining councils in public service.-There will be a *bargaining council* for-

(*a*) the *public service* as a whole, to be known as the Public Service Co-ordinating Bargaining Council; and

(*b*) any *sector* within the *public service* that may be designated in terms of section 37.

36. Public Service Co-ordinating Bargaining Council.-(1) The Public Service Co-ordinating Bargaining Council must be established in accordance with Schedule 1.[8]

(2) The Public Service Co-ordinating Bargaining Council may perform all the functions of a *bargaining council* in respect of those matters that-

(*a*) are regulated by uniform rules, norms and standards that apply across the *public service*; or

(*b*) apply to terms and conditions of service that apply to two or more *sectors*; or

(*c*) are assigned to the State as employer in respect of the *public service* which are not assigned to the State as employer in any *sector*.

Footnotes

8 Schedule 1 deals with the procedure for the establishment of the Public Service Co-ordinating bargaining Council.

37. Bargaining councils in sectors in public service.-(1) The Public Service Co-ordinating Bargaining Council may, in terms of its constitution and by resolution-

(*a*) designate a *sector* of the *public service* for the establishment of a *bargaining council*; and

(*b*) vary the designation of, amalgamate or disestablish *bargaining councils* so established.

(2) A *bargaining council* for a *sector* designated in terms of subsection (1) (*a*) must be established in terms of the constitution of the Public Service Co-ordinating Bargaining Council.

(3) If the parties in the *sector* cannot agree to a constitution for the *bargaining council* for a *sector* designated in terms of subsection (1) (*a*), the Registrar must determine its constitution.

(4) The relevant resolution made in terms of subsection (1) must accompany any application to register or vary the registration of a *bargaining council* or to register an amalgamated *bargaining council*.

(5) A *bargaining council* established in terms of subsection (2) has exclusive jurisdiction in respect of matters that are specific to that *sector* and in respect of which the State as employer in that *sector*, has the requisite authority to conclude *collective agreements* and resolve labour *disputes*.

[S. 37 amended by s. 8 of Act No. 42 of 1996 and substituted by s. 8 of Act No. 12 of 2002.]

Wording of Sections

38. Disputes between bargaining councils in public service.-(1) If there is a jurisdictional *dispute* between two or more *bargaining councils* in the *public service*, including the Public Service Co-ordinating Bargaining Council, any party to the *dispute* may refer the *dispute* in writing to the Commission.

(2) The party who refers the *dispute* to the Commission must satisfy the Commission that a copy of the referral has been served on all other *bargaining councils* that are parties to the *dispute*.

(3) The Commission must attempt to resolve the *dispute* as soon as possible through conciliation.

(4) If the *dispute* remains unresolved, any party to the *dispute* may request that the *dispute* be resolved through arbitration by the Commission.

[S. 38 amended by s. 9 (*a*) and (*b*) of Act No. 42 of 1996 and substituted by s. 9 of Act No. 12 of 2002.]

Wording of Sections

PART E-Statutory Councils

39. Application to establish statutory council.-(1) For the purposes of this Part-

(*a*) "representative *trade union*" means a registered *trade union*, or two or more registered *trade unions* acting jointly, whose members constitute at least 30 per cent of the *employees* in a *sector* and *area*; and

(*b*) "representative *employers' organisation*" means a registered *employers' organisation*, or two or more registered *employers' organisations* acting jointly, whose members employ at least 30 per cent of the *employees* in a *sector* and *area*.

(2) A representative *trade union* or representative *employers' organisation* may apply to the *registrar* in the *prescribed* form for the establishment of a *statutory council* in a *sector* and *area* in respect of which no *council* is registered.

(3) The *registrar* must apply the provisions of section 29 (2) to (10)[9] to the application-

(*a*) read with the changes required by the context; and

(*b*) subject to the deletion of the word "sufficiently" in section 29 (4) (*c*).

(4) The *registrar* must-

(*a*) consider the application and any further information provided by the applicant; and

(*b*) determine whether-

(i) the applicant has complied with section 29 and of this section;

(ii) the applicant is representative of the *sector* and *area* determined by *NEDLAC* or the *Minister*; and

(iii) there is no other *council* registered for the *sector* and *area* in respect of which the application is made.

(5) If the *registrar* is not satisfied that the applicant meets the requirements for establishment, the *registrar* must-

(*a*) send the applicant a written notice of the decision and the reasons for that decision; and

(*b*) in that notice, inform the applicant that it has 30 days from the date of the notice to meet those requirements.

(6) If, after the 30-day period, the *registrar* concludes that the applicant has failed to meet the requirements for establishment, the *registrar* must-

(*a*) refuse to register the applicant; and

(*b*) notify the applicant and any person that objected to the application in writing of that decision.

Footnotes

9 The provisions of section 29 deal with the procedure for the registration of a bargaining council.

40. Establishment and registration of statutory council.-(1) If the *registrar* is satisfied that the applicant meets the requirements for the establishment of a *statutory council*, the *registrar*, by notice in the *Government Gazette*, must establish the *statutory council* for a *sector and area*.

(2) The notice must invite-

(*a*) registered *trade unions* and registered *employers' organisations* in that *sector* and *area* to attend a meeting; and

(*b*) any interested parties in that *sector* and *area* to nominate representatives for the *statutory council*.

(3) The Commission must appoint a commissioner to chair the meeting and facilitate the conclusion of an agreement on-

(*a*) the registered *trade unions* and registered *employers' organisations* to be parties to the *statutory council*; and

(*b*) a constitution that meets the requirements of section 30, read with the changes required by the context.

(4) If an agreement is concluded, the *Minister* may advise the *registrar* to register the *statutory council* in accordance with the agreement if the *Minister* is satisfied that-

(*a*) every registered *trade union* or registered *employers' organisation* that ought to have been included has been included in the agreement; and

(*b*) the constitution meets the requirements of section 30, read with the changes required by the context.

(5) In considering the requirements in subsection (4) (*a*), the *Minister* must take into account-

(*a*) the primary objects of *this Act*;

(*b*) the diversity of registered *trade unions* and registered *employers' organisations* in the *sector* and *area*; and

(*c*) the principle of proportional representation.

(6) If the *Minister* is not satisfied in terms of subsection (4), the *Minister* must advise the Commission of the decision and the reasons for that decision and direct the Commission to reconvene the meeting in terms of subsection (3) in order to facilitate the conclusion of a new agreement.

(7) If advised by the *Minister* in terms of subsection (4), the *registrar* must register the *statutory council* by entering its name in the register of *councils*.

41. Establishment and registration of statutory council in absence of agreement.-(1) If no agreement is concluded in terms of section 40 (3), the commissioner must convene separate meetings of the registered *trade unions* and *employers' organisations* to facilitate the conclusion of agreements on-

(*a*) the registered *trade unions* to be parties to the *statutory council*;

(*b*) the registered *employers' organisations* to be parties to the *statutory council*; and

(*c*) the allocation to each party of the number of representatives of the *statutory council*.

(2) If an agreement is concluded on-

(*a*) the registered *trade unions* to be parties to the *statutory council*, the *Minister* must admit as parties to the *statutory council* the agreed registered *trade unions*;

(*b*) the registered *employers' organisations* to be parties to the *statutory council*, the Minister must admit as parties to the statutory council the agreed registered *employers' organisations*.

(3) If no agreement is concluded on-

(*a*) the registered *trade unions* to be parties to the *statutory council*, the *Minister* must admit as parties to the *statutory council*-

(i) the applicant, if it is a registered *trade union*; and

(ii) any other registered *trade union* in the *sector* and *area* that ought to be admitted, taking into account the factors referred to in section 40 (5);

(*b*) the registered *employers' organisations* to be parties to the *statutory council*, the *Minister* must admit as parties to the *statutory council*-

(i) the applicant, if it is a registered *employers' organisations*; and

(ii) any other registered *employers' organisation* in the *sector* and *area* that ought to be admitted, taking into account the factors referred to in section 40 (5).

(4) (*a*) The *Minister* must determine an even number of representatives of the *statutory council*, taking into account the factors referred to in section 40 (5).

(*b*) One half of the representatives must be allocated to the registered *trade unions* that are parties to the *statutory council* and the other half of the representatives must be allocated to the registered *employers' organisations* that are parties to the *statutory council*.

(5) If no agreement is concluded in respect of the allocation of the number of representatives of the *statutory council*-

(*a*) between the registered *trade unions* that are parties to the *council*, the *Minister* must determine this allocation on the basis of proportional representation;

(*b*) between the registered *employers' organisation* that are parties to the *council*, the *Minister* must determine this allocation on the basis of proportional representation and taking into account the

interests of small and medium enterprises.

(6) If the applicant is a *trade union* and there is no registered *employers' organisation* that is a party to the *statutory council*, the *Minister*, after consulting the Commission, must appoint suitable persons as representatives and alternates, taking into account the nominations received from employers and *employers' organisations* in terms of section 40 (2).

(7) If the applicant is an *employers' organisation* and there is no registered *trade union* that is a party to the *statutory council*, the *Minister*, after consulting the Commission, must appoint suitable persons as representatives and alternates, taking into account the nominations received from *employees* and *trade unions* in terms of section 40 (2).

(8) The *Minister* must notify the *registrar* of agreements concluded and decisions made in terms of this section, and the *registrar* must-

(*a*) adapt the model constitution referred to in section 207 (3) to the extent necessary to give effect to the agreements and decisions made in terms of this section;

(*b*) register the *statutory council* by entering its name in the register of *councils*; and

(*c*) certify the constitution as the constitution of the *statutory council*.

42. Certificate of registration of statutory council.-After registering a *statutory council*, the *registrar* must-

(*a*) issue a certificate of registration that must specify the *registered scope* of the *statutory council*; and

(*b*) send the certificate and a certified copy of the registered constitution to all the parties to the *statutory council* and any representatives appointed to the *statutory council*.

43. Powers and functions of statutory councils.-(1) The powers and functions of a *statutory council* are-

(*a*) to perform the dispute resolution functions referred to in section 51;

(*b*) to promote and establish training and education schemes; and

(*c*) to establish and administer pension, provident, medical aid, sick pay, holiday, unemployment schemes or funds or any similar schemes or funds for the benefit of one or more of the parties to the *statutory council* or their members; and

(*d*) to conclude collective agreements to give effect to the matters mentioned in paragraphs (*a*), (*b*), and (*c*).

(2) A *statutory council*, in terms of its constitution, may agree to the inclusion of any of the other functions of a *bargaining council* referred to in section 28.

(3) If a *statutory council* concludes a *collective agreement* in terms of subsection (1) (*d*), the provisions of section 31, 32 and 33 apply, read with the changes required by the context.

[Sub-s. (3) substituted by s. 10 of Act No. 42 of 1996.]

Wording of Sections

(4) (*a*) From the date on which the Labour Relations Amendment Act, 1998, comes into operation, the provisions of the laws relating to pension, provident or medical aid schemes or funds must be complied with in establishing any pension, provident or medical aid scheme or fund in terms of subsection (1) (*c*).

(*b*) The provisions of the laws relating to pension, provident or medical aid schemes or funds will apply in relation to any pension, provident or medical aid scheme or fund established in terms of subsection (1) (*c*) after the coming into operation of the Labour Relations Amendment Act, 1998.

[Sub-s. (4) added by s. 3 of Act No. 127 of 1998.]

44. Ministerial determinations.-(1) A *statutory council* that is not sufficiently representative within its *registered scope* may submit a *collective agreement* on any of the matters mentioned in section 43 (1) (*a*), (*b*) or (*c*) to the *Minister*. The *Minister* must treat the *collective agreement* as a recommendation made by the Employment Conditions Commission in terms of section 54 (4) of the *Basic Conditions of Employment Act*.

[Sub-s. (1) substituted by s. 10 (*a*) of Act No. 12 of 2002.]

Wording of Sections

(2) The *Minister* may promulgate the *statutory council's* recommendations as a determination under the *Basic Conditions of Employment Act* if satisfied that the *statutory council* has complied with section 54 (3) of the *Basic*

[Sub-s. (2) substituted by s. 10 (*b*) of Act No. 12 of 2002.]

Wording of Sections

(3) The determination must provide for-

(*a*) exemptions to be considered by an independent body appointed by the *Minister*; and

(*b*) criteria for exemption that are fair and promote the primary objects of *this Act*.

(4) The *Minister* may in a determination impose a levy on all employers and *employees* in the *registered scope* of the *statutory council* to defray the operational costs of the *statutory council*.

(5) A *statutory council* may submit a proposal to the *Minister* to amend or extend the period of any determination and the *Minister* may make the amendment to the determination or extend the period by notice in the *Government Gazette*.

45. Disputes about determinations.-(1) If there is a *dispute* about the interpretation or application of a determination promulgated in terms of section 44 (2), any party to the *dispute* may refer the *dispute* in writing to the Commission.

(2) The party who refers the *dispute* to the Commission must satisfy it that a copy of the referral has been *served* on all the other parties to the *dispute*.

(3) The Commission must attempt to resolve the *dispute* through conciliation.

(4) If the *dispute* remains unresolved, any party to the *dispute* may request that the *dispute* be resolved through arbitration.

46. Withdrawal of party from statutory council.-(1) If a registered *trade union* or registered *employers' organisation* that is a party to a *statutory council* withdraws from that *statutory council*, the *Minister* may request the Commission to convene a meeting of the remaining registered *trade unions* or registered *employers' organisations* in the *sector* and *area*, in order to facilitate the conclusion of an agreement on the registered *trade unions* or the registered *employers' organisations* to be parties and the allocation of representatives to the *statutory council*.

(2) If no agreement is concluded, the provisions of section 41 apply, read with the changes required by the context.

47. Appointment of new representative of statutory council.-(1) If a representative appointed in terms of section 41 (6) or (7) for any reason no longer holds office, the *Minister* must publish a notice in the *Government Gazette* inviting interested parties within the *registered scope* of the *statutory council* to nominate a new representative.

(2) The provisions of section 41 (6) or (7) apply, read with the changes required by the context, in respect of the appointment of a new representative.

48. Change of status of statutory council.-(1) A *statutory council* may resolve to apply to register as a *bargaining council*.

(2) The *registrar* must deal with the application as if it were an application in terms of section 29,10 except for section 29 (4) (*b*), (7) to (10) and (15).

(3) If the *registrar* has registered the *statutory council* as a *bargaining council*, the *registrar* must alter the register of *councils* and its certificate to reflect its change of status.

(4) Any determination in force at the time of the registration of the *bargaining council* or any agreement extended by the *Minister* in terms of section 43 (3)-

(*a*) continues to have force for the period of its operation unless superseded by a *collective agreement*; and

(*b*) may be extended for a further period.

(5) The *bargaining council* must perform any function or duty of the *statutory council* in terms of a determination during the period in which the determination is still in effect.

(6) If any *dispute* in terms of a determination is unresolved at the time the determination ceases to have effect, the *dispute* must be dealt with as if the determination was still in effect.

Footnotes

10 Section 29 deals with the procedure for the registration of bargaining councils.

49. Representativeness of council.-(1) When considering the representativeness of the parties to a *council*, or parties seeking registration of a *council*, the *registrar*, having regard to the nature of the *sector* and the situation of the *area* in respect of which registration is sought, may regard the parties to a *council* as representative in respect of the whole *area*, even if a *trade union* or *employers' organisation* that is a party to the *council* has no members in part of that *area*.

(2) A *bargaining council*, having a *collective agreement* that has been extended by the *Minister* in terms of section 32, must inform the *registrar* annually, in writing, on a date to be determined by the *registrar* as to the information specified in subsection (3) and the number of *employees* who are-

(*a*) covered by the *collective agreement*;

(*b*) members of the *trade unions* that are parties to the agreement;

(*c*) employed by members of the *employers' organisations* that are party to the agreement.

[Sub-s. (2) substituted by s. 11 (*a*) of Act No. 12 of 2002 and amended by s. 5 (*a*) of Act No. 6 of 2014.]

Wording of Sections

(3) A *bargaining council* other than one contemplated in subsection (2) must on request by the *registrar*, inform the *registrar* in writing within the period specified in the request as to the number of *employees* who are-

(*a*) employed within the *registered scope* of the *council*;

(*b*) members of the *trade unions* that are parties to the *council*;

(*c*) employed by members of the *employers' organisations* that are party to the *council*.

[Sub-s. (3) substituted by s. 11 (*b*) of Act No. 12 of 2002 and amended by s. 5 (*b*) of Act No. 6 of 2014.]

Wording of Sections

(4) A determination of the representativeness of a *bargaining council* in terms of this section is sufficient proof of the representativeness of the *council* for the year following the determination for any purpose in terms of *this Act*, including a decision by the *Minister* in terms of sections 32 (3) (*b*), 32 (3) (*c*) and 32 (5).

[Sub-s. (4) added by s. 11 (*c*) of Act No. 12 of 2002 and substituted by s. 5 (*c*) of Act No. 6 of 2014.]

Wording of Sections

(5) This section does not apply to the *public service*.

[Sub-s. (5) added by s. 11 (*c*) of Act No. 12 of 2002.]

50. Effect of registration of council.-(1) A certificate of registration is sufficient proof that a registered *council* is a body corporate.

(2) A *council* has all the powers, functions and duties that are conferred or imposed on it by or in terms of *this Act*, and it has jurisdiction to exercise and perform those powers, functions and duties within its *registered scope*.

(3) A party to a *council* is not liable for any of the obligations or liabilities of the *council* by virtue of it being a party to the *council*.

(4) A party to, or *office-bearer* or *official* of, a *council* is not personally liable for any loss suffered by any person as a result of an act performed or omitted in good faith by a party to, or *office-bearer* or *official* of, a *council* while performing their functions for the *council*.

(5) *Service* of any document directed to a *council* at the address most recently provided to the *registrar* will be for all purposes *service* of that document on that *council*.

51. Dispute resolution functions of council.-(1) In this section, *dispute* means any *dispute* about a matter of mutual interest between-

(*a*) on the one side-

(i) one or more *trade unions*;

(ii) one or more *employees*; or
(iii) one or more *trade unions* and one or more *employees*; and

(*b*) on the other side-
(i) one or more *employers' organisations*;
(ii) one or more employers; or
(iii) one or more *employers' organisations* and one or more employers.

(2) (*a*) (i) The parties to a *council* must attempt to resolve any *dispute* between themselves in accordance with the constitution of the *council*.

(ii) For the purposes of subparagraph (i), a party to a *council* includes the members of any registered *trade union* or registered *employers' organisation* that is a party to the *council*.

[Sub-para. (ii) added by s. 11 (*a*) of Act No. 42 of 1996.]

(*b*) Any party to a *dispute* who is not a party to a *council* but who falls within the *registered scope* of the *council* may refer the *dispute* to the *council* in writing.

(*c*) The party who refers the *dispute* to the *council* must satisfy it that a copy of the referral has been *served* on all the other parties to the *dispute*.

(3) If a *dispute* is referred to a *council* in terms of *this Act*[11] and any party to that *dispute* is not a party to that *council*, the *council* must attempt to resolve the *dispute*-

(*a*) through conciliation; and

(*b*) if the *dispute* remains unresolved after conciliation, the *council* must arbitrate the *dispute* if-

(i) *this Act* requires arbitration and any party to the *dispute* has requested that it be resolved through arbitration; or

(ii) all the parties to the *dispute* consent to arbitration under the auspices of the *council*.

(4) If one or more of the parties to a *dispute* that has been referred to the *council* do not fall within the *registered scope* of that *council*, it must refer the *dispute* to the Commission.

(5) The date on which the referral in terms of subsection (4) was received by a *council* is, for all purposes, the date on which the *council* referred the *dispute* to the Commission.

(6) A *council* may enter into an agreement with the Commission or an accredited agency in terms of which the Commission or accredited agency is to perform, on behalf of the *council*, its dispute resolution functions in terms of this section.

[Sub-s. (6) added by s. 11 (*b*) of Act No. 42 of 1996.]

(7) Subject to this Act, a *council* may not provide in a *collective agreement* for the referral of *disputes* to the Commission, without prior consultation with the director.

[Sub-s. (7) added by s. 12 of Act No. 12 of 2002.]

(8) Unless otherwise agreed to in a collective agreement, sections 142A and 143 to 146 apply to any arbitration conducted under the auspices of a *bargaining council*.

[Sub-s. (8) added by s. 12 of Act No. 12 of 2002.]

(9) A *bargaining council* may, by *collective agreement*-

(*a*) establish procedures to resolve any *dispute* contemplated in this section;

(*b*) provide for payment of a dispute resolution levy; and

(*c*) provide for the payment of a fee in relation to any conciliation or arbitration proceedings in respect of matters for which the Commission may charge a fee in terms of section 115 (2A) (*l*), which may not exceed the fee provided for in that section.

[Sub-s. (9) added by s. 12 of Act No. 12 of 2002 and substituted by s. 6 of Act No. 6 of 2014.]

Wording of Sections

Footnotes

11 The following disputes contemplated by subsection (3) must be referred to a council: disputes about the interpretation or application of the provisions of Chapter II. (see section 9); disputes that form the subject matter of a proposed strike or lockout (see section 64 (1)); disputes in essential services (see section 74); disputes about unfair dismissals (see section 191); disputes about severance pay (see section 196); and disputes about unfair labour practices (see item 2 in Schedule 7).

The following disputes contemplated by subsection (3) may not be referred to a council: disputes about organisational rights (see sections 16, 21 and 22); disputes about collective agreements where the agreement does not provide for a procedure or the procedure is inoperative or any party frustrates the

resolution of the dispute (see section 24 (2) to (5)); disputes about agency shops and closed shops (see section 24 (6) and (7) and section 26 (11)); disputes about determinations made by the Minister in respect of proposals made by a statutory council (see section 45); disputes about the interpretation or application of collective agreements of a council whose registration has been cancelled (see section 61 (5) to (8)); disputes about the demarcation of sectors and areas of councils (see section 62); disputes about the interpretation or application of Part C (bargaining councils), Part D (bargaining councils in the public service), Part E (statutory councils) and Part F (general provisions concerning councils) (see section 63); disputes concerning pickets (see section 69 (8) to (10)); disputes about proposals that are the subject of joint decisionmaking in workplace forums (see section 86); disputes about the disclosure of information to workplace forums (see section 89) and disputes about the interpretation or application of the provisions of Chapter V which deals with workplace forums (see section 94).

[Footnote 11 amended by Act No. 12 of 2002]

52. Accreditation of council or appointment of accredited agency.-(1) With a view to performing its dispute resolution functions in terms of section 51 (3), every *council* must-

(*a*) apply to the governing body of the Commission for accreditation to perform those functions; or

(*b*) appoint an accredited agency to perform those of the functions referred to in section 51 (3) for which the council is not accredited.

(2) The *council* must advise the Commission in writing as soon as possible of the appointment of an accredited agency in terms of subsection (1) (*b*), and the terms of that appointment.

[S. 52 substituted by s. 12 of Act No. 42 of 1996.]

Wording of Sections

53. Accounting records and audits.-(1) Every *council* must, to the standards of generally accepted accounting practice, principles and procedures-

(*a*) keep books and records of its income, expenditure, assets and liabilities; and

(*b*) within six months after the end of each financial year, prepare financial statements, including at least-

(i) a statement of income and expenditure for the previous financial year; and

(ii) a balance sheet showing its assets, liabilities and financial position as at the end of the previous financial year.

(2) Each *council* must arrange for an annual audit of its books and records of account and its financial statements by an *auditor* who must-

(*a*) conduct the audit in accordance with generally accepted auditing standards; and

(*b*) report in writing to the *council* and in that report express an opinion as to whether or not the *council* has complied with those provisions of its constitution relating to financial matters.

(3) Every *council* must-

(*a*) make the financial statements and the *auditor's* report available to the parties to the *council* or their representatives for inspection; and

(*b*) submit those statements and the *auditor's* report to a meeting of the *council* as provided for in its constitution.

(4) Every *council* must preserve each of its books of account, supporting vouchers, income and expenditure statements, balance sheets, and *auditors'* reports, in an original or reproduced form, for a period of three years from the end of the financial year to which they relate.

(5) The money of a *council* or of any fund established by a *council* that is surplus to its requirements, or the expenses of the fund, may be invested only in-

(*a*) savings accounts, permanent shares or fixed deposits in any registered bank or financial institution;

(*b*) internal registered stock as contemplated in section 21 of the Exchequer Act, 1975 (Act No. 66 of 1975);

(*c*) a registered unit trust; or

(*d*) any other manner approved by the *registrar*.

[Sub-s. (5) amended by s. 13 of Act No. 42 of 1996.]

(6) A *council* must comply with subsections (1) to (5) in respect of all funds established by it, except funds referred to in section 28 (3).

[Sub-s. (6) added by s. 13 of Act No. 12 of 2002.]

54. Duty to keep records and provide information to registrar.-(1) In addition to the records required by section 53 (4), every *council* must keep minutes of its meetings, in an original or reproduced form, for a period of three years from the end of the financial year to which they relate.

(2) Every *council* must provide to the *registrar*-

(*a*) within 30 days of receipt of its *auditor's* report, a certified copy of that report and of the financial statements;

(*b*) within 30 days of receipt of a written request by the *registrar*, an explanation of anything relating to the *auditor's* report or the financial statements;

(*c*) upon registration, an address within the *Republic* at which it will accept *service* of any document that is directed to it;

(*d*) within 30 days of any appointment or election of its national *office-bearers*, the names and work addresses of those *office-bearers* even if their appointment or election did not result in any changes to its *office-bearers*;

(*e*) 30 days before a new address for *service* of documents will take effect, notice of that change of address; and

(*f*) each year and on a date to be determined by the *registrar*, a report in the prescribed form specifying-

(i) the number of employees who are employed by small enterprises that fall within the *registered scope* of the *council* and the number of *employees* of those enterprises who are members of *trade unions*;

(ii) the number of *employees* employed by small enterprises that are covered by a *collective agreement* that was concluded by the *council* and extended by the *Minister* in terms of section 32;

(iii) the number of small enterprises that are members of the *employers' organisations* that are parties to the *council*; and

(iv) the number of applications for exemptions received from small enterprises and the number of applications that were granted and the number rejected.

[Para. (*f*) added by s. 14 (*b*) of Act No. 12 of 2002.]

(3) Every *council* must provide to the Commission-

(*a*) certified copies of every *collective agreement* concluded by the parties to the *council*, within 30 days of the signing of that *collective agreement*;

(*b*) the details of the admission and resignation of parties to the *council*, within 30 days of their admission or resignation.

(4) If a *council* fails to comply with any of the provisions of section 49 (2) or (3), section 53 or subsections (1) or (2) of this section, the *registrar* may-

(*a*) conduct an inquiry into the affairs of that council;

(*b*) order the production of the *council's* financial records and any other relevant documents;

(*c*) deliver a notice to the *council* requiring the council to comply with the provisions concerned;

(*d*) compile a report on the affairs of the *council*; or

(*e*) submit the report to the Labour Court in support of any application made in terms of section 59 (1) (*b*).

[Sub-s. (4) added by s. 14 (*c*) of Act No. 12 of 2002.]

(5) The *registrar* may use the powers referred to in subsection (4) in respect of any fund established by a *council*, except a fund referred to in section 28 (3).

[Sub-s. (5) added by s. 14 (*c*) of Act No. 12 of 2002.]

55. Delegation of functions to committee of council.-(1) A *council* may delegate any of its powers and functions to a committee on any conditions imposed by the *council* in accordance with its constitution.

[Sub-s. (1) substituted by s. 14 (*a*) of Act No. 42 of 1996.]

Wording of Sections

(2) A committee contemplated by subsection (1) must consist of equal numbers of representatives of *employees* and employers.

(3) . . . . . .

[Sub-s. (3) deleted by s. 14 (*b*) of Act No. 42 of 1996.]

Wording of Sections

56. Admission of parties to council12.-(1) Any registered *trade union* or registered *employers' organisation* may apply in writing to a *council* for admission as a party to that *council*.

(2) The application must be accompanied by a certified copy of the applicant's registered constitution and certificate of registration and must include-

(*a*) details of the applicant's membership within the *registered scope* of the *council* and, if the applicant is a registered *employers' organisation*, the number of *employees* that its members employ within that *registered scope*;

(*b*) the reasons why the applicant ought to be admitted as a party to the *council*; and

(*c*) any other information on which the applicant relies in support of the application.

(3) A *council*, within 90 days of receiving an application for admission, must decide whether to grant or refuse an applicant admission, and must advise the applicant of its decision, failing which the *council* is deemed to have refused the applicant admission.

(4) If the *council* refuses to admit an applicant it must within 30 days of the date of the refusal, advise the applicant in writing of its decision and the reasons for that decision.

(5) The applicant may apply to the Labour Court for an order admitting it as a party to the *council*.

(6) The Labour Court may admit the applicant as a party to the *council*, adapt the constitution of the *council* and make any other appropriate order.

Footnotes

12 See flow diagram No. 5 in Schedule 4.

57. Changing constitution or name of council.-(1) Any *council* may resolve to change or replace its constitution.

(2) The *council* must send the *registrar* a copy of the resolution and a certificate signed by its secretary stating that the resolution complies with its constitution.

(3) The *registrar* must-

(*a*) register the changed or new constitution of a *council* if it meets the requirements of section 30 or if it is a *statutory council* established in terms of section 41 if it meets the requirements of the model constitution referred to in section 207 (3); and

(*b*) send the *council a* copy of the resolution endorsed by the *registrar*, certifying that the change or replacement has been registered.

(4) The changed or new constitution takes effect from the date of the *registrar's* certification.

(5) Any *council* may resolve to change its name.

(6) The *council* must send the *registrar* a copy of the resolution and the original of its current certificate of registration.

(7) The *registrar* must-

(*a*) enter the new name in the register of *councils*, and issue a certificate of registration in the new name of the *council*;

(*b*) remove the old name from that register and cancel the earlier certificate of registration; and

(*c*) send the new certificate to the *council*.

(8) The new name takes effect from the date that the *registrar* enters it in the register of *councils*.

58. Variation of registered scope of council.-(1) If the *registrar* is satisfied that the *sector* and *area* within which a *council* is representative does not coincide with the *registered scope* of the *council*, the *registrar*, acting independently or in response to an application from the council, may vary the *registered scope* of the *council*.

[Sub-s. (1) substituted by s. 15 of Act No. 42 of 1996.]

Wording of Sections

(2) The provisions of section 29 apply, read with the changes required by the context, to a variation in terms of this section.

(3) Despite subsection (2), if within the stipulated period no material objection is lodged to any notice published by the *registrar* in terms of section 29 (3), the *registrar*-

(i) may vary the *registered scope* of the council;

(ii) may issue a certificate specifying the scope of the council as varied; and

(iii) need not comply with the procedure prescribed by section 29.

[Sub-s. (3) added by s. 15 of Act No. 12 of 2002.]

59. Winding-up of council.-(1) The Labour Court may order a *council* to be wound up if-

(*a*) the *council* has resolved to wind up its affairs and has applied to the Court for an order giving effect to that resolution; or

(*b*) the registrar of labour relations or any party to the *council* has applied to the Court and the Court is satisfied that the *council* is unable to continue to function for any reason that cannot be remedied.

(2) If there are any persons not represented before the Labour Court whose interests may be affected by an order in terms of subsection (1), the Court must-

(*a*) consider those interests before deciding whether or not to grant the order; and

(*b*) if it grants the order, include provisions in the order disposing of each of those interests.

(3) If it makes an order in terms of subsection (1), the Labour Court may appoint a suitable person as liquidator, on appropriate conditions.

(4) (*a*) The registrar of the Labour Court must determine the liquidator's fees.

(*b*) The Labour Court, in chambers, may review the determination of the registrar of the Labour Court.

(*c*) The liquidator's fees are a first charge against the assets of the *council*.

(5) If, after all the liabilities of the *council* have been discharged, any assets remain that cannot be disposed of in accordance with the constitution of that *council*, the liquidator must realise those assets and pay the proceeds to the Commission for its own use.

(6) For the purposes of this section, the assets and liabilities of any pension, provident or medical aid scheme or fund established by a *council* will be regarded and treated as part of the assets and liabilities of the *council* unless-

(*a*) the parties to the *council* have agreed to continue with the operation of the pension, provident or medical aid scheme or fund as a separate scheme or fund despite the winding-up of the *council*; and

(*b*) the *Minister* has approved the continuation of the scheme or fund; and

(*c*) application has been made in accordance with the provisions of the laws applicable to pension, provident or medical aid schemes or funds, for the registration of that scheme or fund in terms of those provisions.

[Sub-s. (6) added by s. 4 of Act No. 127 of 1998.]

(7) A pension, provident or medical aid scheme or fund registered under the provisions of those laws after its application in terms of subsection (6) (*c*), will continue to be a separate scheme or fund despite the winding-up of the *council* by which it was established.

[Sub-s. (7) added by s. 4 of Act No. 127 of 1998.]

(8) The *Minister* by notice in the *Government Gazette* may declare the rules of a pension, provident or medical aid scheme or fund mentioned in subsection (7), to be binding on any *employees* and employer or employers that fell within the *registered scope* of the relevant *council* immediately before it was wound up.

[Sub-s. (8) added by s. 4 of Act No. 127 of 1998.]

60. Winding-up of council by reason of insolvency.-Any person who seeks to wind up a *council* by reason of insolvency must comply with the Insolvency Act, 1936 (Act No. 24 of 1936), and, for the purposes of this section, any reference to the court in that Act must be interpreted as referring to the Labour Court.

61. Cancellation of registration of council.-(1) The registrar of the Labour Court must notify the registrar of labour relations if the Court has ordered a council to be wound up.

(2) When the *registrar* receives a notice from the Labour Court in terms of subsection (1), the *registrar* must cancel the registration of the *council* by removing its name from the register of *councils*.

(3) The *registrar* may notify a *council* and every party to the *council* that the *registrar* is considering cancelling the *council's* registration, if the *registrar* believes that-

(*a*) the *council* has ceased to perform its functions in terms of *this Act* for a period longer than 90 days before the date of the notice; or

(*b*) the *council* has ceased to be representative in terms of the provisions of the relevant Part, for a period longer than 90 days prior to the date of the notice.

(4) In a notice in terms of subsection (3), the *registrar* must state the reasons for the notice and inform the *council* and every party to the *council* that they have 60 days to show cause why the *council's* registration should not be cancelled.

(5) After the expiry of the 60-day period, the *registrar*, unless cause has been shown why the *council's* registration should not be cancelled, must notify the *council* and every party to the *council* that the registration will be cancelled unless an appeal to the Labour Court is noted and the Court reverses the decision.

(6) The cancellation takes effect-

(*a*) if no appeal to the Labour Court is noted within the time contemplated in section 111 (3), on the expiry of that period; or

(*b*) if the *council* or any party has appealed and the Labour Court has confirmed the decision of the *registrar*, on the date of the Labour Court's decision.

(7) If either event contemplated in subsection (6) occurs, the *registrar* must cancel the *council's* registration by removing the name of the *council* from the register of *councils*.

(8) Any *collective agreement* concluded by parties to a *council* whose registration has been cancelled, whether or not the *collective agreement* has been extended to non-parties by the *Minister* in terms of section 32, lapses 60 days after the *council's* registration has been cancelled.

(9) Despite subsection (8), the provisions of a *collective agreement* that regulates terms and conditions of employment remain in force for one year after the date that the *council's* registration was cancelled, or until the expiry of the agreement, if earlier.

(10) Any party to a *dispute* about the interpretation or application of a *collective agreement* that regulates terms and conditions of employment referred to in subsection (8) may refer the *dispute* in writing to the Commission.

(11) The party who refers the *dispute* to the Commission must satisfy it that a copy of the referral has been *served* on all the other parties to the *dispute*.

(12) The Commission must attempt to resolve the *dispute* through conciliation.

(13) If the *dispute* remains unresolved, any party to the *dispute* may request that the *dispute* be resolved through arbitration.

(14) The *registrar* must cancel the registration of a *bargaining council* in the *public service* by removing its name from the register of *councils* when the *registrar* receives a resolution from the Public Service Co-ordinating Bargaining Council disestablishing a *bargaining council* established in terms of section 37 (2).

[Sub-s. (14) added by s. 16 of Act No. 12 of 2002.]

(15) The provisions of subsections (3) to (7) do not apply to *bargaining councils* in the *public service*.

[Sub-s. (15) added by s. 16 of Act No. 12 of 2002.]

62. Disputes about demarcation between sectors and areas.-(1) Any registered *trade union*, employer, *employee*, registered *employers' organisation* or *council* that has a direct or indirect interest in the application

contemplated in this section may apply to the Commission in the *prescribed* form and manner for a determination as to-

(*a*) whether any *employee*, employer, class of *employees* or class of employers, is or was employed or engaged in a *sector* or *area*;

(*b*) whether any provision in any arbitration award, *collective agreement* or wage determination made in terms of the *Wage Act* is or was binding on any *employee*, employer, class of *employees* or class of employers.

[Sub-s. (1) amended by s. 16 (*a*) of Act No. 42 of 1996.]

Wording of Sections

(2) If two or more *councils* settle a *dispute* about a question contemplated in subsection (1) (*a*) or (*b*), the *councils* must inform the *Minister* of the provisions of their agreement and the *Minister* may publish a notice in the *Government Gazette* stating the particulars of the agreement.

(3) In any proceedings in terms of *this Act* before the Labour Court, if a question contemplated in subsection (1) (*a*) or (*b*) is raised, the Labour Court must adjourn those proceedings and refer the question to the Commission for determination if the Court is satisfied that-

(*a*) the question raised-

(i) has not previously been determined by arbitration in terms of this section; and

(ii) is not the subject of an agreement in terms of subsection (2); and

(*b*) the determination of the question raised is necessary for the purposes of the proceedings.

(3A) In any proceedings before an arbitrator about the interpretation or application of a *collective agreement*, if a question contemplated in subsection (1) (*a*) or (*b*) is raised, the arbitrator must adjourn those proceedings and refer the question to the Commission if the arbitrator is satisfied that-

(*a*) the question raised-

(i) has not previously been determined by arbitration in terms of this section; and

(ii) is not the subject of an agreement in terms of subsection (2); and

(*b*) the determination of the question raised is necessary for the purposes of the proceedings.

[Sub-s. (3A) inserted by s. 16 (*b*) of Act No. 42 of 1996.]

(4) When the Commission receives an application in terms of subsection (1) or a referral in terms of subsection (3), it must appoint a commissioner to hear the application or determine the question, and the provisions of section 138 apply, read with the changes required by the context.

(5) In any proceedings in terms of *this Act* before a commissioner, if a question contemplated in subsection (1) (*a*) or (*b*) is raised, the commissioner must adjourn the proceedings and consult the *director*, if the commissioner is satisfied that-

(*a*) the question raised-

(i) has not previously been determined by arbitration in terms of this section; and

(ii) is not the subject of an agreement in terms of subsection (2); and

(*b*) the determination of the question raised is necessary for the purposes of the proceedings.

(6) The *director* must either order the commissioner concerned to determine the question or appoint another commissioner to do so, and the provisions of section 138 apply, read with the changes required by the context.

(7) If the Commission believes that the question is of substantial importance, the Commission must publish a notice in the *Government Gazette* stating the particulars of the application or referral and stating the period within which written representations may be made and the address to which they must be directed.

(8) If a notice contemplated in subsection (7) has been published, the commissioner may not commence the arbitration until the period stated in the notice has expired.

(9) Before making an award, the commissioner must consider any written representations that are made, and must consult *NEDLAC*.

(10) The commissioner must send the award, together with brief reasons, to the Labour Court and to the Commission.

(11) If the Commission believes that the nature of the award is substantially important, it may publish notice of the award in the *Government Gazette*.

(12) The *registrar* must amend the certificate of registration of a *council* in so far as is necessary in light of the award.

63. Disputes about Parts A and C to F.-(1) Any party to a *dispute* about the interpretation or application of Parts A and C to F of this Chapter, may refer the *dispute* in writing to the Commission unless-

(*a*) the *dispute* has arisen in the course of arbitration proceedings or proceedings in the Labour Court; or
[Para. (*a*) substituted by s. 17 of Act No. 42 of 1996.]

Wording of Sections

(*b*) the *dispute* is otherwise to be dealt with in terms of Parts A and C to F.

(2) The party who refers the *dispute* to the Commission must satisfy it that a copy of the referral has been *served* on all the other parties to the *dispute*.

(3) The Commission must attempt to resolve the *dispute* through conciliation.

(4) If the *dispute* remains unresolved, any party to the *dispute* may refer it to the Labour Court for adjudication.

CHAPTER IV
STRIKES AND LOCK-OUTS

64. Right to strike and recourse to lock-out.-(1) Every *employee* has the right to strike and every employer has recourse to *lock-out* if-

(*a*) the *issue in dispute* has been referred to a *council* or to the Commission as required by *this Act*, and-

(i) a certificate stating that the *dispute* remains unresolved has been issued; or

(ii) a period of 30 days, or any extension of that period agreed to between the parties to the *dispute*, has elapsed since the referral was received by the *council* or the Commission; and after that-

(*b*) in the case of a proposed *strike*, at least 48 hours' notice of the commencement of the *strike*, in writing, has been given to the employer, unless-

(i) the *issue in dispute* relates to a *collective agreement* to be concluded in a *council*, in which case, notice must have been given to that *council*; or

(ii) the employer is a member of an *employers' organisation* that is a party to the *dispute*, in which case, notice must have been given to that *employers' organisation*; or

(*c*) in the case of a proposed *lock-out*, at least 48 hours' notice of the commencement of the *lock-out*, in writing, has been given to any *trade union* that is a party to the *dispute*, or, if there is no such *trade union*, to the *employees*, unless the *issue in dispute* relates to a *collective agreement* to be concluded in a *council*, in which case, notice must have been given to that *council*; or

(*d*) in the case of a proposed *strike* or *lock-out* where the State is the employer, at least seven days' notice of the commencement of the *strike* or *lock-out* has been given to the parties contemplated in paragraphs (*b*) and (*c*).

(2) If the *issue in dispute* concerns a refusal to bargain, an advisory award must have been made in terms of section 135 (3) (*c*) before notice is given in terms of subsection (1) (*b*) or (*c*). A refusal to bargain includes-

(*a*) a refusal-

(i) to recognise a *trade union* as a collective bargaining agent; or

(ii) to agree to establish a *bargaining council*;

(*b*) a withdrawal of recognition of a collective bargaining agent;

(*c*) a resignation of a party from a *bargaining council*;

(*d*) a *dispute* about-

(i) appropriate bargaining units;

(ii) appropriate bargaining levels; or

(iii) bargaining subjects.

(3) The requirements of subsection (1) do not apply to a *strike* or a *lock-out* if-

(*a*) the parties to the *dispute* are members of a *council*, and the *dispute* has been dealt with by that *council* in accordance with its constitution;

(*b*) the *strike* or *lock-out* conforms with the procedures in a *collective agreement*;

(*c*) the *employees* strike in response to a *lock-out* by their employer that does not comply with the provisions of this Chapter;

(*d*) the employer locks out its *employees* in response to their taking part in a *strike* that does not conform with the provisions of this Chapter; or

(*e*) the employer fails to comply with the requirements of subsections (4) and (5).

(4) Any *employee* who or any *trade union* that refers a *dispute* about a unilateral change to terms and conditions of employment to a *council* or the Commission in terms of subsection (1) (*a*) may, in the referral, and for the period referred to in subsection (1) (*a*)-

(*a*) require the employer not to implement unilaterally the change to terms and conditions of employment; or

(*b*) if the employer has already implemented the change unilaterally, require the employer to restore the terms and conditions of employment that applied before the change.

(5) The employer must comply with a requirement in terms of subsection (4) within 48 hours of *service* of the referral on the employer.

65. Limitations on right to strike or recourse to lock-out.-(1) No person may take part in a *strike* or a *lock-out* or in any conduct in contemplation or furtherance of a *strike* or a *lock-out* if-

(*a*) that person is bound by a *collective agreement* that prohibits a *strike* or *lock-out* in respect of the *issue in dispute*;

(*b*) that person is bound by an agreement that requires the *issue in dispute* to be referred to arbitration;

(*c*) the *issue in dispute* is one that a party has the right to refer to arbitration or to the Labour Court in terms of *this Act* or any other *employment law*;

[Para. (*c*) substituted by s. 7 (*a*) of Act No. 6 of 2014.]

Wording of Sections

(*d*) that person is engaged in-

(i) an *essential service*; or

(ii) a maintenance service.[13]

(2) (*a*) Despite section 65 (1) (*c*), a person may take part in a *strike* or a *lock-out* or in any conduct in contemplation or in furtherance of a *strike* or *lock-out* if the *issue in dispute* is about any matter dealt with in sections 12 to 15.[14]

(*b*) If the registered *trade union* has given notice of the proposed *strike* in terms of section 64 (1) in respect of an *issue in dispute* referred to in paragraph (*a*), it may not exercise the right to refer the *dispute* to arbitration in terms of section 21 for a period of 12 months from the date of the notice.

(3) Subject to a *collective agreement*, no person may take part in a *strike* or a *lock-out* or in any conduct in contemplation or furtherance of a *strike* or *lock-out*-

(*a*) if that person is bound by-

(i) any arbitration award or *collective agreement* that regulates the *issue in dispute*; or

(ii) any determination made in terms of section 44 by the *Minister* that regulates the *issue in dispute*; or

(*b*) any determination made in terms of Chapter Eight of the *Basic Conditions of Employment Act* and that regulates the *issue in dispute*, during the first year of that determination.

[Para. (*b*) substituted by s. 7 (*b*) of Act No. 6 of 2014.]

Wording of Sections

Footnotes

13 Essential services agreed minimum services and maintenance services are regulated in sections 71 to 75.

14 These sections deal with organisational rights.

66. Secondary strikes.-(1) In this section "secondary strike" means a *strike*, or conduct in contemplation or furtherance of a *strike*, that is in support of a *strike* by other *employees* against their employer, but does not include a *strike* in pursuit of a demand that has been referred to a *council* if the striking *employees*, employed within the *registered scope* of that *council*, have a material interest in that demand.

[Sub-s. (1) substituted by s. 19 of Act No. 42 of 1996 (English only).]

Wording of Sections

(2) No person may take part in a secondary *strike* unless-

(*a*) the *strike* that is to be supported complies with the provisions of sections 64 and 65;

(*b*) the employer of the *employees* taking part in the secondary *strike* or, where appropriate, the *employers' organisation* of which that employer is a member, has received written notice of the proposed secondary *strike* at least seven days prior to its commencement; and

(*c*) the nature and extent of the secondary *strike* is reasonable in relation to the possible direct or indirect effect that the secondary *strike* may have on the business of the primary employer.

(3) Subject to section 68 (2) and (3), a secondary employer may apply to the Labour Court for an interdict to prohibit or limit a secondary *strike* that contravenes subsection (2).

(4) Any person who is a party to proceedings in terms of subsection (3), or the Labour Court, may request the Commission to conduct an urgent investigation to assist the Court to determine whether the requirements of subsection (2) (*c*) have been met.

(5) On receipt of a request made in terms of subsection (4), the Commission must appoint a suitably qualified person to conduct the investigation, and then submit, as soon as possible, a report to the Labour Court.

(6) The Labour Court must take account of the Commission's report in terms of subsection (5) before making an order.

67. Strike or lock-out in compliance with this Act.-(1) In this Chapter, "protected *strike*" means a *strike* that complies with the provisions of this Chapter and "protected *lock-out*" means a *lock-out* that complies with the provisions of this Chapter.

(2) A person does not commit a delict or a breach of contract by taking part in-

(*a*) a protected *strike* or a protected *lock-out*; or

(*b*) any conduct in contemplation or in furtherance of a protected *strike* or a protected *lock-out*.

(3) Despite subsection (2), an employer is not obliged to remunerate an *employee* for services that the *employee* does not render during a protected *strike* or a protected *lock-out*, however-

(*a*) if the *employee's remuneration* includes payment in kind in respect of accommodation, the provision of food and other basic amenities of life, the employer, at the request of the *employee*, must not discontinue the payment in kind during the *strike* or *lock-out*; and

(*b*) after the end of the *strike* or *lock-out*, the employer may recover the monetary value of the payment in kind made at the request of the employee during the *strike* or *lock-out* from the *employee* by way of civil proceedings instituted in the Labour Court.

(4) An employer may not dismiss an *employee* for participating in a protected *strike* or for any conduct in contemplation or in furtherance of a protected *strike*.

(5) Subsection (4) does not preclude an employer from fairly dismissing an *employee* in accordance with the provisions of Chapter VIII for a reason related to the *employee's* conduct during the *strike*, or for a reason based on the employer's *operational requirements*.

(6) Civil legal proceedings may not be instituted against any person for-

(*a*) participating in a protected *strike* or a protected *lock-out*; or

(*b*) any conduct in contemplation or in furtherance of a protected *strike* or a protected *lock-out*.

(7) The failure by a registered *trade union* or a registered *employers' organisation* to comply with a provision in its constitution requiring it to conduct a ballot of those of its members in respect of whom it intends to call a *strike* or *lock-out* may not give rise to, or constitute a ground for, any litigation that will affect the legality of, and the protection conferred by this section on, the *strike* or *lock-out*.

(8) The provisions of subsections (2) and (6) do not apply to any act in contemplation or in furtherance of a *strike* or a *lock-out*, if that act is an offence.

(9) . . . . . .

[Sub-s. (9) deleted by s. 8 of Act No. 6 of 2014.]

Wording of Sections

68. Strike or lock-out not in compliance with this Act.-(1) In the case of any *strike* or *lock-out*, or any conduct in contemplation or in furtherance of a *strike* or *lock-out*, that does not comply with the provisions of this Chapter, the Labour Court has exclusive jurisdiction-

(*a*) to grant an interdict or order to restrain-15

(i) any person from participating in a *strike* or any conduct in contemplation or in furtherance of *strike*; or

(ii) any person from participating in a *lock-out* or any conduct in contemplation or in furtherance of a *lock-out*;

(*b*) to order the payment of just and equitable compensation for any loss attributable to the *strike* or *lock-out*, or conduct, having regard to-

(i) whether-

(*aa*) attempts were made to comply with the provisions of this Chapter and the extent of those attempts;

(*bb*) the *strike* or *lock-out* or conduct was premeditated;

(*cc*) the *strike* or *lock-out* or conduct was in response to unjustified conduct by another party to the *dispute*; and

(*dd*) there was compliance with an order granted in terms of paragraph (*a*);

(ii) the interests of orderly collective bargaining;

(iii) the duration of the *strike* or *lock-out* or conduct; and

(iv) the financial position of the employer, *trade union* or *employees* respectively.

[Para. (*b*) substituted by s. 17 of Act No. 12 of 2002.]

Wording of Sections

(2) The Labour Court may not grant any order in terms of subsection (1) (*a*) unless 48 hours' notice of the application has been given to the respondent: However, the Court may permit a shorter period of notice if-

(*a*) the applicant has given written notice to the respondent of the applicant's intention to apply for the granting of an order;

(*b*) the respondent has been given a reasonable opportunity to be heard before a decision concerning that application is taken; and

(*c*) the applicant has shown good cause why a period shorter than 48 hours should be permitted.

(3) Despite subsection (2), if written notice of the commencement of the proposed *strike* or *lock-out* was given to the applicant at least 10 days before the commencement of the proposed *strike* or *lock-out*, the applicant must give at least five days' notice to the respondent of an application for an order in terms of subsection (1) (*a*).

(4) Subsections (2) and (3) do not apply to an employer or an *employee* engaged in an *essential service* or a maintenance service.

(5) Participation in a *strike* that does not comply with the provisions of this Chapter, or conduct in contemplation or in furtherance of that *strike*, may constitute a fair reason for *dismissal*. In determining whether or not the *dismissal* is fair, the Code of Good Practice: Dismissal in Schedule 8 must be taken into account.

Footnotes

15 See flow diagram No. 6 in Schedule 4.

69. Picketing.16-(1) A registered *trade union* may authorise a picket by its members and supporters for the purposes of peacefully demonstrating-

(*a*) in support of any protected *strike*; or

(*b*) in opposition to any *lock-out*.

(2) Despite any law regulating the right of assembly, a picket authorised in terms of subsection (1) may be held-

(*a*) in any place to which the public has access but outside the premises of an employer; or

(*b*) with the permission of the employer, inside the employer's premises.

[Sub-s. (2) amended by s. 20 of Act No. 42 of 1996 (English only).]

Wording of Sections

(3) The permission referred to in subsection (2) (*b*) may not be unreasonably withheld.

(4) If requested to do so by the registered *trade union* or the employer, the Commission must attempt to secure an agreement between the parties to the *dispute* on rules that should apply to any picket in relation to that *strike* or *lock-out*.

(5) If there is no agreement, the Commission must establish picketing rules, and in doing so must take

(*a*) the particular circumstances of the *workplace* or other premises where it is intended that the right to picket is to be exercised; and

(*b*) any relevant *code of good practice*.

(6) The rules established by the Commission may provide for picketing by *employees*-

(*a*) in a place contemplated in section 69 (2) (*a*) which is owned or controlled by a person other than the employer, if that person has had an opportunity to make representations to the Commission before the rules are established; or

(*b*) on their employer's premises if the Commission is satisfied that the employer's permission has been unreasonably withheld.

[Sub-s. (6) substituted by s. 9 (*a*) of Act No. 6 of 2014.]

Wording of Sections

(7) The provisions of section 67, read with the changes required by the context, apply to the call for, organisation of, or participation in a picket that complies with the provisions of this section.

(8) Any party to a *dispute* about any of the following issues, including a person contemplated in subsection (6) (*a*), may refer the *dispute* in writing to the Commission-

(*a*) an allegation that the effective use of the right to picket is being undermined;

(*b*) an alleged material contravention of subsection (1) or (2);

(*c*) an alleged material breach of an agreement concluded in terms of subsection (4); or

(*d*) an alleged material breach of a rule established in terms of subsection (5).

[Sub-s. (8) amended by s. 9 (*b*) of Act No. 6 of 2014.]

Wording of Sections

(9) The party who refers the *dispute* to the Commission must satisfy it that a copy of the referral has been *served* on all the other parties to the *dispute*.

(10) The Commission must attempt to resolve the *dispute* through conciliation.

(11) If the *dispute* remains unresolved, any party to the *dispute* may refer it to the Labour Court for adjudication.

(12) If a party has referred a *dispute* in terms of subsection (8) or (11), the Labour Court may grant relief, including urgent interim relief, which is just and equitable in the circumstances and which may include-

(*a*) an order directing any party, including a person contemplated in subsection (6) (*a*), to comply with a picketing agreement or rule; or

(*b*) an order varying the terms of a picketing agreement or rule;

[Sub-s. (12) added by s. 9 (*c*) of Act No. 6 of 2014.]

(13) The Labour Court may not grant an order in terms of subsection (12) unless-

(*a*) 48 hours' notice of an application seeking relief referred to in subsection (12) (*a*) or (*b*) has been given to the respondent; or

(*b*) 72 hours' notice of an application seeking relief referred to in subsection (12) (*c*) or (*d*) has been given to the respondent.

[Sub-s. (13) added by s. 9 (*c*) of Act No. 6 of 2014.]

(14) The Labour Court may permit a shorter period of notice than required by subsection (13) if the-

(*a*) applicant has given written notice to the respondent of its intention to apply for the order;

(*b*) respondent has been given a reasonable opportunity to be heard before a decision concerning the application is taken; and

(*c*) applicant has shown good cause why a period shorter than that contemplated by subsection (13) should be permitted.

[Sub-s. (14) added by s. 9 (*c*) of Act No. 6 of 2014.]

Footnotes

16 See flow diagram No. 7 in Schedule 4.

70. Essential services committee.17-The *Minister*, after consulting *NEDLAC*, must establish an essential services committee under the auspices of the Commission in accordance with the provisions of *this Act*.

[S. 70 amended by s. 5 of Act No. 127 of 1998 and substituted by s. 10 of Act No. 6 of 2014.]

Wording of Sections

Footnotes

17 A Maintenance Service has been defined in section 75

70A. Composition of essential services committee.-(1) The *Minister* must appoint to the essential services committee on terms that the Minister considers fit-

(*a*) a chairperson, who is independent from the constituencies contemplated in subsection (3) and who may be a senior commissioner;

(*b*) a deputy chairperson, who must be a senior commissioner; and

(*c*) six persons nominated in accordance with the provisions of subsections (3) and (4).

(2) A member of the essential services committee-

(*a*) must be a citizen of South Africa, who is ordinarily resident in South Africa, or a permanent resident of South Africa;

(*b*) must have suitable qualifications or experience in labour law, labour relations, commerce, public affairs, the administration of justice, industry or a sector of the economy;

(*c*) must not be an unrehabilitated insolvent; and

(*d*) must not be subject to an order of a competent court holding that person to be mentally unfit or disordered.

(3) Organised business, labour and government at *NEDLAC* must each nominate to the *Minister* the names of two persons to be appointed to the essential services committee.

(4) The *Minister* must appoint the persons nominated by organised business, labour and government at *NEDLAC* if these persons meet the requirements set out in subsection (2).

(5) The *Minister* may fill any vacancy that arises in accordance with the provisions of this section.

(6) A member of the essential services committee may not represent any person before a panel of the essential services committee, but may be appointed by the *trade union* and employer parties to serve as an assessor in terms of section 70C.

[S. 70A inserted by s. 11 of Act No. 6 of 2014.]

70B. Powers and functions of essential services committee.-(1) The powers and functions of the essential services committee are to-

(*a*) monitor the implementation and observance of essential services determinations, minimum services agreements, maintenance services agreements and determinations;

(*b*) promote effective *dispute resolution* in essential services;

(*c*) develop guidelines for the negotiation of minimum services agreements;

(*d*) decide, on its own initiative or at the reasonable request of any interested party, whether to institute investigations as to whether or not the whole or a part of any service is an essential service;

(*e*) manage its caseload; and

(*f*) appoint the panels contemplated in section 70C to perform one or more of the functions set out in section 70D.

(2) At the request of a *bargaining council*, the essential services committee must establish a panel to perform any function in terms of section 70D (1).

(3) The essential services committee may request the Commission or any other appropriate person to conduct an investigation to assist the essential services committee in an investigation and to submit a report to it.

[S. 70B inserted by s. 11 of Act No. 6 of 2014.]

70C. Appointment of panels.-(1) The essential services committee must, taking into account the nature and complexity of the issue, assign each matter before it to a panel consisting of either three or five persons, including the assessors referred to in subsections (3) and (4).

(2) A panel must be presided over by the chairperson or deputy chairperson of the essential services committee or by a senior commissioner referred to in subsection (3).

(3) The Commission must compile a list of suitably trained senior commissioners who may preside at panel hearings.

(4) If the essential services committee constitutes a three-member panel, it must either-

(*a*) appoint two of its members to serve as *assessors*; or

(*b*) invite the employer and *trade union* parties participating in the hearing to each nominate an assessor.

(5) If the essential services committee constitutes a five-member panel, it must-

(*a*) appoint two of its members to serve as its assessors; and

(*b*) invite the employer and *trade union* parties participating in the hearing to each nominate an assessor.

(6) If the essential services committee appoints assessors from its members to serve on a panel, it must appoint one who was nominated to the essential services committee by-

(*a*) organised labour; and

(*b*) organised business or government, depending on the sector concerned.

(7) A member of the essential services committee may be nominated to serve as an assessor in terms of subsections (4) (*b*) and (5) (*b*).

(8) The essential services committee may appoint an assessor if the *trade union* or employer parties participating in the hearing fail to nominate an assessor in terms of subsections (4) (*b*) and (5) (*b*) within the prescribed period.

(9) When appointing or nominating an assessor in terms of subsections (4) to (8), the essential services committee, and any party to a matter before it, must take into account the person's skills, experience, expertise and knowledge of the sector concerned.

[S. 70C inserted by s. 11 of Act No. 6 of 2014.]

70D. Powers and functions of panel.-(1) The powers and functions of a panel appointed by the essential services committee are to-

(*a*) conduct investigations as to whether or not the whole or a part of any service is an essential service;

(*b*) determine whether or not to designate the whole or a part of that service as an essential service;

(*c*) determine *disputes* as to whether or not the whole or a part of any service falls within the scope of a designated essential service;

(*d*) determine whether or not the whole or a part of any service is a maintenance service;

(*e*) ratify a *collective agreement* that provides for the maintenance of minimum services in a service designated as an essential service; and

(*f*) determine, in accordance with the provisions of *this Act*, the minimum services required to be maintained in the service that is designated as an essential service.

(2) The presiding member of the panel must determine any question of procedure or law, including whether an issue is a question of procedure or law.

(3) The chairperson of the essential services committee or any person contemplated in section 70C (2) presiding at a hearing may, sitting alone, make an order-

(*a*) extending or reducing any period prescribed by the rules of the essential services committee; and

(*b*) condoning the late performance of an act contemplated by the rules of the essential services committee.

(4) Subject to subsections (2) and (3), the decision or finding of the majority of the panel is the decision of the essential services committee.

(5) The decision of a panel must be in writing and signed by the person referred to in section 70C (2), and include the reasons for that decision.

(6) A panel appointed by the essential services committee may make any appropriate order relating to its functions.

[S. 70D inserted by s. 11 of Act No. 6 of 2014.]

70E. Jurisdiction and administration of essential services committee.-(1) The essential services committee has jurisdiction throughout the Republic.

(2) The seat of the essential services committee is the Commission's head office.

(3) The functions of the essential services committee, including the functions of the panels, may be performed at any place in the Republic.

(4) The Commission must administer the essential services committee.

(5) The *director* is the accounting officer of the essential services committee and must allocate adequate resources to the essential services committee in order for it to perform its functions.

(6) The *director* may appoint staff to the essential services committee after consulting the essential services committee and the governing body, and the governing body must determine their remuneration and other terms and conditions of appointment.

(7) The allowances of members of the essential services committee, assessors and persons appointed to investigate matters are determined by the Minister of Finance.

(8) The essential services committee will be financed and provided with working capital from-

(*a*) the monies that Parliament may appropriate to the Commission in terms of section 122; and

(*b*) grants, donations and bequests made to it.

[S. 70E inserted by s. 11 of Act No. 6 of 2014.]

70F. Regulations for essential services committee.-(1) The Minister, after consulting the essential services committee, may make regulations concerning the-

(*a*) functioning of the essential services committee; and

(*b*) panels appointed by the essential services committee.

(2) The rules made by the Commission in terms of section 115 (2) (*c*A) (ii) remain in force until replaced by regulations made in terms of subsection (1).

[S. 70F inserted by s. 11 of Act No. 6 of 2014.]

71. Designating a service as an essential service.-(1) The essential services committee must give notice in the *Government Gazette* of any investigation that it is to conduct as to whether the whole or a part of a service is an *essential service*.

(2) The notice must indicate the service or the part of a service that is to be the subject of the investigation and must invite interested parties, within a period stated in the notice-

(*a*) to submit written representations; and

(*b*) to indicate whether or not they require an opportunity to make oral representations.

(3) Any interested party may inspect any written representations made pursuant to the notice, at the Commission's offices.

(4) The Commission must provide a certified copy of, or extract from, any written representations to any person who has paid the *prescribed* fee.

(5) The essential services committee must advise parties who wish to make oral representations of the place and time at which they may be made.

(6) Oral representations must be made in public.

(7) After having considered any written and oral representations, the essential services committee must decide whether or not to designate the whole or a part of the service that was the subject of the investigation as an *essential service*.

(8) If the panel appointed by the essential services committee designates the whole or a part of a service as an *essential service*, the essential services committee must publish a notice to that effect in the *Government Gazette*.

[Sub-s. (8) substituted by s. 12 of Act No. 6 of 2014.]

(9) A panel appointed by the essential services committee may vary or cancel the designation of the whole or a part of a service as an *essential service* or any determination of a minimum service or ratification of a minimum services agreement, by following the provisions set out in subsections (1) to (8), read with the changes required by the context.

[Sub-s. (9) substituted by s. 12 of Act No. 6 of 2014.]

Wording of Sections

(10) The Parliamentary service and the South African Police Service shall be deemed to have been designated an essential service in terms of this section.

(Date of commencement of s. 71: 1 January, 1996.)

72. Minimum services.-(1) When making a determination in terms of section 71, a panel of the essential services committee may issue an order-

(*a*) directing the parties to negotiate a minimum services agreement as contemplated in this section within a period specified in the order;

(*b*) if an agreement is not negotiated within the specified period, permitting either party to refer the matter to conciliation at the Commission or a *bargaining council* having jurisdiction.

(2) If the parties fail to conclude a *collective agreement* providing for the maintenance of minimum services or if a *collective agreement* is not ratified, a panel appointed by the essential services committee may determine the minimum services that are required to be maintained in an essential service.

(3) If a panel appointed by the essential services committee ratifies a *collective agreement* that provides for the maintenance of minimum services in a service designated as an essential service or if it determines such a minimum service which is binding on the employer and the *employees* involved in that service-

(*a*) the agreed or determined minimum services are to be regarded as an essential service in respect of the employer and its *employees*; and

(*b*) the provisions of section 74 do not apply.

(4) A minimum service determination-

(*a*) is valid until varied or revoked by the essential services committee; and

(*b*) may not be varied or revoked for a period of 12 months after it has been made.

(5) Despite subsections (3) and (4), section 74 applies to a designated essential service in respect of which the essential services committee has made a determination of minimum services if the majority of *employees* employed in the essential services voted in a ballot in favour of this.

(6) Subsection (5) does not apply to a *dispute* in respect of which a notice of a *strike* or *lock-out* has been issued prior to the holding of the ballot.

(7) Despite subsection (4), a panel may vary a determination by ratifying a *collective agreement* concluded between or on behalf of one or more-

(*a*) *trade unions* representing a majority of the *employees* covered by the determination; and

(*b*) employers employing the majority of the *employees* covered by the determination.

(8) Any party to negotiations concerning a minimum services agreement may, subject to any applicable *collective agreement*, refer a *dispute* arising from those negotiations to the Commission or a *bargaining council* having jurisdiction for conciliation and, if an agreement is not concluded, to the essential services committee for determination.

[S. 72 substituted by s. 13 of Act No. 6 of 2014.]

Wording of Sections

73. Disputes about minimum services and about whether a service is an essential service.-(1) Any party to a *dispute* about one or more of the following issues may refer the *dispute* in writing to the essential services committee-

(*a*) whether or not a service is an *essential service*;

[Para. (*a*) amended by s. 14 (*c*) of Act No. 6 of 2014.]

Wording of Sections

(*b*) whether or not an *employee* or employer is engaged in a service designated as an *essential service*;

(*c*) whether or not the employer and a registered *trade union* or trade unions representing *employees* in the *essential service* should conclude a *collective agreement* that provides for the maintenance of minimum services in that service; and

[Para. (*c*) added by s. 14 (*c*) of Act No. 6 of 2014.]

(*d*) the terms of such a *collective agreement*.

[S. 73 amended by s. 14 (*a*) and (*b*) of Act No. 6 of 2014. Para. (*d*) added by s. 14 (*c*) of Act No. 6 of 2014.]

Wording of Sections

(2) The party who refers the *dispute* to the essential services committee must satisfy it that a copy of the referral has been *served* on all the other parties to the *dispute*.

(3) The essential services committee must determine the *dispute* as soon as possible.

74. Disputes in essential services[18].-(1) Subject to section 73 (1), any party to a *dispute* that is precluded from participating in a *strike* or a *lock-out* because that party is engaged in an *essential service* may refer the *dispute* in writing to-

(*a*) a *council*, if the parties to the *dispute* fall within the *registered scope* of that *council*; or

(*b*) the Commission, if no *council* has jurisdiction.

[Sub-s. (1) amended by s. 15 of Act No. 6 of 2014.]

Wording of Sections

(2) The party who refers the *dispute* must satisfy the *council* or the Commission that a copy of the referral has been *served* on all the other parties to the *dispute*.

(3) The *council* or the Commission must attempt to resolve the *dispute* through conciliation.

(4) If the *dispute* remains unresolved, any party to the *dispute* may request that the *dispute* be resolved through arbitration by the *council* or the Commission.

(5) Any arbitration award in terms of subsection (4) made in respect of the State and that has financial implications for the State becomes binding-

(*a*) 14 days after the date of the award, unless a minister has tabled the award in Parliament within that period; or

(*b*) 14 days after the date of tabling the award, unless Parliament has passed a resolution that the award is not binding.

(6) If Parliament passes a resolution that the award is not binding, the *dispute* must be referred back to the Commission for further conciliation between the parties to the *dispute* and if that fails, any party to the *dispute* may request the Commission to arbitrate.

(7) If Parliament is not in session on the expiry of-

(*a*) the period referred to in subsection (5) (*a*), that period or the balance of that period will run from the beginning of the next session of Parliament;

(*b*) the period referred to in subsection (5) (*b*), that period will run from the expiry of the period referred to in paragraph (*a*) of this subsection or from the beginning of the next session of Parliament.

[Para. (*b*) substituted by s. 21 (*b*) of Act No. 42 of 1996.]

Wording of Sections

Footnotes

18 See flow diagram No. 8 in Schedule 4.

75. Maintenance services.-(1) A service is a maintenance service if the interruption of that service has the effect of material physical destruction to any working *area*, plant or machinery.

(2) If there is no *collective agreement* relating to the provision of a maintenance service, an employer may apply in writing to the essential services committee for a determination that the whole or a part of the employer's business or service is a maintenance service.

[Sub-s. (2) substituted by s. 22 (*a*) of Act No. 42 of 1996.]

Wording of Sections

(3) The employer must satisfy the essential services committee that a copy of the application has been

served on all interested parties.

(4) The essential services committee must determine, as soon as possible, whether or not the whole or a part of the employer's business or service is a maintenance service.

[Sub-s. (4) substituted by s. 22 (*b*) of Act No. 42 of 1996.]

Wording of Sections

(5) As part of its determination in terms of subsection (4), the essential services committee may direct that any *dispute* in respect of which the *employees* engaged in a maintenance service would have had the right to strike, but for the provisions of section 65 (1) (*d*) (ii), be referred to arbitration.

[Sub-s. (5) added by s. 22 (*c*) of Act No. 42 of 1996.]

(6) The committee may not make a direction in terms of subsection (5) if-

(*a*) the terms and conditions of employment of the *employees* engaged in the maintenance service are determined by collective bargaining; or

(*b*) the number of *employees* prohibited from striking because they are engaged in the maintenance service does not exceed the number of *employees* who are entitled to strike.

[Sub-s. (6) added by s. 22 (*c*) of Act No. 42 of 1996.]

(7) If a direction in terms of subsection (5) requires a *dispute* to be resolved by arbitration-

(*a*) the provisions of section 74 will apply to the arbitration; and

(*b*) any arbitration award will be binding on the *employees* engaged in the maintenance service and their employer, unless the terms of the award are varied by a *collective agreement*.

[Sub-s. (7) added by s. 22 (*c*) of Act No. 42 of 1996.]

76. Replacement labour.-(1) An employer may not take into employment any person-

(*a*) to continue or maintain production during a protected *strike* if the whole or a part of the employer's service has been designated a maintenance service; or

(*b*) for the purpose of performing the work of any *employee* who is locked out, unless the *lock-out is* in response to a *strike*.

(2) For the purpose of this section, "take into employment" includes engaging the services of a labour broker or an independent contractor.

77. Protest action to promote or defend socio-economic interests of workers.-(1) Every *employee* who is not engaged in an *essential service* or a maintenance service has the right to take part in *protest action* if-

(*a*) the *protest action* has been called by a registered *trade union* or federation of *trade unions*;

(*b*) the registered *trade union* or federation of *trade unions* has *served* a notice on *NEDLAC* stating-

(i) the reasons for the *protest action*; and

(ii) the nature of the *protest action*;

(*c*) the matter giving rise to the intended *protest action* has been considered by *NEDLAC* or any other appropriate forum in which the parties concerned are able to participate in order to resolve the matter; and

(*d*) at least 14 days before the commencement of the *protest action*, the registered *trade union* or federation of *trade unions* has *served* a notice on *NEDLAC* of its intention to proceed with the *protest action*.

(2) The Labour Court has exclusive jurisdiction-

(*a*) to grant any order to restrain any person from taking part in *protest action* or in any conduct in contemplation or in furtherance of *protest action* that does not comply with subsection (1);

(*b*) in respect of *protest action* that complies with subsection (1), to grant a declaratory order contemplated by subsection (4), after having considered-

(i) the nature and duration of the *protest action*;

(ii) the steps taken by the registered *trade union* or federation of *trade unions* to minimise the harm

caused by the *protest action*; and

(iii) the conduct of the participants in the *protest action*.

(3) A person who takes part in *protest action* or in any conduct in contemplation or in furtherance of *protest action* that complies with subsection (1), enjoys the protections conferred by section 67.

(4) Despite the provisions of subsection (3), an *employee* forfeits the protection against *dismissal* conferred by that subsection, if the *employee*-

(*a*) takes part in *protest action* or any conduct in contemplation or in furtherance of *protest action* in breach of an order of the Labour Court; or

(*b*) otherwise acts in contempt of an order of the Labour Court made in terms of this section.

CHAPTER V
WORKPLACE FORUMS

78. Definitions in this Chapter.-In this Chapter-

(*a*) "*employee*" means any person who is employed in a *workplace*, except a senior managerial *employee* whose contract of employment or status confers the authority to do any of the following in the *workplace*-

(i) . . . . . .

[Sub-para. (i) deleted by s. 23 of Act No. 42 of 1996.]

Wording of Sections

(ii) represent the employer in dealings with the *workplace forum*; or

(iii) determine policy and take decisions on behalf of the employer that may be in conflict with the representation of *employees* in the *workplace*; and

(*b*) "representative *trade union*" means a registered *trade union*, or two or more registered *trade unions* acting jointly, that have as members the majority of the *employees* employed by an employer in a *workplace*.

79. General functions of workplace forum.-A *workplace forum* established in terms of this Chapter-

(*a*) must seek to promote the interests of all *employees* in the *workplace*, whether or not they are *trade union* members;

(*b*) must seek to enhance efficiency in the *workplace*;

(*c*) is entitled to be consulted by the employer, with a view to reaching consensus about the matters referred to in section 84; and

(*d*) is entitled to participate in joint decision-making about the matters referred to in section 86.

80. Establishment of workplace forum.-(1) A *workplace forum* may be established in any *workplace* in which an employer employs more than 100 *employees*.

(2) Any representative *trade union* may apply to the Commission in the *prescribed* form for the establishment of a *workplace forum*.

(3) The applicant must satisfy the Commission that a copy of the application has been *served* on the *employer*.

(4) The Commission may require further information in support of the application.

(5) The Commission must-

(*a*) consider the application and any further information provided by the applicant; and

(*b*) consider whether, in the *workplace* in respect of which the application has been made-

(i) the employer employs 100 or more *employees*;

(ii) the applicant is a representative *trade union*; and

(iii) there is no functioning *workplace forum* established in terms of this Chapter.

(6) If satisfied that the requirements of subsection (5) are met, the Commission must appoint a commissioner

to assist the parties to establish a *workplace forum* by *collective agreement* or, failing that, to establish a *workplace forum* in terms of this Chapter.

(7) The commissioner must convene a meeting with the applicant, the employer and any registered *trade union* that has members employed in the *workplace*, in order to facilitate the conclusion of a *collective agreement* between those parties, or at least between the applicant and the employer.

(8) If a *collective agreement* is concluded, the provisions of this Chapter do not apply.

[Sub-s. (8) amended by s.24 of Act No. 42 of 1996.]

Wording of Sections

(9) If a *collective agreement* is not concluded, the commissioner must meet the parties referred to in subsection (7) in order to facilitate agreement between them, or at least between the applicant and the employer, on the provisions of a constitution for a *workplace forum* in accordance with this Chapter, taking into account the guidelines in Schedule 2.

(10) If no agreement is reached on any of the provisions of a constitution, the commissioner must establish a *workplace forum* and determine the provisions of the constitution in accordance with this Chapter, taking into account the guidelines in Schedule 2.

(11) After the *workplace forum* has been established, the commissioner must set a date for the election of the first members of the *workplace forum* and appoint an election officer to conduct the election.

(12) The provisions of this section do not apply to the *public service*. The establishment of *workplace forums* in the *public service* will be regulated in a Schedule promulgated by the Minister for the Public Service and Administration in terms of section 207 (4).

81. Trade union based workplace forum.-(1) If a representative *trade union* is recognised in terms of a *collective agreement* by an employer for the purposes of collective bargaining in respect of all *employees* in a *workplace*, that *trade union* may apply to the Commission in the *prescribed* form for the establishment of a *workplace forum*.

(2) The applicant may choose the members of the *workplace forum* from among its elected representatives in the *workplace*.

(3) If the applicant makes this choice, the provisions of this Chapter apply, except for section 80 (11) and section 82 (1) (*b*) to (*m*).

(4) The constitution of the applicant governs the nomination, election and removal from office of elected representatives of the applicant in the *workplace*.

(5) A *workplace forum* constituted in terms of this section will be dissolved if-

(*a*) the *collective agreement* referred to in subsection (1) is terminated;

(*b*) the applicant is no longer a representative *trade union*.

(6) The provisions of this section do not apply to the *public service*.

82. Requirements for constitution of workplace forum.-(1) The constitution of every *workplace forum* must-

(*a*) establish a formula for determining the number of seats in the workplace *forum*;

(*b*) establish a formula for the distribution of seats in the *workplace forum* so as to reflect the occupational structure of the *workplace*;

(*c*) provide for the direct election of members of the *workplace forum* by the *employees* in the *workplace*;

(*d*) provide for the appointment of an *employee* as an election officer to conduct elections and define that officer's functions and powers;

(*e*) provide that an election of members of the *workplace forum* must be held not later than 24 months after each preceding election;

(*f*) provide that if another registered *trade union* becomes representative, it may demand a new election at any time within 21 months after each preceding election;

(*g*) provide for the procedure and manner in which elections and ballots must be conducted;

(*h*) provide that any *employee*, including any former or current member of the *workplace forum*, may be nominated as a candidate for election as a member of the *workplace forum* by-

(i) any registered *trade union* with members employed in the *workplace*; or

(ii) a petition signed by not less than 20 per cent of the *employees* in the *workplace* or 100 *employees*, whichever number of *employees* is the smaller;

(*i*) provide that in any ballot every *employee* is entitled-

(i) to vote by secret ballot; and

(ii) to vote during *working hours* at the employer's premises;

(*j*) provide that in an election for members of the *workplace forum* every *employee* is entitled, unless the constitution provides otherwise-

(i) to cast a number of votes equal to the number of members to be elected; and

(ii) to cast one or more of those votes in favour of any candidate;

(*k*) establish the terms of office of members of the *workplace forum* and the circumstances in which a member must vacate that office;

(*l*) establish the circumstances and manner in which members of the *workplace forum* may be removed from office, including the right of any representative *trade union* that nominated a member for election to remove that member at any time;

(*m*) establish the manner in which vacancies in the *workplace forum* may be filled, including the rules for holding by-elections;

(*n*) establish the circumstances and manner in which the meetings referred to in section 83 must be held;

(*o*) provide that the employer must allow the election officer reasonable time off with pay during *working hours* to prepare for and conduct elections;

(*p*) provide that the employer must allow each member of the *workplace forum* reasonable time off with pay during *working hours* to perform the functions of a member of the *workplace forum* and to receive training relevant to the performance of those functions;

(*q*) require the employer to take any steps that are reasonably necessary to assist the election officer to conduct elections;

(*r*) require the employer to provide facilities to enable the *workplace forum* to perform its functions;

(*s*) provide for the designation of full-time members of the *workplace forum* if there are more than 1 000 *employees* in a *workplace*;

[Para. (*s*) substituted by s. 25 (*a*) of Act No. 42 of 1996.]

Wording of Sections

(*t*) provide that the *workplace forum* may invite any expert to attend its meetings, including meetings with the employer or the *employees*, and that an expert is entitled to any information to which the *workplace forum is* entitled and to inspect and copy any document that members of the *workplace forum* are entitled to inspect and copy;

[Para. (*t*) substituted by s. 25 (*b*) of Act No. 42 of 1996.]

Wording of Sections

(*u*) provide that *office-bearers* or *officials* of the representative *trade union* may attend meetings of the *workplace forum*, including meetings with the employer or the *employees*;

[Para. (*u*) amended by s. 25 (*c*) of Act No. 42 of 1996.]

Wording of Sections

(*v*) provide that the representative *trade union* and the employer, by agreement, may change the constitution of the *workplace forum*; and

[Para. (*v*) amended by s. 25 (*d*) of Act No. 42 of 1996.]

Wording of Sections

(*w*) establish the manner in which decisions are to be made.

[Para. (*w*) added by s. 25 (*e*) of Act No. 42 of 1996.]

(2) The constitution of a *workplace forum* may-

(*a*) establish a procedure that provides for the conciliation and arbitration of proposals in respect of which the employer and the *workplace forum* do not reach consensus;

(*b*) establish a co-ordinating *workplace forum* to perform any of the general functions of a *workplace forum* and one or more subsidiary *workplace forums* to perform any of the specific functions of a *workplace forum*; and

(*c*) include provisions that depart from sections 83 to 92.

(3) The constitution of a *workplace forum* binds the employer.

(4) The Minister for the Public Service and Administration may amend the requirements for a constitution in terms of this section for *workplace forums* in the *public service* by a Schedule promulgated in terms of section 207 (4).

83. Meetings of workplace forum.-(1) There must be regular meetings of the *workplace forum*.

(2) There must be regular meetings between the *workplace forum* and the employer, at which the employer must-

(*a*) present a report on its financial and employment situation, its performance since the last report and its anticipated performance in the short term and in the long term; and

(*b*) consult the *workplace forum* on any matter arising from the report that may affect *employees* in the *workplace*.

(3) (*a*) There must be meetings between members of the *workplace forum* and the *employees* employed in the *workplace* at regular and appropriate intervals. At the meetings with *employees*, the *workplace forum* must report on-

(i) its activities generally;

(ii) matters in respect of which it has been consulted by the employer; and

(iii) matters in respect of which it has participated in joint decision-making with the employer.

(*b*) Each calendar year, at one of the meetings with the *employees*, the employer must present an annual report of its financial and employment situation, its performance generally and its future prospects and plans.

(*c*) The meetings of *employees* must be held during *working hours* at a time and place agreed upon by the workplace *forum* and the employer without loss of pay on the part of the *employees*.

84. Specific matters for consultation.-(1) Unless the matters for consultation are regulated by a *collective agreement* with the representative *trade union*, a workplace *forum* is entitled to be consulted by the employer about proposals relating to any of the following matters-

(*a*) restructuring the *workplace*, including the introduction of new technology and new work methods;

(*b*) changes in the organisation of work;

(*c*) partial or total plant closures;

(*d*) mergers and transfers of ownership in so far as they have an impact on the *employees*;

(*e*) the *dismissal* of *employees* for reasons based on *operational requirements*;

(*f*) exemptions from any *collective agreement* or any law;

(*g*) job grading;

(*h*) criteria for merit increases or the payment of discretionary bonuses;

(*i*) education and training;

(*j*) product development plans; and

(*k*) export promotion.

(2) A *bargaining council* may confer on a *workplace forum* the right to be consulted about additional matters in *workplaces* that fall within the *registered scope* of the *bargaining council*.

(3) A representative *trade union* and an employer may conclude a *collective agreement* conferring on the *workplace forum* the right to be consulted about any additional matters in that *workplace*.

(4) Any other law may confer on a *workplace forum* the right to be consulted about any additional matters.

(5) Subject to any applicable occupational health and safety legislation, a representative *trade union* and an employer may agree-

(*a*) that the employer must consult with the *workplace forum* with a view to initiating, developing, promoting, monitoring and reviewing measures to ensure health and safety at work;

(*b*) that a meeting between the *workplace forum* and the employer constitutes a meeting of a health and safety committee required to be established in the *workplace* by that legislation; and

(*c*) that one or more members of the *workplace forum* are health and safety representatives for the purposes of that legislation.

(6) For the purposes of *workplace forum* in the *public service*-

(*a*) the *collective agreement* referred to in subsection (1) is a *collective agreement* concluded in a *bargaining council*;

(*b*) a *bargaining council* may remove any matter from the list of matters referred to in subsection (1) in respect of *workplaces* that fall within its *registered scope*; and

(*c*) subsection (3) does not apply.

85. Consultation.-(1) Before an employer may implement a proposal in relation to any matter referred to in section 84 (1), the employer must consult the *workplace forum* and attempt to reach consensus with it.

(2) The employer must allow the *workplace forum* an opportunity during the consultation to make representations and to advance alternative proposals.

(3) The employer must consider and respond to the representations or alternative proposals made by the *workplace forum* and, if the employer does not agree with them, the employer must state the reasons for disagreeing.

(4) If the employer and the workplace *forum* do not reach consensus, the employer must invoke any agreed procedure to resolve any differences before implementing the employer's proposal.

86. Joint decision-making.-(1) Unless the matters for joint decision-making are regulated by a *collective agreement* with the representative *trade union*, an employer must consult and reach consensus with a *workplace forum* before implementing any proposal concerning-

(*a*) disciplinary codes and procedures;

(*b*) rules relating to the proper regulation of the *workplace* in so far as they apply to conduct not related to the work performance of *employees*;

(*c*) measures designed to protect and advance persons disadvantaged by unfair discrimination; and

(*d*) changes by the employer or by employer-appointed representatives on trusts or boards of employer-controlled schemes, to the rules regulating social benefit schemes.

(2) A representative *trade union* and an employer may conclude a *collective agreement*-

(*a*) conferring on the *workplace forum* the right to joint decision-making in respect of additional matters in that *workplace*;

(*b*) removing any matter referred to in subsection (1) (*a*) to (*d*) from the list of matters requiring joint decision-making.

(3) Any other law may confer on a *workplace forum* the right to participate in joint decision-making about additional matters.

(4) If the employer does not reach consensus with the *workplace forum*, the employer may-

(*a*) refer the *dispute* to arbitration in terms of any agreed procedure; or

(*b*) if there is no agreed procedure, refer the *dispute* to the Commission.

(5) The employer must satisfy the Commission that a copy of the referral has been *served* on the chairperson of the *workplace forum*.

(6) The Commission must attempt to resolve the *dispute* through conciliation.

(7) If the *dispute* remains unresolved, the employer may request that the *dispute* be resolved through arbitration.19

(8) (*a*) If an arbitration award is about a proposal referred to in subsection (1) (*d*) it takes effect 30 days after the date of the award.

(*b*) Any representative on the trust or board may apply to the Labour Court for an order declaring that the implementation of the award constitutes a breach of a fiduciary duty on the part of that representative.

(*c*) Despite paragraph (*a*), the award will not take effect pending the determination by the Labour Court an application is made in terms of paragraph (*b*).

(9) For the purposes of *workplace forums* in the *public service*, a *collective agreement* referred to in subsections (1) and (2) is a *collective agreement* concluded in a *bargaining council*.

Footnotes

19 See flow diagram No. 9 in Schedule 4

87. Review at request of newly established workplace forum.-(1) After the establishment of a *workplace forum*, the *workplace forum* may request a meeting with the employer to review-

(*a*) criteria for merit increases or the payment of discretionary bonuses;

(*b*) disciplinary codes and procedures; and

(*c*) rules relating to the proper regulation of the *workplace* in so far as they apply to conduct not related to work performance of *employees* in the *workplace*.

(2) The employer must submit its criteria, disciplinary codes and procedures, and rules, referred to in subsection (1), if any, in writing to the *workplace forum* for its consideration.

(3) A review of the criteria must be conducted in accordance with the provisions of section 85.

(4) A review of the disciplinary codes and procedures, and rules, must be conducted in accordance with the provisions of section 86 (2) to (7) except that, in applying section 86 (4), either the employer or the *workplace forum* may refer a *dispute* between them to arbitration or to the Commission.

[Sub-s. (4) substituted by s. 26 of Act No. 42 of 1996.]

Wording of Sections

88. Matters affecting more than one workplace forum in an employer's operation.-(1) If the employer operates more than one *workplace* and separate *workplace forums* have been established in two or more of those *workplaces*, and if a matter has been referred to arbitration in terms of section 86 (4) (*a*) or (*b*) or by a *workplace forum* in terms of section 87 (4), the employer may give notice in writing to the chairpersons of all the *workplace forums* that no other *workplace forum* may refer a matter that is substantially the same as the matter referred to arbitration.

[Sub-s. (1) substituted by s. 27 of Act No. 42 of 1996.]

Wording of Sections

(2) If the employer gives notice in terms of subsection (1)-

(*a*) each *workplace forum* is entitled to make representations and participate in the arbitration proceedings; and

(*b*) the arbitration award is binding on the employer and the *employees* in each *workplace*.

89. Disclosure of information.-(1) An employer must disclose to the *workplace forum* all relevant information that will allow the *workplace forum* to engage effectively in consultation and joint decision-making.

(2) An employer is not required to disclose information-

(*a*) that is legally privileged;

(*b*) that the employer cannot disclose without contravening a prohibition imposed on the employer by any law or order of any court;

(*c*) that is confidential and, if disclosed, may cause substantial harm to an *employee* or the employer; or

(*d*) that is private personal information relating to an *employee*, unless that *employee* consents to the disclosure of that information.

(2A) The employer must notify the *workplace forum* in writing if of the view that any information disclosed in terms of subsection (1) is confidential.

[Sub-s. (2A) inserted by s. 28 of Act No. 42 of 1996.]

(3) If there is a *dispute* about the disclosure of information, any party to the *dispute* may refer the *dispute* in writing to the Commission.

(4) The party who refers the *dispute* to the Commission must satisfy it that a copy of the referral has been *served* on all the other parties to the *dispute*.

(5) The Commission must attempt to resolve the *dispute* through conciliation.

(6) If the *dispute* remains unresolved, any party to the *dispute* may request that the *dispute* be resolved through arbitration.

(7) In any *dispute* about the disclosure of information contemplated in subsection (3), the commissioner must first decide whether or not the information is relevant.

(8) If the commissioner decides that the information is relevant and if it is information contemplated in subsection (2) (*c*) or (*d*), the commissioner must balance the harm that the disclosure is likely to cause to an *employee* or employer against the harm that the failure to disclose the information is likely to cause to the ability of the *workplace forum* to engage effectively in consultation and joint decision-making.

(9) If the commissioner decides that the balance of harm favours the disclosure of the information, the commissioner may order the disclosure of the information on terms designed to limit the harm likely to be caused to the *employee* or employer.

(10) When making an order in terms of subsection (9), the commissioner must take into account any breach of confidentiality in respect of information disclosed in terms of this section at that *workplace* and may refuse to order the disclosure of the information or any other confidential information which might otherwise be disclosed for a period specified in the arbitration award.

90. Inspection and copies of documents.-(1) Any documented information that is required to be disclosed by the employer in terms of section 89 must be made available on request to the members of the *workplace forum* for inspection.

(2) The employer must provide copies of the documentation on request to the members of the *workplace forum*.

91. Breach of confidentiality.-In any *dispute* about an alleged breach of confidentiality, the commissioner may order that the right to disclosure of information in that *workplace* be withdrawn for a period specified in the arbitration award.

92. Full-time members of workplace forum.-(1) In a *workplace* in which l 000 or more *employees* are employed, the members of the *workplace forum* may designate from their number one full-time member.

(2) (*a*) The employer must pay a full-time member of the *workplace forum* the same *remuneration* that the member would have earned in the position the member held immediately before being designated as a full-time member.

(*b*) When a person ceases to be a full-time member of a *workplace forum* the employer must re-instate that person to the position that person held immediately before election or appoint that person to any higher position to which, but for the election, that person would have advanced.

93. Dissolution of workplace forum.-(1) A representative *trade union* in a *workplace* may request a ballot to dissolve a *workplace forum*.

(2) If a ballot to dissolve a *workplace forum* has been requested, an election officer must be appointed in terms of the constitution of the *workplace forum*.

(3) Within 30 days of the request for a ballot to dissolve the *workplace forum* the election officer must prepare and conduct the ballot.

(4) If more than 50 per cent of the *employees* who have voted in the ballot support the dissolution of the *workplace forum*, the *workplace forum* must be dissolved.

94. Disputes about workplace forums.-(1) Unless a *collective agreement* or this Chapter provides otherwise, any party to a *dispute* about the interpretation or application of this Chapter may refer that *dispute* to the Commission in writing, if that party is-

(*a*) one or more *employees* employed in the *workplace*;

(*a*A) a *workplace forum*;

[Para. (*a*A) inserted by s. 29 of Act No. 42 of 1996.]

(*b*) a registered *trade union* with members employed in the *workplace*;

(*c*) the representative *trade union*; or

(*d*) the employer.

(2) The party who refers the *dispute* to the Commission must satisfy it that a copy of the referral has been *served* on all the other parties to the *dispute*.

(3) The Commission must attempt to resolve the *dispute* through conciliation.

(4) If the *dispute* remains unresolved, any party to the *dispute* may request that the *dispute* be resolved through arbitration.

CHAPTER VI
TRADE UNIONS AND EMPLOYERS' ORGANISATIONS

PART A-Registration and Regulation of Trade Unions and Employers' Organisations

95. Requirements for registration of trade unions or employers' organisations.-(1) Any *trade union* may apply to the *registrar* for registration if-

(*a*) it has adopted a name that meets the requirements of subsection (4);

(*b*) it has adopted a constitution that meets the requirements of subsections (5) and (6);

(*c*) it has an address in the *Republic*; and

(*d*) it is independent.

(2) A *trade union* is independent if-

(*a*) it is not under the direct or indirect control of any employer or *employers' organisation*; and

(*b*) it is free of any interference or influence of any kind from any employer or *employers' organisation*.

(3) Any *employers' organisation* may apply to the *registrar* for registration if-

(*a*) it has adopted a name that meets the requirements of subsection (4);

(*b*) it has adopted a constitution that meets the requirements of subsections (5) and (6), and

(*c*) it has an address in the *Republic*.

(4) Any *trade union* or *employers' organisation* that intends to register may not have a name or shortened form of the name that so closely resembles the name or shortened form of the name of another *trade union* or *employers' organisation* that it is likely to mislead or cause confusion.

(5) The constitution of any *trade union* or *employers' organisation* that intends to register must-

(*a*) state that the *trade union* or *employers' organisation* is an association not for gain;

(*b*) prescribe qualifications for, and admission to, membership;

(*c*) establish the circumstances in which a member will no longer be entitled to the benefits of membership;

(*d*) provide for the termination of membership;

(*e*) provide for appeals against loss of the benefits of membership or against termination of membership, prescribe a procedure for those appeals and determine the body to which those appeals may be made;

(*f*) provide for membership fees and the method for determining membership fees and other payments by members;

(*g*) prescribe rules for the convening and conducting of meetings of members and meetings of representatives of members, including the quorum required for, and the minutes to be kept of, those meetings;

(*h*) establish the manner in which decisions are to be made;

(*i*) establish the office of secretary and define its functions;

(*j*) provide for other *office-bearers*, *officials* and, in the case of a *trade union*, *trade union representatives*, and define their respective functions;

(*k*) prescribe a procedure for nominating or electing *office-bearers* and, in the case of a *trade union*, *trade union representatives*;

(*l*) prescribe a procedure for appointing, or nominating and electing, *officials*;

(*m*) establish the circumstances and manner in which *office-bearers*, *officials* and, in the case of a *trade union*, *trade union representatives*, may be removed from office;

(*n*) provide for appeals against removal from office of *office-bearers*, *officials* and, in the case of a *trade union*, *trade union representatives*, prescribe a procedure for those appeals and determine the body to which those appeals may be made;

(*o*) establish the circumstances and manner in which a ballot must be conducted;

(*p*) provide that the *trade union* or *employers' organisation* before calling a *strike* or *lock-out*, must conduct a ballot of those of its members in respect of whom it intends to call the *strike* or *lock-out*;

(*q*) provide that members of the *trade union* or *employers' organisation* may not be disciplined or have their membership terminated for failure or refusal to participate in a *strike* or *lock-out* if-

(i) no ballot was held about the *strike* or *lock-out*; or

(ii) a ballot was held but a majority of the members who voted did not vote in favour of the *strike* or *lock-out*;

(*r*) provide for banking and investing its money;

(*s*) establish the purposes for which its money may be used;

(*t*) provide for acquiring and controlling property;

(*u*) determine a date for the end of its financial year;

(*v*) prescribe a procedure for changing its constitution; and

(*w*) prescribe a procedure by which it may resolve to wind up.

(6) The constitution of any *trade union* or *employers' organisation* which intends to register may not include any provision that discriminates directly or indirectly against any person on the grounds of race or sex.

(7) The *registrar* must not register a *trade union* or an *employers' organisation* unless the *registrar* is satisfied that the applicant is a genuine *trade union* or a genuine *employers' organisation*.

[Sub-s. (7) added by s. 18 of Act No. 12 of 2002.]

(8) The *Minister*, in consultation with *NEDLAC*, may by notice in the *Government Gazette* publish guidelines to be applied by the *registrar* in determining whether an applicant is a genuine *trade union* or a genuine *employers' organisation*.

[Sub-s. (8) added by s. 18 of Act No. 12 of 2002.]

96. Registration of trade unions or employers' organisations.-(1) Any *trade union* or *employers' organisation* may apply for registration by submitting to the registrar-

(*a*) a *prescribed* form that has been properly completed;

(*b*) a copy of its constitution; and

(*c*) any other information that may assist the *registrar* to determine whether or not the *trade union* or *employers' organisation* meets the requirements for registration.

(2) The *registrar* may require further information in support of the application.

(3) The *registrar*-

(*a*) must consider the application and any further information provided by the applicant; and

(*b*) if satisfied that the applicant meets the requirements for registration, must register the applicant by entering the applicant's name in the register of *trade unions* or the register of *employers' organisations*.

(4) If the *registrar* is not satisfied that the applicant meets the requirements for registration, the *registrar*-

(*a*) must send the applicant a written notice of the decision and the reasons for that decision; and

(*b*) in that notice, must inform the applicant that it has 30 days from the date of the notice to meet those requirements.

(5) If, within that 30-day period, the applicant meets the requirements for registration, the *registrar* must register the applicant by entering the applicant's name in the appropriate register.

(6) If, within that 30-day period, an applicant has attempted to meet the requirements for registration but the *registrar* concludes that the applicant has failed to do so, the *registrar* must-

(*a*) refuse to register the applicant; and

(*b*) notify the applicant in writing of that decision.

(7) After registering the applicant, the *registrar* must-

(*a*) issue a certificate of registration in the applicant's name; and

(*b*) send the certificate and a certified copy of the registered constitution to the applicant.

97. Effect of registration of trade union or employers' organisation.-(1) A certificate of registration is sufficient proof that a registered *trade union* or registered *employers' organisation* is a body corporate.

(2) The fact that a person is a member of a registered *trade union* or a registered *employers' organisation* does not make that person liable for any of the obligations or liabilities of the *trade union* or *employers' organisation*.

(3) A member, *office-bearer* or *official* of a registered *trade union* or a registered *employers' organisation* or, in the case of a *trade union*, a *trade union representative* is not personally liable for any loss suffered by any person as a result of an act performed or omitted in good faith by the member, *office-bearer*, *official* or *trade union representative* while performing their functions for the *trade union* or *employers' organisation*.

(4) *Service* of any document directed to a registered *trade union* or *employers' organisation* at the address most recently provided to the *registrar* will be for all purposes *service* of that document on that *trade union* or *employers' organisation*.

98. Accounting records and audits.-(1) Every registered *trade union* and every registered *employers' organisation* must, to the standards of generally accepted accounting practice, principles and procedures-

(*a*) keep books and records of its income, expenditure, assets and liabilities; and

(*b*) within six months after the end of each financial year, prepare financial statements, including at least-

(i) a statement of income and expenditure for the previous financial year; and

(ii) a balance sheet showing its assets, liabilities and financial position as at the end of the previous financial year.

(2) Every registered *trade union* and every registered *employers' organisation* must arrange for an annual audit of its books and records of account and its financial statements by an *auditor* who must-

(*a*) conduct the audit in accordance with generally accepted auditing standards; and

(*b*) report in writing to the *trade union* or *employers' organisation* and in that report-

(i) express an opinion as to whether or not the *trade union* or *employers' organisation* has complied with those provisions of its constitution relating to financial matters; and

(ii) if the *trade union* is a party to an agency shop agreement referred to in section 25 or a closed shop agreement referred to in section 26 express an opinion as to whether or not the *trade union* has complied with the provisions of those sections.

(3) Every registered *trade union* and every registered *employers' organisation* must-

(*a*) make the financial statements and the *auditor's* report available to its members for inspection; and

(*b*) submit those statements and the *auditor's* report to a meeting or meetings of its members or their representatives as provided for in its constitution.

(4) Every registered *trade union* and every registered *employers' organisation* must preserve each of its books of account, supporting vouchers, records of subscriptions or levies paid by its members, income and expenditure statements, balance sheets, and auditor's reports, in an original or reproduced form, for a period of three years from the end of the financial year to which they relate.

99. Duty to keep records.-In addition to the records required by section 98, every registered *trade union* and every registered *employers' organisation* must keep-

(*a*) a list of its members;

(*b*) the minutes of its meetings, in an original or reproduced form, for a period of three years from the end of the financial year to which they relate; and

(*c*) the ballot papers for a period of three years from the date of every ballot.

100. Duty to provide information to registrar.-Every registered *trade union* and every registered *employers' organisation* must provide to the *registrar*-

(*a*) by 31 March each year, a statement, certified by the secretary that it accords with its records, showing the number of members as at 31 December of the previous year and any other related details that may be required by the *registrar*;

(*b*) within 30 days of receipt of its *auditor's* report, a certified copy of that report and of the financial statements;

(*c*) within 30 days of receipt of a written request by the *registrar*, an explanation of anything relating to the statement of membership, the *auditor's* report or the financial statements;

(*d*) within 30 days of any appointment or election of its national *office-bearers*, the names and work addresses of those *office-bearers*, even if their appointment or election did not result in any changes to its *office-bearers*; and

(*e*) 30 days before a new address for *service* of documents will take effect, notice of that change of address.

101. Changing constitution or name of registered trade unions or employers' organisations.-(1) A registered *trade union* or a registered *employers' organisation* may resolve to change or replace its constitution.

(2) The registered *trade union* or the registered *employers' organisation* must send the *registrar* a copy of the resolution and a certificate signed by its secretary stating that the resolution complies with its constitution.

(3) The *registrar* must-

(*a*) register the changed or new constitution if it meets the requirements for registration; and

(*b*) send the registered *trade union* or registered *employers' organisation* a copy of the resolution endorsed by the *registrar*, certifying that the change or replacement has been registered.

(4) The changed or new constitution takes effect from the date of the *registrar's* certification.

(5) A registered *trade union* or registered *employers' organisation* may resolve to change its name.

(6) The registered *trade union* or registered *employers' organisation* must send the *registrar* a copy of the resolution and the original of its current certificate of registration.

(7) If the new name of the *trade union* or *employers' organisation* meets the requirements of section 95 (4),20 the *registrar* must-

(*a*) enter the new name in the appropriate register and issue a certificate of registration in the new name of the *trade union* or *employers' organisation*;

(*b*) remove the old name from that register and cancel the earlier certificate of registration; and

(*c*) send the new certificate to the *trade union* or *employers' organisation*.

(8) The new name takes effect from the date that the *registrar* enters it in the appropriate register.

Footnotes

20 These are the requirements relating to the name of a trade union or employers' organisation to be registered.

102. Amalgamation of trade unions or employers' organisations.-(1) Any registered-

(*a*) *trade union* may resolve to amalgamate with one or more other *trade unions*, whether or not those

other *trade unions* are registered; and

(*b*) *employers' organisation* may resolve to amalgamate with one or more other *employers' organisations*, whether or not those other *employers' organisations* are registered.

(2) The amalgamating *trade unions* or amalgamating *employers' organisations* may apply to the *registrar* for registration of the amalgamated *trade union* or amalgamated *employers' organisation*, even if any of the amalgamating *trade unions* or amalgamating *employers' organisations* is itself already registered, and the *registrar* must treat the application as an application in terms of section 96.

(3) After the *registrar* has registered the amalgamated *trade union* or amalgamated *employers' organisation* the *registrar* must cancel the registration of each of the amalgamating *trade unions* or amalgamating *employers' organisations* by removing their names from the appropriate register.

(4) The registration of an amalgamated *trade union* or an amalgamated *employers' organisation* takes effect from the date that the *registrar* enters its name in the appropriate register.

(5) When the *registrar* has registered an amalgamated *trade union* or amalgamated *employers' organisation*-

(*a*) all the assets, rights, obligations and liabilities of the amalgamating *trade unions* or the amalgamating *employers' organisations* devolve upon and vest in the amalgamated *trade union* or amalgamated *employers' organisation*; and

(*b*) the amalgamated *trade union* or amalgamated *employers' organisation* succeeds the amalgamating *trade unions* or the amalgamating *employers' organisations* in respect of-

(i) any right that the amalgamating *trade union* or the amalgamating *employers' organisations* enjoyed;

(ii) any fund established in terms of *this Act* or any other law;

(iii) any arbitration award or court order;

(iv) any *collective agreement* or other agreement;

(v) membership of any *council*; and

(vi) any written authorisation by a member for the periodic deduction of levies or subscriptions due to the amalgamating trade unions or amalgamating *employers' organisations*.

103. Winding-up of trade unions or employers' organisations.-(1) The Labour Court may order a *trade union* or *employers' organisation* to be wound up if-

(*a*) the *trade union* or *employers' organisation* has resolved to wind-up its affairs and has applied to the Court for an order giving effect to that resolution; or

(*b*) the *registrar* or any member of the *trade union* or *employers' organisation* has applied to the Court for its winding up and the Court is satisfied that the *trade union* or *employers' organisation* for some reason that cannot be remedied is unable to continue to function.

[Sub-s. (1) substituted by s. 19 (*b*) of Act No. 12 of 2002.]

Wording of Sections

(1A) If the *registrar* has cancelled the registration of a *trade union* or *employers' organisation* in terms of section 106 (2A), any person opposing its winding-up is required to prove that the *trade union* or *employers' organisation* is able to continue to function.

[Sub-s. (1A) inserted by s. 19 (*c*) of Act No. 12 of 2002.]

(2) If there are any persons not represented before the Labour Court whose interests may be affected by an order in terms of subsection (1), the Court must-

(*a*) consider those interests before deciding whether or not to grant the order applied for; and

(*b*) if it grants the order applied for, include provisions in the order disposing of each of those interests.

(3) In granting an order in terms of subsection (1), the Labour Court may appoint a suitable person as liquidator, on appropriate conditions.

[Sub-s. (3) amended by s. 30 of Act No. 42 of 1996 (English text only).]

Wording of Sections

(4) (*a*) The registrar of the Labour Court must determine the liquidator's fees.

(*b*) The Labour Court, in chambers, may review the determination of the registrar of the Labour Court.

(*c*) The liquidator's fees are a first charge against the assets of the *trade union* or *employers' organisation*.

(5) If, after all the liabilities of the *trade union* or *employers' organisation* have been discharged, any assets remain which cannot be disposed of in accordance with the constitution of that *trade union* or *employers' organisation*, the liquidator must realise those assets and pay the proceeds to the Commission for its own use.

[Sub-s. (5) substituted by s. 19 (*d*) of Act No. 12 of 2002.]

Wording of Sections

(6) (*a*) The Labour Court may direct that the costs of the *registrar* or any other person who has brought an application in terms of subsection (1) (*b*) be paid from the assets of the *trade union* or *employers' organisation*.

(*b*) Any costs in terms of paragraph (*a*) rank concurrently with the liquidator's fees.

[S. 103 amended by s. 19 (*a*) of Act No. 12 of 2002. Sub-s. (6) added by s. 19 (*e*) of Act No. 12 of 2002.]

Wording of Sections

103A. Appointment of administrator.-(1) The Labour Court may order that a suitable person, who may be a Commissioner, be appointed to administer a *trade union* or *employers' organisation* on such conditions as the Court may determine if the-

(*a*) Court is satisfied that it is just and equitable to do so; and

(*b*) *trade union* or *employers' organisation* has resolved that an administrator be appointed and has applied to the Court for an order to give effect to that resolution; or

(*c*) *registrar* has applied to the Court to appoint an administrator.

(2) Without limiting the generality of subsection (1) (*a*), it may be just and equitable to make an order in terms of subsection (1) if-

(*a*) the *trade union* or *employers' organisation* fails materially to perform its functions; or

(*b*) there is serious mismanagement of the finances of the *trade union* or *employers' organisation.*

(3) If there are any persons not represented before the Labour Court whose interests may be affected by an order in terms of subsection (1), the Court must consider their interests before deciding whether or not to grant the order.

(4) (*a*) The registrar of the Labour Court must determine the administrator's fees.

(*b*) The Labour Court, in chambers, may review the determination of the registrar of the Labour Court.

(*c*) The administrator's fees will be paid as an expense of the *trade union* or *employers' organisation.*

(5) The Labour Court may, on the application by the *trade union, employer's organisation* or *registrar*-

(*a*) vary or amend any prior order made in terms of this section; or

(*b*) if it is satisfied that an administrator is no longer required, terminate the appointment of the administrator, on appropriate conditions.

[S. 103A inserted by s. 16 of Act No. 6 of 2014.]

104. Winding-up of trade unions or employers' organisations by reason of insolvency.-Any person who seeks to sequestrate a *trade union* or *employers' organisation* by reason of insolvency must comply with the Insolvency Act, 1936 (Act No. 24 of l936), and, for the purposes of this section, any reference to the court in that Act must be interpreted as referring to the Labour Court.

105. Declaration that trade union is no longer independent.-(1) Any registered *trade union* may apply to the Labour Court for an order declaring that another *trade union* is no longer independent.

(2) If the Labour Court is satisfied that a *trade union* is not independent, the Court must make a declaratory order to that effect.

[S. 105 amended by s. 20 of Act No. 12 of 2002.]

Wording of Sections

106. Cancellation of registration of trade unions or employers' organisations.-(1) The registrar of the Labour Court must notify the *registrar* if the Court-

(*a*) in terms of section 103 or 104 has ordered a registered *trade union* or a registered *employers' organisation* to be wound up; or

(*b*) in terms of section 105 has declared that a registered *trade union* is not independent.

[Sub-s. (1) substituted by s. 21 (*a*) of Act No. 12 of 2002.]

Wording of Sections

(2) When the *registrar* receives a notice from the Labour Court in terms of subsection (1), the *registrar* must cancel the registration of the *trade union* or *employers' organisation* by removing its name from the appropriate register.

(2A) The *registrar* may cancel the registration of a *trade union* or *employers' organisation* by removing its name from the appropriate register if the *registrar*-

(*a*) is satisfied that the *trade union* or *employers' organisation* is not, or has ceased to function as, a genuine *trade union* or *employers' organisation*, as the case may be; or

(*b*) has issued a written notice requiring the *trade union* or *employers' organisation* to comply with sections 98, 99 and 100 within a period of 60 days of the notice and the *trade union* or *employers' organisation* has, despite the notice, not complied with those sections.

[Sub-s. (2A) inserted by s. 21 (*b*) of Act No. 12 of 2002.]

(2B) The *registrar* may not act in terms of subsection (2A) unless the *registrar* has published a notice in the *Government Gazette* at least 60 days prior to such action-

(*a*) giving notice of the *registrar's* intention to cancel the registration of the *trade union* or *employers' organisation*; and

(*b*) inviting the *trade union* or *employers' organisation* or any other interested parties to make written representations as to why the registration should not be cancelled.

[Sub-s. (2B) inserted by s. 21 (*b*) of Act No. 12 of 2002.]

(3) When a *trade union's* or *employers' organisation's* registration is cancelled, all the rights it enjoyed as a result of being registered will end.

PART B-Regulation of Federations of Trade Unions and Employers' Organisations

107. Regulation of federations of trade unions or employers' organisations.-(1) Any federation of *trade unions* that has the promotion of the interests of *employees* as a primary object, and any federation of *employers' organisations* that has the promotion of the interests of employers as a primary object, must provide to the *registrar*-

(*a*) within three months of its formation, and after that by 31 March each year, the names and addresses of its members and the number of persons each member in the federation represents;

(*b*) within three months of its formation, and after that within 30 days of any appointment or election of its national *office-bearers*, the names and work addresses of those *office-bearers*, even if their appointment or election did not result in any changes to its *office-bearers*;

(*c*) within three months of its formation, a certified copy of its constitution and an address in the *Republic* at which it will accept *service* of any document that is directed to it;

(*d*) within 30 days of any change to its constitution, or of the address provided to the *registrar* as required in paragraph (*c*), notice of that change; and

(*e*) within 14 days after it has resolved to wind up, a copy of that resolution.

(2) *Service* of any document directed to a federation of *trade unions* or a federation of *employers' organisations* at the address most recently provided to the *registrar* will be for all purposes, *service* of that document on that federation.

(3) The *registrar* must remove from the appropriate register the name of any federation that the *registrar* believes has been wound up or sequestrated.

PART C-Registrar of Labour Relations

108. Appointment of registrar of labour relations.-(1) The *Minister* must designate an officer of the

Department of Labour as the registrar of labour relations to perform the functions conferred on the *registrar* by or terms of *this Act*.

(2) (*a*) The *Minister* may designate any number of officers in the Department as deputy registrars of labour relations to assist the *registrar* to perform the functions of *registrar* in terms of *this Act*.

(*b*) A deputy registrar may exercise any of the functions of the *registrar* that have been generally or specifically delegated to the deputy.

(3) The deputy registrar of labour relations or if there is more than one, the most senior of them, will act as *registrar* whenever-

(*a*) the *registrar* is absent from the *Republic* or from duty, or for any reason is temporarily unable to perform the functions of *registrar*; or

(*b*) the office of *registrar* is vacant.

(Date of commencement of s. 108: 1 January, 1996.)

109. Functions of registrar.-(1) The *registrar* must keep-

(*a*) a register of registered *trade unions*;

(*b*) a register of registered *employers' organisations*;

(*c*) a register of federations of *trade unions* containing the names of the federations whose constitutions have been submitted to the *registrar*;

(*d*) a register of federations of *employers' organisations* containing the names of the federations whose constitutions have been submitted to the *registrar*; and

(*e*) a register of *councils*.

(2) Within 30 days of making an entry in, or deletion from, a register, the *registrar* must give notice of that entry or deletion in the *Government Gazette*.

(3) The *registrar*, on good cause shown, may extend or condone late compliance with any of the time periods established in this Chapter, except the period within which a person may note an appeal against a decision of the *registrar*.

(4) The *registrar* must perform all the other functions conferred on the *registrar* by or in terms of *this Act*.

(Date of commencement of s. 109: 1 January, 1996.)

110. Access to information.-(1) Any person may inspect any of the following documents in the *registrar's* office-

(*a*) the registers of registered *trade unions*, registered *employers' organisations*, federations of *trade unions*, federations of *employers' organisations* and *councils*;

(*b*) the certificates of registration and the registered constitutions of registered *trade unions* registered *employers' organisations*, and *councils* and the constitutions of federations of *trade unions* and federations of *employers' organisations*; and

(*c*) the *auditor's* report in so far as it expresses an opinion on the matters referred to in section 98 (2) (*b*) (ii).

(2) The *registrar* must provide a certified copy of, or extract from, any of the documents referred to in subsection (1) to any person who has paid the *prescribed* fee.

(3) Any person who is a member, *office-bearer* or *official* of a registered *trade union* or of a registered *employers' organisation*, or is a member of a party to a *council*, may inspect any document that has been provided to the *registrar* in compliance with *this Act* by that person's registered *trade union*, registered *employers' organisation* or *council*.

(4) The *registrar* must provide a certified copy of, or extract from, any document referred to in subsection (3) to any person who has a right in terms of that subsection to inspect that document and who has paid the *prescribed* fee.

(5) The *registrar* must provide any of the following information to any person free of charge-

(*a*) the names and work addresses of persons who are national *office-bearers* of any registered *trade union*, registered *employers' organisation*, federation or *council*;

(*b*) the address in the Republic at which any registered *trade union*, registered *employers' organisation*, federation or *council* will accept service of any document that is directed to it; and

(*c*) any of the details of a federation of *trade unions* or a federation of *employers' organisations* referred to in section 107 (1) (*a*), (*c*), and (*e*).

PART D-Appeals from Registrar's Decision

111. Appeals from registrar's decision.-(1) Within 30 days of the written notice of a decision of the *registrar*, any person who is aggrieved by the decision may demand in writing that the *registrar* provide written reasons for the decision.

(2) The *registrar* must give the applicant written reasons for the decision within 30 days of receiving a demand in terms of subsection (1).

(3) Any person who is aggrieved by a decision of the *registrar* may appeal to the Labour Court against that decision, within 60 days of-

(*a*) the date of the *registrar's* decision; or

(*b*) if written reasons for the decision are demanded, the date of those reasons.

(4) The Labour Court, on good cause shown, may extend the period within which a person may note an appeal against a decision of the *registrar*.

(5) An appeal in terms of this section against a decision by the *registrar* in terms of section 106 does not suspend the operation of the *registrar's* decision.

[Sub-s. (5) added by s. 17 of Act No. 6 of 2014.]

CHAPTER VII
DISPUTE RESOLUTION

PART A-Commission for Conciliation, Mediation and Arbitration

112. Establishment of Commission for Conciliation, Mediation and Arbitration.-The Commission for Conciliation, Mediation and Arbitration is hereby established as a juristic person.

(Date of commencement of s. 112 1 January, 1996.)

113. Independence of Commission.-The Commission is independent of the State, any political party, *trade union* employer, *employers' organisation*, federation of *trade unions* or federation of *employers' organisations*.

114. Area of jurisdiction and offices of Commission.-(1) The Commission has jurisdiction in all the provinces of the *Republic*.

(2) The *Minister*, after consulting the governing body, must determine the location for the Commission's head office.

(3) The Commission must maintain an office in each province of the *Republic* and as many local offices as it considers necessary.

115. Functions of Commission.-(1) The Commission must-

(*a*) attempt to resolve, through conciliation, any *dispute* referred to it in terms of *this Act*;

(*b*) if a *dispute* that has been referred to it remains unresolved after conciliation, arbitrate the *dispute* if-

(i) *this Act* requires arbitration and any party to the *dispute* has requested that the *dispute* be resolved through arbitration; or

(ii) all the parties to a *dispute* in respect of which the Labour Court has jurisdiction consent to

arbitration under the auspices of the Commission;

(*c*) assist in the establishment of *workplace forums* in the manner contemplated in Chapter V;

[Para. (*c*) amended by s. 18 (*a*) of Act No. 6 of 2014.]

Wording of Sections

(*d*) compile and publish information and statistics about its activities; and

[Para. (*d*) amended by s. 18 (*a*) of Act No. 6 of 2014.]

Wording of Sections

(*e*) at least every second year, review any rules made in terms of this section.

[Para. (*e*) added by s. 18 (*a*) of Act No. 6 of 2014.]

(2) The Commission may-

(*a*) if asked, advise a party to a *dispute* about the procedure to follow in terms of *this Act*;21

(*b*) if asked, assist a party to a *dispute* to obtain legal advice, assistance or representation;22

(*b*A) if requested, provide assistance of an administrative nature to an *employee* earning less than the threshold prescribed by the *Minister* under section 6 (3) of the *Basic Conditions of Employment Act* to serve any notice or document in respect of conciliation or arbitration proceedings in terms of *this Act*, provided that the *employee* remains responsible in law for any such service;

[Para. (*b*A) inserted by s. 18 (*b*) of Act No. 6 of 2014.]

(*c*) offer to resolve a *dispute* that has not been referred to the Commission through conciliation;23

(*c*A) make rules-

(i) to regulate, subject to Schedule 3, the proceedings at its meetings and at the meetings of any committee of the Commission;

(ii) . . . . . .

[Sub-para. (ii) deleted by s. 18 (*c*) of Act No. 6 of 2014.]

Wording of Sections

(iii) regulating the practice and procedure-

(*aa*) for any process to resolve a dispute through conciliation;

(*bb*) at arbitration proceedings; and

(iv) determining the amount of any fee that the Commission may charge under section 147, and regulating the payment of such a fee in detail;

[Para. (*c*A) inserted by s. 6 (*a*) of Act No. 127 of 1998.]

(*d*) 24

[Para. (*d*) deleted by s. 31 (*a*) of Act No. 42 of 1996.]

Wording of Sections

(*e*) 25

[Para. (*e*) deleted by s. 31 (*a*) of Act No. 42 of 1996.]

Wording of Sections

(*f*) conduct, oversee or scrutinise any election or ballot of a registered *trade union* or registered *employers' organisation* if asked to do so by that *trade union* or *employers' organisation*;

(*g*) publish guidelines in relation to any matter dealt with in *this Act*;

(*h*) conduct and publish research into matters relevant to its functions.

(*i*) . . . . . .

[Para. (*i*) deleted by s. 31 (*a*) of Act No. 42 of 1996.]

Wording of Sections

(2A) The Commission may make rules regulating-

(*a*) the practice and procedure in connection with the resolution of a *dispute* through conciliation or arbitration;

(*b*) the process by which conciliation is initiated, and the form, content and use of that process;

(*c*) the process by which arbitration or arbitration proceedings are initiated, and the form, content and use of that process;

(*d*) the joinder of any person having an interest in the *dispute* in any conciliation and arbitration proceedings;

(*e*) the intervention of any person as an applicant or respondent in conciliation or arbitration proceedings;

(*f*) the amendment of any citation and the substitution of any party for another in conciliation or arbitration proceedings;

(*g*) the hours during which offices of the Commission will be open to receive any process;

(*h*) any period that is not to be counted for the purpose of calculating time or periods for delivering any process or notice relating to any proceedings;

(*i*) the forms to be used by parties and the Commission;

(*j*) the basis on which a commissioner may make any order as to costs in any arbitration;

(*k*) the right of any party to be represented by any person or category of persons in any conciliation or arbitration proceedings, including the regulation or limitation of the right to be represented in those proceedings;

[Para. (*k*) substituted by s. 18 (*d*) of Act No. 6 of 2014.]

Wording of Sections

(*k*A) the consequences for any party to conciliation or arbitration proceedings for not attending those proceedings;

[Para. (*k*A) inserted by s. 18 (*e*) of Act No. 6 of 2014.]

(*l*) the circumstances in which the Commission may charge a fee in relation to any conciliation or arbitration proceedings or for any services the Commission provides; and

(*m*) all other matters incidental to performing the functions of the Commission.

[Sub-s. (2A) inserted by s. 22 (*a*) of Act No. 12 of 2002.]

(3) The Commission may provide *employees,* employers, registered *trade unions,* registered *employers' organisations,* federations of *trade unions,* federations of *employers' organisations* or *councils* with advice or training relating to the primary objects of *this Act* or any other employment law, including but not limited to-

(*a*) establishing collective bargaining structures;

(*b*) designing, establishing and electing *workplace forums* and creating deadlock-breaking mechanisms;

(*c*) the functioning of *workplace forums*;

(*d*) preventing and resolving *disputes* and *employees'* grievances;

(*e*) disciplinary procedures;

(*f*) procedures in relation to *dismissals*;

(*g*) the process of restructuring the *workplace*;

(*h*) affirmative action and equal opportunity programmes; and

(*i*) the prevention of sexual harassment in the *workplace*.

[Sub-s. (3) amended by s. 18 (*f*) of Act No. 6 of 2014. Para. (*i*) substituted by s. 31 (*b*) of Act No. 42 of 1996.]

Wording of Sections

(4) The Commission must perform any other duties imposed, and may exercise any other powers conferred, on it by or in terms of *this Act* and is competent to perform any other function entrusted to it by any other law.

(5) The governing body's rules of procedure, the terms of appointment of its members and other administrative matters are dealt with in Schedule 3.

(6) (*a*) A rule made under subsection (2) (*c*A) or (2A) must be published in the *Government Gazette*. The Commission will be responsible to ensure that the publication occurs.

(*b*) A rule so made will not have any legal force or effect unless it has been so published.

(*c*) A rule so made takes effect from the date of publication unless a later date is stipulated.

[Sub-s. (6) added by s. 6 (*b*) of Act No. 127 of 1998 and substituted by s. 22 (*b*) of Act No. 12 of 2002.]

Footnotes

21 See section 148.

22 See section 149.

23 See section 149.

24 . . . . . .

25 . . . . . .

116. Governing body of Commission.-(1) The Commission will be governed by the governing body, whose acts are acts of the Commission.26

(2) The governing body consists of-

(*a*) a chairperson and nine other members, each nominated by *NEDLAC* and appointed27 by the *Minister* to hold office for a period of three years; and

(*b*) the *director* of the Commission, who-

(i) is a member of the governing body only by virtue of having been appointed *director*; and

(ii) may not vote at meetings of the governing body.

(3) *NEDLAC* must nominate-

(*a*) one independent person for the office of chairperson;

(*b*) three persons proposed by those voting members of *NEDLAC* who represent organised labour; and

(*c*) three persons proposed by those voting members of *NEDLAC* who represent organised business;

(*d*) three persons proposed by those voting members of *NEDLAC* who represent the State.

(Date of commencement of s. 116: 1 January, 1996.)

Footnotes

26 See item 4 of Schedule 3 for the governing body's rules of procedure.

27 See items 1 to 3 of Schedule 3 for the terms of appointment of members of the governing body.

117. Commissioners of Commission.-(1) The governing body must appoint as commissioners as many competent persons as it considers necessary to perform the functions of commissioners by or in terms of *this Act* or any other law.

(2) The governing body-

(*a*) may appoint each commissioner-

(i) on either a full-time or a part-time basis; and

(ii) to be either a commissioner or a senior commissioner;

(*b*) must appoint each commissioner for a fixed term determined by the governing body at the time of appointment;

(*c*) may appoint a commissioner, who is not a senior commissioner, for a probationary period; and

(*d*) when making appointments, must have due regard to the need to constitute a Commission that is independent and competent and representative in respect of race and gender.

(3) Any reference in *this Act* to a commissioner must be interpreted also to mean a senior commissioner, unless otherwise indicated.

(4) The governing body must determine the commissioners' *remuneration*, allowances and any other terms and conditions of appointment not contained in this section.

(5) A commissioner may resign by giving written notice to the governing body.

(6) The governing body must prepare a code of conduct for the commissioners and ensure that they comply with the code of conduct in performing their functions.

(7) The governing body may remove a commissioner from office for-

(*a*) serious misconduct;

(*b*) incapacity; or

(*c*) a material violation of the Commissioner's code of conduct.

(8) Each commissioner is responsible to the *director* for the performance of the commissioner's functions.

(Date of commencement of s. 117: 1 January, 1996.)

118. Director of Commission.-(1) The governing body must appoint, as *director* of the Commission, a person who-

(*a*) is skilled and experienced in labour relations and dispute resolution; and

(*b*) has not been convicted of any offence involving dishonesty.

(2) The *director* must-

(*a*) perform the functions that are-

(i) conferred on the *director* by or in terms of *this Act* or by any other law;

(ii) delegated to the *director* by the governing body;

(*b*) manage and direct the activities of the Commission; and

(*c*) supervise the Commission's staff.

(3) The governing body must determine the *director's remuneration*, allowances and any other terms and conditions of appointment not contained in Schedule 3.

(4) A person appointed *director* automatically holds the office of a senior commissioner.

(5) Despite subsection (4), the provisions of section 117, with the exception of section 117 (6), do not apply to the *director*.

(6) The *director*, in consultation with the governing body, may delegate any of the functions of that office, except the functions mentioned in sections 120 and 138 (8), to a commissioner.

[Sub-s. (6) added by s. 7 of Act No. 127 of 1998.]

(Date of commencement of s. 118: 1 January, 1996.)

119. Acting director of Commission.-(1) The chairperson of the governing body may appoint any suitable person to act as *director* whenever-

(*a*) the *director* is absent from the *Republic* or from duty, or for any reason is temporarily unable to perform the functions of *director*; or

(*b*) the office of *director* is vacant.

(2) Only a senior commissioner may be appointed as acting director.

(3) An acting director is competent to exercise and perform any of the powers and functions of the *director*.

(Date of commencement of s. 119: 1 January, 1996.)

120. Staff of Commission.-(1) The *director* may appoint staff after consulting the governing body.

(2) The governing body must determine the *remuneration* and allowances and any other terms and conditions of appointment of staff members.

(Date of commencement of s. 120: 1 January, 1996.)

121. Establishment of committees of Commission.-(1) The governing body may establish committees to assist the Commission.

(2) A committee may consist of any combination of the following persons-

(*a*) a member of the governing body;

(*b*) the *director*;

(*c*) a commissioner;

(*d*) a staff member of the Commission; and

(*e*) any other person.

(3) The governing body must determine the *remuneration* and allowances and any other terms and conditions of appointment of committee members referred to in subsection (2) (*e*).

(4) The governing body may at any time vary or set aside a decision of a committee.

(5) The governing body may dissolve any committee.

(Date of commencement of s. 121: 1 January, 1996.)

122. Finances of Commission.-(1) The Commission will be financed and provided with working capital from-

(*a*) the moneys that the *Minister*, with the agreement of the Minister of Finance, must allocate to the Commission from public funds at the commencement of *this Act*;

(*b*) the moneys that Parliament may appropriate to the Commission from time to time;

(*c*) fees payable to the Commission in terms of *this Act*;

(*d*) grants, donations and bequests made to it; and

(*e*) income earned on the surplus moneys deposited or invested.

(2) The financial year of the Commission begins on 1 April in each year and ends on 31 March of the following year, except the first financial year which begins on the day *this Act* commences and ends on the first following 31 March.

(3) In each financial year, at a time determined by the *Minister*, the Commission must submit to the *Minister* a statement of the Commission's estimated income and expenditure, and requested appropriation from Parliament, for the following financial year.

(Date of commencement of s. 122: 13 September, 1996.)

123. Circumstances in which Commission may charge fees.-(1) The Commission may charge a fee only for-

(*a*) resolving *disputes* which are referred to it, in circumstances in which *this Act* allows the Commission, or a commissioner, to charge a fee;

(*b*) conducting, overseeing or scrutinising any election or ballot at the request of a registered *trade union* or *employers' organisation*; and

(*c*) providing advice or training in terms of section 115 (3).

(2) The Commission may not charge a fee unless-

(*a*) the governing body has established a tariff of fees; and

(*b*) the fee that is charged is in accordance with that tariff.

(3) The Commission must publish the tariff in the *Government Gazette*.

124. Contracting by Commission, and Commission working in association with any person.-(1) The governing body may-

(*a*) contract with any person to do work for the Commission or contract with an accredited agency to perform, whether for reward or otherwise, any function of the Commission on its behalf; and

[Para. (*a*) substituted by s. 32 of Act No. 42 of 1996.]

Wording of Sections

(*b*) perform any function of the Commission in association with any person.

(2) Every person with whom the Commission contracts or associates is bound by the requirement of independence that binds the Commission.

(Date of commencement of s. 124: 1 January, 1996.)

125. Delegation of governing body's powers, functions and duties.-(1) The governing body may delegate in writing any of its functions, other than the functions listed below, to any member of the governing body, the *director*, a commissioner, or any committee established by the Commission. The functions that the governing body may not delegate are-

(*a*) appointing the *director*;

(*b*) appointing commissioners, or removing a commissioner from office;

(*c*) depositing or investing surplus money;

(*d*) accrediting *councils* or private agencies, or amending, withdrawing or renewing their accreditation; or

(*e*) sub-sidising accredited *councils* or accredited agencies.

(2) The governing body may attach conditions to a delegation and may amend or revoke a delegation at any time.

(3) A function delegated to the *director* may be performed by any commissioner or staff member of the Commission authorised by the *director*, unless the terms of that delegation prevent the *director* from doing so.

(4) The governing body may vary or set aside any decision made by a person acting in terms of any delegation made in terms of subsection (1).

(5) The governing body, by delegating any function, is not divested of any of its powers, nor is it relieved of any function or duty that it may have delegated. This rule also applies if the *director* sub-delegates the performance of a function in terms of subsection (3).

(Date of commencement of s. 125: 1 January, 1996.)

126. Limitation of liability and limitation on disclosure of information.-(1) In this section, "the Commission" means-

(*a*) the governing body;

(*b*) a member of the governing body;

(*c*) the *director*;

(*d*) a commissioner;

(*e*) a staff member of the Commission;

(*f*) a member of any committee established by the governing body; and

(*g*) any person with whom the governing body has contracted to do work for, or in association with whom it performs a function of, the Commission.

(2) The Commission is not liable for any loss suffered by any person as a result of any act performed or omitted in good faith in the course of exercising the functions of the Commission.

(3) The Commission may not disclose to any person or in any court any information, knowledge or document that it acquired on a confidential basis or without prejudice in the course of performing its functions except on the order of a court.

PART B-Accreditation of and Subsidy to Councils and Private Agencies

127. Accreditation of councils and private agencies.-(1) Any *council* or private agency may apply to the governing body in the *prescribed* form for accreditation to perform any of the following functions-

(*a*) resolving *disputes* through conciliation; and

(*b*) arbitrating *disputes* that remain unresolved after conciliation, if *this Act* requires arbitration.

(2) For the purposes of this section, the reference to *disputes* must be interpreted to exclude *disputes* as

(*a*) sections 16, 21 and 22;28

(*b*) section 24 (2) to (5);29

(*c*) section 24 (6) and (7) and section 26 (11);30

(*d*) section 45;31

(*e*) section 61 (5) to (8);32

(*f*) section 62;33

(*g*) section 63;34

(*h*) section 69 (8) to (10);35

(*i*) section 86;36

(*j*) section 89;37

(*k*) section 94.38

(3) The governing body may require further information in support of the application and, for that purpose, may require the applicant to attend one or more meetings of the governing body.

(4) The governing body may accredit an applicant to perform any function for which it seeks accreditation, after considering the application, any further information provided by the applicant and whether-

(*a*) the services provided by the applicant meet the Commission's standards;

(*b*) the applicant is able to conduct its activities effectively;

(*c*) the persons appointed by the applicant to perform those functions will do so in a manner independent of the State, any political party, *trade union*, employer, *employers' organisation*, federation of *trade unions* or federation of *employers' organisations*;

(*d*) the persons appointed by the applicant to perform those functions will be competent to perform those functions and exercise any associated powers;

(*e*) the applicant has an acceptable code of conduct to govern the persons whom it appoints to perform those functions;

(*f*) the applicant uses acceptable disciplinary procedures to ensure that each person it appoints to perform those functions will subscribe, and adhere, to the code of conduct; and

[Para. (*f*) amended by s. 33 (*a*) of Act No. 42 of 1996.]

Wording of Sections

(*g*) the applicant promotes a service that is broadly representative of South African society.

[Para. (*g*) amended by s. 33 (*b*) of Act No. 42 of 1996.]

Wording of Sections

(*h*) . . . . . .

[Para. (*h*) deleted by s. 33 (*c*) of Act No. 42 of 1996.]

Wording of Sections

(5) If the governing body decides-

(*a*) to accredit the applicant, the governing body must-

(i) enter the applicant's name in the register of accredited *councils* or the register of accredited agencies;

(ii) issue a certificate of accreditation in the applicant's name stating the period and other terms of accreditation;

(iii) send the certificate to the applicant; and

(iv) . . . . . .

[Sub-para. (iv) deleted by s. 23 (*a*) of Act No. 12 of 2002.]

Wording of Sections

(*b*) not to accredit the applicant, the governing body must advise the unsuccessful applicant in writing of its decision.

(5A) The governing body must annually publish a list of accredited councils and accredited agencies.

[Sub-s. (5A) inserted by s. 23 (*b*) of Act No. 12 of 2002.]

(6) The terms of accreditation must state the extent to which the provisions of each section in Part C of this Chapter apply to the accredited *council* or accredited agency.

(7) (*a*) Any person may inspect the registers and certificates of accredited *councils* and accredited agencies kept in the Commission's offices.

(*b*) The Commission must provide a certified copy of, or extract from, any of the documents referred to in paragraph (*a*) to any person who has paid the *prescribed* fee.

(Date of commencement of s. 127: 13 September, 1996.)

Footnotes

28 These sections deal with disputes about organisational rights.

29 These subsections deal with disputes about collective agreements where the agreement does not provide for a procedure, the procedure is inoperative or any party frustrates the resolution of the dispute.

30 These subsections deal with disputes about agency shops and closed shops.

31 This section deals with disputes about determinations made by the Minister in respect of proposals made by a statutory council.

32 These subsections deal with disputes about the interpretation or application of collective agreements of a council whose registration has been cancelled.

33 This section deals with disputes about the demarcation of sectors and areas of councils.

34 This section deals with disputes about the interpretation or application of Parts C to F of Chapter III, Part C deals with bargaining councils, Part D with bargaining councils in the public service, Part E with statutory councils and Part F with general provisions concerning councils.

35 This section concerns disputes about pickets during strikes and lockouts.

36 This section deals with disputes about proposals that are the subject of joint decision making.

37 This section deals with disputes about the disclosure of information to workplace forums.

38 This section deals with disputes about the interpretation or application of Chapter V which deals with workplace forums.

128. General provisions relating to accreditation.-(1) (*a*) An accredited *council* or accredited agency may charge a fee for performing any of the functions for which it is accredited in circumstances in which this Act allows a commissioner to charge a fee.

[Para. (*a*) substituted by s. 34 of Act No. 42 of 1996 and by s. 24 (*a*) of Act No. 12 of 2002.]

Wording of Sections

(*b*) A fee charged in terms of paragraph (*a*) must be in accordance with the tariff of fees determined by the Commission.

(2) (*a*) An accredited *council*, accredited agency, or any person engaged by either of them to perform the functions for which it has been accredited, is not liable for any loss suffered by any person as a result of any act performed or omitted in good faith in the course of exercising those functions.

(*b*) An accredited *council*, accredited agency, or any person engaged by either of them to perform the functions for which it has been accredited, may not disclose to any person or in any court any information, knowledge or document that it or that person acquired on a confidential basis or without prejudice in the course of performing those functions except on the order of a court.

(Date of commencement of s. 128: 13 September, 1996.)

(3) (*a*) (i) An accredited *council* may confer on any person appointed by it to resolve a *dispute*, the powers of a commissioner in terms of section 142, read with the changes required by the context.

(ii) For this purpose, any reference in that section to the *director* must be read as a reference to the secretary of the *bargaining council*.

(*b*) An accredited private agency may confer on any person appointed by it to resolve a *dispute*, the powers of a commissioner in terms of section 142 (1) (*a*) to (*e*), (2) and (7) to (9), read with the changes required by the context.

[Sub-s. (3) added by s. 24 (*b*) of Act No. 12 of 2002.]

129. Amendment of accreditation.-(1) An accredited *council* or accredited agency may apply to the governing body in the *prescribed* form to amend its accreditation.

(2) The governing body must treat the application as an application in terms of section 127.

130. Withdrawal of accreditation.-If an accredited *council* or accredited agency fails to comply to a material extent with the terms of its accreditation, the governing body may withdraw its accreditation after having given reasonable notice of the withdrawal to that *council* or accredited agency.

131. Application to renew accreditation.-(1) An accredited *council* or accredited agency may apply to the governing body in the *prescribed* form to renew its accreditation either in the current or in an amended form.

(2) The governing body must treat the application for renewal as an application in terms of section 127.

132. Subsidy to council or private agency.-(1) (*a*) Any *council* may apply to the governing body in the *prescribed* form for a subsidy for performing any dispute resolution functions that the *council* is required to perform in terms of *this Act*, and for training persons to perform those functions.

(*b*) Any accredited agency, or a private agency that has applied for accreditation, may apply to the governing body in the *prescribed* form for a subsidy for performing any dispute resolution functions for which it is accredited or has applied for accreditation, and for training persons to perform those functions.

[Sub-s. (1) substituted by s. 35 of Act No. 42 of 1996.]

Wording of Sections

(2) The governing body may require further information in support of the application and, for that purpose, may require the applicant to attend one or more meetings of the governing body.

(3) The governing body may grant a subsidy to the applicant after considering the application, any further information provided by the applicant and-

(*a*) the need for the performance by the applicant of the functions for which it is accredited;

(*b*) the extent to which the public uses the applicant to perform the functions for which it is accredited;

(*c*) the cost to users for the performance by the applicant of the functions for which it is accredited:

(*d*) the reasons for seeking the subsidy;

(*e*) the amount requested; and

(*f*) the applicant's ability to manage its financial affairs in accordance with established accounting practice, principles and procedures.

(4) If the governing body decides-

(*a*) to grant a subsidy to the applicant, the governing body must-

(i) notify the applicant in writing of the amount, duration and the terms of the subsidy; and

(ii) as soon as practicable after the decision, publish the written notice in the *Government Gazette*; or

(*b*) not to grant a subsidy to the applicant, the governing body must advise the unsuccessful applicant in writing of its decision.

(5) A subsidy granted in terms of subsection (4) (*a*)-

(*a*) may not be paid to a *council* or private agency unless it has been accredited; and

(*b*) lapses at the end of the Commission's financial year within which it was granted.

(6) (*a*) Any person may inspect a written notice referred to in subsection (4) (*a*) in the Commission's offices.

(*b*) The Commission must provide a certified copy of, or extract from, any written notice referred to in paragraph (*a*) to any person who has paid the *prescribed* fee.

(7) If an accredited *council* or accredited agency fails to comply to a material extent with the terms of its subsidy, the governing body may withdraw the subsidy after having given reasonable notice of the withdrawal to

that *council* or agency.

(8) (*a*) An accredited *council* or accredited agency that has been granted a subsidy may apply to the governing body in the *prescribed* form to renew its subsidy, either in the current or in an amended form and amount.

(*b*) The governing body must treat the application for renewal as an application in terms of subsections (1) to (4).

(Date of commencement of s. 132: 13 September, 1996.)

PART C-Resolution of Disputes under Auspices of Commission

133. Resolution of disputes under auspices of Commission.-(1) The Commission must appoint a commissioner to attempt to resolve through conciliation-

(*a*) any *dispute* referred to it in terms of section 134; and

(*b*) any other *dispute* that has been referred to it in terms of *this Act*.

(2) If a *dispute* remains unresolved after conciliation, the Commission must arbitrate the *dispute* if-

(*a*) *this Act* requires the *dispute* to be arbitrated and any party to the *dispute* has requested that the *dispute* be resolved through arbitration; or

(*b*) all the parties to the *dispute* in respect of which the Labour Court has jurisdiction consent in writing to arbitration under the auspices of the Commission.

[Sub-s. (2) substituted by s. 25 of Act No. 12 of 2002.]

Wording of Sections

134. Disputes about matters of mutual interest.-(1) Any party to a *dispute* about a matter of mutual interest may refer the *dispute* in writing to the Commission, if the parties to the *dispute* are-

(*a*) on the one side-

(i) one or more *trade unions*;

(ii) one or more *employees*; or

(iii) one or more *trade unions* and one or more *employees*; and

(*b*) on the other side-

(i) one or more *employers' organisations*;

(ii) one or more employers; or

(iii) one or more *employers' organisations* and one or more employers.

(2) The party who refers the *dispute* to the Commission must satisfy it that a copy of the referral has been *served* on all the other parties to the *dispute*.

135. Resolution of disputes through conciliation.-(1) When a *dispute* has been referred to the Commission, the Commission must appoint a commissioner to attempt to resolve it through conciliation.

(2) The appointed commissioner must attempt to resolve the *dispute* through conciliation within 30 days of the date the Commission received the referral: However the parties may agree to extend the 30-day period.

(3) The commissioner must determine a process to attempt to resolve the *dispute* which may include-

(*a*) mediating the *dispute*;

(*b*) conducting a fact-finding exercise; and

(*c*) making a recommendation to the parties, which may be in the form of an advisory arbitration award.

(3A) If a single commissioner has been appointed, in terms of subsection (1), in respect of more than one *dispute* involving the same parties, that commissioner may consolidate the conciliation proceedings so that all the *disputes* concerned may be dealt with in the same proceedings.

[Sub-s. (3A) inserted by s. 8 (*a*) of Act No. 127 of 1998.]

(4) . . . . . .

[Sub-s. (4) substituted by s. 8 (*b*) of Act No. 127 of 1998 and deleted by s. 26 of Act No. 12 of 2002.]

Wording of Sections

(5) When conciliation has failed, or at the end of the 30-day period or any further period agreed between the parties-

(*a*) the commissioner must issue a certificate stating whether or not the *dispute* has been resolved;

(*b*) the Commission must *serve* a copy of that certificate on each party to the *dispute* or the person who represented a party in the conciliation proceedings; and

(*c*) the commissioner must file the original of that certificate with the Commission.

[Sub-s. (5) amended by s. 36 (*b*) of Act No. 42 of 1996.]

Wording of Sections

(6) (*a*) If a *dispute* about a matter of mutual interest has been referred to the Commission and the parties to the *dispute* are engaged in an *essential service* then, despite subsection (1), the parties may consent within seven days of the date the Commission received the referral-

(i) to the appointment of a specific commissioner by the Commission to attempt to resolve the *dispute* through conciliation; and

(ii) to that commissioner's terms of reference.

(*b*) If the parties do not consent to either of those matters within the seven day period, the Commission must as soon as possible-

(i) appoint a commissioner to attempt to resolve the *dispute*; and

(ii) determine the commissioner's terms of reference.

136. Appointment of commissioner to resolve dispute through arbitration.-(1) If *this Act* requires a *dispute* to be resolved through arbitration, the Commission must appoint a commissioner to arbitrate that *dispute* if-

(*a*) a commissioner has issued a certificate stating that the *dispute* remains unresolved; and

(*b*) within 90 days after the date on which that certificate was issued, any party to the *dispute* has requested that the *dispute* be resolved through arbitration. However, the Commission, on good cause shown, may condone a party's non-observance of that time-frame and allow a request for arbitration filed by the party after the expiry of the 90-day period.

[Para. (*b*) substituted by s. 9 (*a*) of Act No. 127 of 1998.]

Wording of Sections

(2) A commissioner appointed in terms of subsection (1) may be the same commissioner who attempted to resolve the *dispute* through conciliation.

(3) Any party to the *dispute* who wants to object to the arbitration also being conducted by the commissioner who conciliated had attempted to resolve the *dispute* through conciliation, may do so by filing an objection in that regard with the Commission within seven days after the date on which the commissioner's certificate was issued, and must satisfy the Commission that a copy of the objection has been *served* on all the other parties to the *dispute*.

[Sub-s. (3) substituted by s. 9 (*b*) of Act No. 127 of 1998.]

Wording of Sections

(4) When the Commission receives an objection it must appoint another commissioner to resolve the *dispute* by arbitration.

(5) (*a*) The parties to a *dispute* may request the Commission, in appointing a commissioner in terms of subsection (1) or (4), to take into account their stated preference, to the extent that this is reasonably practicable in all the circumstances.

(*b*) The stated preference contemplated in paragraph (*a*) must-

(i) be in writing;

(ii) list no more than five commissioners;

(iii) state that the request is made with the agreement of all the parties to the *dispute*; and

(iv) be submitted within 48 hours of the date of the certificate referred to in subsection (1) (*a*).

(6) If the circumstances contemplated in subsection (1) exist and the parties to the *dispute* are engaged in an *essential service* then the provisions of section 135 (6) apply, read with the changes required by the context, to the appointment of a commissioner to resolve the *dispute* through arbitration.

137. Appointment of senior commissioner to resolve dispute through arbitration.-(1) In the circumstances contemplated in section 136 (1), any party to the *dispute* may apply to the *director* to appoint a senior commissioner to attempt to resolve the *dispute* through arbitration.

(2) When considering whether the *dispute* should be referred to a senior commissioner, the *director* must hear the party making the application, any other party to the *dispute* and the commissioner who conciliated the *dispute*.

(3) The *director* may appoint a senior commissioner to resolve the *dispute* through arbitration, after having considered-

(*a*) the nature of the questions of law raised by the *dispute*;

(*b*) the complexity of the *dispute*;

(*c*) whether there are conflicting arbitration awards that are relevant to the *dispute*; and

(*d*) the public interest.

(4) The *director* must notify the parties to the *dispute* of the decision and-

(*a*) if the application has been granted, appoint a senior commissioner to arbitrate the *dispute*; or

(*b*) if the application has been refused, confirm the appointment of the commissioner initially appointed, subject to section 136 (4).

[Para. (*b*) substituted by s. 37 of Act No. 42 of 1996.]

Wording of Sections

(5) The *director's* decision is final and binding.

(6) No person may apply to any court of law to review the *director's* decision until the *dispute* has been arbitrated.

138. General provisions for arbitration proceedings.-(1) The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the *dispute* fairly and quickly, but must deal with the substantial merits of the *dispute* with the minimum of legal formalities.

(2) Subject to the discretion of the commissioner as to the appropriate form of the proceedings, a party to the *dispute* may give evidence, call witnesses, question the witnesses of any other party, and address concluding arguments to the commissioner.

(3) If all the parties consent, the commissioner may suspend the arbitration proceedings and attempt to resolve the *dispute* through conciliation.

(4) . . . . . .

[Sub-s. (4) substituted by s. 10 of Act No. 127 of 1998 and deleted by s. 27 (*a*) of Act No. 12 of 2002.]

Wording of Sections

(5) If a party to the *dispute* fails to appear in person or to be represented at the arbitration proceedings, and that party-

(*a*) had referred the *dispute* to the Commission, the commissioner may dismiss the matter; or

(*b*) had not referred the *dispute* to the Commission, the commissioner may-

(i) continue with the arbitration proceedings in the absence of that party; or

(ii) adjourn the arbitration proceedings to a later date.

(6) The commissioner must take into account any *code of good practice* that has been issued by *NEDLAC* or guidelines published by the Commission in accordance with the provisions of *this Act* that is relevant to a matter being considered in the arbitration proceedings.

(7) Within 14 days of the conclusion of the arbitration proceedings-

(*a*) the commissioner must issue an arbitration award with brief reasons, signed by that commissioner;

(*b*) the Commission must *serve* a copy of that award on each party to the *dispute* or the person who represented a party in the arbitration proceedings; and

(*c*) . . . . . .

[Para. (*c*) deleted by s. 19 of Act No. 6 of 2014.]

Wording of Sections

(8) On good cause shown, the *director* may extend the period within which the arbitration award and the reasons are to be *served* and filed.

(9) The commissioner may make any appropriate arbitration award in terms of *this Act*, including, but not limited to, an award-

(*a*) that gives effect to any *collective agreement*;

(*b*) that gives effect to the provisions and primary objects of *this Act*;

(*c*) that includes, or is in the form of, a declaratory order.

(10) The commissioner may make an order for the payment of costs according to the requirements of law and fairness in accordance with rules made by the Commission in terms of section 115 (2A) (*j*) and having regard to-

(*a*) any relevant Code of Good Practice issued by *NEDLAC* in terms of section 203;

(*b*) any relevant guideline issued by the Commission.

[Sub-s. (10) substituted by s. 27 (*b*) of Act No. 12 of 2002.]

Wording of Sections

139. Special provisions for arbitrating disputes in essential services.-(1) If a *dispute* about a matter of mutual interest proceeds to arbitration and any party is engaged in an *essential service*-

(*a*) within 30 days of the date of the certificate referred to in section 136 (1) (*a*), or within a further period agreed between the parties to the *dispute*, the commissioner must complete the arbitration and issue an arbitration award with brief reasons signed by that commissioner;

(*b*) the Commission must *serve* a copy of that award on each party to the *dispute* or the person who represented a party in the arbitration proceedings; and

(*c*) the Commission must file the original of that award with the registrar of the Labour Court.

(2) The commissioner may not include an order for costs in the arbitration award unless a party, or the person who represented the party in the arbitration proceedings, acted in a frivolous or vexatious manner in its conduct during the arbitration proceedings.

140. Special provisions for arbitrations about dismissals for reasons related to conduct or capacity.-(1) . . . . . .

[Sub-s. (1) deleted by s. 28 of Act No. 12 of 2002.]

Wording of Sections

(2) If, in terms of section 194 (1), the commissioner finds that the *dismissal* is procedurally unfair, the commissioner may charge the employer an arbitration fee.

141. Resolution of disputes if parties consent to arbitration under auspices of Commission.-(1) If a *dispute* remains unresolved after conciliation, the Commission must arbitrate the *dispute* if a party to the *dispute* would otherwise be entitled to refer the *dispute* to the Labour Court for adjudication and, instead, all the parties agree in writing to arbitration under the auspices of the Commission.

[Sub-s. (1) substituted by s. 29 (*a*) of Act No. 12 of 2002.]

Wording of Sections

(2) The arbitration proceedings must be conducted in accordance with the provisions of sections 136, 137 and 138, read with the changes required by the context.

(3) The arbitration agreement contemplated in subsection (1) may be terminated only with the written consent of all the parties to that agreement, unless the agreement itself provides otherwise.

[Sub-s. (3) substituted by s. 29 (*b*) of Act No. 12 of 2002.]

Wording of Sections

(4) Any party to the arbitration agreement may apply to the Labour Court at any time to vary or set aside that agreement, which the Court may do on good cause.

(5) (*a*) If any party to an arbitration agreement commences proceedings in the Labour Court against any other party to that agreement about any matter that the parties agreed to refer to arbitration, any party to those proceedings may ask the Court-

(i) to stay those proceedings and refer the *dispute* to arbitration; or

(ii) with the consent of the parties and where it is expedient to do so, continue with the proceedings with the Court acting as arbitrator, in which case the Court may only make an order corresponding to the award that an arbitrator could have made.

(*b*) If the Court is satisfied that there is sufficient reason for the *dispute* to be referred to arbitration in accordance with the arbitration agreement, the Court may stay those proceedings, on any conditions.

(6) If the provisions of subsection (1) apply, the commissioner may make an award that the Labour Court could have made.

[Sub-s. (6) amended by s. 39 of Act No. 42 of 1996.]

Wording of Sections

142. Powers of commissioner when attempting to resolve disputes.-(1) A commissioner who has been appointed to attempt to resolve a *dispute* may-

(*a*) subpoena for questioning any person who may be able to give information or whose presence at the conciliation or arbitration proceedings may help to resolve the *dispute*;

(*b*) subpoena any person who is believed to have possession or control of any book, document or object relevant to the resolution of the *dispute*, to appear before the commissioner to be questioned or to produce that book, document or object;

(*c*) call, and if necessary subpoena, any expert to appear before the commissioner to give evidence relevant to the resolution of the *dispute*;

(*d*) call any person present at the conciliation or arbitration proceedings or who was or could have been subpoenaed for any purpose set out in this section, to be questioned about any matter relevant to the *dispute*;

(*e*) administer an oath or accept an affirmation from any person called to give evidence or be questioned;

(*f*) at any reasonable time, but only after obtaining the necessary written authorisation-

(i) enter and inspect any premises on or in which any book, document or object, relevant to the resolution of the *dispute* is to be found or is suspected on reasonable grounds of being found there; and

(ii) examine, demand the production of, and seize any book, document or object that is on or in those premises and that is relevant to the resolution of the *dispute*; and

(iii) take a statement in respect of any matter relevant to the resolution of the *dispute* from any person on the premises who is willing to make a statement; and

[Sub-para. (iii) added by s. 40 of Act No. 42 of 1996.]

(*g*) inspect, and retain for a reasonable period, any of the books, documents or objects that have been produced to, or seized by, the Commission.

(2) A subpoena issued for any purpose in terms of subsection (1) must be signed by the *director* and must-

(*a*) specifically require the person named in it to appear before the commissioner;

(*b*) sufficiently identify the book, document or object to be produced; and

(*c*) state the date, time and place at which the person is to appear.

(3) The written authorisation referred to in subsection (1) (*f*)-

(*a*) if it relates to residential premises, may be given only by a judge of the Labour Court and with due regard to section 13 of the Constitution, and then only on the application of the commissioner setting out under oath or affirmation the following information-

(i) the nature of the *dispute*;

(ii) the relevance of any book, document or object to the resolution of the *dispute*;

(iii) the presence of any book, document or object on the premises; and

(iv) the need to enter, inspect or seize the book, document or object; and

(*b*) in all other cases, may be given by the *director*.

(4) The owner or occupier of any premises that a commissioner is authorised to enter and inspect, and every person employed by that owner or occupier, must provide any facilities that a commissioner requires to enter those premises and to carry out the inspection or seizure.

(5) The commissioner must issue a receipt for any book, document or object seized in terms of subsection (4).

(6) The law relating to privilege, as it applies to a witness subpoenaed to give evidence or to produce any book, document or object before a court of law, applies equally to the questioning of any person or the production or seizure of any document, book or object in terms of this section.

(7) (*a*) The Commission must pay the *prescribed* witness fee to each person who appears before a commissioner in response to a subpoena issued by the commissioner.

(*b*) Any person who requests the Commission to issue a subpoena must pay the *prescribed* witness fee to each person who appears before a commissioner in response to the subpoena and who remains in attendance until excused by the commissioner.

(*c*) The Commission may on good cause shown waive the requirement in paragraph (*b*) and pay to the witness the *prescribed* witness fee.

[Sub-s. (7) substituted by s. 30 (*a*) of Act No. 12 of 2002.]

Wording of Sections

(8) A person commits contempt of the Commission-

(*a*) if, after having been subpoenaed to appear before the commissioner, the person without good cause does not attend at the time and place stated in the subpoena;

(*b*) if, after having appeared in response to a subpoena, that person fails to remain in attendance until excused by the commissioner;

(*c*) by refusing to take the oath or to make an affirmation as a witness when a commissioner so requires;

(*d*) by refusing to answer any question fully and to the best of that person's knowledge and belief subject to subsection (6);

(*e*) if the person, without good cause, fails to produce any book, document or object specified in a subpoena to a commissioner;

(*f*) if the person wilfully hinders a commissioner in performing any function conferred by or in terms of *this Act*;

(*g*) if the person insults, disparages or belittles a commissioner, or prejudices or improperly influences the proceedings or improperly anticipates the commissioner's award;

(*h*) by wilfully interrupting the conciliation or arbitration proceedings or misbehaving in any other manner during those proceedings;

(*i*) by doing anything else in relation to the Commission which, if done in relation to a court of law, would have been contempt of court.

(9) (*a*) A commissioner may make a finding that a party is in contempt of the Commission for any of the reasons set out in subsection (8).

(*b*) The commissioner may refer the finding, together with the record of the proceedings, to the Labour Court for its decision in terms of subsection (11).

[Sub-s. (9) substituted by s. 30 (*b*) of Act No. 12 of 2002.]

Wording of Sections

(10) Before making a decision in terms of subsection (11), the Labour Court-

(*a*) must subpoena any person found in contempt to appear before it on a date determined by the Court;

(*b*) may subpoena any other person to appear before it on a date determined by the Court; and

(*c*) may make any order that it deems appropriate, including an order in the case of a person who is not a legal practitioner that the person's right to represent a party in the Commission and the Labour Court be suspended.

[Sub-s. (10) added by s. 30 (*c*) of Act No. 12 of 2002.]

(11) The Labour Court may confirm, vary or set aside the finding of a commissioner.

[Sub-s. (11) added by s. 30 (*c*) of Act No. 12 of 2002.]

(12) If any person fails to appear before the Labour Court pursuant to a subpoena issued in terms of subsection (10) (*a*), the Court may make any order that it deems appropriate in the absence of that person.

[Sub-s. (12) added by s. 30 (*c*) of Act No. 12 of 2002.]

142A. Making settlement agreement arbitration award.-(1) The Commission may, by agreement between the parties or on application by a party, make any settlement agreement in respect of any *dispute* that has been referred to the Commission, an arbitration award.

(2) For the purposes of subsection (1), a settlement agreement is a written agreement in settlement of a *dispute* that a party has the right to refer to arbitration or to the Labour Court, excluding a *dispute* that a party is entitled to refer to arbitration in terms of either section 74 (4) or 75 (7).

[S. 142A inserted by s. 31 of Act No. 12 of 2002.]

143. Effect of arbitration awards.-(1) An arbitration award issued by a commissioner is final and binding and it may be enforced as if it were an order of the Labour Court in respect of which a writ has been issued, unless it is an advisory arbitration award.

[Sub-s. (1) substituted by s. 32 (*a*) of Act No. 12 of 2002 and by s. 20 (*a*) of Act No. 6 of 2014.]

Wording of Sections

(2) If an arbitration award orders a party to pay a sum of money, the amount earns interest from the date of the award at the same rate as the rate prescribed from time to time in respect of a judgment debt in terms of section 2 of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), unless the award provides otherwise.

(3) An arbitration award may only be enforced in terms of subsection (1) if the director has certified that the arbitration award is an award contemplated in subsection (1).

[Sub-s. (3) added by s. 32 (*b*) of Act No. 12 of 2002.]

(4) If a party fails to comply with an arbitration award certified in terms of subsection (3) that orders the performance of an act, other than the payment of an amount of money, any other party to the award may, without further order, enforce it by way of contempt proceedings instituted in the Labour Court.

[Sub-s. (4) added by s. 32 (*b*) of Act No. 12 of 2002 and substituted by s. 20 (*b*) of Act No. 6 of 2014.]

Wording of Sections

(5) Despite subsection (1), an arbitration award in terms of which a party is required to pay an amount of money must be treated for the purpose of enforcing or executing that award as if it were an order of the Magistrate's Court.

[Sub-s. (5) added by s. 20 (*c*) of Act No. 6 of 2014.]

(6) Subsections (1), (4) and (5), as amended by the Labour Relations Amendment Act, 2014, takes effect on the date of commencement of the Labour Relations Amendment Act, 2014, and applies to an arbitration award issued after such commencement date.

[Sub-s. (6) added by s. 20 (*c*) of Act No. 6 of 2014.]

144. Variation and rescision of arbitration awards and rulings.-Any commissioner who has issued an arbitration award or ruling, or any other commissioner appointed by the *director* for that purpose, may on that commissioner's own accord or, on the application of any affected party, vary or rescind an arbitration award or ruling-

(*a*) erroneously sought or erroneously made in the absence of any party affected by that award;

(*b*) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission;

[Para. (*b*) amended by s. 21 of Act No. 6 of 2014.]

Wording of Sections

(*c*) granted as a result of a mistake common to the parties to the proceedings; or

[Para. (*c*) amended by s. 21 of Act No. 6 of 2014.]

Wording of Sections

(*d*) made in the absence of any party, on good cause shown.

[S. 144 substituted by s. 33 of Act No. 12 of 2002. Para. (*d*) added by s. 21 of Act No. 6 of 2014.]

145. Review of arbitration awards.-(1) Any party to a *dispute* who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award-

(*a*) within six weeks of the date that the award was *served* on the applicant, unless the alleged defect involves the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004; or

[Para. (*a*) substituted by s. 36 (1) of Act No. 12 of 2004.]

Wording of Sections

(*b*) if the alleged defect involves an offence referred to in paragraph (*a*), within six weeks of the date that the applicant discovers such offence.

[Para. (*b*) substituted by s. 36 (1) of Act No. 12 of 2004.]

Wording of Sections

(1A) The Labour Court may on good cause shown condone the late filing of an application in terms of subsection (1).

[Sub-s. (1A) inserted by s. 34 of Act No. 12 of 2002.]

(2) A defect referred to in subsection (1), means-

(*a*) that the commissioner-

(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) exceeded the commissioner's powers; or

(*b*) that an award has been improperly obtained.

(3) The Labour Court may stay the enforcement of the award pending its decision.

(4) If the award is set aside, the Labour Court may-

(*a*) determine the *dispute* in the manner it considers appropriate; or

(*b*) make any order it considers appropriate about the procedures to be followed to determine the *dispute*.

(5) Subject to the rules of the Labour Court, a party who brings an application under subsection (1) must apply for a date for the matter to be heard within six months of delivery of the application, and the Labour Court may, on good cause shown, condone a late application for a date for the matter to be heard.

[Sub-s. (5) added by s. 22 of Act No. 6 of 2014.]

(6) Judgment in an application brought under subsection (1) must be handed down as soon as reasonably possible.

[Sub-s. (6) added by s. 22 of Act No. 6 of 2014.]

(7) The institution of review proceedings does not suspend the operation of an arbitration award, unless the applicant furnishes security to the satisfaction of the Court in accordance with subsection (8).

[Sub-s. (7) added by s. 22 of Act No. 6 of 2014.]

(8) Unless the Labour Court directs otherwise, the security furnished as contemplated in subsection (7) must-

(*a*) in the case of an order of reinstatement or re-employment, be equivalent to 24 months' remuneration; or

(*b*) in the case of an order of compensation, be equivalent to the amount of compensation awarded.

[Sub-s. (8) added by s. 22 of Act No. 6 of 2014.]

(9) An application to set aside an arbitration award in terms of this section interrupts the running of prescription in terms of the Prescription Act, 1969 (Act No. 68 of 1969), in respect of that award.

[Sub-s. (9) added by s. 22 of Act No. 6 of 2014.]

(10) Subsections (5) to (8) apply to an application brought after the date of commencement of the Labour

Relations Amendment Act, 2014 and subsection (9) applies to an arbitration award issued after such commencement date.

[Sub-s. (10) added by s. 22 of Act No. 6 of 2014.]

146. Exclusion of Arbitration Act.-The Arbitration Act, 1965 (Act No. 42 of 1965), does not apply to any arbitration under the auspices of the Commission.

147. Performance of dispute resolution functions by Commission in exceptional circumstances.-(1) (*a*) If at any stage after a *dispute* has been referred to the Commission, it becomes apparent that the *dispute* is about the interpretation or application of a *collective agreement*, the Commission may-

(i) refer the *dispute* for resolution in terms of the procedures provided for in that *collective agreement*; or

(ii) appoint a commissioner or, if one has been appointed, confirm the appointment of the commissioner, to resolve the *dispute* in terms of *this Act*.

(*b*) The Commission may charge the parties to a *collective agreement* a fee for performing the dispute resolution functions if-

(i) their *collective agreement* does not provide a procedure as requested in section 24 (1);39 or

(ii) the procedure provided in the *collective agreement* is not operative.

(*c*) The Commission may charge a party to a *collective agreement* a fee if that party has frustrated the resolution of the *dispute*.

(2) (*a*) If at any stage after a *dispute* has been referred to the Commission, it becomes apparent that the parties to the *dispute* are parties to a *council*, the Commission may-

(i) refer the *dispute* to the *council* for resolution; or

(ii) appoint a commissioner or, if one has been appointed, confirm the appointment of the commissioner, to resolve the *dispute* in terms of *this Act*.

(*b*) The Commission may charge the parties to a *council* a fee for performing the dispute resolution functions if the *council's* dispute resolution procedures are not operative.

(3) (*a*) If at any stage after a *dispute* has been referred to the Commission, it becomes apparent that the parties to the *dispute* fall within the *registered scope* of a *council* and that one or more parties to the *dispute* are not parties to the *council*, the Commission may-

(i) refer the *dispute* to the *council* for resolution; or

(ii) appoint a commissioner or, if one has been appointed, confirm the appointment of the commissioner, to resolve the *dispute* in terms of *this Act*.

(*b*) The Commission may charge the parties to a *council* a fee for performing the dispute resolution functions if the *council's* dispute resolution procedures are not operative.

(4) (*a*) If a *dispute* has been referred to the Commission and not all the parties to the *dispute* fall within the *registered scope* of a *council* or fall within the *registered scope* of two or more *councils*, the Commission must resolve the *dispute* in terms of *this Act*.

(*b*) In the circumstances contemplated in paragraph (*a*), the Commission has exclusive jurisdiction to resolve that *dispute*.

(5) (*a*) If at any stage after a *dispute* has been referred to the Commission, it becomes apparent that the *dispute* ought to have been referred to an accredited agency, the Commission may-

(i) refer the *dispute* to the accredited agency for resolution; or

(ii) appoint a commissioner to resolve the *dispute* in terms of *this Act*.

[Para. (*a*) amended by s. 41 (*a*) of Act No. 42 of 1996.]

Wording of Sections

(*b*) The Commission may-

(i) charge the accredited agency a fee for performing the dispute resolution functions if the accredited agency's dispute resolution procedures are not operative; and

(ii) review the continued accreditation of that agency.

(6) If at any stage after a *dispute* has been referred to the Commission, it becomes apparent that the *dispute* ought to have been resolved through private dispute resolution in terms of a private agreement between the parties to the *dispute*, the Commission may-

(*a*) refer the *dispute* to the appropriate person or body for resolution through private dispute resolution procedures; or

(*b*) appoint a commissioner to resolve the *dispute* in terms of *this Act*.

[Sub-s. (6) substituted by s. 41 (*b*) of Act No. 42 of 1996.]

Wording of Sections

(6A) For the purpose of making a decision in terms of subsection (6), the Commission must appoint a commissioner to resolve the *dispute*-

(*a*) if an *employee* earning less than the threshold prescribed by the *Minister,* in terms of section 6 (3) of the *Basic Conditions of Employment Act,* is required to pay any part of the cost of the private *dispute* resolution procedures; or

(*b*) if the person or body appointed to resolve the *dispute* is not independent of the employer.

[Sub-s. (6A) inserted by s. 23 of Act No. 6 of 2014.]

(7) Where the Commission refers the *dispute* in terms of this section to a person or body other than a commissioner the date of the Commission's initial receipt of the *dispute* will be deemed to be the date on which the Commission referred the *dispute* elsewhere.

(8) The Commission may perform any of the dispute resolution functions of a *council* or an accredited agency appointed by the *council* if the *council* or accredited agency fails to perform its dispute resolution functions in circumstances where, in law, there is an obligation to perform them.

[Sub-s. (8) added by s. 41 (*c*) of Act No. 42 of 1996.]

(9) For the purposes of subsections (2) and (3), a party to a *council* includes the members of a registered *trade union* or registered *employers' organisation* that is a party to the *council*.

[Sub-s. (9) added by s. 41 (*c*) of Act No. 42 of 1996.]

Footnotes

39 Section 24 (1) states that every collective agreement must provide for a procedure to resolve any dispute about the interpretation or application of the collective agreement.

148. Commission may provide advice.-(1) If asked, the Commission may advise any party to a *dispute* in terms of *this Act* about the procedure to be followed for the resolution of that *dispute*.

(2) In response to a request for advice, the Commission may provide the advice that it considers appropriate.

149. Commission may provide assistance.-(1) If asked, the Commission may assist an *employee* or employer who is a party to a *dispute*-

(*a*) together with Legal Aid South Africa,40 to arrange for advice or assistance by a *legal practitioner*;

[Para. (*a*) amended by s. 25 of Act No. 39 of 2014.]

Wording of Sections

(*b*) together with Legal Aid South Africa, to arrange for a *legal practitioner*-

(i) to attempt to avoid or settle any proceedings being instituted against an *employee* or employer in terms of *this Act*;

(ii) to attempt to settle any proceedings instituted against an *employee* or employer in terms of *this Act*;

(iii) to institute on behalf of the *employee* or employer any proceedings in terms of *this Act*;

(iv) to defend or oppose on behalf of the *employee* or employer any proceedings instituted against the *employee* or employer in terms of *this Act*; or

[Para. (*b*) amended by s. 25 of Act No. 39 of 2014.]

Wording of Sections

(*c*) by providing any other form of assistance that the Commission considers appropriate.

(2) The Commission may provide the assistance referred to in subsection (1) after having considered-

(*a*) the nature of the questions of law raised by the *dispute*;

(*b*) the complexity of the *dispute*;

(*c*) whether there are conflicting arbitration awards that are relevant to the *dispute*; and

(*d*) the public interest.

(3) As soon as practicable after having received a request in terms of subsection (1), but not later than 30 days of the date the Commission received the request, the Commission must advise the applicant in writing whether or not it will assist the applicant and, if so, the form that the assistance will take.

Footnotes

40 The Legal Aid Board is established in terms of section 2 of the Legal Aid Act, 1969 (Act No. 22 of 1969).

150. Commission may appoint commissioner to conciliate in public interest.-(1) Despite any provision to the contrary in *this Act*, the *director* may appoint one or more commissioners who must attempt to resolve the *dispute* through conciliation, whether or not that *dispute* has been referred to the Commission or a *bargaining council*-

(*a*) with the consent of the parties; or

(*b*) in the absence of consent by the parties, if the *director* believes it is in the public interest to do so.

(2) Before appointing a commissioner in terms of this section, the *director* must consult-

(*a*) the parties to the *dispute*; and

(*b*) the secretary of a *bargaining council* with jurisdiction over the parties to the *dispute.*

(3) The *director* may appoint a commissioner who has already conciliated that *dispute.*

(4) In addition, to assist a commissioner appointed in terms of subsection (1), the *director* may appoint-

(*a*) one person from a list of at least five names submitted by the representatives of organised labour on the governing body of the Commission; and

(*b*) one person from a list of at least five names submitted by the representatives of organised business on the governing body of the Commission.

(5) Unless the parties to the *dispute* agree otherwise, the appointment of a commissioner in terms of this section does not affect any entitlement, of an *employee* to *strike* or an employer to *lock-out,* that the party to the dispute may have acquired in terms of Chapter IV.

[S. 150 amended by s. 35 (*a*) and (*b*) of Act No. 12 of 2002 and substituted by s. 24 of Act No. 6 of 2014.]

Wording of Sections

PART D-Labour Court

151. Establishment and status of Labour Court.-(1) The Labour Court is hereby established as a court of law and equity.

[Sub-s. (1) amended by s. 11 of Act No. 127 of 1998.]

Wording of Sections

(2) The Labour Court is a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a court of a Division of the High Court of South Africa has in relation to matters under its jurisdiction.

[Sub-s. (2) substituted by s. 55 (1) (*b*) of Act No. 10 of 2013.]

Wording of Sections

(3) The Labour Court is a court of record.

152. Composition of Labour Court.-(1) The Labour Court consists of-

(*a*) a Judge President;

(*b*) a Deputy Judge President; and

(*c*) as many judges as the President may consider necessary, acting on the advice of *NEDLAC* and in consultation with the Minister of Justice and the Judge President of the Labour Court.

(2) The Labour Court is constituted before a single judge.

(3) The Labour Court may sit in as many separate courts as the available judges may allow.

153. Appointment of judges of Labour Court.-(1) (*a*) The President, acting on the advice of *NEDLAC* and the Judicial Service Commission provided for in the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), (in this Part and Part E called the Judicial Service Commission), and after consultation with the Minister of Justice, must appoint a Judge President of the Labour Court.

[Para. (*a*) substituted by s. 12 (*a*) (i) of Act No. 127 of 1998.]

Wording of Sections

(*b*) The President, acting on the advice of *NEDLAC* and the Judicial Service Commission, and after consultation with the Minister of Justice and the Judge President of the Labour Court must appoint the Deputy Judge President of the Labour Court.

[Para. (*b*) amended by s. 12 (*a*) (ii) of Act No. 127 of 1998.]

Wording of Sections

(2) The Judge President and the Deputy Judge President of the Labour Court-

(*a*) must be judges of the Supreme Court; and

(*b*) must have knowledge, experience and expertise in labour law.

(3) The Deputy Judge President must act as Judge President of the Labour Court whenever the Judge President is unable to do so for any reason.

(4) The President, acting on the advice of *NEDLAC* and the Judicial Service Commission, and after consultation with the Minister of Justice and the Judge President of the Labour Court may appoint one or more persons who meet the requirements of subsection (6) as judges of the Labour Court.

[Sub-s. (4) amended by s. 12 (*b*) of Act No. 127 of 1998.]

Wording of Sections

(5) The Minister of Justice**,** after consultation with the Judge President of the Labour Court, may appoint one or more persons who meet the requirements of subsection (6) to serve as acting judges of the Labour Court for such a period as the Minister of Justice in each case may determine.

[Sub-s. (5) substituted by s. 42 (*a*) of Act No. 42 of 1996.]

Wording of Sections

(6) A judge of the Labour Court must-

(*a*) (i) be a judge of the High Court; or

[Sub-para. (i) amended by s. 12 (*c*) of Act No. 127 of 1998.]

Wording of Sections

(ii) be a person who is a *legal practitioner*; and

[Sub-para. (ii) substituted by s. 42 (*b*) of Act No. 42 of 1996.]

Wording of Sections

(*b*) have knowledge, experience and expertise in labour law.

(Date of commencement of s. 153: 1 January, 1996.)

154. Tenure, remuneration and terms and conditions of appointment of Labour Court judges.-(1) A judge of the Labour Court holds office until discharged from active service in terms of the Judges' Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001).

[Sub-s. (1) substituted by s. 55 (1) (*b*) of Act No. 10 of 2013.]

Wording of Sections

(2) A judge of the Labour Court who is also a judge of the High Court may resign as a judge of the Labour Court by giving written notice to the President.

[Sub-s. (2) substituted by s. 55 (1) (*b*) of Act No. 10 of 2013.]

(3) . . . . . .

[Sub-s. (3) amended by s. 13 of Act No. 127 of 1998 and deleted by s. 55 (1) (*b*) of Act No. 10 of 2013.]

Wording of Sections

(4) Neither the tenure of office nor the *remuneration* and terms and conditions of appointment applicable to a judge of the High Court in terms of the Judges' Remuneration and Conditions of Employment Act, 2001, is affected by that judge's appointment and concurrent tenure of office as a judge of the Labour Court.

[Sub-s. (4) amended by s. 13 of Act No. 127 of 1998 and substituted by s. 55 (1) (*b*) of Act No. 10 of 2013.]

Wording of Sections

(5) The Judges' Remuneration and Conditions of Employment Act, 2001, as applicable to a judge of the High Court, apply, read with the changes required by the context, to a judge of the Labour Court who is not a judge of the High Court.

[Sub-s. (5) amended by s. 43 (*a*) of Act No. 42 of 1996, by s. 13 of Act No. 127 of 1998 and substituted by s. 55 (1) (*b*) of Act No. 10 of 2013.]

Wording of Sections

(6) A person who has been appointed a judge of the Labour Court and who is not a judge of the High Court may perform the functions of a judge of the Labour Court only after having taken an oath or made a solemn affirmation in the *prescribed* form before the Judge President of the Labour Court.

[Sub-s. (6) amended by s. 13 of Act No. 127 of 1998.]

Wording of Sections

(7) . . . . . .

[Sub-s. (7) amended by s. 13 of Act No. 127 of 1998 and deleted by s. 55 (1) (*b*) of Act No. 10 of 2013.]

Wording of Sections

(8) Despite the expiry of the period of a person's appointment as a judge of the Labour Court, that person may continue to perform the functions of a judge of that Court, and will be regarded as such in all respects, only-

(*a*) for the purposes of disposing of any proceedings in which that person has taken part as a judge of that Court and which are still pending upon the expiry of that person's appointment or which, having been so disposed of before or after the expiry of that person's appointment, have been re-opened; and

(*b*) for as long as that person will be necessarily engaged in connection with the disposal of the proceedings so pending or re-opened.

[Sub-s. (8) added by s. 43 (*b*) of Act No. 42 of 1996.]

(9) The provisions of subsections (4), (5), (6) and (8) apply, read with the changes required by the context, to acting judges appointed in terms of section 153 (5).

[Sub-s. (9) added by s. 43 (*b*) of Act No. 42 of 1996 and substituted by s. 55 (1) (*b*) of Act No. 10 of 2013.]

Wording of Sections

(10) (*a*) Any judge of the Labour Court holding office immediately before the commencement of Schedule 2 of the Superior Courts Act, 2013, who is not a judge of the High Court, may not later than 30 days after such commencement, inform the Minister of Justice in writing that he or she chooses to continue in office in terms of this section as it existed prior to such commencement.

(*b*) Any judge referred to in paragraph (*a*) who does not choose to continue in office in terms of this section as it existed prior to such commencement-

(i) shall continue to hold that office in accordance with this section as amended by Schedule 2 to the Superior Courts Act, 2013; and

(ii) his or her period of service as a Labour Court judge prior to such commencement shall, for the purposes of the Judges' Remuneration and Conditions of Employment Act, 2001, be deemed to be active service as contemplated in that Act.

[Sub-s. (10) added by s. 55 (1) (*b*) of Act No. 10 of 2013.]

(Date of commencement of s. 154: 1 January, 1996.)

155. Officers of Labour Court.-(1) The Minister of Justice, subject to the laws governing the *public service*, must appoint the following officers of the Labour Court-

(*a*) a person who has experience and expertise in labour law and administration to be the registrar of the Labour Court; and

(*b*) one or more deputy registrars and so many other officers of the Labour Court as the administration of justice requires.

(2) (*a*) The officers of the Labour Court, under the supervision and control of the registrar of that Court must perform the administrative functions of the Labour Court.

(*b*) A deputy registrar of the Labour Court may perform any of the functions of the registrar of that Court that have been delegated generally or specifically to the deputy registrar.

(3) The deputy registrar of the Labour Court or, if there is more than one, the most senior will act as registrar of the Labour Court whenever-

(*a*) the registrar is absent from the *Republic* or from duty, or for any reason is temporarily unable to perform the functions of registrar; or

(*b*) the office of registrar is vacant.

(4) The officers of the Labour Court must provide secretarial and administrative assistance to the Rules Board for Labour Courts.

(Date of commencement of s. 155: 1 January, 1996.)

156. Area of jurisdiction and seat of Labour Court.-(1) The Labour Court has jurisdiction in all the provinces of the *Republic*.

(2) The Minister of Justice, acting on the advice of *NEDLAC*, must determine the seat of the Labour Court.

(3) The functions of the Labour Court may be performed at any place in the *Republic*.

(Date of commencement of s. 156: 1 January, 1996.)

157. Jurisdiction of Labour Court.-(1) Subject to the Constitution and section 173, and except where *this Act* provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of *this Act* or in terms of any other law are to be determined by the Labour Court.

(2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from-

(*a*) employment and from labour relations;

(*b*) any *dispute* over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and

(*c*) the application of any law for the administration of which the *Minister* is responsible.

[Sub-s. (2) substituted by s. 14 of Act No. 127 of 1998.]

Wording of Sections

(3) Any reference to the court in the Arbitration Act, 1965 (Act No. 42 of 1965), must be interpreted as referring to the Labour Court when an arbitration is conducted under that Act in respect of any *dispute* that may be referred to arbitration in terms of *this Act*.

(4) (*a*) The Labour Court may refuse to determine any *dispute*, other than an appeal or review before the Court, if the Court is not satisfied that an attempt has been made to resolve the *dispute* through conciliation.

(*b*) A certificate issued by a commissioner or a *council* stating that a *dispute* remains unresolved is sufficient proof that an attempt has been made to resolve that *dispute* through conciliation.

(5) Except as provided for in section 158 (2), the Labour Court does not have jurisdiction to adjudicate an unresolved *dispute* if *this Act* or any *employment law* requires the *dispute* to be resolved through arbitration.

[Sub-s. (5) substituted by s. 25 of Act No. 6 of 2014.]

Wording of Sections

158. Powers of Labour Court.-(1) The Labour Court may-

(*a*) make any appropriate order, including-

(i) the grant of urgent interim relief;

(ii) an interdict;

(iii) an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of *this Act*;

(iv) a declaratory order;

(v) an award of compensation in any circumstances contemplated in *this Act*;

(vi) an award of damages in any circumstances contemplated in *this Act*; and

(vii) an order for costs;

(*b*) order compliance with any provision of *this Act* or any *employment law*;

[Para. (*b*) substituted by s. 26 (*a*) of Act No. 6 of 2014.]

Wording of Sections

(*c*) make any arbitration award or any settlement agreement an order of the Court;

[Para. (*c*) substituted by s. 36 (*a*) of Act No. 12 of 2002.]

Wording of Sections

(*d*) request the Commission to conduct an investigation to assist the Court and to submit a report to the Court;

(*e*) determine a *dispute* between a registered *trade union* or registered *employers' organisation* and any one of the members or applicants for membership thereof, about any alleged non-compliance with-

(i) the constitution of that *trade union* or *employers' organisation* (as the case may be); or

(ii) section 26 (5) (*b*);

[Para. (*e*) substituted by s. 44 of Act No. 42 of 1996.]

Wording of Sections

(*f*) subject to the provisions of *this Act*, condone the late filing of any document with, or the late referral of any *dispute* to, the Court;

(*g*) subject to section 145, review the performance or purported performance of any function provided for in *this Act* on any grounds that are permissible in law;

[Para. (*g*) substituted by s. 36 (*b*) of Act No. 12 of 2002.]

Wording of Sections

(*h*) review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law;

(*i*) hear and determine any appeal in terms of section 35 of the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993); and

(*j*) deal with all matters necessary or incidental to performing its functions in terms of *this Act* or any other law.

(1A) For the purposes of subsection (1) (*c*), a settlement agreement is a written agreement in settlement of a *dispute* that a party has the right to refer to arbitration or to the Labour Court, excluding a *dispute* that a party is only entitled to refer to arbitration in terms of section 22 (4), 74 (4) or 75 (7).

[Sub-s. (1A) inserted by s. 36 (*c*) of Act No. 12 of 2002.]

(1B) The Labour Court may not review any decision or ruling made during conciliation or arbitration proceedings conducted under the auspices of the Commission or any *bargaining council* in terms of the provisions of *this Act* before the *issue in dispute* has been finally determined by the Commission or the *bargaining council,* as the case may be, except if the Labour Court is of the opinion that it is just and equitable to review the decision or ruling made before the *issue in dispute* has been finally determined.

[Sub-s. (1B) inserted by s. 26 (*b*) of Act No. 6 of 2014.]

(2) If at any stage after a *dispute* has been referred to the Labour Court, it becomes apparent that the *dispute* ought to have been referred to arbitration, the Court may-

(*a*) stay the proceedings and refer the *dispute* to arbitration; or

(*b*) if it is expedient to do so, continue with the proceedings, in which case the Court may only make any order that a commissioner or arbitrator would have been entitled to make: Provided that in relation to the question of costs, the provisions of section 162 (2) (*a*) are applicable.

[Para. (*b*) substituted by s. 26 (*c*) of Act No. 6 of 2014.]

(3) The reference to "arbitration" in subsection (2) must be interpreted to include arbitration-

(*a*) under the auspices of the Commission;

(*b*) under the auspices of an accredited *council*;

(*c*) under the auspices of an accredited agency;

(*d*) in accordance with a private dispute resolution procedure; or

(*e*) if the *dispute* is about the interpretation or application of a *collective agreement*.

(4) (*a*) The Labour Court, on its own accord or, at the request of any party to the proceedings before it may reserve for the decision of the Labour Appeal Court any question of law that arises in those proceedings.

(*b*) A question may be reserved only if it is decisive for the proper adjudication of the *dispute*.

(*c*) Pending the decision of the Labour Appeal Court on any question of law reserved in terms of paragraph (*a*), the Labour Court may make any interim order.

(5) A judgment of the Labour Court must be handed down as soon as reasonably possible.

[Sub-s. (5) added by s. 26 (*d*) of Act No. 6 of 2014.]

159. Rules Board for Labour Courts and rules for Labour Court.-(1) The Rules Board for Labour Courts is hereby established.

(2) The Board consists of-

(*a*) the Judge President of the Labour Court, who is the chairperson;

(*b*) the Deputy Judge President of the Labour Court; and

(*c*) the following persons, to be appointed for a period of three years by the Minister of Justice, acting on the advice of *NEDLAC*-

(i) a practising advocate with knowledge, experience and expertise in labour law;

(ii) a practising attorney with knowledge, experience and expertise in labour law;

(iii) a person who represents the interests of *employees*;

(iv) a person who represents the interests of employers; and

(v) a person who represents the interests of the State.

(3) The Board may make rules to regulate the conduct of proceedings in the Labour Court including, but not limited to-

(*a*) the process by which proceedings are brought before the Court, and the form and content of that process;

(*b*) the period and process for noting appeals;

(*c*) the taxation of bills of costs;

(*d*) after consulting with the Minister of Finance, the fees payable and the costs and expenses allowable in respect of the service or execution of any process of the Labour Court, and the tariff of costs and expenses that may be allowed in respect of that service or execution; and

(*e*) all other matters incidental to performing the functions of the Court, including any matters not expressly mentioned in this subsection that are similar to matters about which the Rules Board for Courts of Law may make rules in terms of section 6 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985).

[Para. (*e*) amended by s. 45 (*a*) of Act No. 42 of 1996.]

Wording of Sections

(4) The Board may alter or repeal any rule that it makes.

(5) Five members of the Board are a quorum at any meeting of the Board.

(6) The Board must publish any rules that it makes, alters or repeals in the *Government Gazette*.

(7) (*a*) A member of the Board who is a judge of the High Court may be paid an allowance determined in terms of subsection (9) in respect of the performance of the functions of a member of the Board.

(*b*) Notwithstanding anything to the contrary in any other law, the payment, in terms of paragraph (*a*), of an allowance to a member of the Board who is a judge of the High Court, will be in addition to any salary or allowances, including allowances for re-imbursement of travelling and subsistence expenses, that is paid to that person in the capacity of a judge of that Court.

[Sub-s. (7) added by s. 45 (*b*) of Act No. 42 of 1996 and amended by s. 15 of Act No. 127 of 1998.]

Wording of Sections

(8) A member of the Board who is not a judge of the High Court nor subject to the Public Service Act, 1994, will be entitled to the remuneration, allowances (including allowances for re-imbursement of travelling and subsistence expenses), benefits and privileges determined in terms of subsection (9).

[Sub-s. (8) added by s. 45 (*b*) of Act No. 42 of 1996 and amended by s. 15 of Act No. 127 of 1998.]

Wording of Sections

(9) The remuneration, allowances, benefits and privileges of the members of the Board-

(*a*) are determined by the Minister of Justice with the concurrence of the Minister of Finance;

(*b*) may vary according to rank functions to be performed and whether office is held in a full-time or part-time capacity; and

(*c*) may be varied by the Minister of Justice under any law in respect of any person or category of persons.

[Sub-s. (9) added by s. 45 (*b*) of Act No. 42 of 1996.]

(10) (*a*) Pending publication in the *Government Gazette* of rules made by the Board, matters before the Court will be dealt with in accordance with such general directions as the Judge President of the Labour Court, or any other judge or judges of that Court designated by the Judge President for that purpose, may consider appropriate and issue in writing.

(*b*) Those directions will cease to be of force on the date of the publication of the Board's rules in the *Government Gazette*, except in relation to proceedings already instituted before that date. With regard to those proceedings, those directions will continue to apply unless the Judge President of the Labour Court has withdrawn them in writing.

[Sub-s. (10) added by s. 45 (*b*) of Act No. 42 of 1996.]

(11) The Judge President must ensure that the Rules Board for Labour Courts meet at least once every two years to review the rules of the Labour Court.

[Sub-s. (11) added by s. 27 of Act No. 6 of 2014.]

(Date of commencement of s. 159: 1 January, 1996.)

160. Proceedings of Labour Court to be carried on in open court.-(1) The proceedings in the Labour Court must be carried on in open court.

(2) Despite subsection (1), the Labour Court may exclude the members of the general public, or specific persons, or categories of persons from the proceedings in any case where a court of a provincial division of the Supreme Court could have done so.

161. Representation before Labour Court.-(1) In any proceedings before the Labour Court, a party to the proceedings may appear in person or be represented only by-

(*a*) a *legal practitioner*;

(*b*) a *director* or *employee* of the party;

(*c*) any *office-bearer* or *official* of that party's registered *trade union* or registered *employers' organisation*;

[Para. (*c*) substituted by s. 28 (*a*) of Act No. 6 of 2014.]

Wording of Sections

(*d*) a designated agent or official of a *council*; or

[Para. (*d*) substituted by s. 37 of Act No. 12 of 2002.]

Wording of Sections

(*e*) an official of the Department of Labour.

[S. 161 substituted by s. 16 of Act No. 127 of 1998 and amended by s. 28 (*b*) of Act No. 6 of 2014.]

(2) No person representing a party in proceedings before the Labour Court in a capacity contemplated in paragraphs (*b*) to (*e*) of subsection (1) may charge a fee or receive a financial benefit in consideration for agreeing to represent that party unless permitted to do so by order of the Labour Court.

[Sub-s. (2) added by s. 28 (*b*) of Act No. 6 of 2014.]

162. Costs.-(1) The Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness.

(2) When deciding whether or not to order the payment of costs, the Labour Court may take into account-

(*a*) whether the matter referred to the Court ought to have been referred to arbitration in terms of *this Act* and, if so, the extra costs incurred in referring the matter to the Court; and

(*b*) the conduct of the parties-

(i) in proceeding with or defending the matter before the Court; and

(ii) during the proceedings before the Court.

(3) The Labour Court may order costs against a party to the *dispute* or against any person who represented that party in those proceedings before the Court.

163. Service and enforcement of orders of Labour Court.-Any decision, judgment or order of the Labour Court may be *served* and executed as if it were a decision, judgment or order of the High Court.

[S. 163 amended by s. 17 of Act No. 127 of 1998.]

Wording of Sections

164. Seal of Labour Court.-(1) The Labour Court for use as occasion may require will have an official seal of a design prescribed by the President by proclamation in the *Government Gazette*.

(2) The registrar of the Labour Court must keep custody of the official seal of the Labour Court.

165. Variation and rescission of orders of Labour Court.-The Labour Court, acting of its own accord or on the application of any affected party may vary or rescind a decision, judgment or order-

(*a*) erroneously sought or erroneously granted in the absence of any party affected by that judgment or order;

(*b*) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission; or

(*c*) granted as a result of a mistake common to the parties to the proceedings.

166. Appeals against judgment or order of Labour Court.-(1) Any party to any proceedings before the Labour Court may apply to the Labour Court for leave to appeal to the Labour Appeal Court against any final judgment or final order of the Labour Court.

(2) If the application for leave to appeal is refused, the applicant may petition the Labour Appeal Court for leave to appeal.

(3) Leave to appeal may be granted subject to any conditions that the Court concerned may determine.

(4) Subject to the Constitution and despite any other law, an appeal against any final judgment or final order of the Labour Court in any matter in respect of which the Labour Court has exclusive jurisdiction may be brought only to the Labour Appeal Court.

Part E-Labour Appeal Court

167. Establishment and status of Labour Appeal Court.-(1) The Labour Appeal Court is hereby established as a court of law and equity.

(2) The Labour Appeal Court is the final court of appeal in respect of all judgments and orders made by the Labour Court in respect of the matters within its exclusive jurisdiction.

(3) The Labour Appeal Court is a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which the Supreme Court of Appeal has in relation to matters under its jurisdiction.

[Sub-s. (3) amended by s. 18 of Act No. 127 of 1998.]

Wording of Sections

(4) The Labour Appeal Court is a court of record.

168. Composition of Labour Appeal Court.-(1) The Labour Appeal Court consists of-

(*a*) the Judge President of the Labour Court, who by virtue of that office is Judge President of the Labour Appeal Court;

(*b*) the Deputy Judge President, who by virtue of that office is Deputy Judge President of the Labour Appeal Court; and

(*c*) such number of other judges who are judges of the Labour Court or High Court, as may be required for the effective functioning of the Labour Appeal Court.

[Para. (*c*) substituted by s. 46 of Act No. 42 of 1996, amended by s. 19 of Act No. 127 of 1998 and substituted by s. 29 of Act No. 6 of 2014.]

Wording of Sections

(2) The Labour Appeal Court is constituted before any three judges whom the Judge President designates from the panel of judges contemplated in subsection (1).

(3) No judge of the Labour Appeal Court may sit in the hearing of an appeal against a judgment or an order given in a case that was heard before that judge.

169. Appointment of other judges of Labour Appeal Court.-(1) The President, acting on the advice of *NEDLAC* and the Judicial Service Commission, after consultation with the Minister of Justice and the Judge President of the Labour Appeal Court, must appoint the judges of the Labour Appeal Court referred to in section 168 (1) (*c*).

[Sub-s. (1) amended by s. 20 (*a*) of Act No. 127 of 1998.]

Wording of Sections

(2) The Minister of Justice, after consultation with the Judge President of the Labour Appeal Court, may appoint one or more judges of the High Court to serve as acting judges of the Labour Appeal Court.

[S. 169 substituted by s. 47 of Act No. 42 of 1996. Sub-s. (2) amended by s. 20 (*b*) of Act No. 127 of 1998.]

Wording of Sections

(Date of commencement of s. 169: 1 January, 1996.)

170. Tenure, remuneration and terms and conditions of appointment of Labour Appeal Court judges.-(1) A judge of the Labour Appeal Court must be appointed for a fixed term determined by the President at the time of appointment.

(2) A judge of the Labour Appeal Court may resign from that office by giving written notice to the President.

[Sub-s. (2) substituted by s. 55 (1) (*b*) of Act No. 10 of 2013.]

Wording of Sections

(3) (*a*) A judge of the Labour Appeal Court holds office until-

(i) the judge's term of office in the Labour Appeal Court ends;

(ii) the judge's resignation takes effect;

(iii) the judge is removed from office;

(iv) the judge ceases to be a judge of the High Court; or

(v) the judge dies.

(*b*) The Judge President and the Deputy Judge President of the Labour Appeal Court hold their offices for as long as they hold their respective offices of Judge President and Deputy Judge President of the Labour Court.

[Sub-s. (3) amended by s. 21 of Act No. 127 of 1998.]

Wording of Sections

(4) Neither the tenure of office nor the *remuneration* and terms and conditions of appointment applicable to a judge of the High Court in terms of the Judges' Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001), is affected by that judge's appointment and concurrent tenure of office as a judge of the Labour Appeal Court.

[Sub-s. (4) amended by s. 21 of Act No. 127 of 1998 and substituted by s. 55 (1) (*b*) of Act No. 10 of 2013.]

Wording of Sections

(5) . . . . . .

[Sub-s. (5) amended by s. 21 of Act No. 127 of 1998 and deleted by s. 55 (1) (*b*) of Act No. 10 of 2013.]

Wording of Sections

(6) Despite the expiry of the period of a person's appointment as a judge of the Labour Appeal Court, that person may continue to perform the functions of a judge of that Court, and will be regarded as such in all respects, only-

(*a*) for the purposes of disposing of any proceedings in which that person has taken part as a judge of that Court and which are still pending upon the expiry of that person's appointment or which, having been so disposed of before or after the expiry of that person's appointment, have been re-opened; and

(*b*) for as long as that person will be necessarily engaged in connection with the disposal of the proceedings so pending or re-opened.

[Sub-s. (6) added by s. 48 of Act No. 42 of 1996.]

(7) The provisions of subsections (2) to (6) apply, read with the changes required by the context, to acting judges appointed in terms of section 169 (2).

[Sub-s. (7) added by s. 48 of Act No. 42 of 1996.]

(Date of commencement of s. 170: 1 January, 1996.)

171. Officers of Labour Appeal Court.-(1) The registrar of the Labour Court is also the registrar of the Labour Appeal Court.

(2) Each of the deputy registrars and other officers of the Labour Court also holds the corresponding office in relation to the Labour Appeal Court.

(3) (*a*) The officers of the Labour Appeal Court, under the supervision and control of the registrar of that Court must perform the administrative functions of the Labour Appeal Court.

(*b*) A deputy registrar of the Labour Appeal Court may perform any of the functions of the registrar of that Court that have been delegated generally or specifically to the deputy registrar.

(4) The deputy registrar of the Labour Appeal Court or, if there is more than one, the most senior will act as registrar of the Labour Appeal Court whenever-

(*a*) the registrar is absent from the *Republic* or from duty, or for any reason is temporarily unable to perform the functions of registrar; or

(*b*) the office of registrar is vacant.

(Date of commencement of s. 171: 1 January, 1996.)

172. Area of jurisdiction and seat of Labour Appeal Court.-(1) The Labour Appeal Court has jurisdiction in all the provinces of the *Republic*.

(2) The seat of the Labour Court is also the seat of the Labour Appeal Court.

(3) The functions of the Labour Appeal Court may be performed at any place in the *Republic*.

(Date of commencement of s. 172: 1 January, 1996.)

173. Jurisdiction of the Labour Appeal Court.-(1) Subject to the Constitution and despite any other law, the

(*a*) to hear and determine all appeals against the final judgments and the final orders of the Labour Court; and

(*b*) to decide any question of law reserved in terms of section 158 (4).

(2) . . . . . .

[Sub-s. (2) deleted by s. 22 (*a*) of Act No. 127 of 1998.]

Wording of Sections

(3) . . . . . .

[Sub-s. (3) amended by s. 22 (*b*) of Act No. 127 of 1998 and deleted by s. 38 of Act No. 12 of 2002.]

Wording of Sections

(4) A decision to which any two judges of the Labour Appeal Court agree is the decision of the Court.

174. Powers of Labour Appeal Court on hearing of appeals.-The Labour Appeal Court has the power-

(*a*) on the hearing of an appeal to receive further evidence, either orally or by deposition before a person appointed by the Labour Appeal Court, or to remit the case to the Labour Court for further hearing, with such instructions as regards the taking of further evidence or otherwise as the Labour Appeal Court considers necessary; and

(*b*) to confirm, amend or set aside the judgment or order that is the subject of the appeal and to give any judgment or make any order that the circumstances may require.

175. Labour Appeal Court may sit as court of first instance.-Despite the provisions of this Part, the Judge President may direct that any matter before the Labour Court be heard by the Labour Appeal Court sitting as a court of first instance, in which case the Labour Appeal Court is entitled to make any order that the Labour Court would have been entitled to make.

176. Rules for Labour Appeal Court.-(1) The Rules Board for Labour Courts established by section 159 may make rules to regulate the conduct of proceedings in the Labour Appeal Court.

(2) The Board has all the powers referred to in section 159 when it makes rules for the Labour Appeal Court.

(3) The Board must publish in the *Government Gazette* any rules that it makes, alters or repeals.

(Date of commencement of s. 176: 1 January, 1996.)

177. Proceedings of Labour Appeal Court to be carried on in open court.-(1) The proceedings in the Labour Appeal Court must be carried on in open court.

(2) Despite subsection (1), the Labour Appeal Court may exclude the members of the general public, or specific persons, or categories of persons from the proceedings in any case where a High Court could have done so.

[Sub-s. (2) amended by s. 23 of Act No. 127 of 1998.]

Wording of Sections

178. Representation before Labour Appeal Court.-Any person who, in terms of section 161, may appear before the Labour Court has the right to appear before the Labour Appeal Court.

179. Costs.-(1) The Labour Appeal Court may make an order for the payment of costs, according to the requirements of the law and fairness.

(2) When deciding whether or not to order the payment of costs, the Labour Appeal Court may take into account-

(*a*) whether the matter referred to the Court should have been referred to arbitration in terms of *this Act* and, if so, the extra costs incurred in referring the matter to the Court; and

(*b*) the conduct of the parties-

(i) in proceeding with or defending the matter before the Court; and

(ii) during the proceedings before the Court.

(3) The Labour Appeal Court may order costs against a party to the *dispute* or against any person who represented that party in those proceedings before the Court.

180. Service and enforcement of orders.-Any decision, judgment or order of the Labour Appeal Court may be *served* and executed as if it were a decision, judgment or order of the High Court.

[S. 180 amended by s. 24 of Act No. 127 of 1998.]

Wording of Sections

181. Seal of Labour Appeal Court.-(1) The Labour Appeal Court for use as the occasion may require will have an official seal of a design prescribed by the President by proclamation in the *Government Gazette*.

(2) The registrar of the Labour Appeal Court must keep custody of the official seal of the Labour Appeal Court.

182. Judgments of Labour Appeal Court binding on Labour Court.-A judgment of the Labour Appeal Court is binding on the Labour Court.

183. Labour Appeal Court final court of appeal.-Subject to the Constitution and despite any other law, no appeal lies against any decision, judgment or order given by the Labour Appeal Court in respect of-

(*a*) any appeal in terms of section 173 (1) (*a*);

(*b*) its decision on any question of law in terms of section 173 (1) (*b*); or

(*c*) any judgment or order made in terms of section 175.

Part F-General Provisions applicable to Courts established by this Act

184. General provisions applicable to courts established by this Act.-Sections 5,41 18,42 25,43 30,44 31,45 39,46 40,47 and 42,48 of the Supreme Court Act, 1959 (Act No. 59 of 1959) apply, read with the changes required by the context, in relation to the Labour Court, or the Labour Appeal Court, or both, to the extent that they are not inconsistent with *this Act*.

CHAPTER VIII
UNFAIR DISMISSAL AND UNFAIR LABOUR PRACTICE

[Heading substituted by s. 39 of Act No. 12 of 2002.]

Footnotes

41 Scope and execution of process.

42 Certified copies of court records admissible as evidence.

43 No process to be issued against judge except with consent of court.

44 Manner of securing attendance of witnesses or the production of any document.

45 Manner in which witness may be dealt with on refusal to give evidence or produce document.

46 Property not liable to be seized in execution.

47 Offences relating to execution.

48 Witness fees.

185. Right not to be unfairly dismissed or subjected to unfair labour practice.-Every employee has the right not to be-

(*a*) unfairly dismissed; and

(*b*) subjected to unfair labour practice.

[S. 185 substituted by s. 40 of Act No. 12 of 2002.]

Wording of Sections

186. Meaning of dismissal and unfair labour practice.-(1) "Dismissal" means that-

(*a*) an employer has terminated employment with or without notice;

[Para. (*a*) substituted by s. 30 (*a*) of Act No. 6 of 2014.]

Wording of Sections

(*b*) an employee employed in terms of a fixed term contract of employment reasonably expected the employer-

(i) to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it; or

(ii) to retain the *employee* in employment on an indefinite basis but otherwise on the same or similar terms as the fixed term contract, but the employer offered to retain the *employee* on less favourable terms, or did not offer to retain the *employee*;

[Para. (*b*) substituted by s. 30 (*a*) of Act No. 6 of 2014.]

Wording of Sections

(*c*) an employer refused to allow an *employee* to resume work after she-

(i) took maternity leave in terms of any law, *collective agreement* or her contract of employment; or

(ii) . . . . . .

[Sub-para. (ii) deleted by s. 95 (4) of Act No. 75 of 1997.]

Wording of Sections

(*d*) an employer who dismissed a number of *employees* for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another; or

(*e*) an *employee* terminated employment with or without notice because the employer made continued employment intolerable for the *employee*; or

[Para. (*e*) substituted by s. 30 (*b*) of Act No. 6 of 2014.]

Wording of Sections

(*f*) an *employee* terminated employment with or without notice because the new employer, after a transfer in terms of section 197 or section 197A, provided the *employee* with conditions or circumstances at work that are substantially less favourable to the *employee* than those provided by the old employer.

[Para. (*f*) added by s. 41 (*b*) of Act No. 12 of 2002 and substituted by s. 30 (*b*) of Act No. 6 of 2014.]

Wording of Sections

(2) "Unfair labour practice" means any unfair act or omission that arises between an employer and an *employee* involving-

(*a*) unfair conduct by the employer relating to the promotion, demotion, probation (excluding *disputes* about dismissals for a reason relating to probation) or training of an *employee* or relating to the provision of benefits to an *employee*;

(*b*) the unfair suspension of an *employee* or any other unfair disciplinary action short of dismissal in respect of an *employee*;

(*c*) a failure or refusal by an employer to reinstate or re-employ a former *employee* in terms of any agreement; and

(*d*) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act No. 26 of 2000), on account of the *employee* having made a protected disclosure defined in that Act.

[S. 186 amended by s. 41 (*a*) of Act No. 12 of 2002. Sub-s. (2) added by s. 41 (*c*) of Act No. 12 of 2002.]

187. Automatically unfair dismissals.-(1) A *dismissal* is automatically unfair if the employer, in dismissing the *employee*, acts contrary to section 549 or, if the reason for the *dismissal* is-

(*a*) that the *employee* participated in or supported, or indicated an intention to participate in or support, a *strike* or *protest action* that complies with the provisions of Chapter IV;50

(*b*) that the *employee* refused, or indicated an intention to refuse, to do any work normally done by an *employee* who at the time was taking part in a *strike* that complies with the provisions of Chapter IV or was locked out, unless that work is necessary to prevent an actual danger to life, personal safety or health;

(*c*) a refusal by *employees* to accept a demand in respect of any matter of mutual interest between them and their employer;

[Para. (*c*) substituted by s. 31 of Act No. 6 of 2014.]

Wording of Sections

(*d*) that the *employee* took action, or indicated an intention to take action, against the employer by-

(i) exercising any right conferred by *this Act*; or

(ii) participating in any proceedings in terms of *this Act*;

(*e*) the *employee's* pregnancy, intended pregnancy, or any reason related to her pregnancy;

(*f*) that the employer unfairly discriminated against an *employee*, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;

(*g*) a transfer, or a reason related to a transfer, contemplated in section 197 or 197A; or

[Para. (*g*) added by s. 42 of Act No. 12 of 2002.]

(*h*) a contravention of the Protected Disclosures Act, 2000, by the employer, on account of an *employee* having made a protected disclosure defined in that Act.

[Para. (*h*) added by s. 42 of Act No. 12 of 2002.]

(2) Despite subsection (1) (*f*)-

(*a*) a *dismissal* may be fair if the reason for *dismissal* is based on an inherent requirement of the particular job;

(*b*) a *dismissal* based on age is fair if the *employee* has reached the normal or agreed retirement age for persons employed in that capacity.

Footnotes

49 Section 5 confers protections relating to the right to freedom of association and on members of workplace forums.

50 Chapter IV deals with industrial action and conduct in support of industrial action. Section 67 (4) and (5) provide-

"(4) An employer may not dismiss an employee for participating in a protected strike or for any conduct in contemplation or in furtherance of a

protected strike.

(5) Subsection (4) does not preclude an employer from fairly dismissing an employee in compliance with the provisions of Chapter VIII for a reason related to the employee's conduct during the strike, or for a reason based on the employer's operational requirements."

Section 77 (3) provides-

"A person who takes part in protest action or in any conduct in contemplation or in furtherance of protest action that complies with subsection (1), enjoys the protections conferred by section 67."

188. Other unfair dismissals.-(1) A *dismissal* that is not automatically unfair, is unfair if the employer fails to prove-

(*a*) that the reason for *dismissal* is a fair reason-

(i) related to the *employee's* conduct or capacity; or

(ii) based on the employer's *operational requirements*; and

(*b*) that the *dismissal* was effected in accordance with a fair procedure.

(2) Any person considering whether or not the reason for *dismissal* is a fair reason or whether or not the *dismissal* was effected in accordance with a fair procedure must take into account any relevant *code of good practice* issued in terms of *this Act*.51

Footnotes

51 See Schedule 8, the Code of Good Practice: Dismissal.

188A. Inquiry by arbitrator.-(1) An employer may, with the consent of the *employee* or in accordance with a collective agreement, request a *council,* an accredited agency or the Commission to appoint an arbitrator to conduct an inquiry into allegations about the conduct or capacity of that *employee*.

[S. 188A amended by s. 32 (*a*) of Act No. 6 of 2014. Sub-s. (1) substituted by s. 32 (*b*) of Act No. 6 of 2014.]

Wording of Sections

(2) The request must be in the *prescribed* form.

(3) The *council*, accredited agency or the Commission must appoint an arbitrator on receipt of-

(*a*) payment by the employer of the *prescribed* fee; and

(*b*) the *employee's* written consent to the inquiry.

(4) (*a*) An *employee* may only consent to an inquiry in terms of this section after the *employee* has been advised of the allegation referred to in subsection (1).

(*b*) Despite any other provision in *this Act*, an *employee* earning more than the amount determined by the *Minister* in terms of section 6 (3) of the *Basic Conditions of Employment Act* at the time, may agree in a contract of employment to the holding of an inquiry in terms of this section.

[Sub-s. (4) substituted by s. 32 (*c*) of Act No. 6 of 2014.]

Wording of Sections

(5) In any inquiry in terms of this section a party to the *dispute* may appear in person or be represented only by-

(*a*) a co-employee;

(*b*) a *director* or *employee*, if the party is a juristic person;

(*c*) an office bearer or official of that party's registered *trade union* or registered *employers' organisation*; or

[Para. (*c*) substituted by s. 32 (*e*) of Act No. 6 of 2014.]

Wording of Sections

(*d*) a legal practitioner, on agreement between the parties or if permitted by the arbitrator in accordance with the rules regulating representation at an arbitration before the Commission.

[Sub-s. (5) amended by s. 32 (*d*) of Act No. 6 of 2014. Para. (*d*) substituted by s. 32 (*e*) of Act No. 6 of 2014.]

Wording of Sections

(6) Section 138, read with the changes required by the context, applies to any inquiry in terms of this section.

[Sub-s. (6) substituted by s. 32 (*f*) of Act No. 6 of 2014.]

Wording of Sections

(7) An arbitrator appointed in terms of this section has all the powers conferred on a commissioner by section 142 (1) (*a*) to (*e*), (2) and (7) to (9), read with the changes required by the context, and any reference in that section to the *director* for the purpose of this section, must be read as a reference to-

(*a*) the secretary of the *council,* if the inquiry is held under the auspices of the *council;*

[Para. (*a*) substituted by s. 32 (*g*) of Act No. 6 of 2014.]

Wording of Sections

(*b*) the *director* of the accredited agency, if the inquiry is held under the auspices of an accredited agency.

[Para. (*b*) substituted by s. 32 (*g*) of Act No. 6 of 2014.]

Wording of Sections

(8) The ruling of the arbitrator in an inquiry has the same status as an arbitration award, and the provisions of sections 143 to 146 apply with the changes required by the context to any such ruling.

[Sub-s. (8) substituted by s. 32 (*h*) of Act No. 6 of 2014.]

Wording of Sections

(9) An arbitrator conducting an inquiry in terms of this section must, in the light of the evidence presented and by reference to the criteria of fairness in the Act, rule as to what action, if any, may be taken against the *employee.*

[Sub-s. (9) substituted by s. 32 (*h*) of Act No. 6 of 2014.]

Wording of Sections

(10) (*a*) A private agency may only appoint an arbitrator to conduct an inquiry in terms of this section if it is accredited for arbitration by the Commission.

(*b*) A *council* may only appoint an arbitrator to conduct an inquiry in terms of this section in respect of which the employer or the *employee* is not a party to the *council,* if the *council* has been accredited for arbitration by the Commission.

[Sub-s. (10) substituted by s. 32 (*h*) of Act No. 6 of 2014.]

Wording of Sections

(11) Despite subsection (1), if an *employee* alleges in good faith that the holding of an inquiry contravenes the Protected Disclosures Act, 2000 (Act No. 26 of 2000), that *employee* or the employer may require that an inquiry be conducted in terms of this section into allegations by the employer into the conduct or capacity of the *employee.*

[Sub-s. (11) added by s. 32 (*i*) of Act No. 6 of 2014.]

(12) The holding of an inquiry by a arbitrator in terms of this section and the suspension of an *employee* on full pay pending the outcome of such an inquiry do not constitute an occupational detriment as contemplated in the Protected Disclosures Act, 2000 (Act No. 26 of 2000).

[S. 188A inserted by s. 43 of Act No. 12 of 2002. Sub-s. (12) added by s. 32 (*i*) of Act No. 6 of 2014.]

189. Dismissals based on operational requirements.-(1) When an employer contemplates dismissing one or more *employees* for reasons based on the employer's *operational requirements*, the employer must consult-

(*a*) any person whom the employer is required to consult in terms of a *collective agreement*;

(*b*) if there is no *collective agreement* that requires consultation-

(i) a *workplace forum*, if the *employees* likely to be affected by the proposed *dismissals* are employed in a *workplace* in respect of which there is a *workplace forum*; and

(ii) any registered *trade union* whose members are likely to be affected by the proposed *dismissals*;

(*c*) if there is no *workplace forum* in the *workplace* in which the *employees* likely to be affected by the proposed *dismissals* are employed, any registered *trade union* whose members are likely to be affected by the proposed *dismissals*; or

(*d*) if there is no such *trade union*, the *employees* likely to be affected by the proposed *dismissals* or their representatives nominated for that purpose.

(2) The employer and the other consulting parties must in the consultation envisaged by subsections (1) and (3) engage in a meaningful joint consensus-seeking process and attempt to reach consensus on-

(*a*) appropriate measures-

(i) to avoid the *dismissals*;

(ii) to minimise the number of *dismissals*;

(iii) to change the timing of the *dismissals*; and

(iv) to mitigate the adverse effects of the *dismissals*;

(*b*) the method for selecting the *employees* to be dismissed; and

(*c*) the severance pay for dismissed *employees*.

(3) The employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to-

(*a*) the reasons for the proposed *dismissals*;

(*b*) the alternatives that the employer considered before proposing the *dismissals*, and the reasons for rejecting each of those alternatives;

(*c*) the number of *employees* likely to be affected and the job categories in which they are employed;

(*d*) the proposed method for selecting which *employees* to dismiss;

(*e*) the time when, or the period during which, the *dismissals* are likely to take effect;

(*f*) the severance pay proposed;

(*g*) any assistance that the employer proposes to offer to the *employees* likely to be dismissed;

(*h*) the possibility of the future re-employment of the *employees* who are dismissed;

(*i*) the number of *employees* employed by the employer; and

(*j*) the number of *employees* that the employer has dismissed for reasons based on its *operational requirements* in the preceding 12 months.

(4) (*a*) The provisions of section 16 apply, read with the changes required by the context, to the disclosure of information in terms of subsection (3).

(*b*) In any *dispute* in which an arbitrator or the Labour Court is required to decide whether or not any information is relevant, the onus is on the employer to prove that any information that it has refused to disclose is not relevant for the purposes for which it is sought.

(5) The employer must allow the other consulting party an opportunity during consultation to make representations about any matter dealt with in subsections (2), (3) and (4) as well as any other matter relating to the proposed *dismissals*.

(6) (*a*) The employer must consider and respond to the representations made by the other consulting party and, if the employer does not agree with them, the employer must state the reasons for disagreeing.

(*b*) If any representation is made in writing the employer must respond in writing.

(7) The employer must select the *employees* to be dismissed according to selection criteria-

(*a*) that have been agreed to by the consulting parties; or

(*b*) if no criteria have been agreed, criteria that are fair and objective.

[S. 189 substituted by s. 44 of Act No. 12 of 2002.]

Wording of Sections

189A. Dismissals based on operational requirements by employers with more than 50 employees.- (1) This section applies to employers employing more than 50 *employees* if-

(*a*) the employer contemplates dismissing by reason of the employer's *operational requirements*, at least-

(i) 10 *employees*, if the employer employs up to 200 *employees*;

(ii) 20 *employees*, if the employer employs more than 200, but not more than 300, *employees*;

(iii) 30 *employees*, if the employer employs more than 300, but not more than 400, *employees*;

(iv) 40 *employees*, if the employer employs more than 400, but not more than 500, *employees*; or

(v) 50 *employees*, if the employer employs more than 500 *employees*; or

(*b*) the number of *employees* that the employer contemplates dismissing together with the number of *employees* that have been dismissed by reason of the employer's *operational requirements* in the 12 months prior to the employer issuing a notice in terms of section 189 (3), is equal to or exceeds the relevant number specified in paragraph (*a*).

(2) In respect of any dismissal covered by this section-

(*a*) an employer must give notice of termination of employment in accordance with the provisions of this section;

(*b*) despite section 65 (1) (*c*), an *employee* may participate in a *strike* and an employer may *lock out* in accordance with the provisions of this section;

(*c*) the consulting parties may agree to vary the time periods for facilitation or consultation;

(*d*) a consulting party may not unreasonably refuse to extend the period for consultation if such an extension is required to ensure meaningful consultation.

[Para. (*d*) added by s. 33 (*a*) of Act No. 6 of 2014.]

(3) The Commission must appoint a facilitator in terms of any regulations made under subsection (6) to assist the parties engaged in consultations if-

(*a*) the employer has in its notice in terms of section 189 (3) requested facilitation; or

(*b*) consulting parties representing the majority of employees whom the employer contemplates dismissing have requested facilitation and have notified the Commission within 15 days of the notice.

(4) This section does not prevent an agreement to appoint a facilitator in circumstances not contemplated in subsection (3).

(5) If a facilitator is appointed in terms of subsection (3) or (4) the facilitation must be conducted in terms of any regulations made by the *Minister* under subsection (6) for the conduct of such facilitations.

(6) The *Minister*, after consulting *NEDLAC* and the Commission, may make regulations relating to-

(*a*) the time period, and the variation of time periods, for facilitation;

(*b*) the powers and duties of facilitators;

(*c*) the circumstances in which the Commission may charge a fee for appointing a facilitator and the amount of the fee; and

(*d*) any other matter necessary for the conduct of facilitations.

(7) If a facilitator is appointed in terms of subsection (3) or (4), and 60 days have elapsed from the date on which notice was given in terms of section 189 (3)-

(*a*) the employer may give notice to terminate the contracts of employment in accordance with section 37 (1) of the *Basic Conditions of Employment Act*; and

(*b*) a registered *trade union* or the *employees* who have received notice of termination may either-

(i) give notice of a *strike* in terms of section 64 (1) (*b*) or (*d*); or

(ii) refer a *dispute* concerning whether there is a fair reason for the *dismissal* to the Labour Court in terms of section 191 (11).

(8) If a facilitator is not appointed-

(*a*) a party may not refer a *dispute* to a *council* or the Commission unless a period of 30 days has lapsed from the date on which notice was given in terms of section 189 (3); and

(*b*) once the periods mentioned in section 64 (1) (*a*) have elapsed-

(i) the employer may give notice to terminate the contracts of employment in accordance with section 37 (1) of the *Basic Conditions of Employment Act*; and

(ii) a registered trade union or the *employees* who have received notice of termination may-

(*aa*) give notice of a *strike* in terms of section 64 (1) (*b*) or (*d*); or

(*bb*) refer a *dispute* concerning whether there is a fair reason for the *dismissal* to the Labour Court in terms of section 191 (11).

(9) Notice of the commencement of a *strike* may be given if the employer dismisses or gives notice of *dismissal* before the expiry of the periods referred to in subsections (7) (*a*) or (8) (*b*) (i).

(10) (*a*) A consulting party may not-

(i) give notice of a strike in terms of this section in respect of a dismissal, if it has referred a dispute concerning whether there is a fair reason for that dismissal to the Labour Court;

(ii) refer a dispute about whether there is a fair reason for a dismissal to the Labour Court, if it has given notice of a strike in terms of this section in respect of that dismissal.

(*b*) If a trade union gives notice of a strike in terms of this section-

(i) no member of that trade union, and no employee to whom a collective agreement concluded by that trade union dealing with consultation or facilitation in respect of dismissals by reason of the employers' operational requirements has been extended in terms of section 23 (1) (*d*), may refer a dispute concerning whether there is a fair reason for dismissal to the Labour Court;

(ii) any referral to the Labour Court contemplated by subparagraph (i) that has been made, is deemed to be withdrawn.

(11) The following provisions of Chapter IV apply to any *strike* or *lock-out* in terms of this section:

(*a*) Section 64 (1) and (3) (*a*) to (*d*), except that-

(i) section 64 (1) (*a*) does not apply if a facilitator is appointed in terms of this section;

(ii) an employer may only *lock out* in respect of a *dispute* in which a *strike* notice has been issued;

(*b*) subsection (2) (*a*), section 65 (1) and (3);

(*c*) section 66 except that written notice of any proposed secondary strike must be given at least 14 days prior to the commencement of the *strike*;

(*d*) sections 67, 68, 69 and 76.

(12) (*a*) During the 14-day period referred to in subsection (11) (*c*), the *director* must, if requested by an employer who has received notice of any intended secondary strike, appoint a commissioner to attempt to resolve any *dispute*, between the employer and the party who gave the notice, through conciliation.

(*b*) A request to appoint a commissioner or the appointment of a commissioner in terms of paragraph (*a*) does not affect the right of *employees* to strike on the expiry of the 14-day period.

(13) If an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application for an order-

(*a*) compelling the employer to comply with a fair procedure;

(*b*) interdicting or restraining the employer from dismissing an *employee* prior to complying with a fair procedure;

(*c*) directing the employer to reinstate an *employee* until it has complied with a fair procedure;

(*d*) make an award of compensation, if an order in terms of paragraphs (*a*) to (*c*) is not appropriate.

(14) Subject to this section, the Labour Court may make any appropriate order referred to in section 158 (1) (*a*).

(15) An award of compensation made to an *employee* in terms of subsection (14) must comply with section 194.

(16) The Labour Court may not make an order in respect of any matter concerning the disclosure of information in terms of section 189 (4) that has been the subject of an arbitration award in terms of section 16.

(17) (*a*) An application in terms of subsection (13) must be brought not later than 30 days after the employer has given notice to terminate the *employee's* services or, if notice is not given, the date on which the *employees* are dismissed.

(*b*) The Labour Court may, on good cause shown condone a failure to comply with the time limit mentioned in paragraph (*a*).

(18) The Labour Court may not adjudicate a *dispute* about the procedural fairness of a *dismissal* based on the employer's *operational requirements* in any *dispute* referred to it in terms of section 191 (5) (*b*) (ii).

(19) . . . . . .

[Sub-s. (19) deleted by s. 33 (*b*) of Act No. 6 of 2014.]

Wording of Sections

(20) For the purposes of this section, an "employer" in the *public service* is the executing authority of a national department, provincial administration, provincial department or organisational component contemplated in section 7 (2) of the Public Service Act, 1994 (promulgated by Proclamation No. 103 of 1994).

190. Date of dismissal.-(1) The date of *dismissal* is the earlier of-

(*a*) the date on which the contract of employment terminated; or

(*b*) the date on which the *employee* left the service of the employer.

(2) Despite subsection (1)-

(*a*) if an employer has offered to renew on less favourable terms, or has failed to renew a fixed-term contract of employment, the date of *dismissal* is the date on which the employer offered the less favourable terms or the date the employer notified the *employee* of the intention not to renew the contract;

(*b*) if the employer refused to allow an *employee* to resume work, the date of *dismissal* is the date on which the employer first refused to allow the *employee* to resume work;

(*c*) if an employer refused to re-instate or re-employ the *employee*, the date of *dismissal is* the date on which the employer first refused to re-instate or re-employ that *employee*;

(*d*) if an employer terminates an *employee's employment* on notice, the date of *dismissal* is the date on which the notice expires or, if it is an earlier date, the date on which the *employee* is paid all outstanding salary.

[Para. (*d*) added by s. 34 of Act No. 6 of 2014.]

191. Disputes about unfair dismissals and unfair labour practices52**.**-(1) (*a*) If there is a *dispute* about the fairness of a *dismissal*, or a *dispute* about an unfair labour practice, the dismissed *employee* or the *employee* alleging the unfair labour practice may refer the *dispute* in writing to-

(i) a *council*, if the parties to the *dispute* fall within the registered *scope* of that *council*; or

(ii) the Commission, if no *council* has jurisdiction.

(*b*) A referral in terms of paragraph (*a*) must be made within-

(i) 30 days of the date of a *dismissal* or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the *dismissal*;

(ii) 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the *employee* became aware of the act or occurrence.

[Sub-s. (1) substituted by s. 46 (*b*) of Act No. 12 of 2002.]

Wording of Sections

(2) If the *employee* shows good cause at any time, the *council* or the Commission may permit the *employee* to refer the *dispute* after the relevant time limit in subsection (1) has expired.

[Sub-s. (2) substituted by s. 46 (*c*) of Act No. 12 of 2002.]

Wording of Sections

(2A) Subject to subsections (1) and (2), an *employee* whose contract of employment is terminated by notice, may refer the *dispute* to the *council* or the Commission once the *employee* has received that notice.

[Sub-s. (2A) inserted by s. 46 (*d*) of Act No. 12 of 2002.]

(3) The *employee* must satisfy the *council* or the Commission that a copy of the referral has been *served* on the employer.

(4) The *council* or the Commission must attempt to resolve the *dispute* through conciliation.

(5) If a *council* or a commissioner has certified that the *dispute* remains unresolved, or if 30 days or any further period as agreed between the parties have expired since the *council* or the Commission received the referral and the *dispute* remains unresolved-

(*a*) the *council* or the Commission must arbitrate the *dispute* at the request of the *employee* if-

(i) the *employee* has alleged that the reason for *dismissal* is related to the *employee*'s conduct or capacity, unless paragraph (*b*) (iii) applies;

(ii) the *employee* has alleged that the reason for *dismissal* is that the employer made continued

employment intolerable or the employer provided the employee with substantially less favourable conditions or circumstances at work after a transfer in terms of section 197 or 197A, unless the *employee* alleges that the contract of employment was terminated for a reason contemplated in section 187;

[Sub-para. (ii) substituted by s. 46 (*e*) of Act No. 12 of 2002.]

Wording of Sections

(iii) the *employee* does not know the reason for *dismissal*; or

(iv) the *dispute* concerns an unfair labour practice; or

[Sub-para. (iv) added by s. 46 (*f*) of Act No. 12 of 2002.]

(*b*) the *employee* may refer the *dispute to* the Labour Court for adjudication if the *employee* has alleged that the reason for *dismissal* is-

(i) automatically unfair;

(ii) based on the employer's *operational requirements*;

(iii) the *employees* participation in a *strike* that does not comply with the provisions of Chapter IV; or

(iv) because the *employee* refused to join, was refused membership of or was expelled from a *trade union* party to a closed shop agreement.

[Sub-s. (5) amended by s. 35 (*a*) of Act No. 6 of 2014.]

Wording of Sections

(5A) Despite any other provision in the Act, the *council* or Commission must commence the arbitration immediately after certifying that the *dispute* remains unresolved if the *dispute* concerns-

(*a*) the *dismissal* of an *employee* for any reason relating to probation;

(*b*) any unfair labour practice relating to probation;

(*c*) any other *dispute* contemplated in subsection (5) (*a*) in respect of which no party has objected to the matter being dealt with in terms of this subsection.

[Sub-s. (5A) inserted by s. 46 (*g*) of Act No. 12 of 2002.]

(6) Despite subsection (5) (*a*) or (5A), the *director* must refer the *dispute* to the Labour Court, if the *director* decides, on application by any party to the *dispute*, that to be appropriate after considering-

(*a*) the reason for *dismissal*;

(*b*) whether there are questions of law raised by the *dispute*;

(*c*) the complexity of the *dispute*;

(*d*) whether there are conflicting arbitration awards that need to be resolved;

(*e*) the public interest.

[Sub-s. (6) substituted by s. 46 (*h*) of Act No. 12 of 2002.]

Wording of Sections

(7) When considering whether the *dispute* should be referred to the Labour Court, the *director* must give the parties to the *dispute* and the commissioner who attempted to conciliate the *dispute*, an opportunity to make representations.

(8) The *director* must notify the parties of the decision and refer the *dispute*-

(*a*) to the Commission for arbitration; or

(*b*) to the Labour Court for adjudication.

(9) The *director's* decision is final and binding.

(10) No person may apply to any court of law to review the *director's* decision until the *dispute* has been arbitrated or adjudicated, as the case may be.

(11) (*a*) The referral, in terms of subsection (5) (*b*), of a *dispute* to the Labour Court for adjudication, must be made within 90 days after the *council* or (as the case may be) the commissioner has certified that the *dispute* remains unresolved.

(*b*) However, the Labour Court may condone non-observance of that time-frame on good cause shown.

[Sub-s. (11) added by s. 25 of Act No. 127 of 1998.]

(12) An *employee* who is dismissed by reason of the employer's *operational requirements* may elect to refer the *dispute*

either to arbitration or to the Labour Court if-

(*a*) the employer followed a consultation procedure that applied to that *employee* only, irrespective of whether that procedure complied with section 189;

(*b*) the employer's *operational requirements* lead to the *dismissal* of that *employee* only; or

(*c*) the employer employs less than ten *employees,* irrespective of the number of *employees* who are dismissed.

[Sub-s. (12) added by s. 46 (*i*) of Act No. 12 of 2002 and substituted by s. 35 (*b*) of Act No. 6 of 2014.]

Wording of Sections

(13) (*a*) An *employee* may refer a *dispute* concerning an alleged unfair labour practice to the Labour Court for adjudication if the *employee* has alleged that the *employee* has been subjected to an occupational detriment by the employer in contravention of section 3 of the Protected Disclosures Act, 2000, for having made a protected disclosure defined in that Act.

(*b*) A referral in terms of paragraph (*a*) is deemed to be made in terms of subsection (5) (*b*).

[S. 191 amended by s. 46 (*a*) of Act No. 12 of 2002. Sub-s. (13) added by s. 46 (*i*) of Act No. 12 of 2002.]

Wording of Sections

Footnotes

52 See flow diagrams Nos. 10, 11, 12 and 13 in Schedule 4.

192. Onus in dismissal disputes.-(1) In any proceedings concerning any *dismissal*, the *employee* must establish the existence of the *dismissal*.

(2) If the existence of the *dismissal* is established, the employer must prove that the *dismissal* is fair.

193. Remedies for unfair dismissal and unfair labour practice.-(1) If the Labour Court or an arbitrator appointed in terms of *this Act* finds that a *dismissal* is unfair, the Court or the arbitrator may-

(*a*) order the employer to re-instate the *employee* from any date not earlier than the date of *dismissal*;

(*b*) order the employer to re-employ the *employee*, either in the work in which the *employee* was employed before the *dismissal* or in other reasonably suitable work on any terms and from any date not earlier than the date of *dismissal*; or

(*c*) order the employer to pay compensation to the *employee*.

(2) The Labour Court or the arbitrator must require the employer to re-instate or re-employ the *employee* unless-

(*a*) the *employee* does not wish to be re-instated or re-employed;

(*b*) the circumstances surrounding the *dismissal* are such that a continued employment relationship would be intolerable;

(*c*) it is not reasonably practicable for the employer to re-instate or re-employ the *employee*; or

(*d*) the *dismissal* is unfair only because the employer did not follow a fair procedure.

(3) If a *dismissal* is automatically unfair or, if a *dismissal* based on the employer's *operational requirements is* found to be unfair, the Labour Court in addition may make any other order that it considers appropriate in the circumstances.53

(4) An arbitrator appointed in terms of this Act may determine any unfair labour practice *dispute* referred to the arbitrator, on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or compensation.

[S. 193 amended by s. 47 (*a*) of Act No. 12 of 2002. Sub-s. (4) inserted by s. 47 (*b*) of Act No. 12 of 2002.]

Wording of Sections

Footnotes

53 The Court, for example, in the case of a dismissal that constitutes an act of discrimination may wish to issue an interdict obliging the employer to stop the discriminatory practice in addition to one of the other remedies it may grant.

194. Limits on compensation.-(1) The compensation awarded to an *employee* whose *dismissal* is found to be unfair either because the employer did not prove that the reason for *dismissal* was a fair reason relating to the employee's conduct or capacity or the employer's *operational requirements* or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the *employee's* rate of *remuneration* on the date of *dismissal*.

[Sub-s. (1) substituted by s. 48 (*a*) of Act No. 12 of 2002.]

Wording of Sections

(2) . . . . . .

[Sub-s. (2) deleted by s. 48 (*b*) of Act No. 12 of 2002.]

Wording of Sections

(3) The compensation awarded to an *employee* whose *dismissal* is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of 24 months' *remuneration* calculated at the *employee's* rate of *remuneration* on the date of *dismissal*.

(4) The compensation awarded to an *employee* in respect of an unfair labour practice must be just and equitable in all the circumstances, but not more than the equivalent of 12 months *remuneration*.

[Sub-s. (4) added by s. 48 (*c*) of Act No. 12 of 2002.]

195. Compensation is in addition to any other amount.-An order or award of compensation made in terms of this Chapter is in addition to, and not a substitute for, any other amount to which the *employee* is entitled in terms of any law, *collective agreement* or contract of employment.

196. . . . . . .

[S. 196 repealed by s. 95 (5) of Act No. 75 of 1997.]

Wording of Sections

197. Transfer of contract of employment.-(1) In this section and in section 197A-

(*a*) "business" includes the whole or a part of any business, trade, undertaking or service; and

(*b*) "transfer" means the transfer of a business by one employer ("the old employer") to another employer ("the new employer") as a going concern.

(2) If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6)-

(*a*) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;

(*b*) all the rights and obligations between the old employer and an *employee* at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the *employee*;

(*c*) anything done before the transfer by or in relation to the old employer, including the *dismissal* of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and

(*d*) the transfer does not interrupt an *employee's* continuity of employment, and an *employee's* contract of employment continues with the new employer as if with the old employer.

(3) (*a*) The new employer complies with subsection (2) if that employer employs transferred *employees* on terms and conditions that are on the whole not less favourable to the *employees* than those on which they were employed by the old employer.

(*b*) Paragraph (*a*) does not apply to *employees* if any of their conditions of employment are determined by a collective agreement.

(4) Subsection (2) does not prevent an employee from being transferred to a pension, provident, retirement or similar fund other than the fund to which the employee belonged prior to the transfer, if the criteria in section 14 (1) (*c*) of the Pension Funds Act, 1956 (Act No. 24 of 1956), are satisfied.53a

(5) (*a*) For the purposes of this subsection, the *collective agreements* and arbitration awards referred to in paragraph (*b*) are agreements and awards that bound the old employer in respect of the *employees* to be transferred, immediately before the date of transfer.

(*b*) Unless otherwise agreed in terms of subsection (6), the new employer is bound by-

(i) any arbitration award made in terms of this Act, the common law or any other law;

(ii) any *collective agreement* binding in terms of section 23; and

(iii) any *collective agreement* binding in terms of section 32 unless a commissioner acting in terms of section 62 decides otherwise.

(6) (*a*) An agreement contemplated in subsection (2) must be in writing and concluded between-

(i) either the old employer, the new employer, or the old and new employers acting jointly, on the one hand; and

(ii) the appropriate person or body referred to in section 189 (1), on the other.

(*b*) In any negotiations to conclude an agreement contemplated by paragraph (*a*), the employer or employers contemplated in subparagraph (i), must disclose to the person or body contemplated in subparagraph (ii), all relevant information that will allow it to engage effectively in the negotiations.

(*c*) Section 16 (4) to (14) applies, read with the changes required by the context, to the disclosure of information in terms of paragraph (*b*).

(7) The old employer must-

(*a*) agree with the new employer to a valuation as at the date of transfer of-

(i) the leave pay accrued to the transferred *employees* of the old employer;

(ii) the severance pay that would have been payable to the transferred *employees* of the old employer in the event of a dismissal by reason of the employer's operational requirements; and

(iii) any other payments that have accrued to the transferred *employees* but have not been paid to *employees* of the old employer;

(*b*) conclude a written agreement that specifies-

(i) which employer is liable for paying any amount referred to in paragraph (*a*), and in the case of the apportionment of liability between them, the terms of that apportionment; and

(ii) what provision has been made for any payment contemplated in paragraph (*a*) if any *employee* becomes entitled to receive a payment;

(*c*) disclose the terms of the agreement contemplated in paragraph (*b*) to each *employee* who after the transfer becomes employed by the new employer; and

(*d*) take any other measure that may be reasonable in the circumstances to ensure that adequate provision is made for any obligation on the new employer that may arise in terms of paragraph (*a*).

(8) For a period of 12 months after the date of the transfer, the old employer is jointly and severally liable with the new employer to any *employee* who becomes entitled to receive a payment contemplated in subsection (7) (*a*) as a result of the *employee's dismissal* for a reason relating to the employer's *operational requirements* or the employer's liquidation or sequestration, unless the old employer is able to show that it has complied with the provisions of this section.

(9) The old and new employer are jointly and severally liable in respect of any claim concerning any term or condition of employment that arose prior to the transfer.

(10) This section does not affect the liability of any person to be prosecuted for, convicted of, and sentenced for, any offence.

[S. 197 substituted by s. 49 of Act No. 12 of 2002.]

Wording of Sections

Footnotes

53a Section 14 (1) (*c*) of the Pensions Funds Act requires the registrar to be satisfied that any scheme to amalgamate or transfer funds is reasonable and equitable, and accords full recognition to the rights and reasonable benefit expectations of the persons concerned in terms of the fund rules, and to additional benefits which have become established practice.

[Footnote 53a inserted by Act No. 12 of 2002.]

197A. Transfer of contract of employment in circumstances of insolvency.-(1) This section applies to a transfer of a business-

(*a*) if the old employer is insolvent; or

(*b*) if a scheme of arrangement or compromise is being entered into to avoid winding-up or sequestration for reasons of insolvency.

(2) Despite the Insolvency Act, 1936 (Act No. 24 of 1936), if a transfer of a business takes place in the circumstances contemplated in subsection (1), unless otherwise agreed in terms of section 197 (6)-

(*a*) the new employer is automatically substituted in the place of the old employer in all contracts of employment in existence immediately before the old employer's provisional winding-up or sequestration;

(*b*) all the rights and obligations between the old employer and each *employee* at the time of the transfer remain rights and obligations between the old employer and each employee;

(*c*) anything done before the transfer by the old employer in respect of each *employee* is considered to have been done by the old employer;

(*d*) the transfer does not interrupt the *employee's* continuity of employment and the employee's contract of employment continues with the new employer as if with the old employer.

(3) Section 197 (3), (4), (5) and (10) applies to a transfer in terms of this section and any reference to an agreement in that section must be read as a reference to an agreement contemplated in section 197 (6).

(4) Section 197 (5) applies to a *collective agreement* or arbitration binding on the employer immediately before the employer's provisional winding-up or sequestration.

(5) Section 197 (7), (8) and (9) does not apply to a transfer in accordance with this section.

[S. 197A inserted by s. 50 of Act No. 12 of 2002.]

197B. Disclosure of information concerning insolvency.-(1) An employer that is facing financial difficulties that may reasonably result in the winding-up or sequestration of the employer, must advise a consulting party contemplated in section 189 (1).

(2) (*a*) An employer that applies to be wound up or sequestrated, whether in terms of the Insolvency Act, 1936, or any other law, must at the time of making application, provide a consulting party contemplated in section 189 (1) with a copy of the application.

(*b*) An employer that receives an application for its winding-up or sequestration must supply a copy of the application to any consulting party contemplated in section 189 (1), within two days of receipt, or if the proceedings are urgent, within 12 hours.

[S. 197B inserted by s. 50 of Act No. 12 of 2002.]

CHAPTER IX
REGULATION OF NON-STANDARD EMPLOYMENT AND GENERAL PROVISIONS

[Heading to Ch. IX substituted by s. 36 of Act No. 6 of 2014.]

198. Temporary Employment Services.-(1) In this section, "temporary employment services" means any person who, for reward, procures for or provides to a client other persons-

(*a*) who perform work for the client; and

[Para. (*a*) substituted by s. 37 (*a*) of Act No. 6 of 2014.]

Wording of Sections

(*b*) who are remunerated by the temporary employment service.

(2) For the purposes of *this Act*, a person whose services have been procured for or provided to a client by a temporary employment service is the *employee* of that temporary employment service, and the temporary employment service is that person's employer.

(3) Despite subsections (1) and (2), a person who is an independent contractor is not an *employee* of a temporary employment service, nor is the temporary employment service the employer of that person.

(4) The temporary employment service and the client are jointly and severally liable if the temporary employment service, in respect of any of its *employees*, contravenes-

(*a*) a *collective agreement* concluded in a *bargaining council* that regulates terms and conditions of employment;

(*b*) a binding arbitration award that regulates terms and conditions of employment;

(*c*) the *Basic Conditions of Employment Act*; or

(*d*) a sectoral determination made in terms of the *Basic Conditions of Employment Act*.

[Para. (*d*) substituted by s. 37 (*b*) of Act No. 6 of 2014.]

Wording of Sections

(4A) If the client of a temporary employment service is jointly and severally liable in terms of section 198 (4) or is deemed to be the employer of an *employee* in terms of section 198A (3) (*b*)-

(*a*) the *employee* may institute proceedings against either the temporary employment service or the client or both the temporary employment service and the client;

(*b*) a labour inspector acting in terms of the *Basic Conditions of Employment Act* may secure and enforce compliance against the temporary employment service or the client as if it were the employer, or both; and

(*c*) any order or award made against a temporary employment service or client in terms of this subsection may be enforced against either.

[Sub-s. (4A) inserted by s. 37 (*c*) of Act No. 6 of 2014.]

(4B) (*a*) A temporary employment service must provide an *employee* whose service is procured for or provided to a client with written particulars of *employment* that comply with section 29 of the *Basic Conditions of Employment Act,* when the *employee* commences *employment.*

(*b*) Paragraph (*a*) applies, three months after the commencement of the Labour Relations Amendment Act, 2014, to a person whose services were procured for or provided to a client by a temporary employment service in terms of subsection 198 (1) prior to the commencement of the Labour Relations Act, 2014.

[Sub-s. (4B) inserted by s. 37 (*c*) of Act No. 6 of 2014.]

(4C) An *employee* may not be employed by a temporary employment service on terms and conditions of *employment* which are not permitted by *this Act,* any *employment law,* sectoral determination or *collective agreement* concluded in a *bargaining council* applicable to a client to whom the *employee* renders services.

[Sub-s. (4C) inserted by s. 37 (*c*) of Act No. 6 of 2014.]

(4D) The issue of whether an *employee* of a temporary employment service is covered by a *bargaining council* agreement or sectoral determination, must be determined by reference to the sector and area in which the client is engaged.

[Sub-s. (4D) inserted by s. 37 (*c*) of Act No. 6 of 2014.]

(4E) In any proceedings brought by an *employee,* the Labour Court or an arbitrator may-

(*a*) determine whether a provision in an *employment* contract or a contract between a temporary employment service and a client complies with subsection (4C); and

(*b*) make an appropriate order or award.

[Sub-s. (4E) inserted by s. 37 (*c*) of Act No. 6 of 2014.]

(4F) No person must perform the functions of a temporary employment service unless it is registered in terms of any applicable legislation, and the fact that a temporary employment service is not registered will not constitute a defence to any claim instituted in terms of this section or 198A.

(Proposed amendment: Sub-s. (4F) to be inserted by s. 37 (*c*) of Act No. 6 of 2014 - the coming into operation of section 198 (4F) is suspended until the date when the applicable legislation contemplated in section 198 (4F) enters into force.)

(Date of commencement of sub-s. (4F) to be proclaimed.)

(5) Two or more *bargaining councils* may agree to bind the following persons, if they fall within the combined *registered scope* of those *bargaining councils* to a *collective agreement* concluded in any one of them-

(*a*) temporary employment service;

(*b*) a person employed by a temporary employment service; and

(*c*) a temporary employment service client.

(6) An agreement concluded in terms of subsection (5) is binding only if the *collective agreement* has been extended to non-parties within the *registered scope* of the *bargaining council*.

(7) Two or more *bargaining councils* may agree to bind the following persons, who fall within their combined *registered scope*, to a *collective agreement*-

(*a*) a temporary employment service;

(*b*) a person employed by a temporary employment service; and

(*c*) a temporary employment service's client.

(8) An agreement concluded in terms of subsection (7) is binding only if-

(*a*) each of the contracting *bargaining councils* has requested the *Minister* to extend the agreement to non-parties falling within its *registered scope*;

(*b*) the *Minister* is satisfied that the terms of the agreement are not substantially more onerous than those prevailing in the corresponding *collective agreements* concluded in the *bargaining councils*; and

(*c*) the *Minister* by notice in the *Government Gazette*, has extended the agreement as requested by all the *bargaining councils* that are parties to the agreement.

198A. Application of section 198 to employees earning below earnings threshold.-(1) In this section, a "temporary service" means work for a client by an *employee*-

(*a*) for a period not exceeding three months;

(*b*) as a substitute for an *employee* of the client who is temporarily absent; or

(*c*) in a category of work and for any period of time which is determined to be a temporary service by a *collective agreement* concluded in a *bargaining council,* a sectoral determination or a notice published by the Minister, in accordance with the provisions of subsections (6) to (8).

(2) This section does not apply to *employees* earning in excess of the threshold prescribed by the *Minister* in terms of section 6 (3) of the *Basic Conditions of Employment Act.*

(3) For the purposes of *this Act,* an *employee*-

(*a*) performing a temporary service as contemplated in subsection (1) for the client is the *employee* of the temporary employment services in terms of section 198 (2); or

(*b*) not performing such temporary service for the client is-

(i) deemed to be the *employee* of that client and the client is deemed to be the employer; and

(ii) subject to the provisions of section 198B, employed on an indefinite basis by the client.

(4) The termination by the temporary employment services of an *employee's* service with a client, whether at the instance of the temporary employment service or the client, for the purpose of avoiding the operation of subsection (3) (*b*) or because the employee exercised a right in terms of this Act, is a *dismissal.*

(5) An *employee* deemed to be an *employee* of the client in terms of subsection (3) (*b*) must be treated on the whole not less favourably than an *employee* of the client performing the same or similar work, unless there is a justifiable reason for different treatment.

(6) The *Minister* must by notice in the *Government Gazette* invite representations from the public on which categories of work should be deemed to be temporary service by notice issued by the *Minister* in terms of subsection (1) (*c*).

(7) The *Minister* must consult with *NEDLAC* before publishing a notice or a provision in a sectoral determination contemplated in subsection (1) (*c*).

(8) If there is conflict between a *collective agreement* concluded in a *bargaining council,* a sectoral determination or a notice by the *Minister* contemplated in subsection (1) (*c*)-

(*a*) the *collective agreement* takes precedence over a sectoral determination or notice; and

(*b*) the notice takes precedence over the sectoral determination.

(9) Employees contemplated in this section, whose services were procured for or provided to a client by a temporary employment service in terms of section 198 (1) before the commencement of the Labour Relations Amendment Act, 2014, acquire the rights contemplated in subsections (3), (4) and (5) with effect from three months after the commencement of the Labour Relations Amendment Act, 2014.

[S. 198A inserted by s. 38 of Act No. 6 of 2014.]

198B. Fixed term contracts with employees earning below earnings threshold.-(1) For the purpose of this section, a "fixed term contract" means a contract of employment that terminates on-

(*a*) the occurrence of a specified event;

(*b*) the completion of a specified task or project; or

(*c*) a fixed date, other than an *employee's* normal or agreed retirement age, subject to subsection (3).

(2) This section does not apply to-

(*a*) *employees* earning in excess of the threshold prescribed by the *Minister* in terms of section 6 (3) of the *Basic Conditions of Employment Act*;

(*b*) an employer that employs less than 10 *employees,* or that employs less than 50 *employees* and whose business has been in operation for less than two years, unless-

(i) the employer conducts more than one business; or

(ii) the business was formed by the division or dissolution for any reason of an existing business; and

(*c*) an *employee* employed in terms of a fixed term contract which is permitted by any statute, sectoral determination or *collective agreement.*

(3) An employer may employ an *employee* on a fixed term contract or successive fixed term contracts for longer than three months of *employment* only if-

(*a*) the nature of the work for which the *employee* is employed is of a limited or definite duration; or

(*b*) the employer can demonstrate any other justifiable reason for fixing the term of the contract.

(4) Without limiting the generality of subsection (3), the conclusion of a fixed term contract will be justified if the *employee*-

(*a*) is replacing another *employee* who is temporarily absent from work;

(*b*) is employed on account of a temporary increase in the volume of work which is not expected to endure beyond 12 months;

(*c*) is a student or recent graduate who is employed for the purpose of being trained or gaining work experience in order to enter a job or profession;

(*d*) is employed to work exclusively on a specific project that has a limited or defined duration;

(*e*) is a non-citizen who has been granted a work permit for a defined period;

(*f*) is employed to perform seasonal work;

(*g*) is employed for the purpose of an official public works scheme or similar public job creation scheme;

(*h*) is employed in a position which is funded by an external source for a limited period; or

(*i*) has reached the normal or agreed retirement age applicable in the employer's business.

(5) *Employment* in terms of a fixed term contract concluded or renewed in contravention of subsection (3) is deemed to be of indefinite duration.

(6) An offer to employ an *employee* on a fixed term contract or to renew or extend a fixed term contract, must-

(*a*) be in writing; and

(*b*) state the reasons contemplated in subsection (3) (*a*) or (*b*).

(7) If it is relevant in any proceedings, an employer must prove that there was a justifiable reason for fixing the term of the contract as contemplated in subsection (3) and that the term was agreed.

(8) (*a*) An *employee* employed in terms of a fixed term contract for longer than three months must not be treated less favourably than an *employee* employed on a permanent basis performing the same or similar work, unless there is a justifiable reason for different treatment.

(*b*) Paragraph (*a*) applies, three months after the commencement of the Labour Relations Amendment Act, 2014, to fixed term contracts of employment entered into before the commencement of the Labour Relations Amendment Act, 2014.

(9) As from the commencement of the Labour Relations Amendment Act, 2014, an employer must provide an *employee* employed in terms of a fixed term contract and an *employee* employed on a permanent basis with equal access to opportunities to apply for vacancies.

(10) (*a*) An employer who employs an *employee* in terms of a fixed term contract for a reason contemplated in subsection (4) (*d*) for a period exceeding 24 months must, subject to the terms of any applicable *collective agreement,* pay the *employee* on expiry of the contract one week's remuneration for each completed year of the

(*b*) An *employee* employed in terms of a fixed-term contract, as contemplated in paragraph (*a*), before the commencement of the Labour Relations Amendment Act, 2014, is entitled to the remuneration contemplated in paragraph (*a*) in respect of any period worked after the commencement of the said Act.

(11) An *employee* is not entitled to payment in terms of subsection (10) if, prior to the expiry of the fixed term contract, the employer offers the *employee* employment or procures employment for the *employee* with a different employer, which commences at the expiry of the contract and on the same or similar terms.

[S. 198B inserted by s. 38 of Act No. 6 of 2014.]

198C. Part-time employment of employees earning below earnings threshold.-(1) For the purpose of this section-

(*a*) a part-time *employee* is an *employee* who is remunerated wholly or partly by reference to the time that the *employee* works and who works less hours than a comparable full-time *employee*; and

(*b*) a comparable full-time *employee*-

(i) is an *employee* who is remunerated wholly or partly by reference to the time that the *employee* works and who is identifiable as a full-time *employee* in terms of the custom and practice of the employer of that *employee*; and

(ii) does not include a full-time *employee* whose hours of work are temporarily reduced for *operational requirements* as a result of an agreement.

(2) This section does not apply-

(*a*) to *employees* earning in excess of the threshold determined by the *Minister* in terms of section 6 (3) of the *Basic Conditions of Employment Act*;

(*b*) to an employer that employs less than 10 *employees* or that employs less than 50 *employees* and whose business has been in operation for less than two years, unless-

(i) the employer conducts more than one business; or

(ii) the business was formed by the division or dissolution, for any reason, of an existing business;

(*c*) to an *employee* who ordinarily works less than 24 hours a month for an employer; and

(*d*) during an *employee's* first three months of continuous *employment* with an employer.

(3) Taking into account the working hours of a part-time *employee,* irrespective of when the part-time *employee* was employed, an employer must-

(*a*) treat a part-time *employee* on the whole not less favourably than a comparable full-time *employee* doing the same or similar work, unless there is a justifiable reason for different treatment; and

(*b*) provide a part-time *employee* with access to training and skills development on the whole not less favourable than the access applicable to a comparable full-time *employee.*

(4) Subsection (3) applies, three months after the commencement of the Labour Relations Amendment Act, 2014, to part-time employees employed before the commencement of the Labour Relations Amendment Act, 2014.

(5) After the commencement of the Labour Relations Amendment Act, 2014, an employer must provide a part-time *employee* with the same access to opportunities to apply for vacancies as it provides to full-time *employees*.

(6) For the purposes of identifying a comparable full-time *employee*, regard must be had to a full-time *employee* employed by the employer on the same type of *employment* relationship who performs the same or similar work-

(*a*) in the same *workplace* as the part-time *employee;* or

(*b*) if there is no comparable full-time *employee* who works in the same *workplace,* a comparable full-time *employee* employed by the employer in any other *workplace.*

[S. 198C inserted by s. 38 of Act No. 6 of 2014.]

198D. General provisions applicable to sections 198A to 198C.-(1) Any *dispute* arising from the interpretation or application of sections 198A, 198B and 198C may be referred to the Commission or a *bargaining council* with jurisdiction for conciliation and, if not resolved, to arbitration.

(2) For the purposes of sections 198A (5), 198B (8) and 198C (3) (*a*), a justifiable reason includes that the different treatment is a result of the application of a system that takes into account-

(*a*) seniority, experience or length of service;

(*b*) merit;

(*c*) the quality or quantity of work performed; or

(*d*) any other criteria of a similar nature,

and such reason is not prohibited by section 6 (1) of the Employment Equity Act, 1998 (Act No. 55 of 1998).

(3) A party to a dispute contemplated in subsection (1), other than a dispute about a dismissal in terms of section 198A (4), may refer the dispute, in writing, to the Commission or to the bargaining council, within six months after the act or omission concerned.

(4) The party that refers a dispute must satisfy the Commission or the bargaining council that a copy of the referral has been served on every party to the dispute.

(5) If the dispute remains unresolved after conciliation, a party to the dispute may refer it to the Commission or to the bargaining council for arbitration within 90 days.

(6) The Commission or the bargaining council may at any time, permit a party that shows good cause to, refer a dispute after the relevant time limit set out in subsection (3) or (5).

[S. 198D inserted by s. 38 of Act No. 6 of 2014.]

199. Contracts of employment may not disregard or waive collective agreements or arbitration awards.-(1) A contract of employment, whether concluded before or after the coming into operation of any applicable *collective agreement* or arbitration award, may not-

(*a*) permit an *employee* to be paid *remuneration* that is less than that prescribed by that *collective agreement* or arbitration award;

(*b*) permit an *employee* to be treated in a manner, or to be granted any benefit, that is less favourable than that prescribed by that *collective agreement* or arbitration award; or

(*c*) waive the application of any provision of that *collective agreement* or arbitration award.

(2) A provision in any contract that purports to permit or grant any payment, treatment, benefit, waiver or exclusion prohibited by subsection (1) is invalid.

200. Representation of employees or employers.-(1) A registered *trade union* or registered *employers' organisation* may act in any one or more of the following capacities in any *dispute* to which any of its members is a party-

(*a*) in its own interest;

(*b*) on behalf of any of its members;

(*c*) in the interest of any of its members.

(2) A registered *trade union* or a registered *employers' organisation* is entitled to be a party to any proceedings in terms of *this Act* if one or more of its members is a party to those proceedings.

200A. Presumption as to who is employee.-(1) Until the contrary is proved, for the purposes of *this Act,* any *employment law* and section 98A of the Insolvency Act, 1936 (Act No. 24 of 1936), a person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an *employee,* if any one or more of the following factors are present-

(*a*) the manner in which the person works is subject to the control or direction of another person;

(*b*) the person's hours of work are subject to the control or direction of another person;

(*c*) in the case of a person who works for an organisation, the person forms part of that organisation;

(*d*) the person has worked for that other person for an average of at least 40 hours per month over the last three months;

(*e*) the person is economically dependent on the other person for whom he or she works or renders services;

(*f*) the person is provided with tools of trade or work equipment by the other person; or

(*g*) the person only works for or renders services to one person.

[Sub-s. (1) amended by s. 39 of Act No. 6 of 2014.]

Wording of Sections

(2) Subsection (1) does not apply to any person who earns in excess of the amount determined by the Minister in terms of section 6 (3) of the *Basic Conditions of Employment Act*.

(3) If a proposed or existing work arrangement involves persons who earn amounts equal to or below the amounts determined by the Minister in terms of section 6 (3) of the *Basic Conditions of Employment Act*, any of the contracting parties may approach the Commission for an advisory award on whether the persons involved in the arrangement are *employees*.

(4) NEDLAC must prepare and issue a Code of Good Practice that sets out guidelines for determining whether persons, including those who earn in excess of the amount determined in subsection (2) are *employees*.

[S. 200A inserted by s. 51 of Act No. 12 of 2002.]

200B. Liability for employer's obligations.-(1) For the purposes of *this Act* and any other *employment law,* "employer" includes one or more persons who carry on associated or related activity or business by or through an employer if the intent or effect of their doing so is or has been to directly or indirectly defeat the purposes of *this Act* or any other *employment law.*

(2) If more than one person is held to be the employer of an *employee* in terms of subsection (1), those persons are jointly and severally liable for any failure to comply with the obligations of an employer in terms of *this Act* or any other *employment law.*

[S. 200B inserted by s. 40 of Act No. 6 of 2014.]

201. Confidentiality.-(1) A person commits an offence by disclosing any information relating to the financial or business affairs of any other person or any business, trade or undertaking if the information was acquired by the first-mentioned person in the performance of any function or exercise of any power in terms of *this Act*, in any capacity, by or on behalf of-

(*a*) a *council*;

(*b*) any independent body established by a *collective agreement* or determination to grant exemptions from the provisions of the *collective agreement* or determination;

(*c*) the *registrar*;

(*d*) the Commission; and

(*e*) an accredited agency.

(2) Subsection (1) does not apply if the information was disclosed to enable a person to perform a function or exercise a power in terms of *this Act*.

(3) (*a*) A person convicted of an offence in terms of this section, may be sentenced to a fine not exceeding R10 000.

(*b*) The *Minister*, in consultation with the Minister of Justice, may from time to time by notice in the *Government Gazette*, amend the maximum amount of the fine referred to in paragraph (*a*).

[Sub-s. (3) substituted by s. 49 of Act No. 42 of 1996.]

Wording of Sections

202. Service of documents.-(1) If a registered *trade union* or a registered *employers' organisation* acts on behalf of any of its members in a *dispute*, *service* on that *trade union* or *employers' organisation* of any document directed to those members in connection with that *dispute*, will be sufficient *service* on those members for the purposes of *this Act*.

(2) *Service* on the Office of the State Attorney of any legal process directed to the State in its capacity as an employer is *service* on the State for the purposes of *this Act*.

203. Codes of good practice.-(1) *NEDLAC* may-

(*a*) prepare and issue codes of good practice; and

(*b*) change or replace any code of good practice.

(2) Any *code of good practice*, or any change to or replacement of a *code of good practice*, must be published in the *Government Gazette*.

(2A) The *Minister* may issue a *code of good practice* by publishing it in the Government *Gazette* in accordance with the provisions of this section, if-

(*a*) proposals relating to the *code of good practice* have been tabled and considered by *NEDLAC*; and

(*b*) *NEDLAC* has reported to the Minister that it has been unable to reach agreement on the matter.

[Sub-s. (2A) inserted by s. 41 of Act No. 6 of 2014.]

(2B) Subsection (2A) applies to the amendment or replacement of an existing *code of good practice*.

[Sub-s. (2B) inserted by s. 41 of Act No. 6 of 2014.]

(3) Any person interpreting or applying *this Act* must take into account any relevant *code of good practice*.

(4) A *Code of Good Practice* issued in terms of this section may provide that the code must be taken into account in applying or interpreting any employment law.

[Sub-s. (4) added by s. 52 of Act No. 12 of 2002.]

(Date of commencement of s. 203: 1 January, 1996.)

204. Collective agreement, arbitration award or wage determination to be kept by employer.-Unless a *collective agreement*, arbitration award or determination made in terms of the *Basic Conditions of Employment Act* provides otherwise, every employer on whom the *collective agreement*, arbitration award, or determination, is binding must-

(*a*) keep a copy of that *collective agreement*, arbitration award or determination available in the workplace at all times;

(*b*) make that copy available for inspection by any *employee*; and

(*c*) give a copy of that *collective agreement*, arbitration award or determination-

(i) to an *employee* who has paid the *prescribed* fee; and

(ii) free of charge, on request, to an *employee* who is a *trade union representative* or a member of a *workplace forum*.

[S. 204 amended by s. 53 of Act No. 12 of 2002.]

Wording of Sections

205. Records to be kept by employer.-(1) Every employer must keep the records that an employer is required to keep in compliance with any applicable-

(*a*) *collective agreement*;

(*b*) arbitration award;

(*c*) determination made in terms of the *Wage Act*.

(2) An employer who is required to keep records in terms of subsection (1) must-

(*a*) retain those records in their original form or a reproduced form for a period of three years from the date of the event or end of the period to which they relate; and

(*b*) submit those records in their original form or a reproduced form in response to a demand made at any reasonable time, to any agent of a *bargaining council*, commissioner or any person whose functions in terms of *this Act* include the resolution of *disputes*.

(3) (*a*) An employer must keep a record of the *prescribed* details of any *strike*, *lock-out* or *protest action* involving its *employees*.

(*b*) An employer must submit those records in the *prescribed* manner to the *registrar*.

206. Effect of certain defects and irregularities.-(1) Despite any provision in *this Act* or any other law, defect does not invalidate-

(*a*) the constitution or the registration of any registered *trade union* registered *employers' organisation* or *council*;

(*b*) any *collective agreement* or arbitration award that would otherwise be binding in terms of *this Act*;

(*c*) any act of a *council*; or

(*d*) any act of the *director* or a commissioner.

(2) A defect referred to in subsection (1) means-

(*a*) a defect in, or omission from, the constitution of any registered *trade union*, registered *employers' organisation* or *council*;

(*b*) a vacancy in the membership of any *council*; or

(*c*) any irregularity in the appointment or election of-

(i) a representative to a *council*;

(ii) an alternate to any representative to a *council*;

(iii) a chairperson or any other person presiding over any meeting of a *council* or a committee of a *council*; or

(iv) the *director* or a commissioner.

(Date of commencement of s. 206: 1 January, 1996.)

207. Ministers empowered to add to and change Schedules.-(1) The *Minister*, after consulting *NEDLAC*, by notice in the *Government Gazette* may change, replace or add to Schedules 2 and 4 to *this Act* and the Schedule envisaged in subsection (3).

[Sub-s. (1) substituted by s. 50 (*a*) of Act No. 42 of 1996 and by s. 26 (*a*) of Act No. 127 of 1998.]

Wording of Sections

(2) . . . . . .

[Sub-s. (2) deleted by s. 26 (*b*) of Act No. 127 of 1998.]

Wording of Sections

(3) The *Minister*, after consulting *NEDLAC*, by notice in the *Government Gazette*, may add to *this Act* a further Schedule containing a model constitution for a *statutory council*.

(4) The Minister for the Public Service and Administration, after consulting the Public Service Co-ordinating Bargaining Council, by notice in the *Government Gazette*, may add to *this Act* a further Schedule regulating the establishment and the constitutions of *workplace forums* in the *public service*.

(5) The *Minister* may add to, change or replace any page header or footnote.

(6) . . . . . .

[Sub-s. (6) substituted by s. 50 (*b*) of Act No. 42 of 1996 (English text only) and deleted by s. 26 (*b*) of Act No. 127 of 1998.]

Wording of Sections

(Date of commencement of s. 207: 1 January, 1996.)

208. Regulations.-The *Minister*, after consulting *NEDLAC* and when appropriate, the Commission, may make regulations not inconsistent with *this Act* relating to-

(*a*) any matter that in terms of *this Act* may or must be *prescribed*; and

(*b*) any matter that the *Minister* considers necessary or expedient to *prescribe* or have governed by regulation in order to achieve the primary objects of *this Act*.

(Date of commencement of s. 208: 1 January, 1996.)

208A. Delegations.-(1) The *Minister*, in writing, may delegate to the Director General or any other officer of

the Department of Labour any power, function or duty conferred or imposed upon the *Minister* in terms of *this Act* except the powers, functions and duties contemplated in section 32 (but excluding subsection (6)), and sections 44, 207 and 208.

(2) A delegation in terms of subsection (1) does not limit or restrict the competence of the *Minister* to exercise or perform any power, function or duty that has been delegated.

(3) The Minister may make a delegation subject to any conditions or restrictions that are deemed fit.

(4) The *Minister* may at any time-

(*a*) withdraw a delegation made in terms of subsection (1); and

(*b*) withdraw or amend any decision made by a person in exercising a power or performing a function or duty delegated in terms of subsection (1).

[S. 208A inserted by s. 51 of Act No. 42 of 1996.]

209. This Act binds the State.-*This Act* binds the State.

210. Application of Act when in conflict with other laws.-If any conflict, relating to the matters dealt with in *this Act*, arises between *this Act* and the provisions of any other law save the Constitution or any Act expressly amending *this Act*, the provisions of *this Act* will prevail.

211. Amendment of laws.-Each of the laws referred to in items 1 and 2 of Schedule 5 is hereby amended to the extent specified in those items.

212. Repeal of laws, and transitional arrangements.-(1) Each of the laws referred to in the first two columns of Schedule 6 is hereby repealed to the extent specified opposite that law in the third column of that Schedule.

(2) The repeal of those laws does not affect any transitional arrangements made in Schedule 7.

(3) The transitional arrangements in Schedule 7 must be read and applied as substantive provisions of *this Act*.

213. Definitions.-In this Act, unless the context otherwise indicates-

"area" includes any number of areas, whether or not contiguous;

"auditor" means any person who is registered to practise in the Republic as a public accountant and auditor;

"bargaining council" means a bargaining council referred to in section 27 and includes, in relation to the *public service*, the bargaining councils referred to in section 35;

"Basic Conditions of Employment Act" means the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997).

[Definiton of "Basic Conditions of Employment Act" substituted by s. 54 (*a*) of Act No. 12 of 2002.]

"code of good practice" means a code of practice issued by *NEDLAC* in terms of section 203 (1) of this Act;

"collective agreement" means a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered *trade unions*, on the one hand and, on the other hand-

(*a*) one or more employers;

(*b*) one or more registered *employers' organisations*; or

(*c*) one or more employers and one or more registered *employers' organisations*;

"Commission" mean the Commission for Conciliation, Mediation and Arbitration established by section 112;

[Definition of "Commission" inserted by s. 42 (*a*) of Act No. 6 of 2014.]

"council" includes a bargaining council and a statutory council;

"director" means the director of the Commission appointed in terms of section 118 (1) and includes any acting director appointed in terms of section 119;

[Definition of "director" amended by s. 52 of Act No. 42 of 1996.]

Wording of Sections

"dismissal" means dismissal as defined in section 186;

"dispute" includes an alleged dispute;

[Definition of "dispute" amended by s. 52 of Act No. 42 of 1996.]

Wording of Sections

"employee"54 means-

(*a*) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any *remuneration*; and

(*b*) any other person who in any manner assists in carrying on or conducting the business of an employer,

and **"employed"** and **"employment"** have meanings corresponding to that of "employee";

[Definition of "employee" amended by s. 52 of Act No. 42 of 1996.]

Wording of Sections

"employers' organisation" means any number of employers associated together for the purpose, whether by itself or with other purposes, of regulating relations between employers and *employees* or *trade unions*;

"employment law" includes this Act, any other Act the administration of which has been assigned to the *Minister*, and any of the following Acts:

(*a*) the Unemployment Insurance Act, 2001 (Act No. 63 of 2001);

[Para. (*a*) substituted by s. 42 (*b*) of Act No. 6 of 2014.]

Wording of Sections

(*b*) the Skills Development Act, 1998 (Act No. 97 of 1998);

(*c*) the Employment Equity Act, 1998 (Act No. 55 of 1998);

(*d*) the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993);

[Para. (*d*) amended by s. 42 (*c*) of Act No. 6 of 2014.]

Wording of Sections

(*e*) the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993);

[Definiton of "employment law" substituted by s. 54 (*b*) of Act No. 12 of 2002.]

(*f*) the Unemployment Insurance Contributions Act, 2002 (Act No. 4 of 2002);

[Para. (*f*) added by s. 42 (*c*) of Act No. 6 of 2014.]

"essential service" means-

(*a*) a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population;

(*b*) the Parliamentary service;

(*c*) the South African Police Services;

"issue in dispute", in relation to a *strike* or *lock-out*, means the demand, the grievance, or the *dispute* that forms the subject matter of the *strike* or *lock-out*;

"legal practitioner" means any person admitted to practise as an advocate or an attorney in the *Republic*;

"lock-out" means the exclusion by an employer of *employees* from the employer's workplace, for the purpose of compelling the *employees* to accept a demand in respect of any matter of mutual interest between employer and *employee*, whether or not the employer breaches those *employees'* contracts of employment in the course of or for the purpose of that exclusion;

"Minister" means the Minister of Labour;

"NEDLAC" means the National Economic Development and Labour Council established by section 2 of the

"office-bearer" means a person who holds office in a *trade union*, *employers' organisation*, federation of *trade unions*, federation of *employers' organisations* or *council* and who is not an *official*;

"official" in relation to a *trade union*, *employers' organisation*, federation of *trade unions* or federation of *employers' organisations* means a person employed as the secretary, assistant secretary or organiser of a *trade union*, *employers' organisation* or federation, or in any other *prescribed* capacity, whether or not that person is employed in a full-time capacity. And, in relation to a *council* means a person employed by a *council* as secretary or in any other *prescribed* capacity, whether or not that person is employed in a full-time capacity;

"operational requirements" means requirements based on the economic, technological, structural or similar needs of an employer;

"prescribed" means prescribed from time to time by regulation in terms of section 208;

"protest action" means the partial or complete concerted refusal to work, or the retardation or obstruction of work, for the purpose of promoting or defending the socio-economic interests of workers, but not for a purpose referred to in the definition of *strike*;

"public service" means the national departments, provincial administrations, provincial departments and government components contemplated in section 7 (2) of the Public Service Act, 1994 (promulgated by Proclamation No. 103 of 1994), but excluding-

(*a*) the members of the South African National Defence Force;

(*b*) the National Intelligence Agency; and

(*c*) the South African Secret Service.

[Definiton of "public service" substituted by s. 54 (*c*) of Act No. 12 of 2002 and amended by s. 43 of Act No. 30 of 2007.]

"registered scope" means-

(*a*) in the case of the Public Service Co-ordinating Bargaining Council, the public service as a whole, subject to section 36;

(*b*) in the case of *bargaining councils* established for *sectors* in the *public service*, the *sector* designated by the Public Service Co-ordinating Bargaining Council in terms of section 37 (1);

[Para. (*b*) substituted by s. 54 (*d*) of Act No. 12 of 2002.]

Wording of Sections

(*c*) in the case of any other *council*, the *sector* and *area* in respect of which it is registered in terms of *this Act*;

"registrar" means the registrar of labour relations appointed in terms of section 108 and includes-

(*a*) any deputy registrar appointed in terms of that section when acting on the direction or under a general or special delegation of the registrar; and

(*b*) any acting registrar appointed in terms of that section;

"remuneration" means any payment in money or in kind, or both in money and in kind, made or owing to any person in return for that person working for any other person, including the State, and **"remunerate"** has a corresponding meaning;

"Republic"-

(*a*) when used to refer to the State as a constitutional entity, means the Republic of South Africa as defined in section 1 of the Constitution; and

(*b*) when used in the territorial sense, means the national territory of the Republic as defined in section 1 of the Constitution;

"sector" means, subject to section 37, an industry or a service;

"serve" means to send by electronic mail, registered post, telegram, telex, telefax or to deliver by hand, and-

(*a*) in respect of the Labour Courts, any other method of service specified in the rules of the Labour Court;

(*b*) in respect of the Commission, any other method of service specified in the Rules of the Commission;

(*c*) in respect of a *bargaining council,* any other method of service specified in a *collective agreement* concluded in the *bargaining council*;

[Definition of "serve" substituted by s. 42 (*d*) of Act No. 6 of 2014.]

Wording of Sections

"statutory council" means a council established in terms of Part E of Chapter III;

"strike" means the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a *dispute* in respect of any matter of mutual interest between employer and *employee*, and every reference to "work" in this definition includes overtime work, whether it is voluntary or compulsory;

"this Act" includes the section numbers, the Schedules, except Schedules 4 and 8, and any regulations made in terms of section 208, but does not include the page headers, the headings or footnotes;

"trade union" means an association of *employees* whose principal purpose is to regulate relations between *employees* and employers, including any *employers' organisations*;

"trade union representative" means a member of a trade union who is elected to represent employees in a *workplace*;

"Wage Act" means the Wage Act, 1957 (Act No. 5 of 1957);

"working hours" means those hours during which an *employee* is obliged to work;

"workplace"-

(*a*) in relation to the *public service*-

(i) for the purposes of collective bargaining and *dispute* resolution, the *registered* scope of the Public Service Co-ordinating Bargaining Council or a *bargaining council* in a *sector* in the *public service*, as the case may be; or

(ii) for any other purpose, a national department, provincial administration, provincial department or organisational component contemplated in section 7 (2) of the Public Service Act, 1994 (promulgated by Proclamation No. 103 of 1994), or any other part of the *public service* that the Minister for Public Service and Administration, after consultation with the Public Service Co-ordinating Bargaining Council, demarcates as a workplace;

[Para. (*a*) substituted by s. 54 (*e*) of Act No. 12 of 2002.]

Wording of Sections

(*b*) . . . . . .

[Para. (*b*) deleted by s. 54 (*f*) of Act No. 12 of 2002.]

Wording of Sections

(*c*) in all other instances means the place or places where the *employees* of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where *employees* work in connection with each independent operation, constitutes the workplace for that operation; and

"workplace forum" means a workplace forum established in terms of Chapter V.

Footnotes

54 "Employee" is given a different and specific meaning in section 78 in Chapter V.

214. Short title and commencement.-(1) *This Act* is called the Labour Relations Act, 1995.

(2) *This Act* will come into operation on a date to be determined by the President by proclamation in the *Government Gazette*, except in the case of any provision in relation to which some other arrangement regarding commencement is made elsewhere in *this Act*.

[Sub-s. (2) substituted by s. 53 of Act No. 42 of 1996.]

Wording of Sections

Schedule 1

ESTABLISHMENT OF BARGAINING COUNCILS FOR PUBLIC SERVICE

[Schedule 1 amended by s. 54 of Act No. 42 of 1996.]

Wording of Sections

1. Definitions for this Schedule.-In this Schedule, unless the context otherwise indicates-

"Education Labour Relations Act" means the Education Labour Relations Act, 1993 (Act No. 146 of 1993);

"Education Labour Relations Council" means the bargaining council established by section 6 (1) of the Education Labour Relations Act;

"National Negotiating Forum" means the National Negotiating Forum established for the South African Police Service by the South Africa Police Service Labour Relations Regulations, 1995;

"Public Service Bargaining Council" means the council referred to in section 5 (1) of the Public Service Labour Relations Act;

"Public Service Labour Relations Act" means the Public Service Labour Relations Act, 1994 (promulgated by Proclamation No. 105 of 1994).

2. Establishment of Public Service Co-ordinating Bargaining Council.-(1) As soon as practicable after the commencement of *this Act*, the Commission, by notice in the *Government Gazette*, must invite the *employee* and employer representatives in the Education Labour Relations Council, the National Negotiating Forum and the central chamber of the Public Service Bargaining Council to attend a meeting, with a view to those representatives agreeing on a constitution for the Public Service Co-ordinating Bargaining Council.

(2) The Commission must appoint a commissioner to chair the meeting and facilitate the conclusion of an agreement on a constitution that meets the requirements of section 30, read with the changes required by the context.

(3) The parties to the Education Labour Relations Council, the National Negotiating Forum and the central chamber of the Public Service Bargaining Council will be the founding parties to the Public Service Co-ordinating Bargaining Council.

(4) If an agreement is concluded and the *registrar* is satisfied that the constitution meets the requirements of section 30, the *registrar* must register the Public Service Co-ordinating Bargaining Council by entering its name in the register of *councils*.

(5) If no agreement is concluded on a constitution, the *registrar* must-

(*a*) determine the constitution for the Public Service Co-ordinating Bargaining Council;

(*b*) register the Public Service Co-ordinating Bargaining Council by entering its name in the register of *councils*; and

(*c*) certify the constitution as the constitution of the Public Service Co-ordinating Bargaining Council.

(6) After registering the Public Service Co-ordinating Bargaining Council, the *registrar* must-

(*a*) issue a certificate of registration that must specify the *registered scope* of the Public Service Co-ordinating Bargaining Council; and

(*b*) send the certificate and a certified copy of the constitution to the Public Service Co-ordinating Bargaining Council.

3. Establishment of bargaining council in sectors.-(1) The departmental and provincial chambers of the Public Service Bargaining Council are deemed to be *bargaining councils* established in terms of section 37 (3) (*a*) of *this Act*, subject to any designation in terms of section 37 (1) of *this Act*.

(2) The Education Labour Relations Council is deemed to be a *bargaining council* established in terms of section 37 (3) (*b*) of *this Act*.

(3) The National Negotiating Forum is deemed to be a *bargaining council* established for a sector designated in terms of section 37 (2).

(4) If the President designates a *sector* in terms of section 37 (2), the President must inform the Commission and instruct it to convene a meeting of the representatives of the registered *trade unions* with members employed in the *sector*.

(5) The Commission must publish a notice in the *Government Gazette* inviting registered *trade unions* with members employed in the *sector* to attend a meeting.

(6) The Commission must appoint a commissioner to chair the meeting and facilitate the conclusion of an agreement on-

(*a*) the registered *trade unions* to be parties to the *bargaining council*; and

(*b*) a constitution that meets the requirements of section 30, read with the changes required by the context.

(7) If agreement is concluded, the *registrar* must-

(*a*) admit the registered *trade unions* as parties to the *bargaining council*; and

(*b*) if satisfied that the constitution meets the requirements of section 30, register the *bargaining council by* entering its name in the register of *councils*.

(8) If no agreement is concluded on-

(*a*) the registered *trade union* to be admitted, the Commission must decide which *trade union* should be admitted;

(*b*) a constitution, the *registrar*, in accordance with the decisions made by the Commission in paragraph (*a*), must determine a constitution that meets the requirements of section 30, read with the changes required by the context.

(9) The *registrar* must register the *bargaining council* for the *sector* by entering its name in the register of *councils*.

(10) After registering the bargaining council the registrar must-

(*a*) issue a certificate of registration that must specify the *registered scope* of the *bargaining council*; and

(*b*) send the certificate and a certified copy of the constitution to the *bargaining council*.

Schedule 2
GUIDELINES FOR CONSTITUTION OF WORKPLACE FORUM

1. Introduction.-(1) This Schedule contains guidelines for the constitution of a *workplace forum*. It is intended to guide representative *trade unions* that wish to establish a *workplace forum*, employers and commissioners.

(2) *This Act* places the highest value on the establishment of *workplace forums* by agreement between a representative *trade union* and an employer. The role of the commissioner is to facilitate an agreement establishing the structure and functions of a *workplace forum*. If agreement is not possible, either in whole or in part, the commissioner must refer to this Schedule, using its guidelines in a manner that best suits the particular *workplace* involved.

(3) For convenience, the guidelines follow the sequence of the paragraphs in section 82 of *this Act*.

2. Number of seats in workplace forums (section 82 (1) (*a*)).-The formula to determine the number of seats in the *workplace forum* should reflect the size, nature, occupational structure and physical location of the *workplace*. *A* guideline may be-

(*a*) in a *workplace* in which 100 to 200 *employees* are employed, five members:

(*b*) in a *workplace* in which 201 to 600 *employees* are employed, eight members:

(*c*) in a *workplace* in which 601 to 1 000 *employees* are employed, 10 members;

(*d*) in a *workplace* in which more than 1 000 *employees* are employed, 10 members for the first 1 000 *employees*, plus an additional member for every additional 500 *employees*, up to a maximum of 20 members.

3. Distribution of seats to reflect occupational structure (section 82 (1) (*b*)).-The formula to determine the distribution of seats in the *workplace forum* must reflect the occupational structure of the *workplace*.

Example:

There are 300 *employees* in a workplace. The occupational structure is as follows: 200 *employees* are manual *employees*; 50 are administrative and clerical *employees*; and 50 are supervisory, managerial and technical *employees*. The six seats may be distributed as follows-

4 seats for members to be elected from candidates nominated from among the manual employees

1 seat for members to be elected from candidates nominated from among the administrative and clerical employees

1 seat for members to be elected from candidates nominated from among the supervisory, managerial and technical employees.

4. Elections (section 82 (1) (*c*), (*d*), (*g*), (*h*), (*i*) and (*j*)).-(1) The constitution must include provisions concerning the appointment of an election officer.

Example:

(*a*) Every election or by-election in relation to a *workplace forum* must be conducted by an election officer appointed by agreement between the representative *trade union* and the employer.

(*b*) If the *trade union* and the employer cannot agree, the *trade union* may apply to the Commission to appoint an election officer.

(*c*) The Commission must appoint an election officer to conduct a by-election only if it is satisfied that the *workplace forum* cannot function adequately without a by-election.

(2) The constitution must set out what the election officer should do and the procedure for an election.

Example:

(*a*) Thirty days before each election of members of the *workplace forum*, the election officer must-

(i) prepare a list of all *employees* in the *workplace*; and

(ii) call for nominations for members of the *workplace forum*.

(*b*) Any *employee* may be nominated as a candidate for election as a member of the *workplace forum* by-

(i) any registered *trade union* with members employed in the *workplace*;

(ii) a petition signed by not less than 20 per cent of the *employees* in the *workplace* or 100 *employees*, whichever number of *employees* is the smaller.

(*c*) Any *employee* who is a member or has previously served as a member of a *workplace forum* is eligible for re-election.

(*d*) Fourteen days before each election of members of the *workplace forum*, the election officer must-

(i) confirm that the nominated candidates qualify for election;

(ii) publish a list of all qualified candidates who have been properly nominated; and

(iii) prepare a ballot for the election, listing the nominated candidates in alphabetical order by surname.

(*e*) Voting must be by secret ballot.

(*f*) Every *employee* is entitled to vote in the election of the *workplace forum* during *working hours* at the employer's premises.

(*g*) Every *employee* in the *workplace* is entitled to cast a number of votes equal to the number of members to be elected to the *workplace forum*.

(*h*) Every *employee* may cast one or more of those votes in favour of any candidate.

5. Terms of office (section 82 (1) (*k*), (*l*) and (*m*)).-(1) The constitution must provide that the members of a *workplace forum* remain in office until the first meeting of the newly elected *workplace forum*.

(2) The constitution must include provisions allowing the members to resign or to be removed from office.

Example:

(*a*) A member of a *workplace forum* may resign by giving written notice to the chairperson.

(*b*) A member of a *workplace forum must* vacate that office-

(i) when the member's resignation takes effect;

(ii) if the member is promoted to senior managerial status;

(iii) if the member is transferred from the *workplace*;

(iv) if the member's employment is terminated;

(v) as a result of an award of a commissioner; or

(vi) if the representative *trade union* that nominated a member removes the member.

(*c*) The representative *trade union*, the employer, or the *workplace forum* may apply to the Commission to have a member of the *workplace forum* removed from office on the grounds of gross dereliction of the duties of office.

(*d*) Twenty percent of the *employees* in the *workplace* may submit a signed petition to the Commission applying for the removal from office of a member of the *workplace forum* on the grounds of gross

dereliction of the duties of office.

(*e*) An application to remove a member of a *workplace forum* from office must be decided by arbitration under the auspices of the Commission.

(*f*) A by-election to fill any vacancy in the *workplace forum* must be conducted by an election officer.

6. Meetings of workplace forum (section 82 (1) (*n*)).-The constitution must include provisions governing meetings of the *workplace forum*.

Example:

(*a*) The first meeting of a newly elected *workplace forum* must be convened by the election officer as soon as practicable after the election.

(*b*) At that meeting the members of the *workplace forum* must elect from among their number a chairperson and a deputy chairperson.

(*c*) The *workplace forum* must meet whenever necessary, but at least once a month.

(*d*) A quorum of the *workplace forum* must be a majority of the members of the *workplace forum* holding office at any time.

(*e*) A decision of the majority of the *workplace forum* present at the meeting must be the decision of the *workplace forum*.

(*f*) The meetings between members of the *workplace forum* and the *employees* should be at least four times a year.

Example 1:

In a *workplace* that is a single place, the meetings with the *employees* should be with all the members of the *workplace forum*.

Example 2:

In a *workplace* that is geographically dispersed, the meetings with the *employees* need not be with all the members of the *workplace forum*, but with one or more members of the *workplace forum*.

7. Time off for members of workplace forum (section 82 (1) (*p*)).-The constitution must include provisions governing time off for members to perform their functions.

Example:

(*a*) A member of a *workplace forum* entitled to take reasonable time off during *working hours* with pay for the purpose of-

(i) performing the functions and duties of a member; and

(ii) undergoing training relevant to the performance of those functions and duties.

(*b*) The right to time off is subject to conditions that are reasonable, so as to prevent the undue disruption of work.

(*c*) The costs associated with the training must be paid by the employer, if those costs are reasonable, having regard to the size and capabilities of the employer.

8. Facilities to be provided to workplace forum (section 82 (1) (*r*)).-The constitution must require the employer to provide adequate facilities to the workplace *forum* to perform its functions.

Example:

(*a*) The employer must provide, at its cost-

(i) fees, facilities and materials that are necessary for the conduct of elections and by-elections of the *workplace forum*; and

(ii) administrative and secretarial facilities that are appropriate to enable the members of the *workplace forum* to perform their functions and duties.

(*b*) These facilities must include, but are not limited to, a room in which the *workplace forum* may meet and access to a telephone.

(*c*) The costs incurred by the employer in complying with the provisions of paragraphs (*a*) and (*b*) must be reasonable, having regard to the size and capabilities of the employer.

9. Experts (section 82 (1) (*t*)).-The constitution may provide for the use of experts.

Example:

(*a*) A *workplace forum* may ask experts to assist it in the performance of any of its functions.

(*b*) An expert must ensure that there is no conflict of interest between the assistance given to one *workplace forum* and another.

(*c*) An expert may attend any meeting of the *workplace forum* and, at its request, address any meetings of the *workplace forum* including a meeting with the employer or the *employees*.

(*d*) An expert is entitled to any information to which the *workplace forum* is entitled and may inspect and copy any document.

10. Establishment of co-ordinating and subsidiary workplace forums (section 82 (2) (*b*)).-(1) Where an employer carries on or conducts two or more operations that are independent of each other by reason of their size, function and organisation, the constitution may provide for the establishment of a co-ordinating *workplace forum* with jurisdiction over those matters contained in sections 84 and 86 that affect the *employees* generally and for the establishment of a subsidiary *workplace forum* in each of the *workplaces* with jurisdiction over those matters that affect only the employees in that *workplace*.

(2) Where the employer has a *workplace* that is geographically dispersed and there are matters that are of local interest rather than general interest, the constitution may establish a co-ordinating *workplace forum* with general jurisdiction and subsidiary *workplace forum* with local interest jurisdiction.

Example:

A bank with a head office may have many branches dispersed around the country. If the branches are not regarded as separate *workplaces*, the bank may have one *workplace forum* for all its *employees* or the constitution may allow for the establishment of a co-ordinating *workplace forum* at head office level and in certain or all of the branches allow the establishment of subsidiary *workplace forums* that will deal with matters that affect only the *employees* in those branches.

Schedule 3
COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION

1. Remuneration and allowances of members of governing body.-The *Minister*, after consulting the Minister of Finance, must determine the *remuneration* and allowances and any other terms and conditions of appointment of members of the governing body.

2. Resignation and removal from office of member of governing body.-(1) A member of the governing body may resign by giving notice to the governing body.

(2) The *Minister*, acting on the advice of *NEDLAC*, may remove a member of the governing body from office for-

(*a*) serious misconduct;

(*b*) incapacity; or

(*c*) being absent from three consecutive meetings of the governing body without good cause or prior permission from the chairperson.

3. Vacancies in governing body.-(1) A vacancy in the governing body exists whenever-

(*a*) a member's term of office ends;

(*b*) a member's resignation takes effect;

(*c*) a member is removed from office; or

(*d*) a member dies.

(2) The *Minister* must fill a vacancy in the governing body as soon as is practicable. In the meantime, the Commission's proceedings and decisions continue to be valid.

(3) If a vacancy-

(*a*) is owing to the end of a member's term of office, the *Minister* may re-appoint the member, or appoint another person nominated by *NEDLAC* in accordance with section 116 (2) and (3);

(*b*) is owing to any other cause, the *Minister* must appoint another person nominated by *NEDLAC* in accordance with section 116 (2) and (3) to replace the member and serve the unexpired portion of the replaced member's term of office.

4. Proceedings of governing body.-(1) The governing body must determine procedures for its meetings.

(2) A quorum for a meeting of the governing body is three members of the governing body. The quorum must include-

(*a*) one member who was nominated by those voting members of *NEDLAC* who represent organised business;

(*b*) one member who was nominated by those voting members of *NEDLAC* who represent organised labour; and

(*c*) one member who was nominated by those voting members of *NEDLAC* who represent the State.

(3) Despite subitem (2), a meeting of the governing body may be held in the absence of any member representing organised business or organised labour or the State, if those members have agreed to the meeting proceeding in the absence of that member and to issues which may be dealt with in the absence of that member.

(4) If the chairperson is absent from a meeting of the governing body, the members present must elect one of themselves to preside at that meeting, and at that meeting that member may exercise or perform any function of the chairperson.

(5) A defect or error in the appointment of a member of the Commission does not affect the validity of the Commission's proceedings or decisions.

5. Director of Commission.-(1) The *director* may resign by giving written notice to the governing body.

(2) The governing body may remove the *director* from office for-

(*a*) serious misconduct;

(*b*) incapacity;

(*c*) a material violation of the Commission's code of conduct; or

(*d*) being absent from three consecutive meetings of the governing body without good cause or prior permission from the chairperson.

(3) A vacancy in the office of *director* exists whenever-

(*a*) the *director* reaches the age of 65;

(*b*) the *director's* resignation takes effect;

(*c*) the governing body removes the *director* from office; or

(*d*) the *director* dies.

(4) The governing body must appoint a *director* in accordance with the provisions of section 118 as soon as practicable after the office of the *director* becomes vacant.

6. Bank account.-The governing body must open and maintain an account in the name of the Commission with a bank registered in the *Republic*, or with another registered financial institution approved by the Minister of Finance and, subject to item 7, must-

(*a*) deposit to that account any money that the Commission receives; and

(*b*) make all payments on behalf of the Commission from that account.

7. Investment of surplus money.-The governing body may resolve to invest any money that the Commission does not immediately require to meet current expenditure or contingencies-

(*a*) on call or short-term deposit with any bank that meets the requirements stated in item 6;

(*b*) if the *Minister*, with the concurrence of the Minister of Finance, gives written approval of the duration and other terms of the investment, in an investment account with the Corporation for Public Deposits.

8. Accounting and auditing.-The Commission must, to the standards of generally accepted accounting practice, principles and procedures-

(*a*) keep books and records of its income, expenditure, assets and liabilities;

(*b*) as soon as practicable after the end of each financial year, prepare financial statements, including at least a statement of income and expenditure for the previous financial year and a balance sheet showing its assets, liabilities and financial position as at the end of the previous financial year; and

(*c*) each year, arrange for the Auditor-General to audit its books and records of account and its financial statements.

9. Annual report.-(1) As soon as practicable after the end of each financial year, the Commission must provide the *Minister* with a report concerning the activities and the financial position of the Commission during the previous financial year.

(2) The *Minister* must table the Commission's annual report in Parliament within 14 days of receiving it from the Commission, but if Parliament is not in session at that time, the *Minister* must table the report within 14 days of the beginning of the next session of Parliament.

Schedule 4
DISPUTE RESOLUTION: FLOW DIAGRAMS

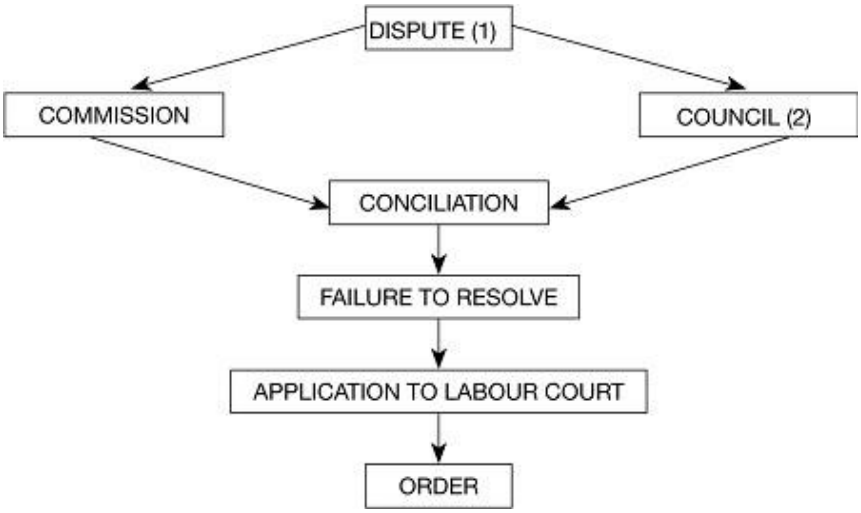
This Schedule contains flow diagrams that provide guidelines to the procedures for the resolution of some of the more important *disputes* that may arise under *this Act*. This Schedule is not part of *this Act*. It does not have the force of law. The flow diagrams are intended only to provide assistance to those parties who may become involved in a *dispute*.

The flow diagrams do not indicate the rights that parties may have to seek urgent interim relief, nor do they indicate the right of review or appeal that parties have to the Labour Court or the Labour Appeal Court in certain cases. *This Act* sets out the circumstances in which these rights are available.

Awards and determinations by arbitrators are enforceable ultimately by the Labour Court.

FLOW DIAGRAM 1
FREEDOM OF ASSOCIATION

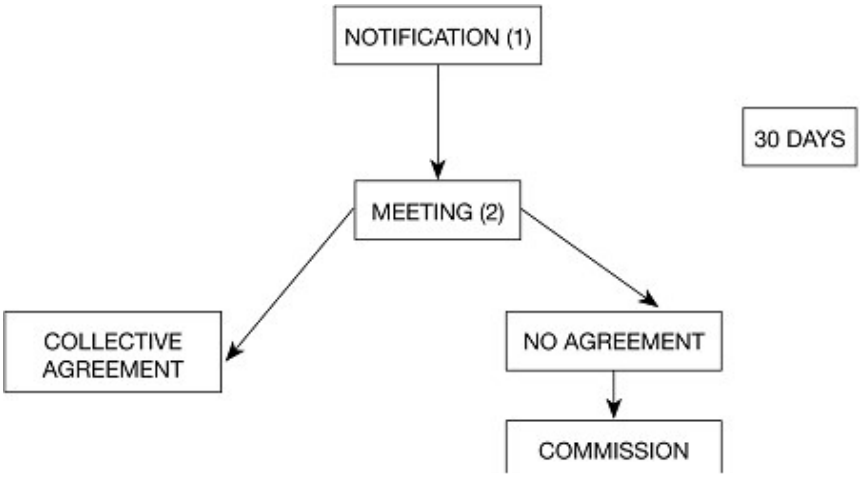
CHAPTER II (Section 9)

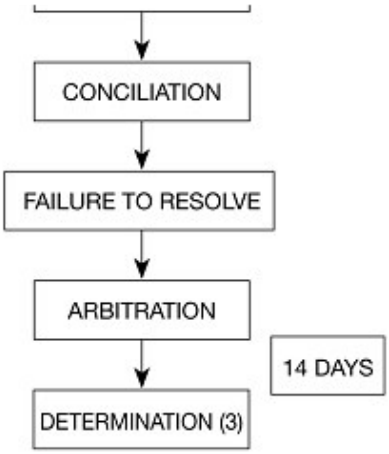


1. This procedure is relevant to the interpretation or application of Chapter II. For example, if an employer threatens to dismiss an employee unless the employee resigns from a trade union, that employee can enforce the rights conferred by this chapter in terms of this procedure. If a trade union threatens to boycott an employer, for example, because the employer institutes proceedings against the union, the employer can enforce its rights in the same way.
2. The dispute must be referred to a council if the parties to the dispute fall within the council's registered scope.

FLOW DIAGRAM 2
ORGANISATIONAL RIGHTS

CHAPTER III (Section 21)

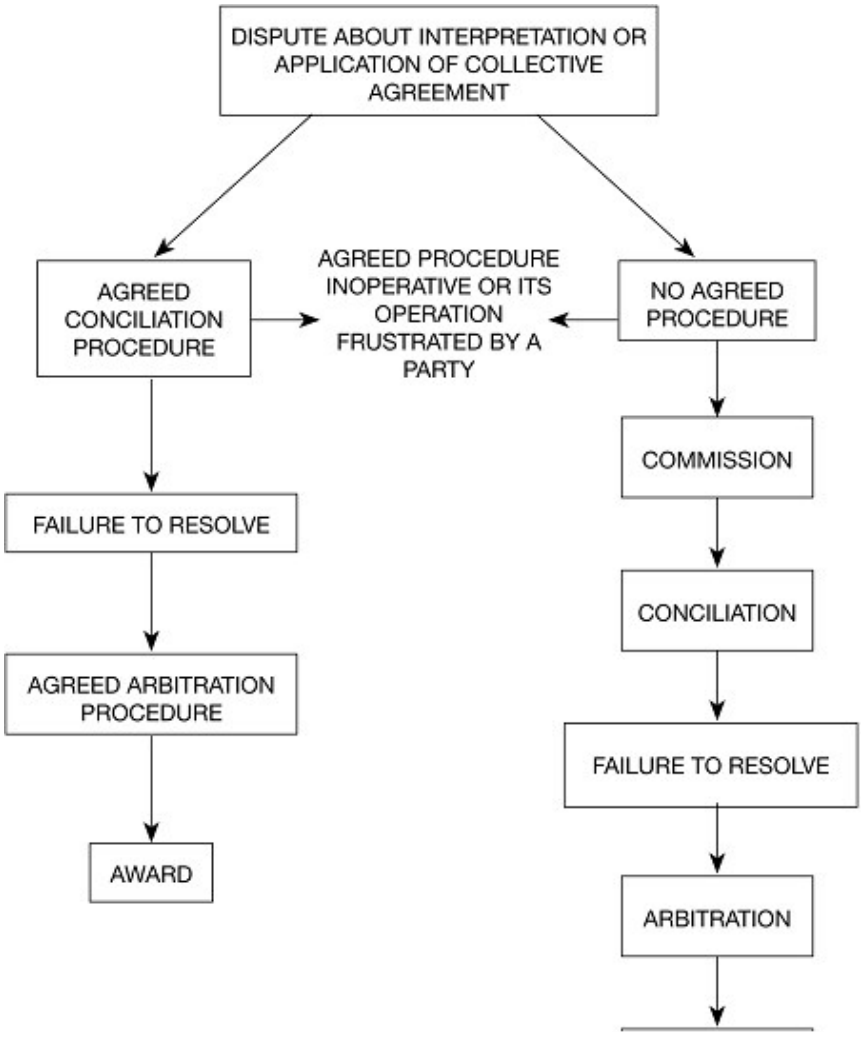




1. A registered trade union may notify an employer that it intends to exercise organisational rights. The content of the notice is described in s 21 (2). For example, if a registered trade union is sufficiently representative, it may notify the employer that it seeks to exercise the rights of access.
2. The object of the meeting is to conclude a collective agreement on the exercise of the organisational right. If there is no agreement, the trade union can elect to exercise a right to strike, or it can refer the dispute to the commission. If the trade union elects not to strike, it cannot refer a dispute over the organisational rights to the Commission for a period of 12 months.
3. The Act contemplates disputes and therefore determinations about the definition of a workplace, the representativeness of the union and the manner in which organisational rights are exercised.

FLOW DIAGRAM 3
COLLECTIVE AGREEMENTS

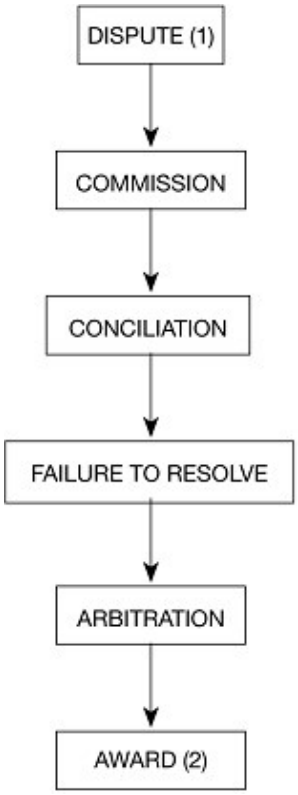
CHAPTER III (Section 24)



AWARD

FLOW DIAGRAM 4
COLLECTIVE AGREEMENTS
(Agency Shop and Closed Shop Agreements)

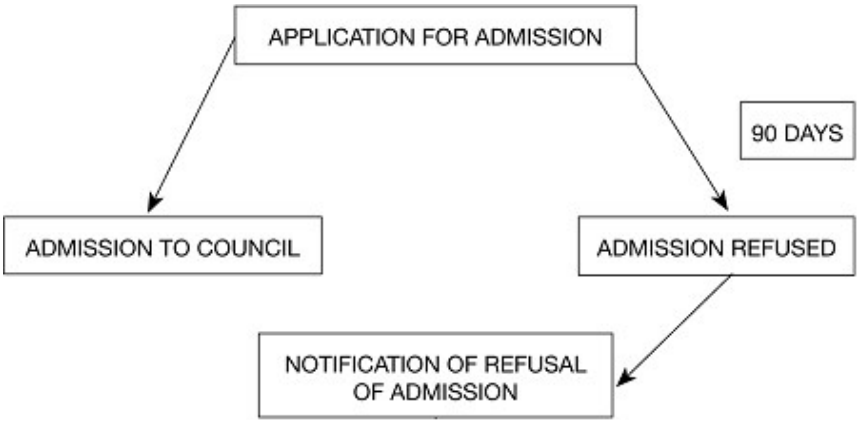
CHAPTER III (Section 24 (6) AND (7))

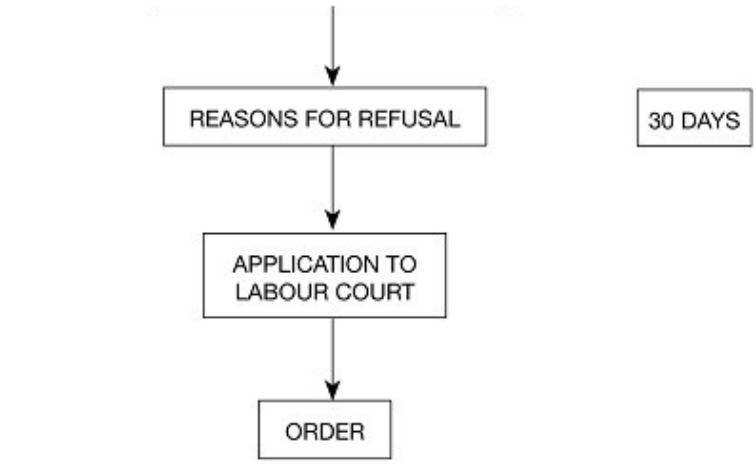


1. This procedure is about the interpretation or application of closed shop and agency shop agreements. For example, if the contributions deducted from wages in terms of those agreements are used for purposes other than those referred to in sections 23 (3) (*d*) or 26 (3) (*d*), that dispute may be referred to the Commission. Dismissal disputes involving closed shops are dealt with in Chapter VIII - see flow diagram No. 11.
2. Section 24 (7) confers a limited right of appeal to the Labour against some awards.

FLOW DIAGRAM 5
COUNCILS
(Admission of Parties)

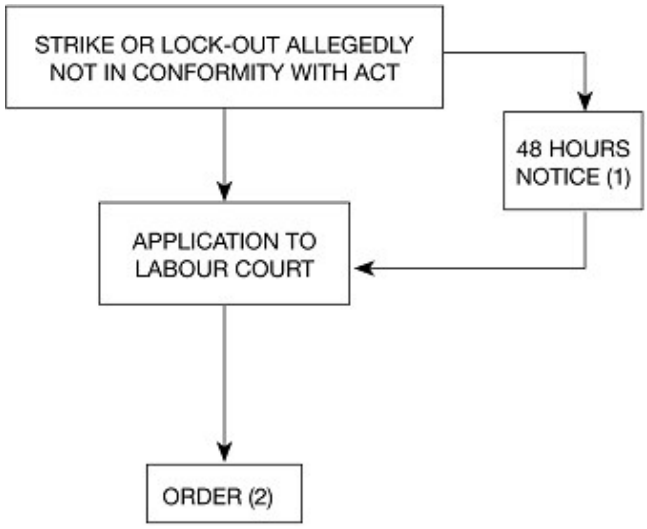
CHAPTER III (Section 56)





FLOW DIAGRAM 6
STRIKES & LOCK-OUTS
(Not in compliance with the Act)

CHAPTER IV (Section 68)

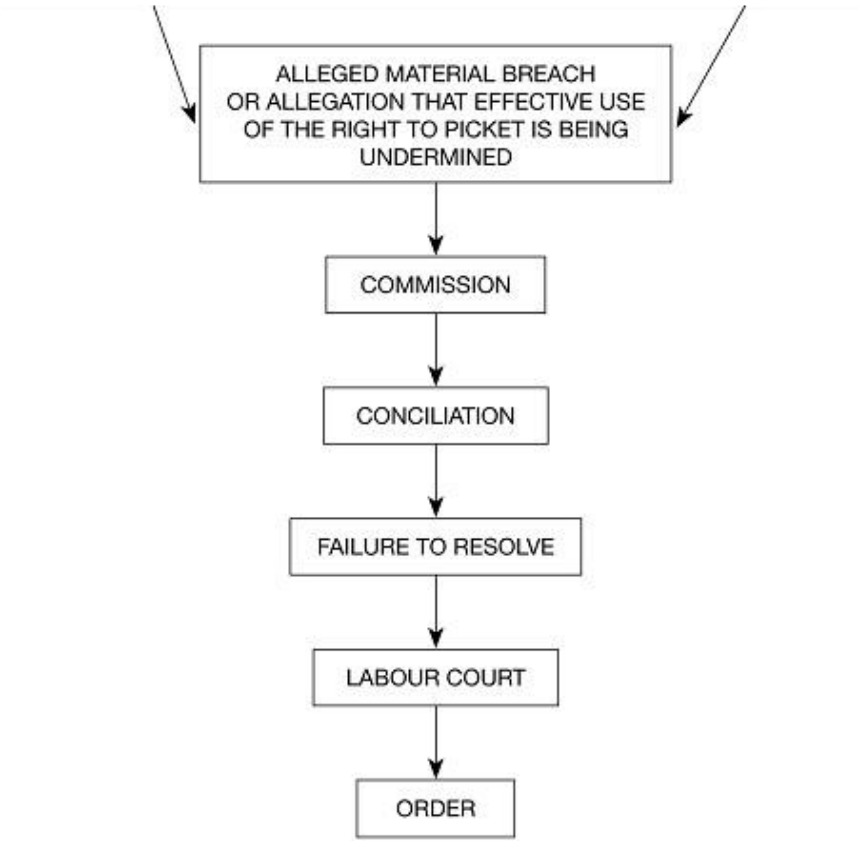


1. The notice requirement is dealt with in s. 68 (2). Shorter notice may be permitted in the circumstances specified in that section. Notice is not required if the employees are engaged in an essential service or a maintenance service.
2. The orders that the Labour Court may grant include restraining orders and an order for the payment of compensation.

FLOW DIAGRAM 7
PICKETING

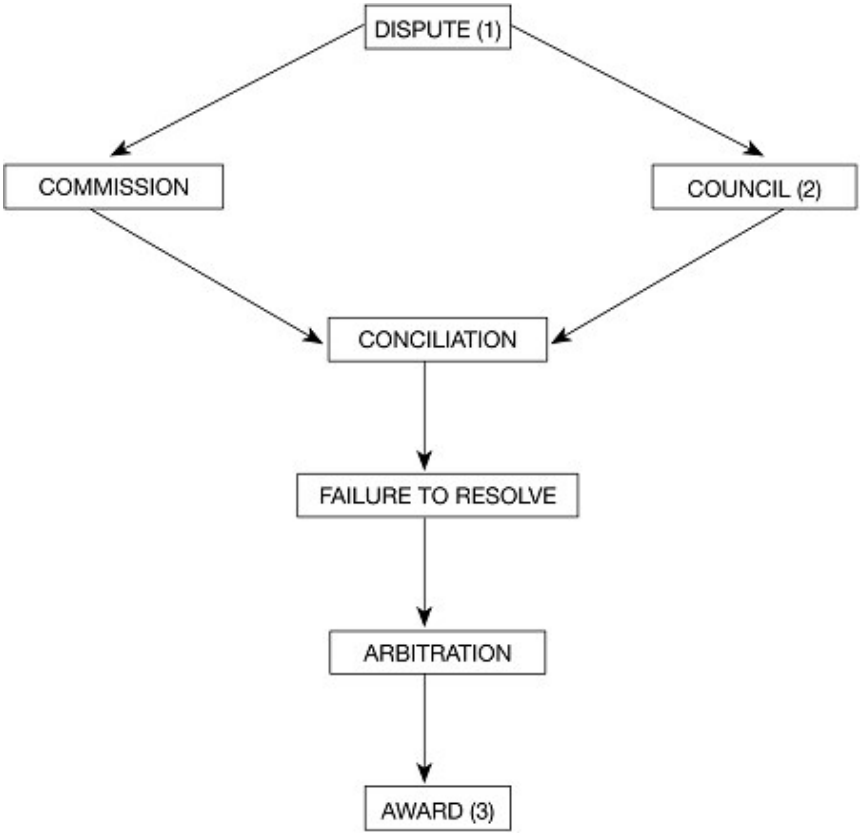
CHAPTER IV (Section 69)





FLOW DIAGRAM 8
ESSENTIAL SERVICES
(Dispute of interest in essential service)

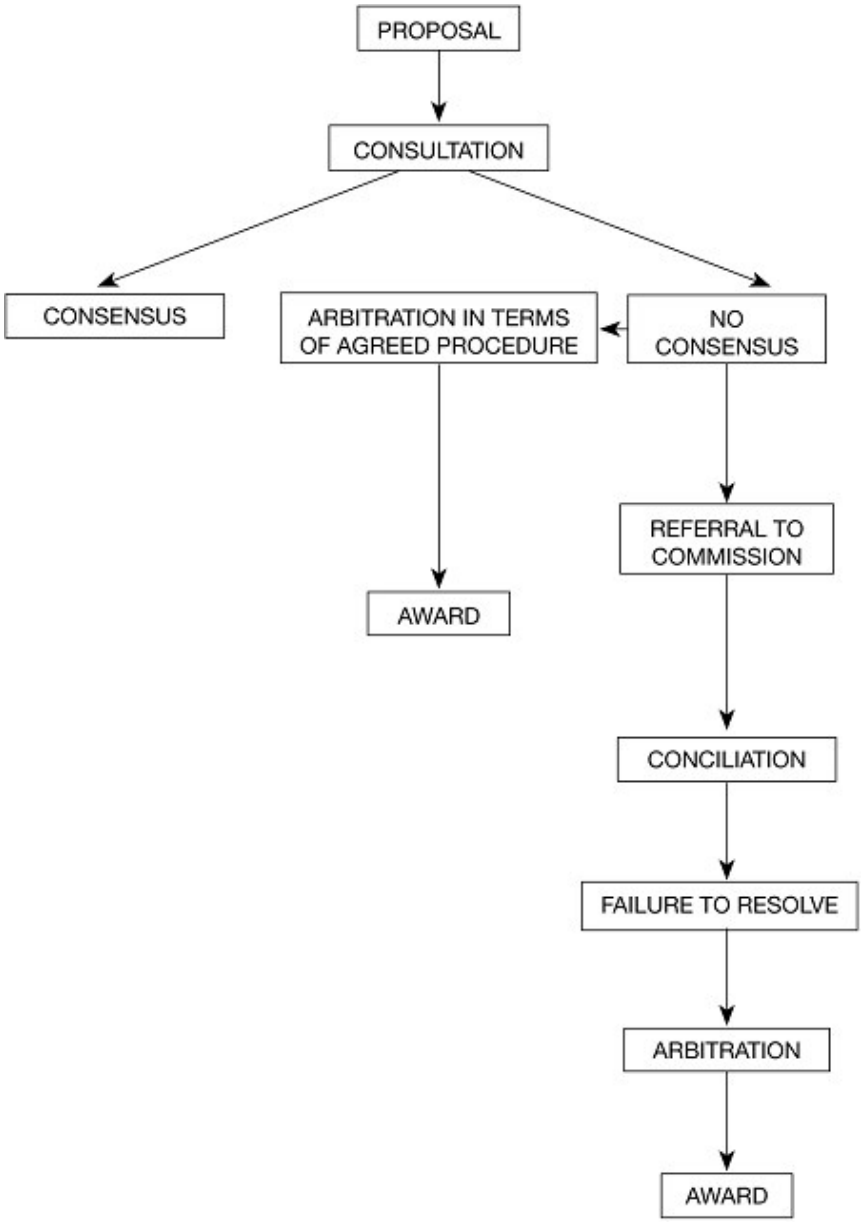
CHAPTER IV (Section 74)



1. A dispute of interest in an essential service may, for example, include a dispute about wages. Because employees may not strike and employers may not lock out (see s. 65 (1) (*d*)) any party may refer the dispute to a council or the commission.
2. The dispute must be referred to a council if the parties to the dispute fall within the council's registered scope.
3. In the case of an award that binds the State and that has financial implications, special parliamentary procedures are prescribed (see s. 74 (5) to (7)).

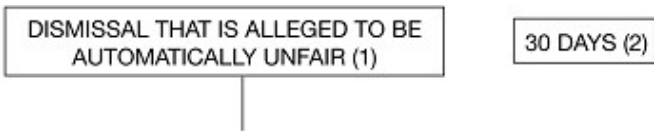
FLOW DIAGRAM 9
WORKPLACE FORUM (1)

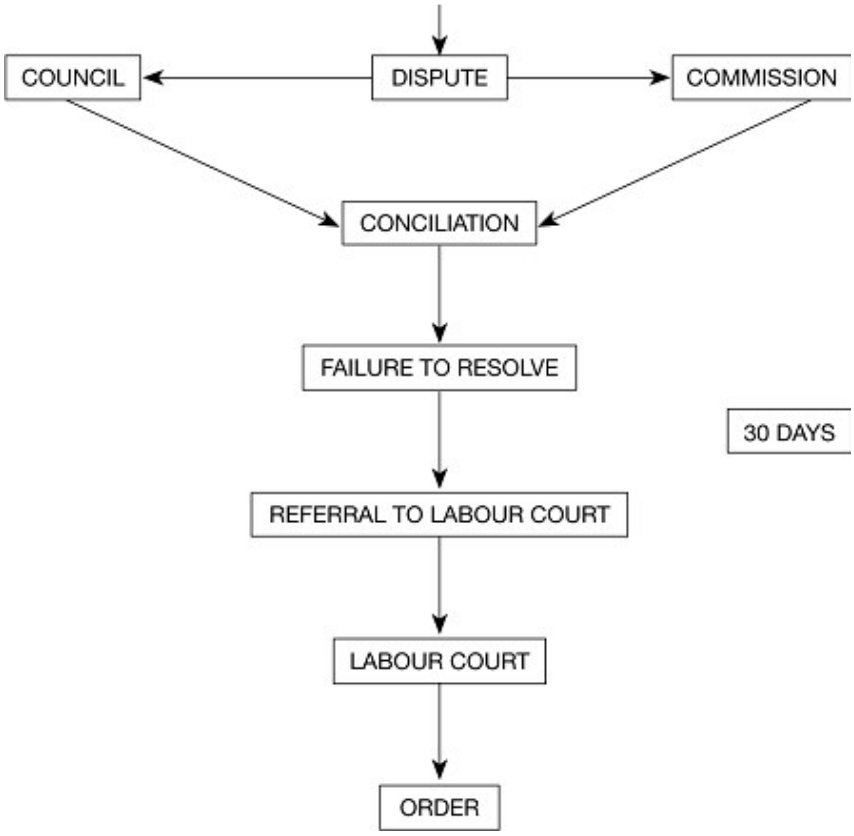
CHAPTER V (Section 86)



FLOW DIAGRAM 10
UNFAIR DISMISSAL (1)
(Automatically Unfair Reasons)

CHAPTER VIII (Section 191)

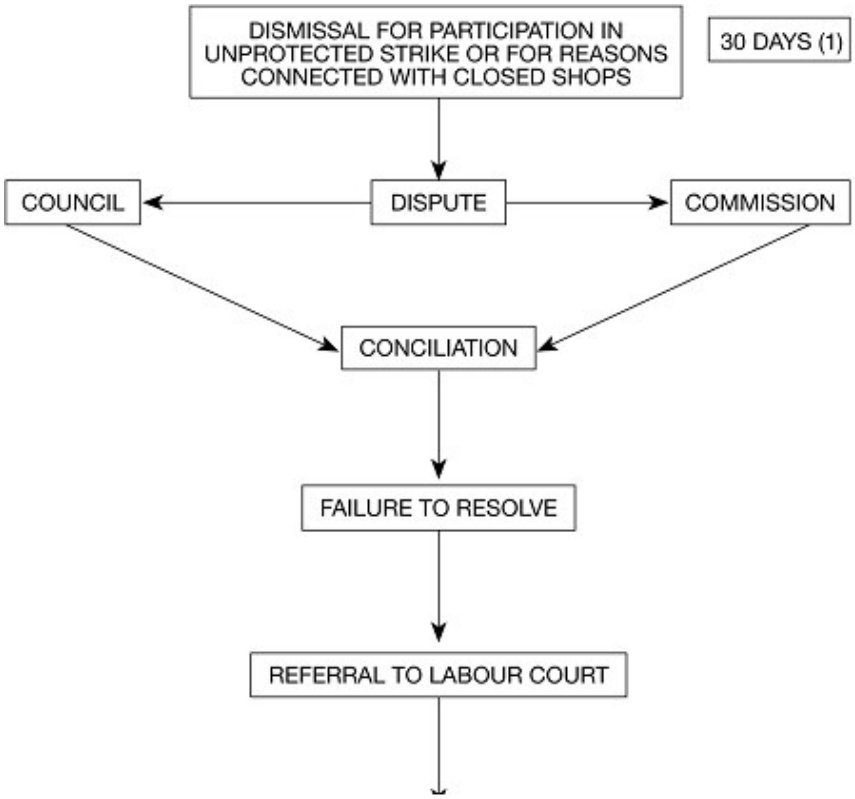


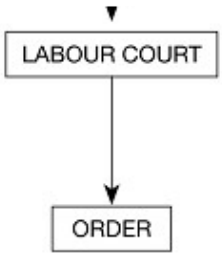


1. Examples of dismissals that are automatically unfair include dismissal for participation in a protected strike, dismissal on account of pregnancy and dismissal that amounts to an act of discrimination.
2. The time limit is designed to ensure that disputes are dealt with as soon as possible. Condonation can be granted of there is good cause to do so.

FLOW DIAGRAM 11
UNFAIR DISMISSAL (2)
(Strikes and reasons related to closed shops))

CHAPTER VIII (Section 191)

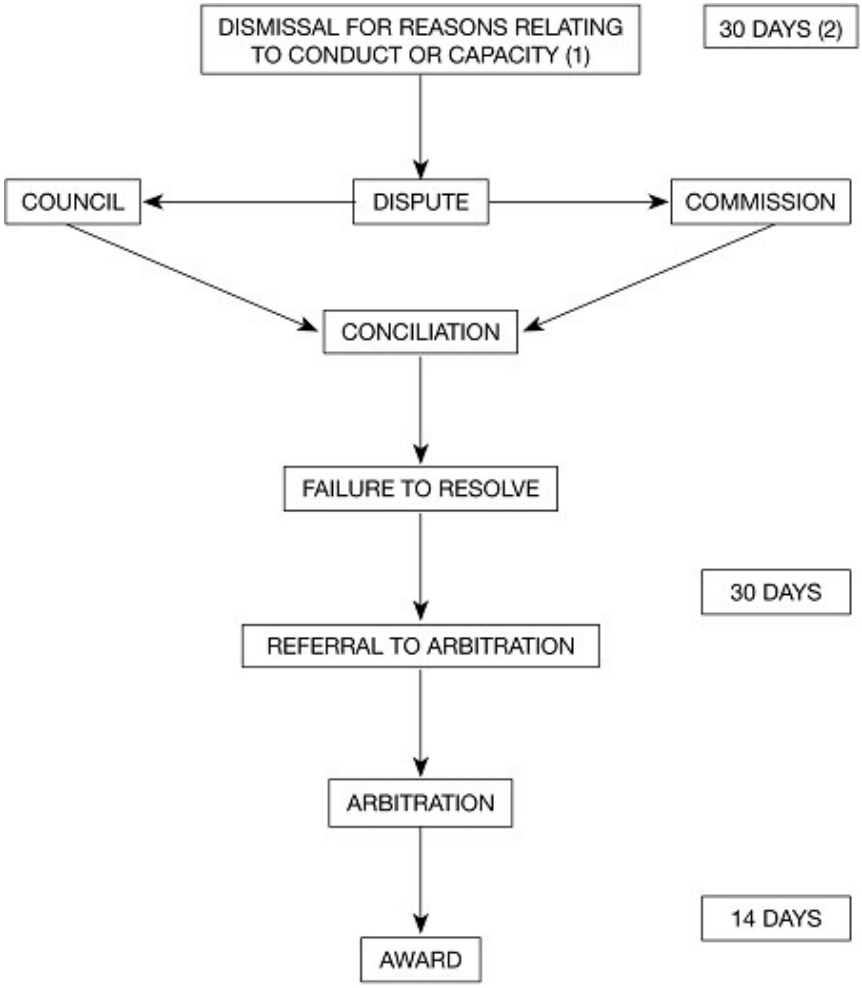




1. The time limit is designed to ensure that disputes are dealt with as soon as possible. Condonation can be granted of there is good cause to do so.

FLOW DIAGRAM 12
UNFAIR DISMISSAL (3)
(Misconduct/Incapacity)

CHAPTER VIII (Section 191)

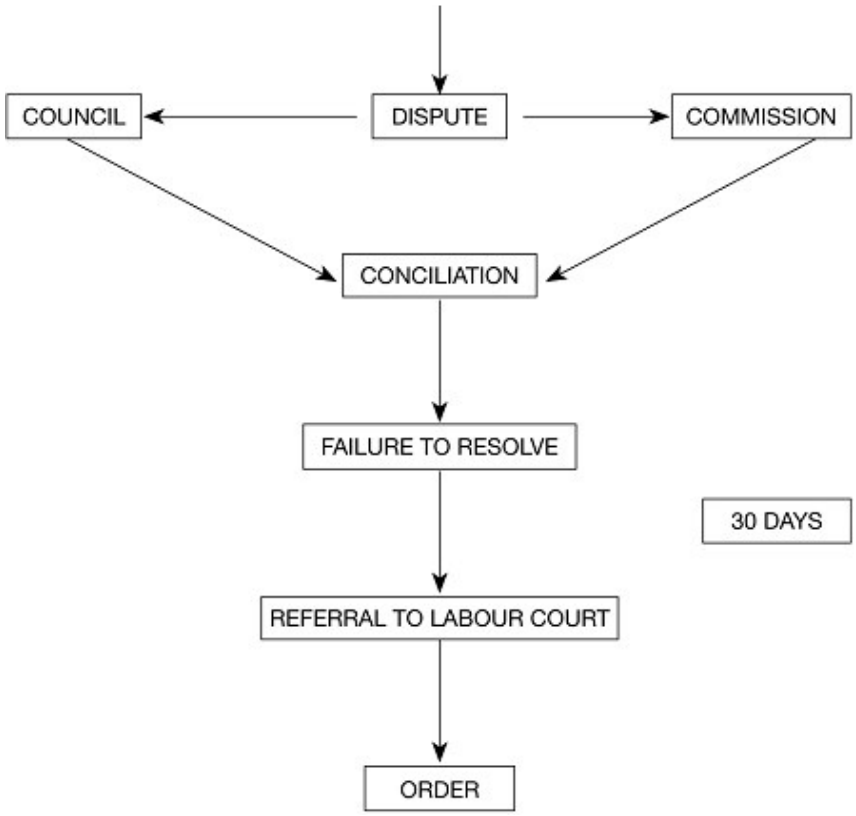


1. Dismissal for misconduct and incapacity is dealt with in the Code of Good Practice. Dismissal in Schedule 8.
2. The time limit is designed to ensure that disputes are dealt with as soon as possible. Condonation can be granted if there is good cause to do so.

FLOW DIAGRAM 13
UNFAIR DISMISSAL (4)
(Operational requirements)

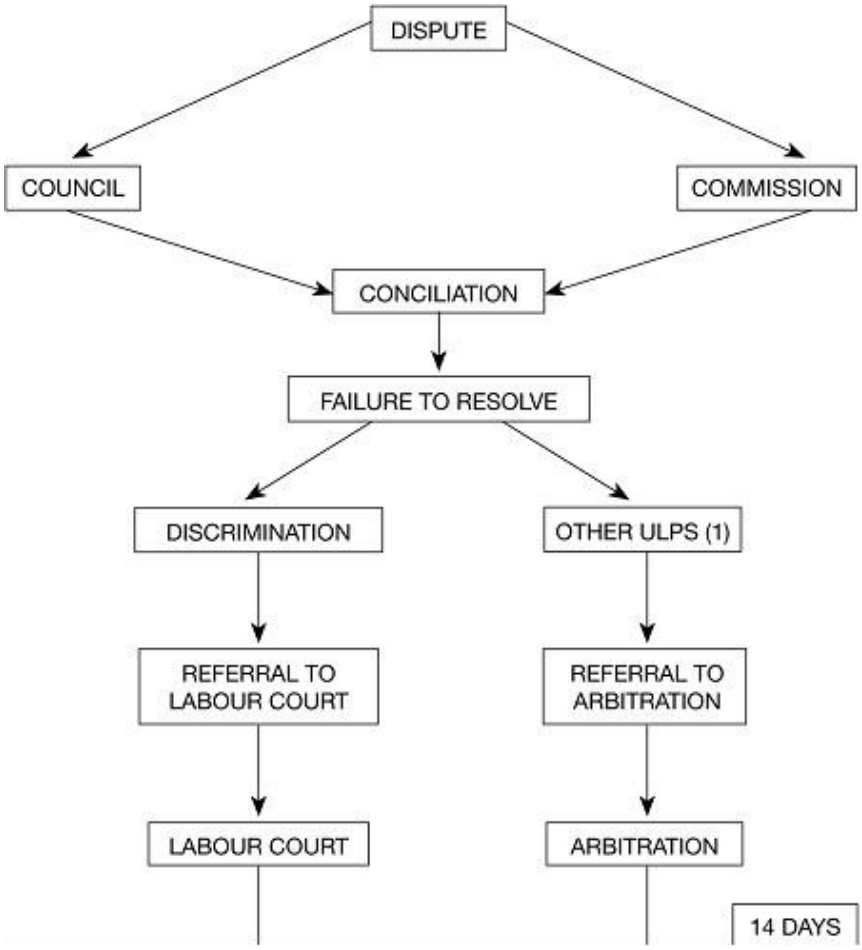
CHAPTER VIII (Section 191)





FLOW DIAGRAM 14
UNFAIR LABOUR PRACTICE

CHAPTER 7 (Item 2)



1. Other unfair labour practices include unfair conduct by the employer relating to promotion/demotion, training or the provision of benefits, unfair suspension, the failure to re-instate or re-employ an employee in terms of any agreement (see Item 2, Schedule 7).

Schedule 5
AMENDMENT OF LAWS

[Schedule 5 amended by s. 55 of Act No. 42 of 1996 and by s. 27 of Act No. 127 of 1998.]

Wording of Sections

1. Amendment of section 1 of Basic Conditions of Employment Act.-Section 1 of the *Basic Conditions of Employment Act* is hereby amended by the substitution for subsection (3), of the following section-

"(3) The Mines and Works Act, 1956 (Act No. 27 of 1956), the Wage Act, 1957 (Act No. 5 of 1957), the Manpower Training Act, 1981 (Act No. 56 of 1981) and the Labour Relations Act, 1995, as well as any matter regulated under any of them in respect of an employee, shall not be affected by this Act, but this Act shall apply in respect of any such employee in so far as a provision thereof provides for any matter which is not regulated by or under any of the said Acts in respect of such employee.".

2. Amendment of section 35 of Occupational Health and Safety Act.-Section 35 of the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993), is hereby amended-

(*a*) by the substitution for the words "industrial court", wherever they occur in subsection (3), of the words "Labour Court"; and

(*b*) by the substitution of subsection (4) of the following subsection-

"(4) Any person who wishes to appeal in terms of subsection (3), shall within 60 days after the chief inspector's decision was given, lodge the appeal with the registrar of the Labour Court in accordance with the Labour Relations Act, 1995, and the rules of the Labour Court.".

3. Amendment of section 2 of Pension Funds Act, 1956.-Section 2 of the Pension Funds Act, 1956 (Act No. 24 of 1956), is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) The provisions of this Act shall not apply in relation to any pension fund which has been established or continued in terms of a collective agreement concluded in a council in terms of the Labour Relations Act, 1995 (Act No. 66 of 1995), before the Labour Relations Amendment Act, 1998, has come into operation, nor in relation to a pension fund so established or continued and which, in terms of a collective agreement concluded in that council after the coming into operation of the Labour Relations Amendment Act, 1998, is continued or further continued (as the case may be). However, such a pension fund shall from time to time furnish the registrar with such statistical information as may be requested by the Minister.".

4. Amendment of section 2 of Medical Schemes Act, 1967.-Section 2 (1) of the Medical Schemes Act, 1967 (Act No. 72 of 1967), is hereby amended by the substitution for paragraph (*g*) of the following paragraph:

"(*g*) shall, subject to the provisions of subsection (2A), apply with reference to-

(i) a particular medical scheme established or continued in terms of a collective agreement concluded in a council in terms of the Labour Relations Act, 1995 (Act No. 66 of 1995), before the Labour Relations Amendment Act, 1998, has come into operation;

(ii) a particular medical scheme which was established or continued in the circumstances mentioned in subparagraph (i) and which, in terms of a collective agreement so concluded in that council after the coming into operation of the Labour Relations Amendment Act, 1998, is continued or further continued (as the case may be),

only if the Minister, at the request of the Minister of Labour and by notice in the *Gazette*, has declared the said provisions to be applicable with reference to such a particular medical scheme;".

5. Amendment of section 1 of Insurance Act, 1943.-Section 1 (1) of the Insurance Act, 1943 (Act No. 27 of 1943), is hereby amended by the substitution for paragraph (*d*) of the definition of "insurance business" of the following paragraph:

"(*d*) any transaction under the Labour Relations Act, 1995 (Act No. 66 of 1995);".

6. Amendment of section 2 of Friendly Societies Act, 1956.-Section 2 (1) of the Friendly Societies Act, 1956 (Act No. 25 of 1956), is hereby amended by the substitution for paragraph (*g*) of the following paragraph:

"(*g*) the relief or maintenance of members, or any group of members, when unemployed or in distressed circumstances, otherwise than in consequence of the existence of a strike or lock-out as defined in section 213 of the Labour Relations Act, 1995 (Act No. 66 of 1995);".

7. Amendment of section 3 of Friendly Societies Act, 1956.-Section 3 (1) of the Friendly Societies Act, 1956, is hereby amended by the substitution for paragraph (*a*) of the following paragraph:

"(*a*) which has been established or continued in terms of a collective agreement concluded in a council in terms of the Labour Relations Act, 1995. However, such a friendly society shall from time to time furnish the registrar with such statistical information as may be requested by the Minister;".

Schedule 6

LAWS REPEALED BY SECTION 212

Number and year of law	*Short title*	*Extent of repeal*
Act No. 28 of 1956	Labour Relations Act, 1956	The whole
Act No. 41 of 1959	Industrial Conciliation Amendment Act, 1959	The whole
Act No. 18 of 1961	Industrial Conciliation Amendment Act, 1961	The whole
Act No. 43 of 1966	Industrial Conciliation Amendment Act, 1966	The whole
Act No. 61 of 1966	Industrial Conciliation Further Amendment Act, 1966	The whole
Act No. 104 of 1967	Industrial Conciliation Amendment Act, 1967	The whole
Act No. 21 of 1970	Industrial Conciliation Amendment Act, 1970	The whole
Act No. 94 of 1979	Industrial Conciliation Amendment Act, 1979	The whole
Act No. 95 of 1980	Industrial Conciliation Amendment Act, 1980	The whole
Act No. 57 of 1981	Labour Relations Amendment Act, 1981	The whole
Act No. 51 of 1982	Labour Relations Amendment Act, 1982	The whole
Act No. 2 of 1983	Labour Relations Amendment Act, 1983	The whole
Act No. 81 of 1984	Labour Relations Amendment Act, 1984	The whole
Act No. 83 of 1988	Labour Relations Amendment Act, 1988	The whole
Act No. 9 of 1991	Labour Relations Amendment Act, 1991	The whole
Act No. 129 of 1993	General Law Third Amendment Act, 1993	Section 9 only
Act No. 146 of 1993	Education Labour Relations Act, 1993	The whole
Act No. 147 of 1993	Agricultural Labour Act, 1993	Chapter 1 only
Act No. 50 of 1994	Agricultural Labour Amendment Act, 1994	Section 1 only
Proclamation No. 105 of 1994	Public Service Labour Relations Act, 1994	The whole
Proclamation No. 128 of 1994	Education Labour Relations Act, Amendment Proclamation, 1994	The whole except section 6
Proclamation No. 134 of 1994	-	Sections 1 and 2 only
-	South African Police Service Labour Relations Regulations, 1995	The whole

Schedule 7
TRANSITIONAL ARRANGEMENTS

[Schedule 7 amended by s. 56 of Act No. 42 of 1996, by Proclamation No. R.1734 of 1 November 1996, by Government Notice No. R.2025 of 6 December 1996, by Government Notice No. R.440 of 27 March 1997, by Government Notice No. R.654 of 9 May 1997, by s. 64 of Act No. 55 of 1998, by s. 28 of Act No. 127 of 1998 and by s. 55 (*a*) and (*b*) of Act No. 12 of 2002.]

Wording of Sections

Part A-Definitions for this Schedule

1. Definitions for this Schedule.-In this Schedule, unless the context otherwise indicates-

"Agricultural Labour Act" means the Agricultural Labour Act, 1993 (Act No. 147 of 1993);

"Education Labour Relations Act" means the Education Labour Relations Act, 1993 (Act No. 146 of 1993);

"Education Labour Relations Council" means the bargaining council established in terms of section 6 (1) of the Education Labour Relations Act;

"Labour Relations Act" means the Labour Relations Act, 1956 (Act No. 28 of 1956);

"labour relations laws" means the Labour Relations Act, the Educational Labour Relations Act, Chapter 4 of the Agricultural Labour Act and the Public Service Labour Relations Act;

"National Negotiating Forum" means the National Negotiating Forum established for the South African Police Service by the South African Police Service Labour Relations Regulations, 1995;

"pending" means pending immediately before *this Act* comes into operation;

"public service" does not include the education *sector*;

"Public Service Bargaining Council" means the bargaining council referred to in section 5 (1) of the Public Service Labour Relations Act;

"Public Service Labour Relations Act" means the Public Service Labour Relations Act, 1994 (promulgated by Proclamation No. 105 of 1994);

"registrar" means the registrar of labour relations designated in terms of section 108; and

"trade union" includes an *employee* organisation.

Part B-Unfair Labour Practices

2. . . . . . .

3. . . . . . .

4. . . . . . .

Part C-Provisions concerning existing Trade Unions, Employers' Organisations, Industrial Councils and Conciliation Boards

5. Existing registered trade unions and employers' organisations.-(1) A *trade union* or *employers' organisation* registered or deemed to be registered in terms of the labour relations laws immediately before the commencement of *this Act*, will be deemed to be a registered *trade union* or registered *employers' organisation* under *this Act* and continues to be a body corporate.

(2) As soon as practicable after the commencement of *this Act*, the *registrar* must enter-

(*a*) the name of the *trade union* in the register of *trade unions*;

(*b*) the name of the *employers' organisation* in the register of *employers' organisations*.

(3) A *trade union* or *employers' organisation* whose name has been entered in the appropriate register must be issued with a new certificate of registration.

(4) If any provision of the constitution of the *trade union* or *employers' organisation* does not comply with the requirements of section 95, the *registrar* may direct that *trade union* or *employers' organisation*, in writing, to rectify its constitution and submit it to the *registrar* within a period specified in the direction, which period may not be shorter than three months.

(5) If a *trade union* or *employers' organisation* fails to comply with a direction issued to it in terms of subitem (4), the *registrar* must notify the *trade union* or *employers' organisation* that cancellation of its registration is being considered because of the failure, and give the *trade union* or *employers' organisation* an opportunity to show cause why its registration should not be cancelled within 30 days of the notice.

(6) If, when the 30-day period expires, the relevant *trade union* or *employers' organisation* has not shown cause why its registration should not be cancelled, the *registrar* must cancel the registration of that *trade union* or *employers' organisation* by removing its name from the appropriate register or take other lesser steps that are appropriate and not inconsistent with *this Act*.

(7) The *registrar* must notify the relevant *trade union* or *employers' organisation* whether the registration of the *trade union* or *employers' organisation* has been cancelled.

(8) Cancellation in terms of subitem (6) takes effect-

(*a*) if the *trade union* or the *employers' organisation* has failed, within the time contemplated in section 111 (3), to appeal to the Labour Court against the cancellation, when that period expires; or

(*b*) if the *trade union* or the *employers' organisation* has lodged an appeal, when the decision of the *registrar* has been confirmed by the Labour Court.

6. Pending applications by trade unions or employers' organisations for registration, variation of scope, alteration of constitution or name.-(1) Any pending application in terms of the labour relations laws for the registration, variation of scope of registration or alteration of the constitution or name of a *trade union* or an *employers' organisation* must be dealt with by the *registrar* as if the application had been made in terms of *this Act*.

(2) The registrar appointed in terms of the Public Service Labour Relations Act and the secretary of the Education Labour Relations Council appointed in terms of the Education Labour Relations Act must forward any pending application referred to in subitem (1) to the *registrar*.

(3) In any pending appeal in terms of section 16 of the Labour Relations Act or in terms of section 11 of the Education Labour Relations Act or in terms of section 11 of the Public Service Labour Relations Act, the *Minister* or the registrar of the industrial court or the registrar of the Supreme Court, as the case may be, must refer the matter back to the *registrar* who must deal with the application as if it were an application made in terms of *this Act*.

(4) When dealing with any application referred to in subitem (1) or (2), the *registrar*-

(*a*) may condone any technical non-compliance with the provisions of *this Act*; and

(*b*) may require the applicant to amend its application within 60 days in order to comply with the provisions of *this Act*.

7. Industrial councils.-(1) An industrial council registered or deemed to be registered in terms of the Labour Relations Act immediately before the commencement of *this Act*, will be deemed to be a *bargaining council* under *this Act* and continues to be a body corporate.

(2) As soon as practicable after the commencement of *this Act*, the registrar must enter the name of the *bargaining council* in the register of *councils*.

(3) A *bargaining council* whose name has been entered in the register of *councils* must be issued with a certificate of registration.

(4) If any provisions of the constitution of a *bargaining council* does not comply with the requirements of section 30, the registrar may direct the *bargaining council*, in writing, to rectify its constitution and submit it to the *registrar* within a period specified in the direction, which period may not be shorter than three months.

(5) If a *bargaining council* fails to comply with a direction issued to it in terms of subitem (4), the *registrar* must notify the *bargaining council* that cancellation of its registration is being considered because of the failure, and give the *bargaining council* an opportunity to show cause why its registration should not be cancelled within 30 days of the notice.

(6) If, when the 30-day period expires, the *bargaining council* has not shown cause why its registration should not be cancelled, the *registrar* must cancel the registration of that *bargaining council* by removing its name from the register of *councils* or take other lesser steps that are appropriate and not inconsistent with *this Act*.

(7) The *registrar* must notify the *bargaining council* whether the registration of the *bargaining council* has been cancelled.

(8) Cancellation in terms of subitem (6) takes effect-

(*a*) if the *bargaining council* has failed, within the time contemplated in section 111 (3), to appeal to the Labour Court against the cancellation, when that period expires; or

(*b*) if the *bargaining council* has lodged an appeal, when the decision of the *registrar* has been confirmed by the Labour Court.

8. Pending applications by industrial councils for registration and variation of scope.-(1) Any pending application for the registration or the variation of the scope of registration of an industrial council in terms of the Labour Relations Act must be dealt with as if it were an application made in terms of *this Act*.

(2) In any pending appeal in terms of section 16 of the Labour Relations Act against the refusal to register or vary the scope of an industrial council, the *Minister* or the registrar of the Supreme Court, as the case may be, must refer the matter to the registrar of labour relations, who must consider the application anew as if it were an application for registration made in terms of *this Act*.

(3) When dealing with the application referred to in subitem (1) or (2), the *registrar* may-

(*a*) require the applicant to amend its application within 60 days in order to comply with the provision of *this Act*; and

(*b*) condone technical non-compliance with the provisions of *this Act*.

8A. Pending enquiries by industrial registrar.-Any pending enquiry conducted by the industrial registrar under section 12 (3) of the Labour Relations Act, must, after the commencement of *this Act*, be continued and dealt with further by the same person in terms of the Labour Relations Act as if it had not been repealed.

9. Pending applications by industrial councils for alterations of constitution or name.-The provisions in item 6 apply, read with the changes required by the context, to any pending application for the alteration of the constitution or the name of an industrial council in terms of the Labour Relations Act.

10. Pending application for admission of parties to industrial councils.-(1) Any pending application for admission of a party to an industrial council in terms of section 21A of the Labour Relations Act must be dealt with by the industrial council as if it were an application made in terms of *this Act*.

(2) Any pending appeal before the industrial court against a decision of an industrial council in terms of section 21A of the Labour Relations Act must be dealt with by the industrial court as if the application had been made for admission as a party to a bargaining council in terms of *this Act*.

(3) An appeal against a decision of an industrial council as contemplated in section 21A of the Labour Relations Act may, despite the repeal of that Act, be instituted after the commencement of *this Act*, and must be heard by the Labour Court and dealt with as if the application for admission had been made in terms of *this Act*.

11. Pending applications to wind up and cancel registration of trade unions, employers' organisations and industrial councils.-Any pending application to wind up or to cancel the registration of a *trade union*, *employers' organisation* or industrial council registered in terms of any labour relations law must be dealt with by the *registrar* as if the labour relations laws had not been repealed.

12. Existing agreements and awards of industrial councils and conciliation boards.-(1) (*a*) Any agreement promulgated in terms of section 48, any award binding in terms of sections 49 and 50, and any order made in terms of section 51A, of the Labour Relations Act and in force immediately before the commencement of *this Act*, remains in force and enforceable, subject to paragraphs (*b*) and (*c*) of this subitem, and to subitem (5B), for a period of 18 months after the commencement of *this Act* or until the expiry of that agreement, award or order, whichever is the shorter period, in all respects, as if the Labour Relations Act had not been repealed.

(*b*) On the request of any council deemed by item 7 (1) to be a *bargaining council*, an agreement referred to in paragraph (*a*) that had been concluded in that council-

(i) if it expires before the end of the 18-month period referred to in paragraph (*a*), may be extended or declared effective in accordance with the provisions of subsection (4) (*a*) of section 48 of the Labour Relations Act, for a period ending before or on the expiry of that 18-month period, which provisions, as well as any other provisions of the Labour Relations Act relating to industrial council agreements extended or declared effective in terms of that subsection, will apply in all respects, read with the changes required by the context, in relation to any agreement extended or declared effective on the authority of this subparagraph as if those various provisions had not been repealed. However, the *Minister* may not on the authority of this subparagraph declare an agreement to be effective if it expires after 31 March 1997;

(ii) may be cancelled, in whole or in part, in accordance with the provisions of subsection (5) of section 48 of the Labour Relations Act, which provisions, as well as any other provisions of the Labour Relations Act relating to industrial council agreements wholly or partly cancelled in terms of that subsection, will apply in all respects, read with the changes required by the context, in relation to any agreement wholly or partly cancelled on the authority of this subparagraph as if those various provisions had not been repealed.

(*c*) An agreement referred to in paragraph (*a*) that had been concluded by parties to a conciliation board-

(i) if it expires before the end of the 18-month period referred to in paragraph (*a*), may, at the request of the parties that were represented on that conciliation board at the time of the conclusion of that agreement, be extended in accordance with, and in the manner provided for in, paragraph (*b*) (i) which will apply, read with the changes required by the context, in relation to the extension of agreements of that nature;

(ii) may, at the request of those parties, be cancelled, in whole or in part, in accordance with paragraph (*b*) (ii) which will apply, read with the changes required by the context, in relation to the cancellation of agreements of that nature.

(1A) (*a*) An agreement referred to in subitem (1) that had been concluded in a council deemed by item 7 (1) to be a *bargaining council*, may be amended or amplified by a further agreement concluded in that *bargaining council* and promulgated in accordance with the provisions of subsections (1) and (2) of section 48 of the Labour Relations Act, which provisions will apply in all respects, read with the changes required by the context, for the purposes of this paragraph as if they had not been repealed.

(*b*) Sub-items (1) (*b*), (3) and (8) (*a*) will apply to any further agreement concluded and promulgated on the authority of paragraph (*a*) of this subitem, in all respects as if it were an agreement referred to in subitem (1) (*a*).

(2) An agreement promulgated in terms of section 12 of the Education Labour Relations Act and in force immediately before the commencement of *this Act* remains in force for a period of 18 months after the commencement of *this Act* or until the expiry of that agreement, whichever is the shorter period, as if the provisions of that Act had not been repealed.

(3) Despite the provisions of subitem (1), an agreement referred to in section 24 (1) (*x*) of the Labour Relations Act that is in force immediately before the commencement of *this Act* will be deemed to be a closed shop agreement concluded in compliance with section 26 of *this Act* except that-

(*a*) the requirements in section 26 (3) (*d*) and section 98 (2) (*b*) (ii) become applicable at the commencement of the next financial year of the *trade union* party to the agreement; and

(*b*) the commencement date of the closed shop agreement shall be deemed to be the commencement date of *this Act*.

(4) Any pending request for the promulgation of an agreement in terms of section 48 of the Labour Relations Act must be dealt with as if the Labour Relations Act had not been repealed.

(5) Any request made before the expiry of six months after the commencement of *this Act* for the promulgation of an agreement entered into before the commencement of *this Act* must be dealt with as if the Labour Relations Act had not been repealed.

(5A) Any exemption from an agreement or award, or from an order, contemplated in subitem (1), that was in force immediately before the commencement of *this Act*, will remain in force for a period of 18 months after the commencement of *this Act* or until the period for which the exemption had been granted, has expired, whichever is the shorter period, as if the Labour Relations Act had not been repealed.

(5B) Any one or more of or all the provisions of an order referred to in subitem (1) (*a*), may be cancelled, suspended or amended by the *Minister* in accordance with the provisions of section 51A (4) (*a*) of the Labour Relations Act, which provisions will apply for the purposes of this subitem as if they had not been repealed.

(6) Any pending application for an exemption from all or any of the provisions of any agreement or award remaining in force in terms of subitem (1), or for an exemption from any provision of an order remaining in force in terms of that subitem, must-

(*a*) in the case of that agreement or award, be dealt with in terms of the provisions of section 51 and, whenever applicable, any other relevant provisions, of the Labour Relations Act, in all respects, read with the changes required by the context, as if the provisions in question had not been repealed;

(*b*) in the case of that order, be dealt with in terms of the provisions of section 51A and, whenever applicable, any other relevant provisions, of the Labour Relations Act as if the provisions in question had not been repealed.

(7) An exclusion granted in terms of section 51 (12) of the Labour Relations Act will remain in force until it is withdrawn by the *Minister*.

(8) After the commencement of *this Act* and despite the repeal of the Labour Relations Act-

(*a*) any person or class of persons bound by an agreement or award remaining in force in terms of subitem (1), may apply in accordance with the provisions of section 51 of the Labour Relations Act for an exemption from all or any of the provisions of that agreement or award (as the case may be). Any application so made, must be dealt with in terms of the provisions of section 51 and, whenever applicable, any other relevant provisions, of the Labour Relations Act, in all respects as if the provisions in question had not been repealed;

(*b*) any person bound by an order remaining in force in terms of subitem (1), may apply in accordance with the provisions of section 51A of the Labour Relations Act for exemption from any provision of that order. Any application so made, must be dealt with in terms of the provisions of section 51A and, whenever applicable, any other relevant provisions, of the Labour Relations Act, in all respects as if the provisions in question had not been repealed.

12A. Designated agents.-(1) Any person appointed under section 62 of the Labour Relations Act as a designated agent of an industrial council deemed by item 7 (1) to be a *bargaining council*, who holds that office immediately before the commencement of *this Act*, will be deemed to be a designated agent appointed for that *bargaining council* under section 33 of *this Act*.

(2) The certificate of appointment that had been issued in terms of section 62 (2) of the Labour Relations Act to that designated agent, will be deemed to have been issued in terms of section 33 (2) of *this Act*.

13. Existing agreements including recognition agreements.-(1) For the purposes of this section, an agreement-

(*a*) includes a recognition agreement;

(*b*) excludes an agreement promulgated in terms of section 48 of the Labour Relations Act;

(*c*) means an agreement about terms and conditions of employment or any other matter of mutual interest entered into between one or more registered *trade unions*, on the one hand, and on the other hand-

(i) one or more employers;

(ii) one or more registered *employers' organisations*; or

(iii) one or more employers and one or more registered *employers' organisations*.

(2) Any agreement that was in force immediately before the commencement of *this Act* is deemed to be a *collective agreement* concluded in terms of *this Act*.

(3) Any registered *trade union* that is party to an agreement referred to in subitem (1) and (2) in terms of which that *trade union* was recognised or the purposes of collective bargaining is entitled to the organisational rights conferred by sections 11 to 16 of Chapter III as may be regulated by that agreement and in respect of *employees* that it represents in terms of the agreement, for so long as the *trade union* remains recognised in terms of the agreement as the collective bargaining agent of those *employees*.

(4) If the parties to an agreement referred to in subsection (1) or (2) have not provided for a procedure to resolve any *dispute* about the interpretation or application of the agreement as contemplated in section 24 (1), the parties to the agreement must attempt to agree a procedure as soon as practicable after the commencement of *this Act*.

(5) An existing non-statutory agency shop or closed shop agreement is not binding unless the agreement complies with the provisions of this item. Sections 25 and 26 of this Act become effective 180 days after the commencement of this item.

Part D-Matters concerning Public Service

14. Public Service Bargaining Council.-(1) The Public Service Bargaining Council will continue to exist, subject to item 20.

(2) The departmental and provincial chambers will continue to exist, subject to item 20.

(3) Within 30 days after the commencement of this Act, the chambers of the Public Service Bargaining Council must furnish the *registrar* with copies of their constitutions signed by their authorised representatives.

(4) The constitutions of the chambers of the Public Service Bargaining Council, are deemed to be in compliance with section 30. However, where any provision of the constitution of a chamber does not comply with the requirements of section 30, the *registrar* may direct the chamber to rectify its constitution and re-submit the rectified constitution within the period specified in the direction, which period may not be shorter than three months.

(5) If a chamber fails to comply with a direction issued to it in terms of subitem (5), the *registrar* must-

(*a*) determine the amendments to the constitution in order to meet the requirements of section 30; and

(*b*) send a certified copy of the constitution to the chamber.

(6) A chamber of the Public Service Bargaining Council must deal with any pending application for admission of a party to it in terms of section 10 of the Public Service Labour Relations Act as if the application had been made in terms of *this Act*.

(7) Any pending appeal before the industrial court or an arbitrator against a decision of the Public Service Bargaining Council in terms of section 10 of the Public Service Labour Relations Act must, despite the repeal of any of the labour relations laws, be dealt with by the industrial court or arbitrator as if the application had been made in terms of *this Act*.

(8) Despite the repeal of the Public Service Labour Relations Act, an appeal in terms of section 10 of that Act against a decision of a chamber of the Public Service Bargaining Council may be instituted after the commencement of *this Act* and must be heard by the Labour Court and dealt with as if the application had been made in terms of *this Act*.

15. Collective agreements in the public service.-The following provisions, read with the changes required by the context, of the Public Service Labour Relations Act, despite the repeal of that Act, will have the effect and status of a *collective agreement* binding on the State, the parties to the chambers of the Public Service Bargaining Council and all *employees* in the *public service*-

(*a*) section 1 for the purposes of this item unless the context otherwise indicates;

(*b*) section 4 (10);

(*c*) section 5 (2), (3), (4) (*a*) and (5);

(*d*) section 7;

(*e*) section 8, except that the reference to section 5 (1) should be a reference to item 14 (1);

(*f*) section 9 (3);

(*g*) section 10 (4) and (5);

(*h*) section 12;

(*i*) section 13, except that the reference to agreements should be a reference to *collective agreements* including the *collective agreement* contemplated in this item;

(*j*) sections 14, 15 and 16 (2);

(*k*) section 17, except that the following subsection must be substituted for subsection (4) (*b*)-

"If the application of a trade union for recognition is refused, the trade union, within 90 days of the notice of the refusal, may refer the dispute to arbitration."; and

(*l*) section 18, except that-

(i) the following subsection must be substituted for subsection (10) (*a*)-

"An employee who or the employee organisation which in terms of subsection (1) has declared a dispute, requested that a conciliation board be established and submitted the completed prescribed form, may refer the dispute to arbitration or to the Labour Court in terms of the provisions of this Act and, in respect of a dispute not contemplated by this Act, to any other court if-

(i) a meeting of a conciliation board is not convened as contemplated in subsection (3);

(ii) the head of department concerned fails to request the appointment of a chairperson in terms of subsection (5);

(iii) where applicable, the Commission fails to appoint a chairperson of the conciliation board in terms of subsection (5);

(iv) the parties involved in the conciliation board have failed to agree to extend the period of office of the conciliation board in terms of subsection (7) until a settlement is reached;

(v) the conciliation board does not succeed in settling the dispute within the period contemplated in subsection (7); or

(vi) the parties to the dispute agree that they will not be able to settle the dispute and submit written proof thereof to the Commission or relevant court."; and

(ii) any reference to the Department of Labour should be a reference to the Commission.

16. Education Labour Relations Council.-(1) The Education Labour Relations Council will continue to exist, subject to item 20.

(2) The *registered scope* of the Education Labour Relations Council in the State and those *employees* in respect of which the Educators' Employment Act, 1994 (Proclamation No. 138 of 1994) applies.

(3) Within 30 days after the commencement of *this Act*, the Education Labour Relations Council must furnish the *registrar* with a copy of its constitution signed by its authorised representatives, and with the other information or documentation.

(4) The constitution agreed on between the parties to the Education Labour Relations Council is deemed to be in compliance with *this Act*: However, where any provision of the constitution does not comply with the requirements of section 30, the *registrar* may direct the Council to rectify its constitution and re-submit the rectified constitution within the period specified in the direction, which period may not be shorter than three months.

(5) If the Education Labour Relations Council fails to comply with a direction issued to it in terms of subitem (5), the *registrar* must-

(*a*) determine the amendments to the constitution in order to meet the requirements of section 30; and

(*b*) send a certified copy of the constitution to the Council.

(6) The Education Labour Relations Council must deal with any pending application for admission to it in terms of the Education Labour Relations Act as if the application had been made in terms of *this Act*.

(7) Any pending appeal before the industrial court or an arbitrator against a decision of the Education Labour Relations Council must, despite the repeal of any of the labour relations laws, be dealt with by the industrial court or arbitrator as if the application had been made in terms of *this Act*.

(8) Despite the repeal of the Education Labour Relations Act, any appeal against a decision of the Education Labour Relations Council may be instituted after the commencement of *this Act* and must be heard by the Labour Court and dealt with as if the application had been made in terms of *this Act*.

17. Education sector collective agreements.-The following provisions, read with the changes required by the context, of the Education Labour Relations Act, despite the repeal of that Act, will have the effect and status of a *collective agreement* binding on the State, the parties to the Education Labour Relations Council and all *employees* within *registered scope*-

(*a*) section 6 (2) and (3);

(*b*) section 8 (3), (4) and (5) (*a*);

(*c*) section 10 (3) and (4);

(*d*) section 12 (1) to (4), except that the disputes referred to in subsections (2) and (4) may be referred to arbitration only; and

(*e*) section 13 and section 14 (2).

18. Negotiating Forums in South African Police Service.-(1) The National Negotiating Forum will continue to exist subject to item 20.

(2) The *registered scope* of the National Negotiating Forum is the State and those *employees* in respect of whom the South African Police Service Rationalisation Proclamation, 1995 and the Act contemplated in section 214 of the Constitution applies.

(3) Within fourteen days of the commencement of *this Act*, or signing of its constitution by its authorised representatives, whichever is the later, the National Negotiating Forum must furnish the *register* with a copy of its constitution signed by its authorised representatives, and with the other information or documentation.

(4) The constitution agreed to by the National Negotiating Forum is deemed to be in compliance with this Act. However where any provision of the constitution does not comply with the requirements of section 30, the *registrar* may direct the National Negotiating Forum to rectify its constitution and re-submit the rectified constitution within fourteen days.

(5) The National Commissioner of the South African Police Service must deal with any pending application for registration and recognition in terms of the South African Police Service Labour Regulations as if the application had been made in terms of *this Act*.

19. Collective agreements in South African Police Service.-The provisions of the South African Police Service Labour Relations Regulations, read with the changes required by the context, despite the repeal of those regulations, will have the effect and status of a *collective agreement* binding on the State, the parties to the National Negotiating Forum and all the employees within its *registered scope*.

20. Consequences for public service bargaining institutions when Public Service Co-ordinating Bargaining Council is established.-When the Public Service Co-ordinating Bargaining Council is established in terms of item 2 of Schedule 1-

(*a*) the Public Service Bargaining Council and its chamber at central level will cease to exist; and

(*b*) the following chambers of the former Public Service Bargaining Council will continue to exist as juristic persons, despite paragraph (*a*), namely-

(i) the chamber for each department, which will be deemed to be a *bargaining council* that has been established under section 37 (3) (*a*) of *this Act* for that department;

(ii) the chamber of each provincial administration, which will be deemed to be a *bargaining council* that has been established under section 37 (3) (*a*) for that provincial administration; and

(*c*) the Education Labour Relations Council will be deemed to be a *bargaining council* that has been established in terms of section 37 (3) (*b*) of *this Act* for the education sector;

(*d*) the National Negotiating Forum will be deemed to be a *bargaining council* that has been established in terms of section 37 (3) (*b*) of *this Act* for the South African Police Service.

Part E-Disputes and Courts

21. Disputes arising before commencement of this Act.-(1) Any *dispute* contemplated in the labour relations laws that arose before the commencement of *this Act* must be dealt with as if those laws had not been repealed.

(2) Despite subsection (1) a *strike* or *lock-out* that commences after *this Act* comes into operation will be dealt with in terms of *this Act*. This rule applies even if the *dispute* giving rise to the *strike* or *lock-out* arose before *this Act* comes into operation.

(3) For the purposes of a *strike* or *lock-out* referred to in subitem (2), compliance with section 65 (1) (*d*) of the Labour Relations Act, section 19 (1) (*b*) of the Public Service Labour Relations Act and section 15 (1) (*b*) of the Education Labour Relations Act will be deemed to be compliance with section 64 (1) (*a*) of *this Act*.

21A. Dispute resolution by councils before their accreditation.-(1) Despite the provisions of section 52, a *council* may attempt to resolve through conciliation-

(*a*) any *dispute* that may be referred to it in terms of *this Act* before 1 December 1996; and

(*b*) if the *council* has applied for accreditation in terms of section 127 of *this Act* before 1 December 1996, also any *dispute* so referred to it after 1 December 1996 but before the governing body of the Commission has made a decision on that application in terms of section 127 (5) of *this Act*.

(2) For the purposes of subitem (1), any person appointed by a *council* to perform on its behalf the dispute resolution function referred to in that subitem, will be competent to exercise any of the powers conferred on a commissioner by section 142 of *this Act*, except the powers contemplated in subsection (1) (*c*) and (*d*) of that section. In applying that section for the purposes of this subitem, that section must be read with the changes required by the context, and any reference in that section to the *director* must be read as a reference to the secretary of the *council*.

(3) A *council* must refer to the Commission, for arbitration, any *dispute* that-

(*a*) was referred to the *council* in terms of *this Act* on the authority of subitem (1); and

(*b*) remains unresolved after the *council* has attempted to resolve it through conciliation; and

(*c*) is by *this Act* required to be resolved through arbitration.

22. Courts.-(1) In any pending *dispute* in respect of which the industrial court or the agricultural labour court had jurisdiction and in respect of which proceedings had not been instituted before the commencement of *this Act*, proceedings must be instituted in the industrial court or agricultural labour court (as the case may be) and dealt with as if the labour relations laws had not been repealed. The industrial court or the agricultural labour court may perform or exercise any of the functions and powers that it had in terms of the labour relations laws when it determines the *dispute.*

(2) Any *dispute* in respect of which proceedings were pending in the industrial court or the agricultural labour court must be proceeded with as if the labour relations laws had not been repealed.

(2A) In relation to any proceedings which, in terms of this Schedule, are brought or continued before the industrial court, the rules which, immediately before the commencement of *this Act*, were in force under the provisions of paragraph (*c*) or (*d*) of section 17 (22) of the Labour Relations Act, will apply as if those provisions had not been repealed, subject to subitem (2B).

(2B) The *Minister*, after consultation with the president of the industrial court, may make rules in accordance with the provisions of paragraph (*c*) of section 17 (22) of the Labour Relations Act, and, in accordance with the provisions of paragraph (*d*) of that section, may repeal or alter any rule so made as well as any of the rules contemplated in subitem (2A), as if those provisions had not been repealed and the *Minister* were the Board contemplated in those provisions.

(3) Any pending appeal before the Labour Appeal Court established by section 17A of the Labour Relations Act must be dealt with by the Labour Appeal Court as if the labour relations laws had not been repealed.

(4) Any pending appeal from a decision of that Labour Appeal Court or any appeal to the Appellate Division from a decision of the Labour Appeal Court in terms of section 17C and section 64 of the Labour Relations Act must be dealt with as if the labour relations laws had not been repealed.

(5) Any appeal from a decision of the industrial court or the agricultural labour court in terms of subitem (1) or (2), must be made to the Labour Appeal Court established by section 167 of *this Act*, and that Labour Appeal Court must deal with the appeal as if the labour relations laws had not been repealed.

(6) Despite the provisions of any other law but subject to the Constitution, no appeal will lie against any judgment or order given or made by the Labour Appeal Court established by *this Act* in determining any appeal

brought in terms of subitem (5).

22A. Minister may authorise Commission to perform industrial court's functions.-(1) The *Minister*, after consulting the Commission, may authorise the Commission, by notice in the *Government Gazette*, to perform the industrial court's functions in terms of item 22 (1)-

(*a*) in respect of the Republic as a whole or any province specified in the notice; and

(*b*) with effect from a date so specified.

(2) The authorisation of the Commission in terms of subitem (1)-

(*a*) does not affect the competence of the industrial court in terms of item 22 (1) to decide and finalise all pending matters that are partly heard by it as at the date when the authorisation takes effect, nor does it relieve that court of its functions, duties and responsibility with regard to those matters;

(*b*) does not empower the Commission to perform any of the industrial court's functions with regard to the matters mentioned in paragraph (*a*); and

(*c*) has the effect of substituting the Commission for the industrial court in so far as all other pending matters are concerned.

(3) In the application of this item-

(*a*) the provisions of item 22 (1) will apply to the Commission in all respects as if it were the industrial court; and

(*b*) the rules governing the proceedings at the industrial court in terms of item 22 (2A) and (2B) will apply to the proceedings at all pending matters to be decided by the Commission by virtue of its authorisation in terms of this item.

Part F-Pension Matters

23. Continuation of existing pension rights of staff members of Commission upon assuming employment.-(1) Any staff member of the Commission who, immediately before assuming employment with the Commission, is a member of the Government Service Pension Fund, the Temporary Employees Pension Fund or any other pension fund or scheme administered by the Department of Finance (hereinafter referred to as an officer or employee), may upon assuming that employment-

(*a*) choose to remain a member of that pension fund, and from the date of exercising the choice, the officer or employee, despite the provisions of any other law, will be deemed to be a dormant member of the relevant pension fund within the contemplation of section 15 (1) (*a*) of the General Pensions Act, 1979 (Act No. 29 of 1979);

(*b*) request to become a member of the Associated Institutions Pension Fund established under the Associated Institutions Pension Fund Act, 1963 (Act No. 41 of 1963), as if the Commission had been declared an associated institution under section 4 of that Act; or

(*c*) request to become a member of any other pension fund registered under the Pension Funds Act, 1956 (Act No. 24 of 1956).

(2) In the case where an officer or employee becomes a member of a fund after making a request in terms of subitem (1) (*b*) or (*c*)-

(*a*) the pension fund of which the officer or employee was a member ("the former fund") must transfer to the pension fund of which the officer or employee becomes a member of ("the new fund") an amount equal to the funding level of the former fund multiplied by its actuarial liability in respect of that officer or employee at the date the officer or employee assumes office with the Commission, increased by the amount of interest calculated on that amount at the prime rate of interest from the date when employment with the Commission commenced up to the date of transfer of the amount;

(*b*) membership of the officer or employee of the former fund will lapse from the date when employment with the Commission commenced, and from that date the officer or employee will cease to have any further claim against the former fund except as provided in paragraph (*a*); and

(*c*) the former fund must transfer any claim it may have against the officer or employee, to the new fund.

(3) In the case where an officer or employee becomes a member of a new fund after a request in terms of subitem (1) (*c*) the State must pay the new fund an amount equal to the difference between the actuarial liability of the former fund in respect of the officer or employee as on the date of the commencement of employment with the Commission, and the amount transferred in terms of subitem (2) (*c*) to the new fund, increased by the amount of interest thereon calculated at the prime rate from the date of commencement of employment up to the date of the transfer of the amount.

(4) Sub-items (2) and (3) will apply, read with the changes required by the context, in respect of any officer

or employee who, by reason of having made a choice in terms of subitem (1) (*a*), has become a dormant member and thereafter requests that the pension benefits that had accrued, be transferred in terms of section 15A (1) of the General Pensions Act, 1979, to another pension fund referred to in that Act or a pension fund registered in terms of the Pension Funds Act, 1956.

(5) If, after an officer or employee has become a member of any other pension fund, by reason of having made a choice in terms of subitem (1) (*c*), a lump sum benefit has become payable by that pension fund by reason of the death, or the withdrawal or resignation from the pension fund, or retirement, of the officer or employee, or the winding-up of the pension fund, then, for the purposes of paragraph (*e*) of the definition of "gross income" in section 1 of the Income Tax Act, 1962 (Act No. 58 of 1962), the pension fund will be deemed, in relation to such officer or employee, to be a fund referred to in paragraph (*a*) of the definition of "pension fund" in section 1 of that Act.

(6) For the purposes of this item-

"**actuarial liability**" of a pension fund in respect of a particular member or a group of members of the fund, means the actuarial liability that is determined by an actuary who the *Minister* has nominated for that purpose;

"**funding level**", in relation to a pension fund, means the market value of the assets of the fund stated as a percentage of the total actuarial liability of the fund, after those assets and liabilities have been reduced by the amount of the liabilities of the fund in respect of all its pensioners, as determined at the time of the most recent actuarial valuation of the fund or any review thereof carried out under direction of the responsible Minister; and

"**prime rate of interest**" means the average prime rate of interest of the three largest banks in the *Republic*.

Part G-Essential Services

24. Essential services in the public service.-(1) An essential service contemplated in section 20 (1) of the Public Service Labour Relations Act, will be deemed to have been designated an essential service in terms of *this Act* for a period ending on a date 10 months after the commencement of *this Act* or on the date of the publication of the notice of designation mentioned in subitem (2), in the *Government Gazette*, whichever date occurs first.

(2) The essential services committee must, in the case of the services contemplated in section 20 (1) of the Public Service Labour Relations Act, as soon as possible after the commencement of *this Act* make a new designation, under section 71 of *this Act*, of services that are essential services. Such a designation will be effective from the date of the publication of the notice of designation in the *Government Gazette* in terms of section 71 (8) of *this Act*.

25. Essential services provided for in the Labour Relations Act.-(1) The services in which employers referred to in paragraphs (*a*) and (*b*) of section 46 (1) of the Labour Relations Act, and *employees* referred to in paragraphs (*e*) and (*f*) of that section, are engaged, as well as any service contemplated in paragraph (*a*) or (*b*) of section 46 (7) of that Act in which the employers and *employees* to whom a notice in terms of the latter section applied immediately before the commencement of *this Act*, are engaged, will be deemed to have been designated essential services in terms of *this Act* for a period ending on a date 10 months after the commencement of *this Act* or on the date of the publication of the notice of designation mentioned in subitem (2), in the *Government Gazette*, whichever date occurs first.

(2) The essential services committee must, in the case of the services contemplated in subitem (1), as soon as possible after the commencement of *this Act* make a new designation, under section 71 of *this Act*, of services that are essential services. Such a designation will be effective from the date of the publication of the notice of the designation in the *Government Gazette* in terms of section 71 (8) of *this Act*.

Part H-Transitional Provisions Arising out of the Application of the Labour Relations Amendment Act, 2002

26. Definitions.-In this part-

(*a*) **"Act"** means the Labour Relations Act, 1995 (Act No. 66 of 1995); and

(*b*) **"Amendment Act"** means the Labour Relations Amendment Act, 2002.

27. Representation in conciliation and arbitration.-(1) Until such time as rules made by the Commission in terms of section 115 (2A) (*k*) of the Act come into force-

(*a*) sections 135 (4), 138 (4) and 140 (1) of the Act remain in force as if they had not been repealed, and any reference in this item to those sections is a reference to those sections prior to amendment by this Amendment Act;

(*b*) a *bargaining council* may be represented in arbitration proceedings in terms of section 33A of the Act by a person specified in section 138 (4) of the Act or by a designated agent or an official of the *council*;

(*c*) the right of any party to be represented in proceedings in terms of section 191 of the Act must be

determined by-

(i) section 138 (4) read with section 140 (1) of the Act for *disputes* about a *dismissal*; and

(ii) section 138 (4) of the Act for *disputes* about an unfair labour practice.

[Subitem (1) amended by s. 44 of Act No. 6 of 2014.]

(2) Despite subitem 1 (*a*), section 138 (4) of the Act does not apply to an arbitration conducted in terms of section 188A of the Act.

28. Order for costs in arbitration.-Section 138 (10) of the Act, before amendment by the Amendment Act, remains in effect as if it had not been amended until such time as the rules made by the Commission in terms of section 115 (2A) (*j*) of the Act come into effect.

29. Arbitration in terms of section 33A.-(1) Until such time as the *Minister* promulgates a notice in terms of section 33A (13) of the Act, an arbitrator conducting an arbitration in terms of section 33A of the Act may impose a fine in terms of section 33A (8) (*b*) of the Act subject to the maximum fines set out in Table One and Two of this item.

(2) The maximum fine that may be imposed by an arbitrator in terms of section 33A (8) (*b*) of the Act-

(*a*) for a failure to comply with a provision of a *collective agreement* not involving a failure to pay any amount of money, is the fine determined in terms of Table One; and

(*b*) involving a failure to pay an amount due in terms of a *collective agreement*, is the greater of the amounts determined in terms of Table One and Table Two.

TABLE ONE: MAXIMUM PERMISSIBLE FINE NOT INVOLVING AN UNDERPAYMENT

No previous failure to comply	R100 per employee in respect of whom the failure to comply occurs
A previous failure to comply in respect of the same provision	R200 per employee in respect of whom the failure to comply occurs
A previous failure to comply within the previous 12 months or two previous failures to comply in respect of the same provisions within three years	R300 per employee in respect of whom the failure to comply occurs
Three previous failures to comply in respect of the same provision within three years	R400 per employee in respect of whom the failure to comply occurs
Four or more previous failures to comply in respect of the same provision within three years	R500 per employee in respect of whom the failure to comply occurs

TABLE TWO: MAXIMUM PERMISSIBLE FINE INVOLVING AN UNDERPAYMENT

No previous failure to comply	25% of the amount due, including any interest owing on the amount at the date of the order
A previous failure to comply in respect of the same provision within three years	50% of the amount due, including any interest owing on the amount at the date of the order
A previous failure to comply in respect of the same provision within a year, or two previous failures to comply in respect of the same provision within three years	75% of the amount due, including any interest owing on the amount at the date of the order
Three previous failures to comply in respect of the same provision within three years	100% of the amount due, including any interest owing on the amount at the date of the order
Four or more previous failures to comply in respect of the same provision within three years	200% of the amount due, including any interest owing on the amount at the date of the order

30. Unfair labour practice.-(1) Any *dispute* about an unfair labour practice referred to a *council* or Commission in accordance with items 3 (1) and (2) of this Schedule prior to the commencement of the Amendment Act must be dealt with as if items 2, 3 and 4 of this Schedule had not been repealed.

(2) (*a*) A *dispute* concerning any act or omission constituting an alleged unfair labour practice that occurred prior to the commencement of the Amendment Act that had not been referred to a *council* or Commission in terms of item 3 (1) and 3 (2) prior to the commencement of the Amendment Act must be dealt with in terms of section 191 of the Act.

(*b*) If a *dispute* contemplated in paragraph (*a*) is not referred to conciliation in terms of section 191 (1) (*a*) of the Act within 90 days of the commencement of the Amendment Act, the *employee* alleging the unfair labour practice must apply for condonation in terms of section 191 (2) of the Act.

(*c*) Subitem (*a*) does not apply to an unfair labour practice in relation to probation.

31. Bargaining councils in public service.-Any *bargaining council* that was established or deemed to be established in terms of section 37 (3) of the Act prior to the Amendment Act coming into force is deemed to have been established in terms of section 37 (2) of the Act.

32. Expedited applications in terms of section 189A (13).-Until such time as rules are made in terms of section 159 of the Act-

(*a*) the Labour Court may not grant any order in terms of section 189A (13) or (14) of the Act unless the applicant has given at least four days' notice to the respondent of an application for an order in terms of subsection (1). However, the Court may permit a shorter period of notice if-

(i) the applicant has given written notice to the respondent of the applicant's intention to apply for the granting of an order;

(ii) the respondent has been given a reasonable opportunity to be heard before a decision concerning that application is taken; and

(iii) the applicant has shown good cause why a period shorter than four days should be permitted;

(*b*) an application made in terms of section 189A (13) must be enrolled by the Labour Court on an expedited basis.

Schedule 8

CODE OF GOOD PRACTICE: DISMISSAL

[Schedule 8 amended by s. 57 of Act No. 42 of 1996 and by s. 56 of Act No. 12 of 2002.]

Wording of Sections

1. Introduction.-(1) This *code of good practice* deals with some of the key aspects of *dismissal* for reasons related to conduct and capacity. It is intentionally general. Each case is unique, and departures from the norms established by this Code may be justified in proper circumstances. For example, the number of *employees* employed in an establishment may warrant a different approach.

(2) *This* Act emphasises the primary of *collective agreements*. This Code is not intended as a substitute for disciplinary codes and procedures where these are the subject of *collective agreements*, or the outcome of joint decision-making by an employer and a *workplace forum*.

(3) The key principle in this Code is that employers and *employees* should treat one another with mutual respect. A premium is placed on both employment justice and the efficient operation of business. While *employees* should be protected from arbitrary action, employers are entitled to satisfactory conduct and work performance from their *employees*.

2. Fair reasons for dismissal.-(1) A *dismissal* is unfair if it is not effected for a fair reason and in accordance with a fair procedure, even if it complies with any notice period in a contract of employment or in legislation governing employment. Whether or not a *dismissal* is for a fair reason is determined by the facts of the case, and the appropriateness of *dismissal* as a penalty. Whether or not the procedure is fair is determined by referring to the guidelines set out below.

(2) *This Act* recognises three grounds on which a termination of employment might be legitimate. These are: the conduct of the *employee*, the capacity of the *employee*, and the *operational requirements* of the employer's business.

(3) *This Act* provides that a *dismissal* is automatically unfair if the reason for the *dismissal* is one that amounts to an infringement of the fundamental rights of *employees* and *trade unions*, or if the reason is one of those listed in section 187. The reasons include participation in a lawful *strike*, intended or actual pregnancy and acts of discrimination.

(4) In cases where the *dismissal* is not automatically unfair, the employer must show that the reason for *dismissal* is a reason related to the *employee's* conduct or capacity, or is based on the *operational requirements* of the business. If the employer fails to do that, or fails to prove that the *dismissal* was effected in accordance with a fair procedure, the *dismissal* is unfair.

Disciplinary procedures prior to dismissal

3. Disciplinary measures short of dismissal.-(1) All employers should adopt disciplinary rules that establish the standard of conduct required of their *employees*. The form and content of disciplinary rules will obviously vary according to the size and nature of the employer's business. In general, a larger business will require a more formal approach to discipline. An employer's rules must create certainty and consistency in the application of discipline. This requires that the standards of conduct are clear and made available to *employees* in a manner that is easily understood. Some rules or standards may be so well established and known that it is not necessary to communicate them.

(2) The courts have endorsed the concept of corrective or progressive discipline. This approach regards the purpose of discipline as a means for *employees* to know and understand what standards are required of them. Efforts should be made to correct *employees'* behaviour through a system of graduated disciplinary measures such as counselling and warnings.

(3) Formal procedures do not have to be invoked every time a rule is broken or a standard is not met. Informal advice and correction is the best and most effective way for an employer to deal with minor violations of work discipline. Repeated misconduct will warrant warnings, which themselves may be graded according to degrees of severity. More serious infringements or repeated misconduct may call for a final warning, or other action short of *dismissal*. Dismissal should be reserved for cases of serious misconduct or repeated offences.

Dismissals for misconduct

(4) Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Examples of serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty or wilful damage to the property of the employer, wilful endangering of the safety of others physical assault on the employer, a fellow *employee*, client or customer and gross insubordination. Whatever the merits of the case for *dismissal* might be, a *dismissal* will not be fair if it does not meet the requirements of section 188.

(5) When deciding whether or not to impose the penalty of *dismissal*, the employer should in addition to the gravity of the misconduct consider factors such as the *employee's* circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself.

(6) The employer should apply the penalty of *dismissal* consistently with the way in which it has been applied to the same and other *employees* in the past, and consistently as between two or more *employees* who participate in the misconduct under consideration.

4. Fair procedure.-(1) Normally, the employer should conduct an investigation to determine whether there are grounds for *dismissal*. This does not need to be a formal enquiry. The employer should notify the *employee* of the allegations using a form and language that the *employee* can reasonably understand. The *employee* should be allowed the opportunity to state a case in response to the allegations. The *employee* should be entitled to a reasonable time to prepare the response and to the assistance of a *trade union representative* or fellow *employee*. After the enquiry, the employer should communicate the decision taken, and preferably furnish the *employee* with written notification of that decision.

(2) Discipline against a *trade union representative* or an *employee* who is an *office-bearer* or *official* of a *trade union* should not be instituted without first informing and consulting the *trade union*.

(3) If the *employee* is dismissed, the *employee* should be given the reason for *dismissal* and reminded of any rights to refer the matter to a *council* with jurisdiction or to the Commission or to any *dispute* resolution procedures established in terms of a *collective agreement*.

(4) In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with pre-dismissal procedures.

5. Disciplinary records.-Employers should keep records for each *employee* specifying the nature of any disciplinary transgressions, the actions taken by the employer and the reasons for the actions.

6. Dismissals and industrial action.-(1) Participation in a *strike* that does not comply with the provisions of chapter IV is misconduct. However, like any other act of misconduct, it does not always deserve *dismissal*. The substantive fairness of *dismissal* in these circumstances must be determined in the light of the facts of the case, including-

(*a*) the seriousness of the contravention of *this Act*;

(*b*) attempts made to comply with *this Act*; and

(*c*) whether or not the *strike* was in response to unjustified conduct by the employer.

(2) Prior to *dismissal* the employer should, at the earliest opportunity, contact a *trade union official* to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms

that should state what is required of the *employees* and what sanction will be imposed if they do not comply with the ultimatum. The *employees* should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the *employees* in question, the employer may dispense with them.

7. Guidelines in cases of dismissal for misconduct.-Any person who is determining whether a dismissal for misconduct is unfair should consider-

(*a*) whether or not the *employee* contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and

(*b*) if a rule or standard was contravened, whether or not-

(i) the rule was a valid or reasonable rule or standard;

(ii) the *employee* was aware, or could reasonably be expected to have been aware, of the rule or standard;

(iii) the rule or standard has been consistently applied by the employer; and

(iv) *dismissal* with an appropriate sanction for the contravention of the rule or standard.

8. Probation.-(1) (*a*) An employer may require a newly-hired *employee* to serve a period of probation before the appointment of the *employee* is confirmed.

(*b*) The purpose of probation is to give the employer an opportunity to evaluate the *employee's* performance before confirming the appointment.

(*c*) Probation should not be used for purposes not contemplated by this Code to deprive *employees* of the status of permanent employment. For example, a practice of dismissing *employees* who complete their probation periods and replacing them with newly-hired *employees*, is not consistent with the purpose of probation and constitutes an unfair labour practice.

(*d*) The period of probation should be determined in advance and be of reasonable duration. The length of the probationary period should be determined with reference to the nature of the job and the time it takes to determine the *employee's* suitability for continued employment.

(*e*) During the probationary period, the *employee's* performance should be assessed. An employer should give an *employee* reasonable evaluation, instruction, training, guidance or counselling in order to allow the *employee* to render a satisfactory service.

(*f*) If the employer determines that the *employee's* performance is below standard, the employer should advise the *employee* of any aspects in which the employer considers the *employee* to be failing to meet the required performance standards. If the employer believes that the *employee* is incompetent, the employer should advise the *employee* of the respects in which the *employee* is not competent. The employer may either extend the probationary period or dismiss the *employee* after complying with subitems (*g*) or (*h*), as the case may be.

(*g*) The period of probation may only be extended for a reason that relates to the purpose of probation. The period of extension should not be disproportionate to the legitimate purpose that the employer seeks to achieve.

(*h*) An employer may only decide to dismiss an *employee* or extend the probationary period after the employer has invited the *employee* to make representations and has considered any representations made. A *trade union* representative or fellow *employee* may make the representations on behalf of the *employee*.

(*i*) If the employer decides to dismiss the *employee* or to extend the probationary period, the employer should advise the *employee* of his or her rights to refer the matter to a *council* having jurisdiction, or to the Commission.

(*j*) Any person making a decision about the fairness of a *dismissal* of an *employee* for poor work performance during or on expiry of the probationary period ought to accept reasons for *dismissal* that may be less compelling than would be the case in *dismissals* effected after the completion of the probationary period.

(2) After probation, an *employee* should not be dismissed for unsatisfactory performance unless the employer has-

(*a*) given the *employee* appropriate evaluation, instruction, training, guidance or counselling; and

(*b*) after a reasonable period of time for improvement, the *employee* continues to perform unsatisfactorily.

(3) The procedure leading to *dismissal* should include an investigation to establish the reasons for the unsatisfactory performance and the employer should consider other ways, short of *dismissal*, to remedy the matter.

(4) In the process, the *employee* should have the right to be heard and to be assisted by a *trade union representative* or a fellow *employee*.

9. Guidelines in cases of dismissal for poor work performance.-Any person determining whether a *dismissal* for poor work performance is unfair should consider-

(*a*) whether or not the *employee* failed to meet a performance standard; and

(*b*) if the *employee* did not meet a required performance standard whether or not-

(i) the *employee* was aware, or could reasonably be expected to have been aware, of the required performance standard;

(ii) the *employee* was given a fair opportunity to meet the required performance standard; and

(iii) *dismissal* was an appropriate sanction for not meeting the required performance standard.

10. Incapacity: Ill health and injury.-(1) Incapacity on the grounds of ill health or injury may be temporary or permanent. If an *employee* is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or the injury. If the *employee* is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the possible alternatives short of *dismissal*. When alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the ill or injured *employee*. In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the *employee* to accommodate the *employee's* disability.

(2) In the process of the investigation referred to in subsection (1) the *employee* should be allowed the opportunity to state a case in response and to be assisted by a *trade union representative* or fellow *employee*.

(3) The degree of incapacity is relevant to the fairness of any *dismissal*. The cause of the incapacity may also be relevant. In the case of certain kinds of incapacity, for example alcoholism or drug abuse, counselling and rehabilitation may be appropriate steps for an employer to consider.

(4) Particular consideration should be given to *employees* who are injured at work or who are incapacitated by work-related illness. The courts have indicated that the duty on the employer to accommodate the incapacity of the *employee* is more onerous in these circumstances.

11. Guidelines in cases of dismissal arising from ill health or injury.-Any person determining whether a dismissal arising from ill health or injury is unfair should consider-

(*a*) whether or not the *employee* is capable of performing the work; and

(*b*) if the *employee* is not capable-

(i) the extent to which the *employee* is able to perform the work;

(ii) the extent to which the *employee's* work circumstances might be adapted to accommodate disability, or, where this is not possible, the extent to which the *employee's* duties might be adapted; and

(iii) the availability of any suitable alternative work.

Schedule 9

MODEL CONSTITUTION FOR A STATUTORY COUNCIL

[Schedule 9 added by Government Notice No. R.443 of 27 March 1997.]

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MODEL CONSTITUTION FOR A STATUTORY COUNCIL

CONSTITUTION OF .....

Note:-*This is a model constitution. The parties to the council are free to draft their own constitution or to adapt this model to suit their own requirements provided the constitution complies with the provisions of the Act.*

1. Name.-The name of this statutory council is

2. Registered scope.-The registered scope of the council is specified in the council's certificate of registration attached to this constitution.

3. Powers and functions.-(1) The powers and functions of the council are-

(*a*) to perform the dispute resolution functions referred to in section 51 of the Act;

(*b*) to promote and establish training and education schemes;

(*c*) to establish and administer pension, provident, medical aid, sick pay, holiday and unemployment schemes or funds or any similar schemes or funds for the benefit of one or more of the parties to the council or their members; and

(*d*) to conclude collective agreements to give effect to the matters mentioned in paragraphs (*a*), (*b*) and (*c*).

(2) The council may agree to the inclusion of any of the functions of a bargaining council referred to in section 28 (1) (*a*), (*b*), (*c*), (*e*), (*h*), (*i*) and (*j*) of the Act as functions of the council.

(3) The council is only able to exercise these powers and perform these functions within its registered scope.

Note:-*There is an alternative method of giving effect to section 43 (2) of the Act which permits statutory councils to agree to include any of the other functions of a bargaining council. The council could, through its amending provisions* (*clause 17*)*, amend clause 3* (*1*) *by including any one or more of those functions.*

4. Parties.-(1) The founding parties to the council are-

(*a*) the following employers' organisation(s)-

(i) ; and

(ii) ; and

(iii) ; and

(names)

(*b*) the following trade union(s)-

(i) ; and

(ii) ; and

(iii)

(names)

(2) Any registered trade union or registered employers' organisation that has members that fall within the registered scope of the council may apply in writing to the council for admission as a party.

(3) The application must be accompanied by-

(*a*) a certified copy of the applicant's registered constitution;

(*b*) a certified copy of the applicant's certificate of registration;

(*c*) details of the applicant's membership within the registered scope of the council, including, in the case of an employers' organisation, the number of employees that its members employ within the council's registered scope;

(*d*) a statement of the reasons why the applicant ought to be admitted as a party to the council; and

(*e*) any other information on which the applicant relies in support of the application.

(4) The council, within 90 days of receiving an application for admission, must decide whether to grant or refuse the applicant admission, and must advise the applicant of its decision, failing which the council is deemed to have refused the applicant admission.

(5) If the council refuses to admit an applicant it must, within 30 days of the date of the refusal, advise the applicant in writing of its decision and the reasons for that decision.

5. Appointment of representatives.-(1) The council consists of-

(*a*) ..... representatives of the employers' organisations that are parties to the council, ... of whom represent(s) small and medium enterprises; and

(*b*) ..... representatives of the trade unions that are parties to the council.

Note:-*The number of representatives representing employers in paragraph* (*a*) *must be equal to the number of representatives representing employees in paragraph* (*b*).

In the event that there are no employers' organisations party to the council, representatives will be appointed by the Minister to represent employer interests, and the provisions in the constitution concerning the appointment of representatives will have to be adapted to deal with this situation.

The employer representation must make provision for one or more representatives representing small and medium enterprises.

In the event that there are no trade unions party to the council, representatives will be appointed by the Minister to represent employee interests, and the provisions in the constitution concerning the appointment of representatives will have to be adapted to deal with this situation.

(2) The representatives will be allocated among the parties to the council as follows-

(*a*) employers' organisation(s)- number of representatives-

(names)

(*b*) trade union(s)- number of representatives-

(names)

Note:-*The allocation may be determined according to a formula based on representativeness, with the Secretary of the Council making a determination on an annual basis.*

(3) Subject to sub-clause (2) and to its own constitution, each party to the council may appoint-

(*a*) its representatives to the council; and

(*b*) an alternate for each of its representatives.

(4) (*a*) A representative or an alternate will hold office for 12 months and will be eligible for re-appointment at the end of that term.

(*b*) A representative or an alternate whose term of office has expired and who is not re-appointed, may nevertheless continue to act as a representative until that representative's successor assumes office.

(5) Despite sub-clause (4)-

(*a*) a party may withdraw any of its representatives or alternatives after having given at least 21 days' notice in writing to the secretary;

(*b*) a representative who, without good cause, is absent from three consecutive meetings of the council is disqualified from continuing in that office.

(6) If the office of any representative or alternate becomes vacant, the party that appointed the representative or alternate may appoint another representative or alternate for the unexpired portion of the predecessor's term of office.

6. Council meetings.-(1) The council must hold-

(*a*) an annual general meeting in the month of ..... each year; and

(*b*) an ordinary meeting at least once every ..... month(s).

(2) A special meeting of the council-

(*a*) may be called at any time by the chairperson with a view to disposing of urgent business; and

(*b*) must be called by the chairperson within 14 days of-

(i) receiving a request for that purpose, stating the purpose of the special meeting and signed by not less than ..... representatives; or

(ii) the adoption of a resolution by the council calling for a special meeting.

(3) At the annual general meeting the council must-

(*a*) elect the additional members of the executive committee;

(*b*) elect the chairperson and the deputy chairperson of the council;

(*c*) appoint the members of the panel of conciliators referred to in clause 11 (1) (*a*);

(*d*) appoint the members of the panel of arbitrators referred to in clause 11 (1) (*b*);

(*e*) appoint the members of an exemptions board to consider and dispose of applications for exemption from the provisions of any collective agreement that may be concluded in the council;

(*f*) consider the annual financial statements of the council and the auditor's report on those statements; and

(*g*) consider and approve, with or without any amendments, the budget of the council for the next financial year as prepared in terms of clause 15 (10).

(4) The secretary must prepare a written notice of every council meeting stating the date, time and venue of the meeting and the business to be transacted, and must send the notice to each representative by registered post at least ..... days before the date of the meeting. However, the chairperson may authorise shorter notice for a special meeting.

Note:-*There is no restriction as to the kind of service. The constitution can stipulate any form of service e.g. service by hand, faxed transmission or electronic mail.*

(5) At least half of the total number of employer representatives and half of the total number of employee representatives form a quorum and must be present before a meeting may begin or continue.

(6) If, at the time fixed for a meeting to begin or continue, and for 30 minutes after that time, there is no quorum present, the meeting must be adjourned to the same place at the same time on the corresponding day in the following week unless that day is a public holiday, in which case the meeting must be adjourned to the day immediately after that public holiday.

(7) A meeting that has been adjourned in terms of sub-clause (6) may proceed on the date to which it was adjourned with the representatives present at the time called for the meeting, regardless of whether or not notice has been given in terms of sub-clause (4) and whether or not a quorum is present.

(8) The secretary must cause minutes to be kept of the proceedings at council meetings.

(9) At every meeting of the council-

(*a*) the secretary must read the minutes of the previous meeting, unless they were previously circulated; and

(*b*) after the minutes have been confirmed, with or without any amendments, the chairperson must sign the minutes.

(10) A motion proposed at a meeting may not be considered unless it has been seconded. The chairperson may require a motion to be submitted in writing, in which case the chairperson must read the motion to the meeting.

(11) Unless this constitution provides otherwise, all motions must be decided by a majority of votes of those present and entitled to vote and voting must be by show of hands.

Note:-*The constitution could stipulate that certain matters should be decided by ballot.*

(12) Each representative has one vote on any matter before the council for its decision. However, if at the meeting the employer representatives and employee representatives are not equal in number, the side that is in the majority must withdraw so many of its representatives from voting at that meeting as may be necessary to ensure that the two sides are of equal numerical strength at the time of voting.

(13) If any question which the executive committee considers to be extremely urgent arises between meetings of the council, and it is possible to answer that question by a simple 'yes' or 'no', the executive committee may direct the secretary to cause a vote of the representatives on the council to be taken by post. A proposal subjected to a postal vote may be adopted only if it is supported by at least two-thirds of the total number of representatives who are entitled to vote.

(14) The executive committee may adopt general rules of procedure for its meetings and for the meetings of the council and its other committees. However, in the event of any conflict between those rules and the provisions of this constitution, the provisions of this constitution will prevail.

7. Executive committee.-(1) The council will have an executive committee that consists of the chairperson and the deputy chairperson of the council, who are members by virtue of their respective offices, and ..... additional members elected in accordance with sub-clause (3).

(2) Subject to the directions and control of the council, the executive committee may exercise and perform the powers, functions and duties of the council relating to the supervision and control of the everyday management and administration of the council. In addition, the executive committee may-

(*a*) investigate and report to the council on any matter connected with the sector in respect of which the council is registered;

(*b*) do anything necessary to give effect to decisions of the council;

(*c*) monitor and enforce collective agreements concluded in the council; and

(*d*) exercise and perform any power, function and duty that is conferred or imposed on the executive committee by or in terms of this constitution or that is delegated by the council to the executive committee. However, the council may not delegate to the executive committee the powers, functions and duties contemplated in clauses 4 (4) and (5), 6 (3), 16 and 17 and sub-clauses (3) and (6) of this clause, and the power of the council to delegate.

Note:-*Admission of parties.*

Various functions to be performed by the council at its annual general meeting.

Winding-up of council.

Changing council's constitution.

Election and appointment of additional members of the executive committee.

(3) At the annual general meeting, the council must elect the additional members of the executive committee and an alternate for each of them. The additional members and their alternates must be representatives in the council, and half of the additional members, as well as their alternates, must be nominated by the employer representatives in the council, whilst the other half of the additional members, as well as their alternates, must be nominated by the employee representatives in the council.

(4) (*a*) An additional member of the executive committee will hold office for 12 months and will be eligible for re-election at the end of that term.

(*b*) An additional member of the executive committee whose term of office has expired and who is not re-elected, may nevertheless continue to act as a member of the executive committee until that member's successor assumes office.

(5) An additional member of the executive committee-

(*a*) may resign from the committee at any time after having given at least 21 days' notice in writing to the secretary;

(*b*) must vacate office immediately-

(i) in the case of the resignation, when the resignation takes effect; or

(ii) upon ceasing to be a representative in the council.

(6) (*a*) If the seat of an additional member of the executive committee becomes vacant, the council must fill the vacancy from the number of the candidates nominated for that purpose by-

(i) the employer representatives in the council, if that seat had been held by an additional member representing the employers; or

(ii) the employee representatives in the council, if that seat had been held by an additional member representing employees.

(*b*) A member appointed to fill a vacant seat holds that seat for the unexpired portion of the predecessor's term of office.

(7) The executive committee must hold an ordinary meeting at least once every .....

(8) A special meeting of the executive committee-

(*a*) may be called at any time by the chairperson with a view to disposing of urgent business; and

(*b*) must be called by the chairperson within ..... days of receiving a request for that purpose, stating the purpose of the special meeting and signed by not less than ..... members of the executive committee.

(9) The secretary must prepare a written notice of every executive committee meeting showing the date, time and venue of the meeting and the business to be transacted, and must send the notice to each member of the committee by registered post at least ..... days before the date of the meeting. However, the chairperson may authorise shorter notice for a special meeting.

Note:-*There are no restrictions as to the kind of service. The constitution can stipulate any form of service e.g. service by hand, faxed transmission or electronic mail.*

(10) At least half of the members of the executive committee representing employers and half of the members of that committee representing employees form a quorum and must be present before a meeting may begin or continue.

(11) Each member of the executive committee has one vote on any matter before the committee for its decision. However, if at the meeting the members representing employers and those representing employees are not equal in number, the side that is in the majority must withdraw so many of its members from voting as may be necessary to ensure that the two sides are of equal numerical strength at the time of voting.

(12) In relation to any matter before the executive committee for its decision, the decision of a majority of those members of the executive committee who are present at the meeting and entitled to vote, will be the decision of the committee.

8. Other committees.-(1) The council may appoint other committees to perform any of its functions, including investigating and reporting to the council on any matter, but excluding the non-delegateable functions referred to in clause 7 (2) (*d*).

Note:-*For example, a council that has been established for two or more sectors, could appoint a sectoral committee for each sector to conclude collective agreements on matters specific to that sector.*

(2) (*a*) Half of the members of any committee so appointed must be nominated by the employer representatives, and the other half by the employee representatives.

(*b*) Subject to paragraph (*a*), committee members must be-

(i) employers or employees within the registered scope of the council;

(ii) office-bearers or officials of the parties to the council.

(3) A majority of the total number of the members of a committee forms a quorum and must be present before the meeting may begin or continue.

(4) The provisions of clause 7 relating to the calling and conduct of meetings, read with the changes required by the context, apply to meeting of any committee contemplated in this clause.

9. Chairperson and deputy chairperson.-(1) (*a*) At the annual general meeting, the council must elect a chairperson and deputy chairperson.

(*b*) Subject to sub-clauses (3) and (6) (*a*), the serving chairperson of the council at the time of the annual general meeting will be the chairperson of the meeting and preside over the election of the next chairperson.

(2) The chairperson of the meeting must call for nominations for the office of chairperson. A person will have been nominated if proposed by one and seconded by another representative in the council.

(3) If the serving chairperson is nominated for another term, the council, by a show of hands, must elect a

representative in the council to act as chairperson of the meeting during the election of the next chairperson.

(4) (*a*) If only one candidate is nominated, the candidate will be deemed to have been elected the new chairperson unopposed, and must be declared by the chairperson of the meeting to have been so elected.

(*b*) If two or more candidates are nominated, the chairperson of the meeting must conduct a vote by ballot, and must declare the candidate in whose favour the majority of the votes have been cast, to have been elected the new chairperson.

(5) If an equal number of votes are cast for two or more candidates, and no other candidate has drawn a higher number of votes than those candidates, the chairperson of the meeting will cause to be determined by lot which one of those candidates is to become the new chairperson.

(6) (*a*) Upon having been declared elected, the new chairperson must preside over the meeting and must call for nominations for the office of deputy chairperson.

(*b*) If the newly elected chairperson is an employer representative, only employee representatives may be nominated for deputy chairperson, and vice versa.

(*c*) The provisions of sub-clauses (2), (4) and (5), read with the changes required by the context, apply to the election of the deputy chairperson.

(7) (*a*) The chairperson and the deputy chairperson hold their respective offices until the next election of the chairperson or deputy chairperson (as the case may be) takes place, or, if the chairperson or deputy chairperson ceases to be a representative in the council on any date before that election, until that date. Each of them will be eligible for re-election if still a representative when their respective terms as chairperson and deputy chairperson expire.

(*b*) If the office of chairperson or deputy chairperson becomes vacant before the next election of the chairperson or deputy chairperson (as the case may be) the executive committee must elect a person as chairperson or deputy chairperson (as the case may be) to hold office until that next election.

(*c*) An election contemplated in paragraph (*b*) must be held in accordance with sub-clauses (2), (4), (5) and (6), read with the changes required by the context.

(8) The chairperson must preside over the meetings of the council, and must-

(*a*) sign the minutes of council meetings after those minutes have been confirmed;

(*b*) sign cheques drawn in the council's bank account; and

(*c*) perform any other functions and duties entrusted to the chairperson by this constitution as well as those that are generally associated with the office of a chairperson.

(9) The deputy chairperson must preside over meetings of the council and perform the function and duties of the chairperson whenever the chairperson is absent or for any reason unable to act or to perform those functions and duties.

(10) If both the chairperson and deputy chairperson are absent or unable to act or to perform the functions and duties of the chairperson, the council, by a show of hands, must elect from the representatives a person to act as chairperson and to perform those functions and duties.

(11) A chairperson or deputy chairperson who has not been elected from amongst the representatives in the council is not entitled to vote on any matter before the council or the executive committee.

(12) A chairperson or deputy chairperson may be removed from office by the council for serious neglect of duty, serious misconduct or due to incapacity.

10. Officials and employees.-(1) The council must appoint a secretary who will be responsible for the administrative and secretarial work arising from the functioning of the council and for performing the functions and duties imposed on the secretary by or in terms of the Act and this constitution. That work and those duties and functions include-

(*a*) to keep and maintain the books and records of account that the council may direct in order fully to reflect the financial transactions and state of affairs of the council;

(*b*) to attend all meetings of the council and its executive committee and record the minutes of the proceedings at those meetings;

(*c*) to conduct the correspondence of the council, keeping originals of letters received and copies of letters sent;

(*d*) at each meeting of the council, to read significant correspondence that has taken place since the previous meeting;

(*e*) to bank all moneys received on behalf of the council within three days of receipt;

(*f*) whenever required by the council, but at least once in every quarter of the financial year, to submit to the council statements of its financial affairs and position;

(*g*) to prepare, for submission at the annual general meeting of the council, a budget for the next financial year and an annual report summarising the key activities of the council; and

(*h*) to counter-sign cheques drawn on the council's bank account.

(2) The secretary must-

(*a*) retain a copy of the confirmed and signed minutes of every meeting of the council, the executive committee and any other committee of the council in safe custody at the office of the council for a period of at least three years from the date those minutes were confirmed;

(*b*) retain every financial statement referred to in sub-clause (1) (*f*), and all vouchers and records relating to statements of that nature, for at least three years from the date of the statement; and

(*c*) sign the certificates of appointment to be issued to the persons appointed by the Minister as designated agents of the council.

(3) The council may appoint any additional officials and any number of employees that may be necessary to assist the secretary in performing the functions and duties of that office.

(4) The council may request the Minister to appoint any number of persons as designated agents to help it enforce any collective agreement concluded in the council.

(5) Where there are two or more suitable candidates for appointment to the position of secretary or a designated agent, the council must elect the secretary or designated agent by conducting a ballot of the representatives present at the meeting at which the appointment is to be made, with the candidate receiving the highest number of votes being appointed.

(6) The secretary, designated agents and other officials and employees of the council must not be biased in favour of or prejudiced against any party in the performance of their respective functions.

11. Panels of conciliators and arbitrators.-(1) At its annual general meeting, the council must appoint-

(*a*) a panel of conciliators, consisting of ..... members, for the purpose of conciliating disputes; and

(*b*) a panel of arbitrators, consisting of ..... members, for the purpose of determining disputes.

(2) The council may remove a member of the panel of conciliators or arbitrators from office-

(*a*) for serious misconduct;

(*b*) due to incapacity; or

(*c*) if at least one half of the employer representatives in the council and at least one half of the employee representatives in the council have voted in favour of the removal of that member from office.

(3) If for any reason there is a vacancy in the panel of conciliators or the panel of arbitrators, the council may appoint a new member to the relevant panel for the unexpired portion of the predecessor's term of office.

(4) Unless the parties to a dispute have agreed on a member of the panel of conciliators or the panel of arbitrators to conciliate or arbitrate their dispute, the secretary must appoint a member of the relevant panel to conciliate or arbitrate the dispute.

(5) (*a*) A person may be appointed to both the panel of conciliators and the panel of arbitrators.

(*b*) A member of the panel of conciliators or the panel of arbitrators whose term of office expires, will be eligible for re-appointment to the relevant panel at the end of that term.

12. Disputes referred to council for conciliation.-(1) In this clause, a dispute means any dispute between any of the parties to the council that may be referred to a council in terms of the Act except a dispute contemplated in clause 14.

Note:-*A dispute about the interpretation or application of the provisions of Chapter II of the Act* (*see section 9*), *about the interpretation or application of the provisions of a collective agreement concluded in the council that could form the subject matter of proposed strike or lock-out* (*see section 64 (1)*), *in any case where the parties to the dispute are engaged in an essential service* (*see section 74*), *about an unfair dismissal* (*see section 191*), *about severance pay* (*see section 196*), *or about an unfair labour practice* (*see item 2 in Schedule 7*) *may be referred to a council in terms of the*

(2) For the purposes of sub-clause (1), a party to the council includes the members of any party to the council.

(3) Any party to a dispute may refer the dispute in writing to the council.

(4) The party who refers the dispute must satisfy the secretary that a copy of the referral has been served on all the other parties to the dispute.

(5) If satisfied that the referral has been served in compliance with sub-clause (4), the secretary-

(*a*) may, if there is a collective agreement binding on the parties to the dispute that provides for an alternative procedure for resolving disputes, refer the dispute for resolution in terms of that procedure; or

(*b*) must appoint a member of the panel of conciliators to attempt to resolve the dispute through conciliation.

(6) Nothing in this clause prevents an officer or an employee of the council investigating the dispute or attempting to conciliate the dispute before the appointment of a conciliator in terms of sub-clause (5) (*b*).

13. Disputes referred to council for arbitration.-(1) For the purpose of this clause, a dispute means any dispute between any of the parties to the council that-

(*a*) has been referred to a conciliator in terms of clause 12, but remains unresolved, and-

(i) the Act requires that the dispute be arbitrated and any party to the dispute has requested that the dispute be resolved through arbitration; or

Note:-*The Act requires councils to arbitrate the following types of disputes:* (*1*) *Unfair dismissal disputes if :* (*a*) *the reason is related to the employee's conduct or capacity.* (*This does not apply to an employee's participation in an unprotected strike*)*;* (*b*) *the reason is that the employer made continued employment intolerable; and* (*c*) *the employee does not know the reason for the dismissal.* (*See section 191 (5) (a) of the Act*).

(*2*) *Disputes about severance pay.* (*See section 196 of the Act*).

(*3*) *Unfair labour practice disputes, but excluding a dispute concerning unfair discrimination.* (*See item 2* (*1*) (*a*) *in Schedule 7 to the Act*).

(*4*) *Disputes in essential services as contemplated in section 74 (1) of the Act.*

(ii) all the parties to the dispute consent to arbitration; or

(*b*) it is a dispute about the interpretation or application of the provisions of this constitution.

(2) Any party to a dispute may request that the dispute be resolved through arbitration.

(3) The secretary must appoint a member of the panel of arbitrators to arbitrate the dispute.

(4) The arbitrator may conduct the arbitration in a manner that the arbitrator considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.

(5) The arbitration proceedings must be conducted in accordance with the provisions of sections 138 and 142 and, if applicable, sections 139, 140 and 141, of the Act, read with the changes required by the context.

14. Procedure for negotiation of collective agreements.-(1) Any party to the council may introduce proposals for the conclusion of a collective agreement in the council.

(2) The proposals must be submitted to the secretary in writing and must identify the other parties to the proposed agreement.

(3) Within seven days of submission of the proposals, the secretary must serve copies of the proposals on the other parties to the council.

(4) Within 21 days of submission of the proposals, the chairperson must call a special meeting of the executive committee to consider the proposals and decide on a process for negotiating the proposals, including-

(*a*) the introduction of counter-proposals;

(*b*) whether the negotiations should be conducted by the council, the executive committee or any other committee of the council;

(*c*) the appointment of a conciliator from the panel of conciliators to facilitate the negotiations; and

(*d*) the timetable for the negotiations.

(5) If no negotiation process is agreed-

(*a*) the secretary must appoint a conciliator from the panel or conciliators to facilitate negotiations and the conclusion of a collective agreement;

(*b*) the council must meet at least twice within 30 days of the meeting of the executive committee to negotiate on the proposals and any counter-proposals, unless a collective agreement has been concluded;

(*c*) the conciliator must facilitate the negotiations at those meetings and the conclusion of a collective agreement.

(6) If no collective agreement is concluded in the course of a process or procedure contemplated in this clause,-

(*a*) the parties to the council may-

(i) agree to refer the dispute to arbitration; or

(ii) resort to a strike or a lock-out that conforms with the provisions of Chapter IV of the Act; or

(*b*) Any party to the dispute whose members are engaged in an essential service may request that the dispute in respect of the employers and employees engaged in that service be resolved through arbitration.

(7) In the circumstances contemplated in sub-clause (6) (*a*) (i) or (*b*), the secretary must appoint a member of the panel of arbitrators to arbitrate the dispute.

(8) The provisions of clause 13 (4) and (5) will apply to arbitration proceedings conducted in terms of this clause.

(9) (*a*) During the strike or lock-out the parties to the dispute must attend every meeting convened by the conciliator to resolve the dispute.

(*b*) If any party to the dispute fails to attend, without good cause, a meeting so convened, the members of that party-

(i) if they participate in a strike, will forfeit the protection they would have enjoyed in terms of section 67 of the Act;

(ii) if they are engaged in a lock-out, will forfeit the protection they would have enjoyed in terms of section 67 of the Act.

15. Finances.-(1) The council may raise funds by charging a levy on employees and employers within the registered scope of the council.

(2) The council must open and maintain an account in its name with a bank of its choice that is registered in the Republic, and-

(*a*) deposit all moneys it receives in that account within three days of receipt; and

(*b*) pay the expenses of and make all payments on behalf of the council by cheques drawn on that account.

(3) The council may invest any surplus funds not immediately required for current expenditure or contingencies, in-

(*a*) savings accounts, permanent shares or fixed deposits in any registered bank or financial institution;

(*b*) internal registered stock as contemplated in section 21 of the Exchequer Act, 1975 (Act No. 66 of 1975);

(*c*) a registered unit trust;

(*d*) any other manner approved by the registrar.

(4) All payments from the council's funds must be-

(*a*) approved by the council; and

(*b*) made by cheques drawn on the council's bank account and signed by the chairperson or deputy chairperson and counter-signed by the secretary. However, the council, by special resolution, may authorise any representative in the council, official or employee of the council to sign or counter-sign cheques drawn on the council's bank account in the event of both the chairperson and the deputy

chairperson or the secretary not being readily available for that purpose.

(5) (*a*) Despite sub-clause (4), the council may maintain a petty cash account, out of which the secretary may make cash payments not exceeding R ..... at any one occasion.

(*b*) Funds required for the petty cash account may be transferred to that account only by drawing a cheque issued and signed in the manner required by sub-clause (4).

(*c*) Except with the approval of the council, cheques drawn to transfer funds to petty cash may not exceed R ..... per month in aggregate.

(*d*) The council may determine the form of the records to be kept for the petty cash account.

(6) At the end of each quarter of the financial year, the secretary must prepare a statement showing the income and expenditure of the council for that quarter, and another reflecting its assets, liabilities and financial position as at the end of that period.

(7) The financial year of the council begins on 1 ..... in each year and ends on ..... of the following year, except the first financial year, which begins on the day that the council is registered and ends on .....

(8) Not later than ..... after the end of the financial year, the secretary must prepare a statement of the council's financial activity in respect of that financial year, showing-

(*a*) all moneys received for the council-

(i) in terms of any collective agreement published in terms of the Act; and

(ii) from any other sources;

(*b*) expenditure incurred on behalf of the council, under the following heads-

(i) remuneration and allowances of officials and employees;

(ii) amounts paid to representatives and alternates in respect of their attendance at meetings, the travelling and subsistence expenses incurred by them, and the salary or wage deducted or not received by them due to their absence from work by reason of their involvement with the council;

(iii) remuneration and allowances of members of the panel of conciliators and arbitrators;

(iv) office accommodation;

(v) printing and stationery requirements; and

(vi) miscellaneous operating expenditure; and

(*c*) the council's assets, liabilities and financial position as at the end of that financial year.

(9) (*a*) The annual financial statements must be signed by the secretary and counter-signed by the chairperson, and submitted to an auditor for auditing and preparing a report to the council.

(*b*) Certified copies of the audited statements and the auditor's report must be made available for inspection at the office of the council to members and representatives of the parties, who are entitled to make copies of those statements and the auditor's report.

(*c*) The secretary must send certified copies of the audited financial statements and the auditor's report to the registrar within 30 days of receipt thereof.

(10) Every year the secretary must prepare, for submission at the annual general meeting of the council, a budget for the council for the next financial year.

(11) At the annual general meeting the council must appoint an auditor to perform the audit of the council for the next financial year.

16. Winding-up.-(1) At a special meeting called for that purpose, the council, by resolution adopted by a majority of the total number of representatives in the council, may decide to be wound up.

(2) Upon adoption of a resolution to wind-up, the secretary must take the necessary steps to ensure that-

(*a*) application is immediately made to the Labour Court for an order giving effect to that resolution; and

(*b*) the council's books and records of account and an inventory of its assets, including funds and investments, are delivered to the liquidator appointed by the Labour Court, and that whatever may be necessary is done to place the assets, funds and investments of the council at the disposal and under the control of that liquidator.

(3) Each party to the council remains liable for any of its unpaid liabilities to the council as at the adoption of a resolution to wind-up the council.

(4) If all the liabilities of the council have been discharged, the council must transfer any remaining assets to-

(*a*) a bargaining council within the same or a similar sector, that has been agreed upon at the special meeting referred to in sub-clause (1);

(*b*) the Commission, if-

(i) there is no bargaining council within the same or a similar sector; or

(ii) the parties to the council fail to agree on a bargaining council that is to receive the remaining assets.

17. Changing constitution.-(1) The council may change this constitution at any time-

(*a*) by a resolution adopted by unanimous vote of all the representatives in the council on a motion to amend tabled without prior notice; or

(*b*) by a resolution adopted by at least two-thirds of all the representatives in the council after at least-

(i) one month's notice of that motion to amend had been given to the secretary; and

(ii) two weeks' notice of that motion had been given to all the other representatives.

(2) Any amendment to this constitution becomes effective after the resolution effecting that amendment has been certified by the registrar in terms of section 57 (3) of the Act.

18. Necessary first steps.-(1) With a view to making the council operative and functional without delay, the provisions contained in the Annexure to this constitution will apply and must be read as one with this constitution until the requirements and procedures contemplated in those provisions have been complied with.

(2) Any act performed in compliance with the provisions contained in the Annexure will be deemed to have been performed in terms of and in accordance with this constitution.

19. Definitions.-In this constitution, any expression that is defined in the Act has that meaning and unless the context otherwise indicates-

"chairperson" means the chairperson of the council who, by virtue of that office, is also the chairperson of the executive committee;

"deputy chairperson" means the deputy chairperson of the council who, by virtue of that office, is also the deputy chairperson of the executive committee;

"executive committee" means the executive committee of the council; contemplated in clause 7;

"Minister" means the Minister of Labour;

"secretary" means the secretary of the council; and

"the Act" means the Labour Relations Act, 1995 (Act No. 66 of 1995).

ANNEXURE

Necessary First Steps to be Followed by Council.

1. At the first meeting of the council, which will be held

.....

.....

Note:-*State the date on which, or specify the period after the occurrence of a particular event* (*e.g. registration of the Council*)*, on expiry of which the meeting must be held, as well as the time and venue of the meeting.*

(*a*) the council, by a show of hands, must select a suitable person to act as chairperson of that meeting, subject to paragraph (*c*), as well as another to keep the minutes of the meeting;

(*b*) the council must elect the chairperson and the deputy chairperson and the additional members of the executive committee in the manner set out in clauses 9 and 7 respectively, read with the changes required by the context;

(*c*) the newly elected chairperson of the council must take over the chair at that meeting;

(*d*) the council must appoint the officials contemplated in clause 6 (3) (*c*), (*d*) and (*e*); and

(*e*) the council must appoint an auditor to perform the audit of the council in respect of its first financial

year.

2. The secretary, in the manner contemplated in clause 10 (1) (*g*), must as soon as possible prepare, for submission at the next ordinary meeting of the council, a budget for the council for its first financial year.

[**NOTE:** *According to the above model constitution, the council's certificate of registration is, upon receipt, to be attached to its constitution* (*see clause 2*). *If not so attached, the constitution of a council following the model will be incomplete*.]

Schedule 10

POWERS OF DESIGNATED AGENT OF BARGAINING COUNCIL

[Schedule 10 added by Government Notice No. R.1865 of 15 November 1996 and substituted by s. 57 of Act No. 12 of 2002.]

(Section 33)

(1) A designated agent may, without warrant or notice at any reasonable time, enter any *workplace* or any other place where an employer carries on business or keeps employment records, that is not a home, in order to monitor or enforce compliance with a *collective agreement* concluded in the *bargaining council*.

(2) A designated agent may only enter a home or any place other than a place referred to in subitem (1)-

(*a*) with the consent of the owner or occupier; or

(*b*) if authorised to do so by the Labour Court in terms of subitem (3);

(3) The Labour Court may issue an authorisation contemplated in subitem (2) (*b*) only on written application by a designated agent who states under oath or affirmation the reasons for the need to enter a place, in order to monitor or enforce compliance with a *collective agreement* concluded in the *bargaining council*.

(4) If it is practicable to do so, the employer and a *trade union* representative must be notified that the designated agent is present at a *workplace* and of the reason for the designated agent's presence.

(5) In order to monitor or enforce compliance with a *collective agreement* a designated agent may-

(*a*) require a person to disclose information, either orally or in writing, and either alone or in the presence of witnesses, on a matter to which a *collective agreement* relates, and require that disclosure to be under oath or affirmation;

(*b*) inspect and question a person about any record or document to which a *collective agreement* relates;

(*c*) copy any record or document referred to in paragraph (*b*) or remove these to make copies or extracts;

(*d*) require a person to produce or deliver to a place specified by the designated agent any record or document referred to in paragraph (*b*) for inspection;

(*e*) inspect, question a person about, and if necessary remove, an article, substance or machinery present at a place referred to in subitems (1) and (2);

(*f*) question a person about any work performed; and

(*g*) perform any other prescribed function necessary for monitoring or enforcing compliance with a *collective agreement*.

(6) A designated agent may be accompanied by an interpreter and any other person reasonably required to assist in conducting an inspection.

(7) A designated agent must-

(*a*) produce on request a copy of the authorisation referred to in subitem (3);

(*b*) provide a receipt for any record or document removed in terms of subitem (5) (*e*); and

(*c*) return any removed record, document or item within a reasonable time.

(8) Any person who is questioned by a designated agent in terms of subitem (5) must answer all questions lawfully put to that person truthfully and to the best of that person's ability.

(9) An answer by any person to a question by a designated agent in terms of this item may not be used against that person in any criminal proceedings, except proceedings in respect of a charge of perjury or making a false statement.

(10) Every employer and each *employee* must provide any facility and assistance at a *workplace* that is

reasonably required by a designated agent to effectively perform the designated agent's functions.

(11) The *bargaining council* may apply to the Labour Court for an appropriate order against any person who-

(*a*) refuses or fails to answer all questions lawfully put to that person truthfully and to the best of that person's ability;

(*b*) refuses or fails to comply with any requirement of the designated agent in terms of this item; or

(*c*) hinders the designated agent in the performance of the agent's functions in terms of this item.

(12) For the purposes of this Schedule, a *collective agreement* is deemed to include any basic condition of employment which constitutes a term of a contract of employment in terms of section 49 (1) of the *Basic Conditions of Employment Act*.

MINE HEALTH AND SAFETY ACT
NO. 29 OF 1996

[View Regulation]

[ASSENTED TO 30 MAY, 1996]
[DATE OF COMMENCEMENT: 15 JANUARY, 1997]

(Unless otherwise indicated)

(English text signed by the President)

This Act has been updated to *Government Gazette* 32226 dated 12 May, 2009.

as amended by

Mine Health and Safety Amendment Act, No. 72 of 1997

Skills Development Amendment Act, No. 31 of 2003
[with effect from 14 November, 2003]

Mineral and Petroleum Resources Development Act, No. 28 of 2002

Mine Health and Safety Amendment Act, No. 74 of 2008

Mine Health and Safety Amendment Act, No. 74 of 2008 (provisions mentioned below not yet proclaimed)	
Proposed amendment by	*Section to be amended*
S. 16 of Act No. 74 of 2008	S. 50 of Act No. 29 of 1996
S. 26 of Act No. 74 of 2008	Inserts s. 86A in Act No. 29 of 1996

GENERAL NOTE

In terms of s. 47 of Act No. 72 of 1997, the expressions in the principal Act are amended by-

(*a*) the substitution for the expression "*Chief Inspector*", of the expression "*Chief Inspector of Mines*";

(*b*) the substitution for the expression "*Government Gazette*", of the expression "*Gazette*";

(*c*) the substitution for the expressions "*owner*", "*owner* or an *employer*", "*owner* or *manager*", "*owner* or the *employer*", "*owner*, *manager*", "management" and "an *owner* or *employer*", of the expression "*employer*";

(*d*) the substitution for the expressions "*owners*" and "*owners*, *employers* and *managers*", of the expression "*employers*";

(*e*) the substitution for the expression "*manager*", except in sections 3 and 4, of the expression "*employer*";

(*f*) the substitution for the expression "a *manager*", except in sections 3 and 4, of the expression "an *employer*"; and

(*g*) the substitution for the expression "*managers,* ", except in sections 3 and 4 of the expression "*employers*, ".

In terms of s. 34 of Act No. 74 of 2008, the expressions in the principal Act are amended by-

(*a*) the substitution for the expression "*permanent committee(s)*", of the expression "*committee(s)*";

(*b*) the substitution for the expression "*Minerals Act*", of the expression "*Mineral and Petroleum Resources Development Act, 2002*".

ACT

To provide for protection of the health and safety of employees and other persons at mines and, for that purpose-

to promote a culture of health and safety;

to provide for the enforcement of health and safety measures;

to provide for appropriate systems of employee, employer and State participation in health and safety matters;

to establish representative tripartite institutions to review legislation, promote health and enhance properly targeted research;

to provide for effective monitoring systems and inspections, investigations and inquiries to improve health and safety;

to promote training and human resources development;

to regulate employers' and employees' duties to identify hazards and eliminate, control and minimise the risk to health and safety;

to entrench the right to refuse to work in dangerous conditions; and

to give effect to the public international law obligations of the Republic relating to mining health and safety;

and to provide for matters connected therewith.

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[An italicised word or phrase indicates that the word or phrase is defined in section 102 of this Act.]

CHAPTER 1
OBJECTS OF ACT

1. Objects of Act.-The objects of *this Act* are-

(*a*) to protect the *health* and *safety* of persons at *mines*;

(*b*) to require *employers* and *employees* to identify *hazards* and eliminate, control and minimise the *risks* relating to *health* and *safety* at *mines*;

(*c*) to give effect to the public international law obligations of the Republic that concern *health* and *safety* at *mines*;

(*d*) to provide for *employee* participation in matters of *health* and *safety* through *health and safety representatives* and the *health and safety committees* at *mines*;

(*e*) to provide for effective monitoring of *health* and *safety* conditions at *mines*;

(*f*) to provide for enforcement of *health* and *safety* measures at *mines*;

(*g*) to provide for investigations and inquiries to improve *health* and *safety* at *mines*; and

(*h*) to promote-

(i) a culture of *health* and *safety* in the mining industry;

(ii) training in *health* and *safety* in the mining industry; and

(iii) co-operation and consultation on *health* and *safety* between the State, *employers*, *employees* and their representatives.

CHAPTER 2
HEALTH AND SAFETY AT MINES

2. Employer to ensure safety.-(1) The *employer* of every *mine* that is being worked must-

(*a*) ensure, as far as *reasonably practicable*, that the *mine* is designed, constructed and equipped-

(i) to provide conditions for safe operation and a *healthy* working environment; and

(ii) with a communication system and with electrical, mechanical and other equipment as necessary to achieve those conditions;

(*b*) ensure, as far as *reasonably practicable*, that the *mine* is commissioned, operated, maintained and decommissioned in such a way that *employees* can perform their work without endangering the *health* and *safety* of themselves or of any other person;

(*c*) compile an annual report on *health* and *safety* at the *mine* including the statistics on *health* and *safety* that must be kept in terms of *this Act* and the annual medical report referred to in section 16; and

(*d*) if the *employer* is a body corporate, and employs more than 50 *employees*, publish and distribute the report referred to in paragraph (*c*), in an appropriate form, to the body corporate's shareholders or members.

[Para. (*d*) substituted by s. 1 of Act No. 72 of 1997.]

(2) The *employer* of a *mine* that is not being worked, but in respect of which a closure certificate in terms of the *Mineral and Petroleum Resources and Development Act* has not been issued, must take reasonable steps to continuously prevent injuries, ill-health, loss of life or damage of any kind from occurring at or because of the *mine.*

[Sub-s. (2) substituted by s. 1 of Act No. 74 of 2008.]

Wording of Sections

2A. Chief executive officer charged with certain functions.-(1) Every *chief executive officer* must take reasonable steps to ensure that the functions of the *employer* as contemplated in *this Act*, are properly performed.

(2) Without derogating from any responsibility or liability of the *chief executive officer* in terms of subsection (1), the *chief executive officer* may entrust any function contemplated in the said subsection to any person under the control of the *chief executive officer*, which person must act subject to the control and directions of the *chief executive officer*.

(3) If the *employer* is a body corporate, the functions of the *chief executive officer* contemplated in subsections (1) and (2) may be performed by a member of the board of the body corporate designated by the board.

(4) Subsections (1), (2) and (3) do not relieve an *employer* of any duty imposed on *employers* by *this Act*.

(5) Every person appointed in terms of section 3 or 4 (1) must perform their functions subject to the control and direction of the *chief executive officer* or the person contemplated in subsection (3).

(6) (*a*) The *employer* must inform the *Chief Inspector of Mines,* in writing, within seven days of the appointment of the *chief executive officer.*

(*b*) The information to the *Chief Inspector of Mines* include-

(i) the name of the chief executive officer;

(ii) the nature of such person's function; and

(iii) the name of persons who are *managers* under the supervision of the *chief executive officer.*

[S. 2A inserted by s. 2 of Act No. 72 of 1997. Sub-s. (6) added by s. 2 of Act No. 74 of 2008.]

3. Employer must appoint manager.-(1) The *employer* of every *mine* that is being worked must-

(*a*) appoint one or more *managers* with the qualifications as may be *prescribed* to be responsible for the day to day management and operation of the *mine*, and if more than one *manager* is appointed, ensure that the *managers*' functions do not overlap;

[Para. (*a*) substituted by s. 3 of Act No. 72 of 1997.]

Wording of Sections

(*b*) supply the *managers* with the means to perform their functions; and

(*c*) take reasonable steps to ensure that the *managers* perform their functions.

(2) The appointment of a *manager* does not relieve the *employer* of any duty imposed on *employers* by *this Act* or any other law.

(3) If no *manager is* appointed in terms of subsection (1), the *employer* must perform the functions of a *manager* in terms of *this Act.*

4. Employer may entrust functions to another person.-(1) An *employer* may appoint any person except a *manager* to perform any function entrusted to the *employer* by sections 2 and 3 of *this Act*.

[Sub-s. (1) substituted by s. 4 of Act No. 72 of 1997.]

Wording of Sections

(2) An *employer* who appoints a person under subsection (1) must notify the *Chief Inspector of Mines* of that appointment within seven days, and must include in that notice-

(*a*) the name of the person appointed;

(*b*) the nature of the person's functions; and

(*c*) the names of the *manager* or *managers* over whom that person has control.

(3) An *employer* who appoints a person under subsection (1) must-

(*a*) supply each person appointed with the means to perform their functions; and

(*b*) take reasonable steps to ensure that they perform their functions.

(4) The appointment of a person under subsection (1) does not relieve the *employer* of any duty imposed on *employers* by *this Act* or any other law.

5. Employer to maintain healthy and safe mine environment.-(1) As far as *reasonably practicable*, every *employer* must provide and maintain a working environment that is safe and without *risk* to the *health* of *employees*.

(2) As far as *reasonably practicable*, every *employer* must-

(*a*) identify the relevant *hazards* and assess the related *risks* to which persons who are not *employees* may be exposed; and

(*b*) ensure that persons who are not *employees*, but who may be directly affected by the activities at the *mine*, are not exposed to any *hazards* to their health and safety.

[S. 5 substituted by s. 5 of Act No. 72 of 1997.]

Wording of Sections

6. Employer to ensure adequate supply of health and safety equipment.-(1) Every *employer* must-

(*a*) supply all necessary *health and safety equipment* and *health and safety* facilities to each *employee*; and

(*b*) maintain, as far as *reasonably practicable*, that equipment and those facilities in a serviceable and hygienic condition.

[Sub-s. (1) substituted by s. 6 (*a*) of Act No. 72 of 1997.]

Wording of Sections

(2) Every *employer* must ensure that sufficient quantities of all necessary personal protective equipment are available so that every *employee* who is required to use that equipment is able to do so.

(3) Every *employer* must take reasonable steps to ensure that all *employees* who are required to use personal protective equipment are instructed in the proper use, the limitations and the appropriate maintenance of that equipment.

[Sub-s. (3) substituted by s. 6 (*b*) of Act No. 72 of 1997.]

Wording of Sections

7. Employer to staff mine with due regard to health and safety.-(1) As far as *reasonably practicable*, every *employer* must-

(*a*) ensure that every *employee* complies with the requirements of *this Act*;

(*b*) institute the measures necessary to secure, maintain and enhance *health* and *safety*;

(*c*) provide persons appointed under subsections (2) and (4) with the means to comply with the requirements of *this Act* and with any instruction given by an *inspector*;

[Para. (*c*) substituted by s. 7 (*b*) of Act No. 72 of 1997.]

Wording of Sections

(*d*) consider an *employee's* training and capabilities in respect of *health* and *safety* before assigning a task to that *employee*; and

(*e*) ensure that work is performed under the general supervision of a person trained to understand the *hazards* associated with the work and who has the authority to ensure that the precautionary measures laid down by the *employer* are implemented.

[Sub-s. (1) amended by s. 7 (*a*) of Act No. 72 of 1997.]

Wording of Sections

(2) The *employer* may appoint any person with qualifications as may be *prescribed* to perform any function of the *employer* in terms of *this Act*.

[Sub-s. (2) substituted by s. 7 (*c*) of Act No. 72 of 1997.]

Wording of Sections

(3) The appointment of a person under subsection (2) does not relieve the *employer* of any duty imposed on *employers* by *this Act.*

(4) A *manager* may appoint any person with qualifications as may be *prescribed* to perform any function of the *manager* in terms of *this Act*.

[Sub-s. (4) added by s. 7 (*d*) of Act No. 72 of 1997.]

(5) The appointment of a person under subsection (4) does not relieve the *manager* of any duty imposed on *managers* by *this Act*.

[Sub-s. (5) added by s. 7 (*d*) of Act No. 72 of 1997.]

8. Employer must establish health and safety policy.-(1) Every *employer* must prepare a document that-

(*a*) describes the organisation of work;

(*b*) establishes a policy concerning the protection of *employees*' *health* and *safety* at work;

(*c*) establishes a policy concerning the protection of persons who are not *employees* but who may be directly affected by the activities at the *mine*; and

[Para. (*c*) substituted by s. 8 of Act No. 72 of 1997.]

Wording of Sections

(*d*) outlines the arrangements for carrying out and reviewing policies.

(2) The *employer* must consult with the *health and safety committee* on the preparation or revision of the document and policies referred to in subsection (1).

(3) The *employer* must-

(*a*) prominently and conspicuously display a copy of the document referred to in subsection (1) for *employees* to read; and

(*b*) give each *health and safety representative* a copy of the document.

9. Codes of practice.-(1) Any *employer* may prepare and implement a code of practice on any matter affecting the *health* or *safety* of *employees* and other persons who may be directly affected by activities at the *mine.*

(2) An *employer* must prepare and implement a code of practice on any matter affecting the *health* or *safety* of *employees* and other persons who may be directly affected by activities at the *mine* if the *Chief Inspector of Mines* requires it.

(3) A code of practice required by the *Chief Inspector of Mines* must comply with guidelines issued by the *Chief Inspector of Mines.*

(4) The *employer* must consult with the *health and safety committee* on the preparation, implementation or revision of any code of practice.

(5) The *employer* must deliver a copy of every code of practice prepared in terms of subsection (2) to the *Chief Inspector of Mines.*

(6) The *Chief Inspector of Mines* must review a code of practice of a *mine* if requested to do so by a *registered trade union* with members at the *mine*, or a *health and safety committee* or a *health and safety representative* at the *mine*.

(7) At any time, an *inspector* may instruct *an employer* to review any code of practice within a specified period if that code of practice-

(*a*) does not comply with a guideline of the *Chief Inspector of Mines*; or

(*b*) is inadequate to protect the *health* or *safety* of *employees.*

10. Employer to provide health and safety training.-(1) As far as *reasonably practicable*, every *employer* must-

(*a*) provide *employees* with any information, instruction, training or supervision that is necessary to enable them to perform their work safely and without *risk* to *health*; and

(*b*) ensure that every *employee* becomes familiar with work-related *hazards* and *risks* and the measures that must be taken to eliminate, control and minimise those *hazards* and *risks.*

(2) As far as *reasonably practicable*, every *employer* must ensure that every *employee* is properly trained-

(*a*) to deal with every *risk* to the *employee*'s *health* or *safety* that-

(i) is associated with any work that the *employee* has to perform; and

(ii) has been recorded in terms of section 11;

(*b*) in the measures necessary to eliminate, control and minimise those *risks* to *health* or *safety*;

(*c*) in the procedures to be followed to perform that *employee*'s work; and

(*d*) in relevant emergency procedures.

(3) In respect of every *employee*, the provisions of subsection (2) must be complied with-

(*a*) before that *employee* first starts work;

(*b*) at intervals determined by the *employer* after consulting the *health and safety committee*;

(*c*) before significant changes are introduced to procedures, mining and ventilation lay-outs, mining methods, plant or equipment and material; and

(*d*) before significant changes are made to the nature of that *employee*'s occupation or work.

(4) The *employer* must keep a record of all formal training provided in respect of each *employee* in terms of subsection (2).

[Sub-s. (4) added by s. 3 of Act No. 74 of 2008.]

(5) All *mines* must submit a workplace skills plan and the annual training reports to the Mining Qualifications Authority.

[Sub-s. (5) added by s. 3 of Act No. 74 of 2008.]

11. Employer to assess and respond to risk.-(1) Every *employer* must-

(*a*) identify the *hazards* to *health* or *safety* to which *employees* may be exposed while they are at work;

(*b*) assess the *risks* to *health* or *safety* to which *employees* may be exposed while they are at work;

(*c*) record the significant *hazards* identified and *risks* assessed; and

(*d*) make those *records* available for inspection by *employees*.

(2) Every *employer*, after consulting the *health and safety committee* at the *mine*, must determine all measures, including changing the organisation of work and the design of safe systems of work, necessary to-

(*a*) eliminate any recorded *risk*;

(*b*) control the *risk* at source;

(*c*) minimise the *risk*; and

(*d*) in so far as the *risk* remains-

(i) provide for personal protective equipment; and

(ii) institute a programme to monitor the *risk* to which *employees* may be exposed.

(3) Every *employer* must, as far as *reasonably practicable*, implement the measures determined necessary in terms of subsection (2) in the order in which the measures are listed in the paragraphs of that subsection.

(4) Every *employer* must-

(*a*) periodically review the *hazards* identified and *risks* assessed, including the results of *occupational hygiene* measurements and *medical surveillance*, to determine whether further elimination, control and minimisation of *risk* is possible; and

(*b*) consult with the *health and safety committee* on the review.

(5) Every *employer* must-

(*a*) conduct an investigation into every-

(i) accident that must be reported in terms of *this Act*;

(ii) *serious illness*; and

(iii) *health-threatening occurrence*;

(*a*A) commence an investigation referred to in paragraph (*a*) within 10 days from the date of such accident, *serious illness* or *health-threatening occurrence*;

[Para. (*a*A) inserted by s. 4 (*a*) of Act No. 74 of 2008.]

(*b*) consult the *health and safety committee* on investigations in terms of this section;

(*c*) conduct an investigation in co-operation with the *health and safety representative* responsible for the *working place* in which the investigation takes place;

(*d*) on completion of each investigation, prepare a report that-

(i) identifies the causes and the underlying causes of the accident, *serious illness* or *health-threatening occurrence*;

[Sub-para. (i) substituted by s. 4 (*b*) of Act No. 74 of 2008.]

Wording of Sections

(ii) identifies any unsafe conditions, acts, or procedures that contributed in any manner to the accident, *serious illness* or *health-threatening occurrence*; and

(iii) makes recommendations to prevent a similar accident, *serious illness* or *health-threatening occurrence*; and

(*e*) deliver a copy of the report referred to in paragraph (*d*) within 30 days from the date of the accident, *serious illness* or *health-threatening occurrence* being investigated to the *Principal Inspector of Mines* and the *health and safety committee.* If there is no *health and safety committee* the *employer* must deliver a copy of the report to the *health and safety representative* responsible for the *working place.*

[Para. (*e*) substituted by s. 4 (*c*) of Act No. 74 of 2008.]

Wording of Sections

(5A) An investigation in terms of subsection (5) must be completed within 30 days after the accident, *serious illness* or *health-threatening occurrence* being investigated or such longer period as the *Principal Inspector of Mines* may permit.

[Sub-s. (5A) inserted by s. 4 (*d*) of Act No. 74 of 2008.]

(5B) The *employer* must notify the *Principal Inspector of Mines* of any accident or occurrence at a mine that results in-

(*a*) the serious injury;

(*b*) illness; or

(*c*) death,

of any person, in order to allow the *Principal Inspector of Mines* to instruct an *Inspector* to conduct an investigation simultaneously with the *employer* as required in section 11 (5) (*a*).

[Sub-s. (5B) inserted by s. 4 (*d*) of Act No. 74 of 2008.]

(6) An investigation referred to in subsection (5) may be held jointly with an investigation conducted by an *inspector* in terms of section 60.

(7) If there is no *health and safety committee* at a *mine*, the consultations required in this section must be held with-

(*a*) the *health and safety representatives*; or

(*b*) if there is no *health and safety representative* at the *mine*, with the *employees.*

(8) In the event of an incident in which a person died, or was injured to such an extent that he or she is likely to die, or suffered the loss of a limb or part of a limb, no person may without the consent of the *Principal Inspector of Mines* disturb the site at which the incident occurred or remove any article or substance involved in the incident: Provided that an article or substance may only be removed if it is necessary to-

(*a*) prevent any further incident;

(*b*) remove the injured or dead; or

(*c*) rescue any person from danger.

[Sub-s. (8) added by s. 4 (*e*) of Act No. 74 of 2008.]

12. Employer to conduct occupational hygiene measurements.-(1) The *employer* must engage the part-time

or full-time services of a person qualified in *occupational hygiene* techniques to measure levels of exposure to *hazards* at the *mine*-

(*a*) if required to do so by *regulation* or a notice in the *Gazette*; or

(*b*) if, after assessing *risks* in terms of section 11 (1), it is necessary to do so.

(2) Every system of *occupational hygiene* measurements must-

(*a*) be appropriate, considering the *hazards* to which the *employees* are or may be exposed; and

(*b*) be designed so that it provides information that the *employer* can use in determining measures to eliminate, control and minimise the *health risks* and *hazards* to which *employees* are or may be exposed.

(3) The *employer* must keep a *record* of all *occupational hygiene* measurements in terms of subsection (1) in a manner that can be linked as far as practicable to each *employee's record of medical surveillance.*

13. Employer to establish system of medical surveillance.-(1) The *employer* must establish and maintain a system of *medical surveillance* of *employees* exposed to *health hazards*-

(*a*) if required to do so by *regulation* or a notice in the *Gazette*; or

(*b*) if, after assessing *risks* in terms of section 11 (1), it is necessary to do so.

(2) Every system of *medical surveillance* must-

(*a*) be appropriate, considering the *health hazards* to which the *employees* are or may be exposed;

(*b*) be designed so that it provides information that the *employer* can use in determining measures to-

(i) eliminate, control and minimise the *health risk* and *hazards* to which employees are or may be exposed; or

(ii) prevent, detect and treat *occupational diseases*; and

(*c*) consist of an initial medical examination and other medical examinations at appropriate intervals.

(3) Every *employer* who establishes or maintains a system of *medical surveillance* must-

(*a*) engage the part-time or full-time services of-

(i) an *occupational medical practitioner*; and

(ii) . . . . . .

[Sub-para. (ii) deleted by s. 5 (*a*) of Act No. 74 of 2008.]

Wording of Sections

(*b*) supply the practitioners with the means to perform their functions; and

(*c*) keep a *record of medical surveillance* for each *employee* exposed to a *health hazard.*

(4) . . . . . .

[Sub-s. (4) deleted by s. 5 (*b*) of Act No. 74 of 2008.]

Wording of Sections

(4A) The *employer* must inform the *Principal Inspector of Mines*, in writing, within seven days of the appointment of the *occupational medical practitioner*.

[Sub-s. (4A) inserted by s. 5 (*c*) of Act No. 74 of 2008.]

(4B) The information submitted in terms of subsection (4A) must include-

(*a*) the name of a *occupational medical practitioner*;

(*b*) his or her practice number; and

(*c*) whether the occupational medical practitioner is engaged full time or part time.

[Sub-s. (4B) inserted by s. 5 (*c*) of Act No. 74 of 2008.]

(5) An *occupational medical practitioner* must take every measure that is *reasonably practicable* to-

(*a*) promote the *health* and *safety* of *employees* at the *mine*; and

(*b*) assist *employees* in matters related to *occupational medicine.*

(6) If any *employee* is declared unfit to perform work as a result of an *occupational disease,* the *employer* must conduct an investigation in terms of section 11 (5).

(7) If an *employee* is temporarily unfit to perform work as a result of any *occupational disease*, but there is a reasonable expectation that the *employee's health* will improve so that the *employee* can return to work, the *occupational medical practitioner* must record that fact and notify both the *employer* and *employee* of it.

(8) The *employer* must-

(*a*) retain the *records* referred to in sections 12 (3), 13 (3) (*c*) and 14 (1) until the *mine* closes; and

(*b*) when the *mine* closes, deliver those *records* to the *Medical Inspector*.

14. Record of hazardous work.-(1) The *employer* at every *mine* must keep a service *record*, in the *prescribed* form, of *employees* at the *mine* who perform work in respect of which *medical surveillance* is conducted in terms of section 13.

(2) The *employer* must deliver to the *Medical Inspector* a copy of the relevant part of the *record* kept in terms of subsection (1)-

(*a*) when an *employee* whose name appears in that *record* ceases to be employed at that *mine*; or

(*b*) when required to do so by the *Chief Inspector of Mines.*

15. Record of medical surveillance.-(1) An *employee's record of medical surveillance* kept in terms of section 13 (3) (*c*) must be kept confidential and may be made available only-

(*a*) in accordance with the ethics of medical practice;

(*b*) if required by law or court order; or

(*c*) if the *employee* has consented, in writing, to the release of that information.

(2) Any person required to maintain an *employee's record of medical surveillance* must-

(*a*) store it safely; and

(*b*) not destroy it or dispose of it, or allow it to be destroyed or disposed of, for 40 years from the last date of the *medical surveillance* of that *employee.*

16. Annual medical reports.-(1) Every *occupational medical practitioner* at a *mine* must compile an annual report covering *employees* at that *mine*, giving an analysis of the *employees' health* based on the *employees' records of medical surveillance*, without disclosing the names of the *employees.*

(2) The annual report compiled in terms of subsection (1) must be given to the *employer*, who must deliver one copy of the report to each of-

(*a*) . . . . . .

[Para. (*a*) deleted by s. 9 of Act No. 72 of 1997.]

Wording of Sections

(*b*) the *health and safety committees*, or if there is no *health and safety committee*, the *health and safety representatives*; and

(*c*) the *Medical Inspector*.

17. Exit certificates.-(1) If an *employee* was subject to, or was required to be subject to, *medical surveillance* in terms of *this Act* and such *employee's* employment at a *mine* is terminated for any reason, the *employer* must arrange an exit medical examination of the *employee*.

[Sub-s. (1) substituted by s. 10 of Act No. 72 of 1997.]

Wording of Sections

(2) The examination referred to in subsection (1) must be held before, or within 30 days after, termination of employment.

[Sub-s. (2) substituted by s. 6 of Act No. 74 of 2008.]

Wording of Sections

(3) The *employee* must attend the examination.

(4) The *occupational medical practitioner* conducting the examination must-

(*a*) produce an exit certificate with respect to that *employee* indicating the results of all *medical surveillance* and the presence or absence of any *occupational disease*; and

(*b*) enter a copy of the exit certificate into the *employee's record of medical surveillance.*

18. Costs of examination.-The *employer* must pay the costs of all clinical examinations and medical tests performed in terms of *this Act* unless *this Act* expressly provides otherwise.

19. Employees' right to information.-(1) An *employee* may request, and the *employer* must then provide, a copy of the *record* or of any part of it that-

(*a*) is being kept in terms of sections 12 (3) and 13 (3) (*c*); and

(*b*) relates to that *employee.*

(2) The *occupational medical practitioner* conducting an examination in terms of section 17 must provide the *employee* with a copy of the exit certificate prepared as a result of that examination.

20. Employee may dispute finding of unfitness to perform work.-(1) An *employee* may appeal to the *Medical Inspector* against-

(*a*) a decision that the *employee* is unfit to perform any particular category of work; or

(*b*) any finding of an *occupational medical practitioner* contained in an exit certificate prepared in terms of section 17.

(2) An appeal under subsection (1) must-

(*a*) be lodged with the *Medical Inspector* within 30 days of the relevant decision or finding, or such further period as may be *prescribed*; and

[Para. (*a*) substituted by s. 11 of Act No. 72 of 1997.]

Wording of Sections

(*b*) state the grounds of the appeal.

(3) When the *Medical Inspector* receives an appeal under subsection (1), the *Medical Inspector* must choose a *medical practitioner* who is not employed by the *employer* of the *employee*, and arrange for that *employee* to be re-examined by that *medical practitioner*, at the cost of the *Chief Inspector of Mines.*

(4) The *medical practitioner* referred to in subsection (3) must report to the *Medical Inspector*, who must then consider the appeal and-

(*a*) confirm, set aside or vary the decision or finding of the *occupational medical practitioner*; or

(*b*) substitute any other decision or finding for that decision or finding.

(5) Nothing in this section precludes an *employee* from-

(*a*) obtaining and paying for a medical opinion from any other *medical practitioner*; or

(*b*) pursuing any other legal remedy.

(6) For the purposes of this section, "*employee*" includes any applicant for employment who has previously been employed at a *mine.*

(7) An *employee* lodging an appeal under subsection (1) may not be dismissed on any grounds relating to unfitness to perform work, pending the outcome of the appeal.

[Sub-s. (7) added by s. 7 of Act No. 74 of 2008.]

21. Manufacturer's and supplier's duty for health and safety.-(1) Any person who-

(*a*) designs, manufactures, repairs, imports or supplies any article for use at a *mine* must ensure, as far as *reasonably practicable*-

(i) that the article is safe and without *risk* to *health* and *safety* when used properly; and

(ii) that it complies with all the requirements in terms of *this Act*;

(*b*) erects or installs any article for use at a *mine* must ensure, as far as *reasonably practicable*, that nothing about the manner in which it is erected or installed makes it unsafe or creates a *risk* to *health* and *safety* when used properly; or

(*c*) designs, manufactures, erects or installs any article for use at a *mine* must ensure, as far as *reasonably practicable*, that ergonomic principles are considered and implemented during design, manufacture, erection or installation.

(2) Any person who bears a duty in terms of subsection (1) is relieved of that duty to the extent that is reasonable in the circumstances, if-

(*a*) that person designs, manufactures, repairs, imports or supplies an article for or to another person; and

(*b*) that other person provides a written undertaking to take specified steps sufficient to ensure, as far as *reasonably practicable*, that the article will be safe and without *risk* to *health* and *safety* when used properly and that it complies with all prescribed requirements.

(3) Any person who designs or constructs a building or structure, including a temporary structure, for use at a *mine* must ensure, as far as *reasonably practicable*, that the design or construction is safe and without *risk* to *health* and *safety* when used properly.

(4) Every person who manufactures, imports or supplies any hazardous *substance* for use at a *mine* must-

(*a*) ensure, as far as *reasonably practicable*, that the *substance* is safe and without *risk* to *health* and *safety* when used, handled, processed, stored or transported at a *mine* in accordance with the information provided in terms of paragraph (*b*);

(*b*) provide adequate information about-

(i) the use of the *substance*;

(ii) the *risks* to *health* and *safety* associated with the *substance*;

(iii) any restriction or control on the use, transport and storage of the *substance*, including but not limited to exposure limits;

(iv) the *safety* precautions to ensure that the *substance* is without *risk* to *health* or *safety*;

(v) the procedure to be followed in the case of an accident involving excessive exposure to the *substance*, or any other emergency involving the *substance*; and

(vi) the disposal of used containers in which the *substance* has been stored and any waste involving the *substance*; and

(*c*) ensure that the information provided in terms of paragraph (*b*) complies with the provisions of the Hazardous Substances Act, 1973 (Act No. 15 of 1973).

22. Employees' duties for health and safety.-Every *employee* at a *mine*, while at that *mine*, must-

(*a*) take reasonable care to protect their own *health* and *safety*;

(*b*) take reasonable care to protect the *health* and *safety* of other persons who may be affected by any act or omission of that *employee*;

(*c*) use and take proper care of protective clothing, and other *health and safety* facilities and *equipment* provided for the protection, *health* or *safety* of that *employee* and other *employees*;

(*d*) report promptly to their immediate supervisor any situation which the *employee* believes presents a *risk* to the *health* or *safety* of that *employee* or any other person, and with which the *employee* cannot properly deal;

(*e*) co-operate with any person to permit compliance with the duties and responsibilities placed on that person in terms of *this Act*; and

(*f*) comply with *prescribed health* and *safety* measures.

23. Employees' right to leave dangerous working place.-(1) The *employee* has the right to leave any *working*

(*a*) circumstances arise at that *working place* which, with reasonable justification, appear to that *employee* to pose a serious danger to the *health* or *safety* of that *employee*; or

(*b*) the *health and safety representative* responsible for that *working place* directs that *employee* to leave that *working place.*

(2) Every *employer*, after consulting the *health and safety committee* at the *mine*, must determine effective procedures for the general exercise of the rights granted by subsection (1), and those procedures must provide for-

(*a*) notification of supervisors and *health and safety representatives* of dangers which have been perceived and responded to in terms of subsection (1);

(*b*) participation by representatives of *employer* and representatives of the *employees* in endeavouring to resolve any issue that may arise from the exercise of the right referred to in subsection (1);

(*c*) participation, where necessary, by an *inspector* or technical adviser to assist in resolving any issue that may arise from the exercise of the right referred to in subsection (1);

(*d*) where appropriate, the assignment to suitable alternative work of any *employee* who left, or refuses to work in, a *working place* contemplated in subsection (1); and

[Para. (*d*) substituted by s. 12 of Act No. 72 of 1997.]

Wording of Sections

(*e*) notification to any *employee* who has to perform work or is requested to perform work in a *working place* contemplated in subsection (1) of the fact that another *employee* has refused to work there and of the reason for that refusal.

(3) If there is no *health and safety committee* at a *mine*, the consultation required in subsection (2) must be held with-

(*a*) the *health and safety representatives*; or

(*b*) if there is no *health and safety representative* at the *mine*, with the *employees.*

(4) The *Minister*, by notice in the *Gazette*, must determine minimum requirements for the procedures contemplated in subsection (2).

[Sub-s. (4) added by s. 8 of Act No. 74 of 2008.]

24. Employees not to pay for safety measures.-No person may make any deduction from an *employee's* wages, or permit an *employee* to make any payment to any person, in respect of anything which the *employer* is obliged to provide or to do in terms of *this Act* in the interest of the *health* and *safety* of an *employee.*

CHAPTER 3
HEALTH AND SAFETY REPRESENTATIVES AND COMMITTEES

25. Health and safety representatives and committees.-(1) Every *mine* with 20 or more *employees* must have a *health and safety representative* for each shift at each designated *working place* at the *mine*.

(2) Every *mine* with 100 or more *employees* must have one or more *health and safety committees.*

(3) *A health and safety representative* or a member of a *health and safety committee* does not incur any civil liability only because of doing or failing to do something which a *health and safety representative* or a member of a *health and safety committee* may do or is required to do in terms of *this Act.*

26. Negotiations and consultations before appointment of representatives.-(1) The *employer* of any *mine* where there must be a *health and safety representative* in terms of section 25 must meet, within the *prescribed* period, with the *representative trade union* of the *mine* to enter into negotiations to conclude a collective agreement concerning-

(*a*) the designation of *working places*;

(*b*) the number of full-time *health and safety representatives*;

(*c*) the election or appointment of *health and safety representatives*;

(*d*) the terms of office of *health and safety representatives* and the circumstances and the manner in which they may be removed from office;

(*e*) the manner in which vacancies are to be filled;

(*f*) the manner in which *health and safety representatives* must perform their functions in terms of *this Act*;

(*g*) the procedures for the effective exercise of the right to withdraw from serious danger in terms of section 23;

(*h*) circumstances and the manner in which meetings referred to in sections 30 (1) (*j*) and 31 (2) must be held;

(*i*) the facilities and assistance that must be provided to *health and safety representatives* in terms of section 31 (3);

(*j*) the training of *health and safety representatives*;

(*k*) a procedure that provides for the conciliation and arbitration of disputes arising from the application or the interpretation of the collective agreement or any provision of this Chapter;

[Para. (*k*) substituted by s. 13 (*a*) of Act No. 72 of 1997.]

Wording of Sections

(*l*) any *prescribed* matter; and

(*m*) any other matter which the parties believe will promote *health* and *safety* at the *mine* or *mines* concerned.

(2) Before concluding a collective agreement referred to in subsection (1) with the *representative trade union*, the *employer* must consult on the matters referred to in that subsection with all other *registered trade unions* with members at that *mine.*

(3) A collective agreement referred to in subsection (1) may include two or more *employers* as parties to the agreement.

(4) To the extent that an agreement concluded in terms of subsection (1) deals with any matter regulated by this Chapter or by any *regulation* regarding any matter regulated by this Chapter, the provisions of this Chapter or such *regulation* do not apply.

[Sub-s. (4) substituted by s. 13 (*b*) of Act No. 72 of 1997.]

Wording of Sections

(5) The provisions applicable to collective agreements in terms of the *Labour Relations Act*, read with the changes required by the context, apply to agreements concluded in terms of subsection (1).

(6) If there is no *representative trade union* at the *mine*, the *employer* must within the *prescribed* period-

(*a*) consult with the *registered trade unions* with members at the *mine* on the matters referred to in subsection (1); and

(*b*) endeavour to reach agreement on the number of full-time *health and safety representatives* at the *mine.*

(7) If there is no *registered trade union* with members at the *mine*, the *employer* must, within the *prescribed* period-

(*a*) consult with the *employees* or any elected representative of the *employees* on the matters referred to in subsection (1); and

(*b*) endeavour to reach agreement on the number of full-time *health and safety representatives* at the *mine.*

(8) A dispute exists if either-

(*a*) no collective agreement in terms of subsection (1) is concluded on the number of full-time *health and safety representatives* at a *mine*; or

(*b*) no agreement is reached in terms of either subsection (6) (*b*) or (7) (*b*).

(9) When a dispute exists in terms of subsection (8), any party to the dispute may refer it to the *Commission.*

(10) When a dispute is referred to the *Commission* under subsection (9), the *Commission* must attempt to resolve it through conciliation.

(11) If a dispute remains unresolved, any party to the dispute may request that it be resolved through arbitration, in which case the *Commission*, taking into account the guidelines in Schedule 1, must determine the number of full-time *health and safety representatives.*

(12) Nothing in this section precludes the *employer* from consulting with any *employee* who is not a member

of a *registered trade union* or any representative of those *employees* concerning the matters referred to in subsection (1).

27. Designation of working places.-(1) If a collective agreement is concluded after the negotiations and consultations referred to in section 26, the *employer* must designate *working places* at the *mine* in accordance with that agreement.

(2) If no collective agreement is concluded after the negotiations and consultations referred to in section 26, the *employer* must designate *working places* at the mine so that-

(*a*) every *working place* at the *mine* is designated;

(*b*) no *health and safety representative* is responsible for more than 100 *employees*; and

(*c*) no *health and safety representative* is responsible for more than 50 *employees* if the designated *working place* includes separate *working places.*

28. Qualifications of representatives.-(1) To qualify to serve as a *health and safety representative* referred to in section 25 (1), an *employee* must-

(*a*) be employed in a full-time capacity in the designated *working place*; and

(*b*) be acquainted with conditions and activities at the designated *working place.*

(2) To qualify to serve as a full-time *health and safety representative* an *employee* must-

(*a*) be employed in full-time capacity at the *mine*;

(*b*) comply with any other qualifications which may be-

(i) agreed by a *health and safety committee*; or

(ii) *prescribed.*

29. Election and appointment of representatives.-(1) At a *mine* referred to in section 25 (1), the *employees* in a designated *working place* may elect from among themselves *health and safety representatives.*

(2) The *employees* at the *mine* may elect from among themselves any full-time *health and safety representatives* that may be agreed or determined in terms of section 26.

(3) The elections referred to in subsections (1) and (2) must be conducted in the *prescribed* manner.

(4) The *employees* elected as representatives in terms of this section must be appointed by the *employer* in the *prescribed* manner.

30. Rights and powers of representatives.-(1) A *health and safety representative* may-

(*a*) represent *employees* on all aspects of *health* and *safety*;

(*b*) direct any *employee* to leave any *working place* whenever circumstances arise at that *working place* which, with reasonable justification, appears to the *health and safety representative* to pose a serious danger to the *health* or *safety* of that *employee*;

[Para. (*b*) substituted by s. 14 of Act No. 72 of 1997.]

Wording of Sections

(*c*) assist any *employee* who has left a *working place* in terms of section 23;

(*d*) identify potential *hazards* and *risks* to *health* or *safety*;

(*e*) make representations or recommendations to the *employer* or to a *health and safety committee* on any matter affecting the *health* or *safety* of *employees*;

(*f*) inspect any relevant document which must be kept in terms of *this Act*;

(*g*) request relevant information and reports from an *inspector*;

(*h*) with the approval of the *employer*, be assisted by or consult an adviser or technical expert who may be either another *employee* or any other person;

(*i*) attend any meeting of a *health and safety committee*-

(i) of which that representative is a member; or

(ii) which will consider a representation or recommendation made by that representative;

(*j*) request-

(i) an *inspector* to conduct an investigation in terms of section 60; or

(ii) the *Chief Inspector of Mines* to conduct an inquiry in terms of section 65;

(*k*) participate in consultations on *health* and *safety* with-

(i) the *employer* or person acting on behalf of the *employer*; or

(ii) an *inspector*;

(*l*) participate in any *health* and *safety* inspection by-

(i) the *employer* or person acting on behalf of *an employer*; or

(ii) an *inspector*;

(*m*) inspect *working places* with regard to the *health* and *safety* of *employees* at intervals agreed with the *employer*;

(*n*) participate in any internal *health* or *safety* audit;

(*o*) investigate complaints by any *employee* relating to *health* and *safety* at work;

(*p*) examine the causes of accidents and other dangerous occurrences in collaboration with the *employer* or person acting on behalf of the *employer*;

(*q*) visit the site of an accident or dangerous occurrence at any reasonable time;

(*r*) attend a post-accident inspection;

(*s*) co-operate with the *employer* in the conducting of investigations in terms of section 11 (5);

(*t*) participate in an inquiry held in terms of section 65; and

(*u*) perform the functions-

(i) agreed by the *health and safety committee*; or

(ii) *prescribed.*

(2) The rights and powers referred to in subsection (1) apply to *health and safety representatives* referred to in section 25 (1) only in respect of the *working places* for which they are responsible.

(3) If a *health and safety representative* requests information or reports under subsection (1) (*g*), the *inspector* must supply the representative with the information or reports in their possession.

(4) *An employer* may not unreasonably withhold the approval required in terms of subsection (1) (*h*).

(5) A *health and safety representative* intending to exercise the right to inspect *working places* under subsection (1) (*m*) must-

(*a*) give the *employer* reasonable notice of the inspection; and

(*b*) permit the *employer* to participate in the inspection.

(6) *Health and safety representatives* are entitled to perform their functions and to receive training during ordinary working hours.

(7) Any time reasonably spent by a *health and safety representative* for a purpose referred to in subsection (6) must be considered for all purposes to be time spent carrying out the employment duties of that representative.

31. Duty to compensate and assist representatives.-(1) The *employer* must pay every full-time *health and safety representative* appropriate remuneration at least equal to the remuneration the representative earned immediately before being appointed as a full-time *health and safety representative.*

(2) The *employer* must provide reasonable time and facilities for *employees* to meet monthly with their *health and safety representatives* in order to consider-

(*a*) *health* and *safety* in their *working places*; and

(*b*) reports by the representatives on the performance of their functions.

(3) The *employer* must provide *health and safety representatives* with-

(*a*) the facilities and assistance reasonably necessary to perform their functions;

(*b*) training that is reasonable required to enable them to perform their functions; and

(*c*) time off from work, without loss of remuneration, to attend any training course that is agreed or *prescribed.*

(4) Unless otherwise agreed, the assistance referred to in subsection (3) (*a*) does not include any costs associated with advisers or independent experts contemplated in either section 30 (1) (*h*) or section 36 (1) (*g*).

(5) On the completion of a term of office as a full-time *health and safety representative*, the *health and safety representative* is entitled to-

(*a*) employment in the same position held immediately before being appointed as a full-time *health and safety representative*; or

(*b*) employment in a position that is at least as favourable as the position held immediately before being appointed a full-time *health and safety representative.*

32. Duty to inform representatives.-Every *employer* must notify the *health and safety representatives* concerned and, if there is a *health and safety committee*, the *employee* co-chairperson of that committee-

(*a*) in good time, of inspections, investigations or inquiries of which an *inspector* has notified the *employer*; and

(*b*) as soon as practicable, of any accident, *serious illness* or *health-threatening occurrence*, or other dangerous event.

33. Negotiation and consultation on establishment of committees.-(1) The *employer* of any *mine* in respect of which a *health and safety committee* must be established in terms of section 25 (2), must meet, within the *prescribed* period, with the *representative trade union* at the *mine* to enter into negotiations to conclude a collective agreement concerning-

(*a*) the number of *health and safety committees* to be established at the *mine* and the *working places* for which they will be responsible;

(*b*) the number of *employer* and *employee* representatives on the committees;

(*c*) the election and appointment of members of *health and safety committees*;

(*d*) the terms of office of members of the *health and safety committee* and the circumstances and the manner in which the members may be removed from office;

(*e*) the manner in which vacancies are to be filled;

(*f*) the circumstances and the manner in which meetings may be held;

(*g*) the facilities and assistance which must be provided to *health and safety committees* in terms of section 37 (*a*); and

(*h*) a procedure that provides for the conciliation and arbitration of disputes arising from the application or interpretation of the collective agreement or any provision of this Chapter.

[Para. (*h*) substituted by s. 15 (*a*) of Act No. 72 of 1997.]

Wording of Sections

(2) Before concluding a collective agreement referred to in subsection (1) with the *representative trade union*, the *employer* must consult on the matters referred to in that subsection with all other *registered trade unions* with members at that *mine.*

(3) A collective agreement referred to in subsection (1) may include two or more *employers* as parties to the agreement.

(4) To the extent that an agreement concluded in terms of subsection (1) deals with any matter regulated by this Chapter or by any *regulation* regarding any matter regulated by this Chapter, the provisions of this Chapter or such *regulation* do not apply.

[Sub-s. (4) substituted by s. 15 (*b*) of Act No. 72 of 1997.]

Wording of Sections

(5) The provisions applicable to collective agreements in terms of the *Labour Relations Act*, read with the changes required by the context, apply to agreements concluded in terms of subsection (1).

(6) If there is no *representative trade union* at the *mine*, the *employer* must consult, within the *prescribed* period, with the *registered trade unions* with members at the *mine* on the matters referred to in subsection (1).

(7) If there is no *registered trade union* with members at the *mine*, the *employer* must, within the *prescribed* period, consult with the *employees* or any elected representatives of the *employees* on the matters referred to in subsection (1).

(8) The negotiations and consultations referred to in this section may be held at the same time as those referred to in section 26.

34. Establishment of health and safety committees.-(1) If a collective agreement is concluded in terms of section 33 (1), *health and safety committees* must be established in terms of that agreement.

(2) If no collective agreement is concluded in terms of section 33 (1), the *employer* must establish *health and safety committees* after the consultation referred to in section 33 (6) or (7) and in accordance with this section and the *regulations.*

(3) A *health and safety committee* must consist of-

(*a*) at least four *employee* representatives; and

(*b*) a number of *employer* representatives equal to or less than the number of *employee* representatives.

(4) The *health and safety representatives* must appoint the *employee* representatives on the *health and safety committee.* The *employee* representatives must be-

(*a*) broadly representative of the *working places* at the *mine*; and

(*b*) *employees* at that *mine.*

(5) No more than two of the *employee* representatives may be appointed from full-time *employees* who are not *health and safety representatives*, unless all of the *health and safety representatives* have been appointed to the committee and there are still *employee* committee positions to be filled.

(6) The *employer* must appoint the *employer* representatives on the *health and safety committee.* The persons appointed must include persons who have authority to develop and implement *health* and *safety* policies at the *mine*.

35. Committee procedures.-(1) The *employee* and *employer* representatives on a *health and safety committee* must each elect a chairperson from their number. Unless otherwise agreed by the committee, the two chairpersons must alternate as the presiding chairperson of the committee.

(2) Unless otherwise agreed by a *health and safety committee*, the committee must meet at least once a month.

(3) *A health and safety committee* may determine its own rules and procedures.

(4) Persons other than *employee* or *employer* representatives may be invited to attend meetings of the *health and safety committee* and to participate in its proceedings.

36. Rights and powers of health and safety committee.-(1) A *health and safety committee* may-

(*a*) represent *employees* on all aspects of *health* and *safety*;

(*b*) participate in consultations on any *health* and *safety* matter listed in the Schedule referred to in section 97 (2);

(*c*) request the *Chief Inspector of Mines* to review any code of practice;

(*d*) request relevant information from any person who is required, in terms of *this Act*, to provide that information to the committee;

(*e*) agree on additional qualifications or functions of *health and safety representatives*;

(*f*) request-

(i) an *inspector* to conduct an investigation in terms of section 60; or

(ii) the *Chief Inspector of Mines* to conduct an inquiry in terms of section 65;

(*g*) with the approval of the *employer*, be assisted by or consult an adviser or a technical expert who may be either another *employee* or any other person;

(*h*) take reasonable time to prepare for each meeting of the committee; and

(*i*) take reasonable time to report on meetings of the committee to the *health and safety representatives* at the *mine.*

(2) No *employer* may unreasonably withhold the approval required in terms of subsection (1) (*g*).

(3) Members of *health and safety committees* are entitled to perform their functions and to receive training during ordinary working hours.

(4) Any time reasonably spent by a member of a *health and safety committee* for a purpose referred to in subsection (3) must be considered for all purposes to be time spent carrying out the employment duties of that member.

37. Duty to support committee.-The *employer* must-

(*a*) provide the *health and safety committee* with the facilities and assistance reasonably necessary to perform its functions;

(*b*) supply the *health and safety committee* with the annual report referred to in section 2 (1) (*c*) and any information necessary to perform its functions.

38. Disclosure of information.-(1) Whenever *an employer*, *inspector* or a person who conducts an inquiry in terms of section 65, is required by the provisions of this Chapter to supply information or reports to a *health and safety representative* or to the *health and safety committee*, that *employer*, *inspector* or person-

(*a*) must not disclose any information that is private personal information relating to an *employee*, unless the *employee* consents in writing to the disclosure of that information; and

(*b*) is not required to supply any information-

(i) that is legally privileged;

(ii) that the *employer*, *inspector* or person could not disclose without contravening a prohibition imposed upon the *employer* by any law or court order; or

(iii) that is confidential and, if disclosed, may cause substantial harm to an *employee* or the *employer.*

(2) No *employee* may unreasonably withhold the consent required in terms of subsection (1) (*a*).

39. Disputes concerning disclosure of information.-(1) If there is a dispute about what information is required to be disclosed in terms of the provisions of this Chapter, any party to the dispute may refer the dispute in writing to the *Commission.*

(2) The party who refers a dispute to the *Commission* must satisfy it that a copy of the referral has been served on all other parties to the dispute.

(3) The *Commission* must attempt to resolve the dispute through conciliation.

(4) If the dispute remains unresolved, any party to the dispute may request that the dispute be resolved through arbitration.

(5) A commissioner appointed to arbitrate a dispute must first decide whether or not the information is required to be supplied in terms of the provisions of this Chapter.

(6) If the commissioner decides that the information is required and if it is information contemplated in section 38 (1) (*a*) or (*b*) (iii), the commissioner must balance the harm that disclosure is likely to cause to an *employee* or *employer* or any other person who employs *employees*, against the harm that the failure to disclose the information is likely to cause to the ability of *health and safety representatives* or members of the *health and safety committee* to perform their functions effectively.

[Sub-s. (6) substituted by s. 16 of Act No. 72 of 1997.]

Wording of Sections

(7) If the commissioner decides that the balance of harm favours the disclosure of the information, the commissioner may order the disclosure of the information on terms designed to limit the harm likely to be caused to

the *employee* or the *employer.*

(8) When making an order under subsection (7), the commissioner must take into account any previous breach of confidentiality in respect of information disclosed in terms of the provisions of this Chapter, and may refuse to order the disclosure of the information or any other confidential information which might otherwise be disclosed for a period specified in the arbitration award.

(9) In any dispute about an alleged breach of confidentiality, the commissioner may order that the right to disclosure of information in terms of the provisions of this Chapter be withdrawn for a period specified in the arbitration award.

40. Disputes concerning this Chapter.-(1) Any party to a dispute about the interpretation or application of any provision of this Chapter, other than a dispute contemplated in section 26 (8) or 39, may refer the dispute in writing to the *Commission.*

(2) The party who refers a dispute to the *Commission* must satisfy it that a copy of the referral has been served on all the other parties to the dispute.

(3) The *Commission* must attempt to resolve the dispute through conciliation.

(4) If the dispute remains unresolved, any party to the dispute may request that the dispute be resolved through arbitration as soon as possible.

(5) The provisions relating to arbitration in the *Labour Relations Act*, read with changes required by the context, apply to an arbitration referred to in sections 26 (11) and 39 and subsection (4).

CHAPTER 4
TRIPARTITE INSTITUTIONS

41. Establishment of tripartite institutions.-(1) A Mine Health and Safety Council is hereby established to advise the *Minister* on *health* and *safety* at *mines.*

(2) A *committee*, *ad hoc committee* or *subcommittee* may when necessary be established, which *committee* may include-

(*a*) the Mining Regulation Advisory Committee;

(*b*) the Mining Occupational Health Advisory Committee; and

(*c*) the Safety in Mines Research Advisory Committee.

[Sub-s. (2) amended by s. 9 of Act No. 74 of 2008.]

Wording of Sections

(3) A Mining Qualifications Authority is hereby established to advise the *Minister* on-

(*a*) qualifications and learning achievements in the mining industry to improve *health and safety standards* through proper training and education;

[Para. (*a*) substituted by s. 17 (*a*) of Act No. 72 of 1997.]

Wording of Sections

(*b*) standards and competency setting, assessment, examinations, quality assurance and accreditation in the mining industry; and

(*c*) proposals for the registration of education and training standards and qualifications in the mining industry on the National Qualifications Framework referred to in the South African Qualifications Authority Act, 1995 (Act No. 58 of 1995).

[Para. (*c*) substituted by s. 17 (*b*) of Act No. 72 of 1997.]

Wording of Sections

42. Mine Health and Safety Council.-(1) The *Council* consists of-

(*a*) five members representing *employers* in the mining industry;

(*b*) five members representing *employees* in the mining industry;

(*c*) four members representing departments of the State; and

(*d*) the *Chief Inspector of Mines*, who must chair the *Council*.

(2) The *Minister* must appoint the members of the *Council* in accordance with the *regulations.*

[Sub-s. (2) substituted by s. 10 (*a*) of Act No. 74 of 2008.]

Wording of Sections

(2A) The *Council* may appoint members to *committees, ad hoc subcommittees* and *other committees*, for any period of time and on any conditions.

[Sub-s. (2A) inserted by s. 18 (*a*) of Act No. 72 of 1997 and substituted by s. 10 (*b*) of Act No. 74 of 2008.]

Wording of Sections

(2B) The structure and functions of any *committee* contemplated in subsection (2A) must be provided for in the constitution contemplated in section 97 (3).

[Sub-s. (2B) inserted by s. 10 (*c*) of Act No. 74 of 2008.]

(3) The *Council* and its committees must govern themselves in accordance with the constitution contemplated in section 97 (3).

[Sub-s. (3) substituted by s. 18 (*b*) of Act No. 72 of 1997.]

Wording of Sections

(4) The *Council* may delegate any of its powers and assign any of its duties by or under *this Act* in accordance with the constitution contemplated in section 97 (3).

[Sub-s. (4) substituted by s. 18 (*b*) of Act No. 72 of 1997.]

Wording of Sections

(5) A delegation or an assignment under subsection (4)-

(*a*) must be in writing;

(*b*) may be subject to such conditions and restrictions a the *Council* may determine; and

(*c*) does not prevent the exercise of that power or the performance of that duty by the *Council.*

(6) Members of the *Council*, or of a committee of the *Council*, are each entitled to have their views reflected in any report of the *Council* or committee, as the case may be.

(7) Each year, the *Minister*, with the agreement of the Minister of Finance, must provide sufficient funds for the administration of the *Council*, and committees of the *Council*, from public funds.

43. Council's duties.-The *Council* must-

(*a*) advise the *Minister* on *health* and *safety* at *mines* including, but not limited to, any legislation on *mine* rehabilitation in so far as it concerns *health* and *safety*;

[Para. (*a*) substituted by s. 19 (*a*) of Act No. 72 of 1997.]

Wording of Sections

(*b*) co-ordinate the activities of its committees, receive reports from the committees and liaise with the Mining Qualifications Authority on matters relating to *health* and *safety*;

(*c*) liaise with any other statutory bodies concerned with matters relating to *health* and *safety*;

(*d*) promote a culture of *health* and *safety* in the mining industry;

(*e*) at least once every two years arrange and co-ordinate a tripartite summit to review the state of *health* and *safety* at *mines*;

[Para. (*e*) substituted by s. 19 (*b*) of Act No. 72 of 1997.]

Wording of Sections

(*e*A) annually adivse the *Minister* on relevant research relating to *health and safety* at *mines*; and

[Para. (*e*A) inserted by s. 19 (*c*) of Act No. 72 of 1997 and substituted by s. 11 of Act No. 74 of 2008.]

Wording of Sections

(*f*) perform every duty imposed upon the *Council* in terms of *this Act.*

44. . . . . . .

[S. 44 amended by s. 20 of Act No. 72 of 1997 and repealed by s. 12 of Act No. 74 of 2008.]

Wording of Sections

45. Mining Qualifications Authority.-(1) The Mining Qualifications Authority consists of-

(*a*) five members representing *employers* in the mining industry;

(*b*) five members representing *employees* in the mining industry;

(*c*) four members representing departments of State; and

(*d*) the *Chief Inspector of Mines*, who must chair the Mining Qualifications Authority.

[Para. (*d*) substituted by s. 21 (*a*) of Act No. 72 of 1997.]

Wording of Sections

(2) The members of the Mining Qualifications Authority must be appointed in accordance with the constitution contemplated in section 97 (4).

[Sub-s. (2) substituted by s. 27 of Act No. 31 of 2003.]

Wording of Sections

(3) The Mining Qualifications Authority and its committees must govern themselves in accordance with the constitution contemplated in section 97 (4).

[Sub-s. (3) substituted by s. 21 (*b*) of Act No. 72 of 1997.]

Wording of Sections

46. Mining Qualifications Authority's functions.-(1) The Mining Qualifications Authority must-

(*a*) seek registration in terms of the South African Qualifications Act, 1995 (Act No. 58 of 1995), as a body responsible for generating education and training standards and qualifications as contemplated in section 5 (1) (*a*) (ii) (*aa*) of that Act;

[Para. (*a*) substituted by s. 22 (*a*) of Act No. 72 of 1997.]

Wording of Sections

(*b*) seek accreditation in terms of the South African Qualifications Act, 1995 (Act No. 58 of 1995), as a body responsible for monitoring and auditing achievements as contemplated in section 5 (1) (*a*) (ii) (*bb*) of that Act;

(*c*) propose education and training standards and qualifications to bodies registered with that Authority and responsible for developing education and training standards;

[Para. (*c*) substituted by s. 22 (*b*) of Act No. 72 of 1997.]

Wording of Sections

(*d*) generate education and training standards and qualifications in the mining industry;

[Para. (*d*) substituted by s. 22 (*b*) of Act No. 72 of 1997.]

Wording of Sections

(*e*) monitor and audit achievement in terms of the standards and qualifications; and

(*f*) perform the functions of a sector education and training authority in terms of the Skills Development Act, 1998 (Act No. 97 of 1998).

[Para. (*f*) added by s. 28 (*a*) of Act No. 31 of 2003.]

(2) The Mining Qualifications Authority-

(*a*) may appoint permanent and *ad hoc* committees, and subcommittees, for any period and on any conditions;

(*b*) must administer and control its financial affairs in accordance with the Skills Development Act, 1998 (Act No. 97 of 1998); and

(*c*) may do anything necessary to achieve its objectives.

[Sub-s. (2) substituted by s. 28 (*b*) of Act No. 31 of 2003.]

Wording of Sections

(3) The Mining Qualifications Authority may delegate any of its powers or assign any of its duties by or under *this Act* in accordance with the constitution contemplated in section 97 (4).

[Sub-s. (3) substituted by s. 22 (*c*) of Act No. 72 of 1997.]

Wording of Sections

(4) A delegation or an assignment under subsection (3)-

(*a*) must be in writing;

(*b*) may be subject to such conditions and restrictions as the Authority may determine; and

(*c*) does not prevent the exercise of that power or the performance of that duty by the Authority.

(5) In performing its functions, the Mining Qualifications Authority must comply with the policies and criteria formulated by the South African Qualifications Authority in terms of section 5 (1) (*a*) (ii) of the South African Qualifications Authority Act, 1995 (Act No. 58 of 1995).

CHAPTER 5
INSPECTORATE OF MINE HEALTH AND SAFETY

47. Inspectorate established.-(1) (*a*) A juristic person to be known as the Mine Health and Safety Inspectorate is hereby established.

(*b*) The Public Finance Management Act, 1999 (Act No. 1 of 1999), applies to the Inspectorate.

[Sub-s. (1) substituted by s. 13 of Act No. 74 of 2008.]

Wording of Sections

(2) The *Minister*, by notice in the *Gazette*, may establish regions of the country for the purpose of administering *this Act* through regional offices of the Mine Health and Safety Inspectorate.

48. Chief Inspector of Mines.-(1) The *Minister* must appoint an *officer*, with suitable mining qualifications and appropriate experience in *health* and *safety* at *mines*, to be *Chief Inspector of Mines.*

(2) Subject to the control and direction of the *Minister*, the *Chief Inspector of Mines* must perform the functions entrusted to the *Chief Inspector of Mines* by *this Act.*

(3) The *Chief Inspector of Mines* may perform any of the functions of an *inspector.*

49. Chief Inspector of Mines' functions.-(1) Without limiting any statutory duty of any other person in terms of *this Act*, the *Chief Inspector of Mines* must-

(*a*) ensure that the provisions of *this Act* are complied with and enforced and that every duty imposed upon the *Chief Inspector of Mines*, the *Medical Inspector* or *inspectors* in terms of any other law is performed;

(*b*) appoint an *officer* with the *prescribed* qualifications and experience as the *Medical Inspector*;

(*c*) appoint *officers* with the *prescribed* qualifications and experience as *inspectors*;

(*d*) administer the Mine Health and Safety Inspectorate;

(*e*) determine and implement policies to promote the *health* and *safety* of persons at *mines* and any person affected by mining activities;

(*f*) consult with the *Council* before issuing guidelines on the form, content and distribution of codes of practice referred to in section 9;

(*g*) collect, process and distribute information relating to *health* and *safety*;

(*h*) advise the *Minister* on *health* or *safety* matters at *mines*;

(*i*) each year, after consulting the *Council* and with the approval of the *Minister*, publish and distribute a plan of action for the activities of the Mine Health and Safety Inspectorate;

(*j*) complete a report on *health and safety* at *mines* and the activities of the Mine Health and Safety Inspectorate for each year and submit the report to the *Minister* within three months of the end of the year concerned;

[Para. (*j*) substituted by s. 14 (*a*) of Act No. 74 of 2008.]

Wording of Sections

(*k*) perform any duties relating to *health* or *safety* at *mines* that the *Minister* directs or prescribes;

[Para. (k) substituted by s. 14 (b) of Act No. 74 of 2008.]

Wording of Sections

(l) develop and maintain an integrated *mine health* and *safety* database and reporting system;
[Para. (l) added by s. 14 (c) of Act No. 74 of 2008.]

(m) conduct or commission relevant research and evaluate and publish the results of the research; and
[Para. (m) added by s. 14 (c) of Act No. 74 of 2008.]

(n) provide logistical, administrative and technical support to the *Council.*
[Para. (n) added by s. 14 (c) of Act No. 74 of 2008.]

(2) The *Chief Inspector of Mines* must furnish a *prescribed* certificate to the *Medical Inspector* and to each *inspector.*

(3) Despite the provisions of the *Mineral and Petroleum Resources Development Act* or any other law, the *Chief Inspector of Mines*-

(a) has the power to monitor and control those environmental aspects at *mines* that affect, or may affect, the *health* or *safety* of *employees* or other persons; and

(b) must consult with the appropriate *officer* appointed in terms of the *Mineral and Petroleum Resources Development Act* concerning the exercise of those powers.

[Sub-s. (3) amended by s. 14 (d) of Act No. 74 of 2008. Para. (b) substituted by s. 14 (e) of Act No. 74 of 2008.]

Wording of Sections

(4) To further the objectives of *this Act* the *Chief Inspector of Mines* may-

(a) enter into agreements with other persons;

(b) authorise a competent independent person to perform any or all the functions of an *inspector*;

(c) perform any act, whether in the Republic or elsewhere, that is calculated, directly or indirectly, to enhance the value of the services which the Mine Health and Safety Inspectorate renders, or perform any *prescribed* act;

(d) require all *mines* or groups of *mines* to prepare and implement a *health* and *safety* management system for *mines*;

(e) require all *mines* or groups of *mines* to prepare and implement a *hazard* management system for significant *hazards* mentioned under section 11;

(f) in consultation with the *Minister* and the Minister of Finance acquire or dispose of immovable property;

(g) hire, purchase or otherwise acquire any movable property and proprietary right, and lease or dispose of property;

(h) collaborate with any other body or institution or establish and control facilities for the collection and dissemination of scientific and technical information relating to *health* and *safety* at *mines*;

(i) collaborate with any educational, governmental or scientific body or institution in connection with the provision of instruction for, or the training of, persons required by the Mine Health and Safety Inspectorate;

(j) provide financial or other assistance in connection with the training of persons in so far as is necessary to ensure that a sufficient number of trained persons are available to enable the Mine Health and Safety Inspectorate to perform its functions efficiently;

(k) insure the Mine Health and Safety Inspectorate against any loss, damage, risk or liability;

(l) invest any of the money of the Mine Health and Safety Inspectorate; and

(m) institute or defend any legal action.
[Sub-s. (4) substituted by s. 14 (f) of Act No. 74 of 2008.]

Wording of Sections

(5) The *Chief Inspector* must furnish a *prescribed* certificate to each person authorised under subsection (4) (b).

(6) The *Chief Inspector of Mines* must issue guidelines by notice in the *Gazette.*
[Sub-s. (6) added by s. 14 (g) of Act No. 74 of 2008.]

49A. Financial and judicial management of Mine Health and Safety Inspectorate.-(1) The funds of the Mine Health and Safety Inspectorate consist of-

(*a*) money appropriated by Parliament;

(*b*) any donations made to the Mine Health and Safety Inspectorate;

(*c*) revenue made on investments; and

(*d*) money raised and received in terms of *this Act*.

(2) The Mine Health and Safety Inspectorate must utilise its funds to defray expenses incurred by it in the performance of its functions.

(3) The *Chief Inspector of Mines* must, after consultation with the *Council*, use the monies collected in terms of section 55B for the promotion of *health* and *safety* in the mining industry.

(4) The *Chief Inspector of Mines* as the accounting authority of the Inspectorate must-

(*a*) open a bank account in the name of the Mine Health and Safety Inspectorate with an institution registered as a bank in terms of the Banks Act, 1990 (Act No. 94 of 1990); and

(*b*) deposit therein all money received in terms of subsection (1).

(5) The Mine Health and Safety Inspectorate may invest any of its funds not immediately required-

(*a*) subject to any investment policy that may be prescribed; and

(*b*) in such a manner as may be approved by the *Minister*.

(6) The Mine Health and Safety Inspectorate's financial year is from 1 April in any year to 31 March in the following year.

(7) The report of the *Chief Inspector of Mines* referred to in section 49 (1) (*j*) must reflect the financial affairs of the Mine Health and Safety Inspectorate.

(8) Despite any other law, the Mine Health and Safety Inspectorate may not be placed under judicial management or in liquidation except if authorised by an Act of Parliament adopted especially for that purpose.

[S. 49A inserted by s. 15 of Act No. 74 of 2008.]

49B. Co-operative governance.-(1) The *Chief Inspector of Mines* must co-ordinate the exercise of the functions of the Mine Health and Safety Inspectorate with other organs of state in respect of regulating and promoting *occupational health* and *safety*, in accordance with the principles of co-operative governance contemplated in Chapter 3 of the Constitution.

(2) The *Chief Inspector of Mines* may conclude co-operative agreements with relevant organs of state to give effect to the co-operation contemplated in subsection (1).

[S. 49B inserted by s. 15 of Act No. 74 of 2008.]

50. Inspectors' powers.-(1) An *inspector* may for the purposes of monitoring or enforcing compliance with *this Act*-

(*a*) enter any *mine* at any time without warrant or notice;

(*b*) enter any other place after obtaining the necessary warrant in terms of subsection (7); and

(*c*) bring into and use at any *mine*, or at any place referred to in paragraph (*b*), vehicles, equipment and material as necessary to perform any function in terms of *this Act.*

(2) While the *inspector* is at any *mine* or place referred to subsection (1), the *inspector* may, for the purposes of monitoring or enforcing compliance with *this Act*-

(*a*) question any person on any matter to which *this Act* relates;

(*b*) require any person who has control over, or custody of, any document, including but not limited to, a plan, book or *record* to produce that document to the *inspector* immediately or at any other time and place that the *inspector* requires;

(*c*) require from any person referred to in paragraph (*b*) an explanation of any entry or non-entry in any document over which that person has custody or control;

(*d*) examine any document produced in terms of paragraph (*b*), and make a copy of it or take an extract

from it;

(*e*) inspect-

(i) any article, *substance* or *machinery*;

(ii) any work performed; or

(iii) any condition;

(*f*) inspect arrangements made by the *employer* for *medical surveillance* of *employees*;

(*g*) seize any document, article, *substance* or *machinery* or any part or sample of it; and

(*h*) perform any other *prescribed* function.

(3) An *inspector* may instruct any *employer*, *employee* or any other person who performs an activity regulated by *this Act* or any former *employer* or *employee* or person who formerly performed an activity regulated by *this Act*, to appear before the *inspector* to be questioned on any matter to which *this Act* relates.

(4) Before an *inspector* may seize any document under subsection (2) (*g*), the *employer* of the *mine* may copy it.

(5) An *inspector* may remove any article, *substance* or *machinery* or any part or sample of it from any *mine* or place referred to in subsection (1) for examination or analysis.

(6) When an *inspector* seizes or removes any item under this section, the *inspector* must issue a receipt for that item to the *employer* of the *mine* or place involved.

(7) A magistrate may issue a warrant contemplated in subsection (1) (*b*) only on written application by an *inspector* setting out under oath or affirmation the need to enter a place other than a *mine* to monitor or enforce compliance with *this Act.*

(8) For the purpose of this section, "*mine*" does not include any home, or residential quarters, situated at the *mine.*

51. Inspector may be accompanied.-When performing any function under *this Act*, an *inspector* may be accompanied by an interpreter or any other person reasonably required to assist the *inspector.*

52. Duty to assist inspector and answer questions.-(1) When an *inspector* enters any *mine* or place referred to in section 50 (1), the *employer* and each *employee* performing any work there must provide any facility that the *inspector* reasonably requires.

(2) Persons questioned by an *inspector* under section 50 (2) (*a*) or (*c*) or (3) must answer each question to the best of their ability, but no person is required to answer any question if the answer may be self-incriminating.

53. Duty to produce documents required by inspector.-Any person who holds or should hold a permit, licence, permission, certificate, authorisation or any other document issued in accordance with *this Act* or the *Minerals and Petroleum Resources Development Act*, must produce it at the request of the *Chief Inspector of Mines* or any *inspector.*

54. Inspector's power to deal with dangerous conditions.-(1) 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* or *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.*

[Sub-s. (1) amended by s. 23 of Act No. 72 of 1997.]

(2) An instruction under subsection (1) 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.

(3) An *inspector* may issue an instruction under subsection (1) either orally or in writing. If it is issued orally, the *inspector* must confirm it in writing and give it to the person concerned at the earliest opportunity.

(4) If an instruction issued under subsection (1) is not issued to the *employer*, the *inspector* must give a copy of the instruction to the *employer* at the earliest opportunity.

(5) Any instruction issued under subsection (1) (*a*) must either be confirmed, varied or set aside by the *Chief Inspector of Mines* as soon as practicable.

(6) Any instruction issued under subsection (1) (*a*) 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.

(7) . . . . . .

[Sub-s. (7) deleted by s. 17 of Act No. 74 of 2008.]

Wording of Sections

(8) . . . . . .

[Sub-s. (8) deleted by s. 17 of Act No. 74 of 2008.]

Wording of Sections

(9) . . . . . .

[Sub-s. (9) deleted by s. 17 of Act No. 74 of 2008.]

Wording of Sections

(10) . . . . . .

[Sub-s. (10) deleted by s. 17 of Act No. 74 of 2008.]

Wording of Sections

55. Inspectors' power to order compliance.-(1) 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.

[Sub-s. (1) amended by s. 24 of Act No. 72 of 1997.]

Wording of Sections

(2) When issuing an instruction under subsection (1), an *inspector* must specify the period within which the specified steps must be taken. A period specified in an instruction may be extended by an *inspector* at any time by giving notice in writing to the person concerned.

55A. Inspector's powers to recommend fine.-(1) An *inspector* may make a recommendation in writing to the *Principal Inspector of Mines* that a fine be imposed on an *employer* who has failed to comply with any provision contemplated in section 91 (1B).

[Sub-s. (1) substituted by s. 18 (*a*) of Act No. 74 of 2008.]

Wording of Sections

(2) . . . . . .

[Sub-s. (2) deleted by s. 18 (*b*) of Act No. 74 of 2008.]

Wording of Sections

(3) The *inspector* concerned must serve a copy of the recommendation on-

(*a*) the *employer*;

(*b*) the *health and safety committee*, or if there is no *health and safety committee*, to any *health and safety representative* responsible for the *working place* in question; and

(*c*) the *representative trade union*, or if there is no *representative trade union*, to every *registered trade union* with members at the *mine*.

[Sub-s. (3) amended by s. 18 (*c*) of Act No. 74 of 2008.]

Wording of Sections

(4) The *employer* may make written representations to the *Principal Inspector of Mines* within 30 days of the recommendation.

[Sub-s. (4) added by s. 18 (*d*) of Act No. 74 of 2008.]

(5) A representation made in terms of this section may not be used against the *employer* in any criminal or civil proceedings in respect of the same set of facts.

[S. 55A inserted by s. 25 of Act No. 72 of 1997. Sub-s. (5) added by s. 18 (*d*) of Act No. 74 of 2008.]

55B. *Principal Inspector of Mines* may impose fines.-(1) The *Principal Inspector of Mines*, after considering the recommendation and any representations made in accordance with section 55A, may-

(*a*) disregard the recommendation;

(*b*) impose a fine not exceeding the maximum amount mentioned in Table 2 of Schedule 8; or

(*c*) refer the matter to the prosecuting authority for a decision as to whether the *employer* should be charged with an offence.

(2) The Principal Inspector of Mines must notify the employer, committee, representative and trade union contemplated in section 55A (3), as the case may be, of any decision made in terms of subsection (1).

(3) An *employer* must pay any fine imposed in terms of this section within 30 days of the imposition of the fine.

(4) If the employer fails to pay the fine within the specified period, the *Chief Inspector of Mines* may apply to the Labour Court for the fine to be made an order of that court.

[S. 55B inserted by s. 25 of Act No. 72 of 1997 and substituted by s. 19 of Act No. 74 of 2008.]

Wording of Sections

55C. . . . . .

[S. 55C inserted by s. 25 of Act No. 72 of 1997 and repealed by s. 20 of Act No. 74 of 2008.]

Wording of Sections

55D. . . . . . .

[S. 55D inserted by s. 25 of Act No. 72 of 1997 and repealed by s. 20 of Act No. 74 of 2008.]

Wording of Sections

55E. . . . . . .

[S. 55E inserted by s. 25 of Act No. 72 of 1997 and repealed by s. 20 of Act No. 74 of 2008.]

Wording of Sections

55F. . . . . . .

[S. 55F inserted by s. 25 of Act No. 72 of 1997 and repealed by s. 20 of Act No. 74 of 2008.]

Wording of Sections

55G. . . . . . .

[S. 55G inserted by s. 25 of Act No. 72 of 1997 and repealed by s. 20 of Act No. 74 of 2008.]

Wording of Sections

55H. . . . . . .

[S. 55H inserted by s. 25 of Act No. 72 of 1997 and repealed by s. 20 of Act No. 74 of 2008.]

Wording of Sections

56. Instructions to be posted at mine.-The *employer* of a *mine* must-

(*a*) promptly supply a copy of any instruction of an *inspector* to-

(i) the *health and safety representative* representing the *employees* affected by the instruction; and

(ii) the *health and safety committee* responsible for those *employees*; and

(*b*) promptly publicise the instruction by-

(i) prominently and conspicuously displaying copies of the instruction to the *employees* whose interests may be affected; and

(ii) causing its contents to be communicated orally to those *employees.*

57. Right to appeal inspectors' decisions.-(1) Any person adversely affected by a decision of an *inspector*, except a decision contemplated in section 55B, may appeal against that decision to the *Chief Inspector of Mines*.

[Sub-s. (1) substituted by s. 27 (*a*) of Act No. 72 of 1997 and by s. 21 of Act No. 74 of 2008.]

Wording of Sections

(2) An appeal under subsection (1) must-

(*a*) be lodged with the *Chief Inspector of Mines* within 30 days of the decision, or such further period as may be *prescribed*; and

[Para. (*a*) substituted by s. 27 (*b*) of Act No. 72 of 1997.]

Wording of Sections

(*b*) set out the grounds of appeal.

(3) After considering the grounds of the appeal and the *inspector's* reasons for the decision, the *Chief Inspector of Mines* must as soon as practicable-

(*a*) confirm, set aside or vary the decision; or

(*b*) substitute any other decision for the decision of the *inspector.*

57A. . . . . . .

[S. 57A inserted by s. 28 of Act No. 72 of 1997 and repealed by s. 22 of Act No. 74 of 2008.]

Wording of Sections

58. Right to appeal Chief Inspector of Mines' decision.-(1) Any person adversely affected by a decision of the *Chief Inspector of Mines*, either in terms of section 57 (3) or in the exercise of any power under *this Act*, may appeal against the decision to the *Labour Court.*

(2) An appeal under subsection (1), must be lodged with the registrar of the *Labour Court* in accordance with the rules of the *Labour Court*, within 60 days of the date that the *Chief Inspector of Mines'* decision was given.

(3) The *Labour Court* must consider the appeal and confirm, set aside or vary the decision.

59. Appeal does not suspend decision.-(1) An appeal against a decision under either section 57, 57A or 58 does not suspend the decision.

(2) Despite subsection (1)-

(*a*) an appeal in terms of section 57A or 58 against a decision to impose a fine suspends the obligation to pay the fine, pending the outcome of the appeal; and

(*b*) the *Labour Court* may suspend the operation of the decision, pending the determination of the matter, if there are reasonable grounds for doing so.

[S. 59 substituted by s. 29 of Act No. 72 of 1997.]

Wording of Sections

60. Initiating investigations.-(1) The *Chief Inspector of Mines* must instruct an *inspector* to investigate any accident or occurrence at a *mine* that results in the death of any person.

[Sub-s. (1) substituted by s. 30 of Act No. 72 of 1997.]

Wording of Sections

(2) At any time an *inspector* may investigate-

(*a*) any accident or occurrence at a *mine* that results in the *serious injury* or *serious illness* of any person;

(*b*) any occurrence, practice or condition concerning *health* or *safety* of persons at one or more *mines*; or

(*c*) any actual or suspected contravention of, or failure to comply with, any provision of *this Act*.

[Sub-s. (2) substituted by s. 30 of Act No. 72 of 1997.]

Wording of Sections

(3) If there is cause for concern on *health* or *safety* grounds, an *inspector* must investigate any matter referred to in subsection (2), if-

(*a*) instructed to do so by the *Chief Inspector of Mines*; or

(*b*) requested to do so by-

(i) a *registered trade union* with members at the *mine* or *mines*;

(ii) a *health and safety representative* or *health and safety committee* at the *mine*; or

(iii) if there is no *health and safety representative*, an *employee* at the *mine.*

61. Chief Inspector of Mines may designate assistant in investigation.-At any time before or during an investigation, the *Chief Inspector of Mines* may designate one or more persons to assist the *Inspector* holding the investigation.

62. Duty to answer questions during investigation.-Persons questioned during an investigation must answer every question to the best of their ability, but no person is required to answer any question if the answer may be self-incriminating.

63. Enhancing effectiveness of investigation.-(1) (*a*) For the purpose of enhancing the effectiveness of an investigation in terms of section 60 the National Prosecuting Authority, after receiving representations from the *Chief Inspector of mines*, may issue a certificate that no prosecution may be instituted in respect of any contravention of, or failure to comply with, a provision of *this Act* related to the event being investigated.

(*b*) If a certificate is issued, no fine in terms of section 55B or disciplinary action related to the event investigated may thereafter be imposed on or taken against any person.

[Sub-s. (1) substituted by s. 31 of Act No. 72 of 1997 and by s. 23 of Act No. 74 of 2008.]

Wording of Sections

(2) The *Chief Inspector of Mines* must communicate in writing the protection afforded under subsection (1) to all persons questioned during the investigation.

(3) Persons questioned during the investigation who are afforded protection under this section must answer every question to the best of their ability and may not refuse to answer any question on the grounds that the answer may be self-incriminating.

64. Reports on investigations.-(1) After completing an investigation, an *inspector* must prepare a written report of the findings, recommendations and any remedial steps.

(2) The *inspector*-

(*a*) must submit a copy of the report referred to in subsection (1) to the *Chief Inspector of Mines*;

(*b*) must supply a copy of the report to the *employer* and to the *health and safety representative*, *health and safety committee*, *registered trade union* or *employee* that requested the investigation; and

(*c*) may instruct the *employer* of the *mine* concerned to prominently and conspicuously display a copy of the report or portion of it for *employees* to read.

65. Initiating inquiries.-(1) Unless the provisions of section 63 have been invoked, the *Chief Inspector of Mines* must direct an *inspector* to conduct an inquiry into any accident or occurrence at a *mine* that results in the death of any person.

(2) Unless the provisions of section 63 have been invoked, the *Chief Inspector* may direct an *inspector* to conduct an inquiry into-

(*a*) any accident or occurrence at a *mine* that results in the *serious injury* or *serious illness* of any person;

(*b*) any occurrence, practice or condition concerning *health* or *safety* of persons at one or more *mines*; or

(*c*) any actual or suspected contravention of, or failure to comply with, any provision of *this Act.*

(3) If there is cause for concern on *health* or *safety* grounds and if the provisions of section 63 have not been invoked, the *Chief Inspector of Mines* may direct an *inspector* to conduct an inquiry into any matter referred to in subsection (2) if requested in writing to do so by-

(*a*) a *registered trade union* with members at the *mine* or *mines*;

(*b*) a *health and safety representative* or *health and safety committee* at the *mine*; or

(*c*) if there is no *health and safety representative* at the *mine*, an *employee.*

(4) This section does not limit any other law regulating the holding of an inquest or other inquiry into the death of a person.

66. Investigation may be converted into inquiry.-(1) At any time during an investigation, the *Chief Inspector of Mines* may convert it into an inquiry.

(2) The provisions of sections 68 to 71 relating to attendance and examination of witnesses at inquiries apply equally to a converted investigation.

(3) Any person instructed or summoned to give evidence at an inquiry that was converted from an investigation is not entitled to refuse to give evidence only on the grounds that a statement had previously been given, or documents previously been adduced, during the investigation.

(4) This section does not preclude or limit holding an inquiry after an investigation has been completed.

67. Chief Inspector of Mines may designate assistant in inquiry.-At any time before or during an inquiry the *Chief Inspector of Mines* may designate one or more persons to assist in the inquiry or to preside at the inquiry.

68. Inquiry to be public.-(1) An inquiry must be held in public.

(2) Despite subsection (1) the person presiding at an inquiry may of that person's own accord or at the request of a witness exclude members of the public or specific persons or categories of persons from attending the proceedings or part of the proceedings when the proper conduct of the inquiry requires.

(3) The person presiding at an inquiry may make any order necessary to ensure that *employees* at the *mine* and members of the public have access to the premises in which the inquiry is held.

69. Right to participate in inquiry.-The persons listed in this section may participate in an inquiry and, either personally or through a representative, may put questions to witnesses and inspect any book, plan, *record* or other document or item presented at the inquiry. The persons entitled to participate are-

(*a*) any person who has a material interest in the inquiry;

(*b*) a representative of any *registered trade union* with members at the *mine* in respect of which the inquiry is being held; and

(*c*) any *health and safety representative* responsible for the *working place* in respect of which the inquiry is being held.

[Para. (c) substituted by s. 32 of Act No. 72 of 1997.]

Wording of Sections

70. Powers of person presiding at inquiry.-The person presiding at an inquiry may-

(*a*) instruct or summon any person to appear at any specified time and place;

(*b*) question any person under oath or affirmation;

(*c*) instruct any person-

(i) to produce any book, plan, *record* or other document or item necessary for the purposes of the inquiry; or

(ii) to perform any other act in relation to *this Act* necessary for the purpose of the inquiry.

71. Duty of persons summoned or instructed.-(1) Subject to subsection (2), every person giving evidence at an inquiry must answer any relevant question.

(2) The law regarding a witness's privilege in a court of law applies equally to any person being questioned at an inquiry.

(3) The person presiding at an inquiry may direct that any evidence given by a person during an inquiry may not be used in any criminal or disciplinary proceedings against that person except in criminal proceedings on a charge of perjury against that person.

[Sub-s. (3) substituted by s. 33 of Act No. 72 of 1997 and by s. 24 of Act No. 74 of 2008.]

Wording of Sections

(4) When a directive has been issued under subsection (3), the person involved is not entitled to refuse to answer any relevant question only on the grounds that the answer could expose that person to a criminal charge, disciplinary proceedings or a recommendation under section 55A.

[Sub-s. (4) substituted by s. 33 of Act No. 72 of 1997.]

Wording of Sections

(5) A person instructed in terms of section 70 (*c*) must comply with that instruction unless the person has sufficient cause for not doing so.

72. Inquiry records and reports.-(1) A person presiding at an inquiry must-

(*a*) record the evidence given at the inquiry, including any evidence given with the assistance of an interpreter;

(*b*) at the conclusion of the inquiry, prepare a written report of the findings, recommendations and any remedial steps;

(*c*) submit a copy of the report and the *record* of the inquiry to the *Chief Inspector of Mines*;

(*d*) supply a copy of the report and the *record* of the inquiry to the *employer* and to any *health and safety representative*, *health and safety committee* or *registered trade union* that requested the inquiry; and

(*e*) on request supply a copy of the report and the *record* of the inquiry to any person who has a material interest in the inquiry.

(2) An *inspector* may instruct the *employer* of the *mine* concerned to prominently and conspicuously display a copy of the report or any portion of it for *employees* to read.

(3) The *Chief Inspector of Mines* may submit a copy of the report to the appropriate Attorney-General.

73. Chief Inspector of Mines may order further inquiry.-Upon considering the evidence and the report referred to in section 72, the *Chief Inspector of Mines* may require that the matter be inquired into further.

74. Inquiry and inquest may be conducted jointly.-(1) An inquiry in terms of *this Act* into the death of a person may be held jointly with an inquest in terms of the Inquests Act, 1959 (Act No. 58 of 1959).

(2) The judicial officer contemplated in the Inquests Act, 1959 (Act No. 58 of 1959), must preside at a joint inquiry referred to in subsection (1) and the person instructed to hold the inquiry in terms of *this Act* must be deemed to be an assessor appointed in terms of the Inquests Act, 1959.

(3) The provisions of the Inquests Act, 1959 (Act No. 58 of 1959), apply to a joint inquiry.

(4) The assessor referred to in subsection (2) must-

(*a*) prepare a report contemplated in section 72 (1) (*b*); and

(*b*) submit the report and the *record* of the joint inquiry the *Chief Inspector of Mines.*

CHAPTER 6
MINISTER'S POWERS

75. Minister may prohibit or restrict work.-(1) For any reason relating to *health* or *safety*, the *Minister*, by notice in the *Gazette*, may prohibit or restrict any work or any exposure of a person to a *substance* or an environmental condition, if-

(*a*) the *Minister* has consulted the *Council* on the prohibition or restriction; and

(*b*) unless the *Minister* believes that the public interest requires the notice to be published immediately, the *Minister* has-

(i) published a draft of the proposed notice at least three months previously; and

(ii) at that time invited interested persons to submit comments and representations concerning the proposed notice within a specified period.

(2) The *Minister* may attach any conditions to a prohibition or restriction by specifying them in the published notice.

(3) The *Minister*, after consulting the *Council*, may amend or withdraw a notice under subsection (1) at any time.

76. Minister may declare health hazards.-(1) The *Minister*, by notice in the *Gazette*, may declare that an environmental condition or a *substance* present at a *mine* is a *health hazard* to *employees* who are or may be exposed to that condition or *substance*, if-

(*a*) the *Minister* has consulted the *Council* on the issuing of the declaration; and

(*b*) unless the *Minister* believes that the public interest requires the notice to be published immediately, the *Minister* has-

(i) published a draft of the proposed notice at least three months previously; and

(ii) at that time invited interested persons to submit comments and representations concerning the proposed notice within a specified period.

(2) In connection with any *health hazard*, the *Minister*, after consulting the *Council*, by notice in the *Gazette*, may-

(*a*) impose conditions on the performance of work by *employees* exposed to the *health hazard*;

(*b*) stipulate the standards of fitness for an *employee* to perform work involving exposure to the *health hazard*;

(*c*) require *employers* to take measures to eliminate, control and minimise *health risks* associated with the *health hazard*;

(*d*) require *employers* to conduct specified *occupational hygiene* measurements;

(*e*) require *employers* to conduct specified *medical surveillance* in respect of *employees* exposed to the *health hazard*; and

(*f*) provide for any other matter that the *Minister* considers necessary to protect *employees* exposed to the *health hazard.*

(3) The *Minister* may enter any *mine* at any time only for the purposes of *health hazards.*

[Sub-s. (3) added by s. 25 of Act No. 74 of 2008.]

77. Application of Minister's notice.-A notice under either section 75 or 76 may differentiate between *mines*, types of *mines*, parts of a *mine*, occupations and types of work.

78. Exemption from Minister's notice.-(1) A notice under either section 75 or 76 may exempt a particular person or group of persons from compliance with that notice if the *Minister* is satisfied that any of the following conditions exists-

(*a*) in the circumstances the exemption is desirable;

(*b*) the performance of the work by that person or group of persons is temporary; or

(*c*) the *risk* to which that person or group of persons is exposed is negligible.

(2) The *Minister*, after consulting the *Council*, may cancel an exemption granted under subsection (1) at any time.

79. Exemption from all or part of this Act.-(1) The *employer* of a *mine* may request an exemption from the *Minister*, and if satisfied that the *employer* has consulted appropriately with the affected *employees* or their representatives, the *Minister* may exempt the *employer* from any or all the provisions of *this Act* or from a notice or instruction issued under *this Act.* An exemption may be-

(*a*) general or particular;

(*b*) for any period; and

(*c*) on any conditions that provide the same overall protection which would result from the full application of *this Act.*

(2) When an exemption is granted under subsection (1), the *Minister* must issue a certificate of exemption to the *employer*, specifying the scope, period and conditions of the exemption.

(3) The *Minister* may amend or withdraw a certificate of exemption at any time.

(4) The *employer* must prominently and conspicuously display any exemption granted, or deemed to have been granted, under this section to the *employees* to read.

80. Minister may apply other laws to mine.-(1) After consulting the *Council*, the *Minister*, by notice in the *Gazette*, may declare that any provision of the Occupational Health and Safety Act, 1993 (Act No. 181 of 1993), or any regulation made under that Act, or the provisions of any other Act or regulations, must apply to a *mine.*

(2) A declaration in terms of subsection (1) may differentiate between *mines*, types of *mines*, parts of a *mine*, occupations and types of work.

81. Minister to table annual report.-(1) Within 30 days of receiving the annual report of the *Chief Inspector of Mines*, the *Minister* must table it in Parliament.

(2) If Parliament is not in session at the end of the period referred to in subsection (1), the *Minister* must table the report within 14 days of the beginning of the next session of Parliament.

CHAPTER 7
LEGAL PROCEEDINGS AND OFFENCES

82. Jurisdiction of Labour Court.-(1) The *Labour Court* has exclusive jurisdiction to determine any dispute about the interpretation or application of any provision of *this Act* except where *this Act* provides otherwise.

(2) The *Labour Court* has no jurisdiction in respect of offences in terms of *this Act.*

83. No discrimination against employees who exercise rights.-(1) No person may discriminate against any *employee* for-

(*a*) exercising a right in terms of *this Act* or in terms of a collective agreement contemplated in *this Act*;

(*b*) doing anything that the *employee* is entitled to do in terms of *this Act* or in terms of a collective agreement contemplated in *this Act*;

(*c*) refusing to do anything that the *employee* is entitled to refuse to do in terms of *this Act* or in terms of a collective agreement contemplated in *this Act*;

(*d*) refusing to do anything that the *employee* is prohibited from doing in terms of *this Act* or in terms of a collective agreement contemplated in *this Act*; and

(*e*) standing for election, or performing any function, as a *health and safety representative* or a member of a *health and safety committee.*

(2) For the purposes of this section-

(*a*) "discriminate" means to dismiss an *employee* or to engage in any other conduct which has the effect of prejudicing or disadvantaging the *employee*, or which prejudices or disadvantages the *employee* relative to other *employees*; and

(*b*) "*employee*" includes any applicant for employment who has previously been employed at a *mine.*

84. Safety equipment not to be interfered with.-Unless specifically authorised by the *employer*, no person-

(*a*) other than an *inspector* acting in terms of section 50, may remove personal protective equipment from a *mine*, or cause that equipment to be removed;

(*b*) other than an *inspector* acting in terms of section 50, may remove anything that is provided in the interest of *health* or *safety*, or cause that equipment to be removed; or

(*c*) may alter, damage, misuse, render ineffective or interfere with anything that is provided in the interest of *health* or *safety*, or cause that equipment to be altered, damaged, misused, rendered ineffective or interfered with.

85. Juvenile employment underground prohibited.-(1) No person may cause or permit an *employee* under the age of 18 years to work underground at a *mine.*

(2) No *employee* under the age of 18 years may work underground at a *mine.*

(3) Despite subsections (1) and (2), an *employee* under the age of 18 years but over the age of 16 years may work underground as part of vocational education or training.

86. Negligent act or omission.-(1) Any person who, by a negligent act or by a negligent omission, causes *serious injury* or *serious illness* to a person at a *mine*, commits an offence.

[Sub-s. (1) substituted by s. 35 (*a*) of Act No. 72 of 1997.]

Wording of Sections

(2) Any person, other than an *employer* or *employee*, who, by a negligent act or by a negligent omission, endangers the *health* or *safety* of a person at a *mine*, commits an offence.

[Sub-s. (2) substituted by s. 35 (*b*) of Act No. 72 of 1997.]

Wording of Sections

(Date of commencement s. 86: 15 January, 1998.)

(3) . . . . . .

[Sub-s. (3) deleted by s. 35 (*c*) of Act No. 72 of 1997.]

Wording of Sections

87. Breach of confidence.-(1) Any person who discloses any information that they acquired in the performance of a function in terms of *this Act* and that relates to the financial and business affairs of an *employer* or any other person who employs *employees*, commits an offence.

[Sub-s. (1) substituted by s. 36 of Act No. 72 of 1997.]

Wording of Sections

(2) Subsection (1) does not apply if the information-

(*a*) was disclosed to enable a person to perform a function in terms of *this Act*;

(*b*) must be disclosed in terms of *this Act*, any other law or an order of court; or

(*c*) was disclosed to a *health and safety representative* or *health and safety committee* in terms of Chapter 3.

88. Hindering administration of this Act.-Any person who hinders, opposes, obstructs or unduly influences any person who is performing a function in terms of *this Act* commits an offence.

89. Falsifying documents.-Any person who obtains or attempts to obtain a *prescribed* certificate of competency by means of fraud, dishonesty, false pretences or the presentation or submission of a false or forged document commits an offence.

90. Failure to attend when summoned.-A person commits an offence who, having been instructed or summoned to attend an inquiry-

(*a*) without sufficient cause fails-

(i) to appear at the time and place specified; or

(ii) to remain in attendance until excused by the person presiding at the inquiry;

(*b*) attends as required, but without sufficient cause-

(i) fails to comply with an instruction in terms of section 70 (*c*) (i); or

(ii) refuses to be sworn or to make an affirmation; or

(*c*) attends as required and having been sworn or having made an affirmation-

(i) without sufficient cause fails to answer any question fully and to the best of that person's ability; or

(ii) gives evidence, knowing or believing it to be false.

91. Failure to comply with this Act.-(1) Any person, including an *employer*, who contravenes, or fails to comply with, any-

(*a*) provision of *this Act*;

(*b*) *regulation*; or

(*c*) condition, suspension, notice, order, instruction, prohibition, authorisation, permission, consent, exemption, certificate or document determined, given, issued, prescribed or granted by or under *this Act* by the *Minister*, *Chief Inspector of Mines*, *inspector*, any person authorised under section 49 (4) or any person to whom any power has been delegated or the performance of any duty has been assigned under section 96,

commits an offence and is liable to a fine or imprisonment as may be *prescribed*.

[Sub-s. (1) substituted by s. 37 (*a*) of Act No. 72 of 1997 and by s. 27 (*a*) of Act No. 74 of 2008.]

Wording of Sections

(1A) . . . . . .

[Sub-s. (1A) inserted by s. 37 (*b*) of Act No. 72 of 1997 and deleted by s. 27 (*b*) of Act No. 74 of 2008.]

Wording of Sections

(1B) Any *employer* is liable to a fine in terms of section 55B if the *employer* contravenes, or fails to comply with, any-

(*a*) provision of *this Act*;

[Para. (*a*) substituted by s. 27 (*d*) of Act No. 74 of 2008.]

Wording of Sections

(*b*) regulation; or

(*c*) condition, suspension, notice, order, instruction, prohibition, authorisation, permission, consent, exemption, certificate or document determined, given, issued, promulgated or granted by or under *this Act* by the *Minister*, *Chief Inspector of Mines*, *inspector*, any person authorised under section 49 (4)

or any person to whom any power has been delegated or the performance of any duty has been assigned under section 96.

[Sub-s. (1B) inserted by s. 37 (*b*) of Act No. 72 of 1997 and amended by s. 27 (*c*) of Act No. 74 of 2008.]

Wording of Sections

(1C) Despite subsection (1B), any *employer* who contravenes or fails to comply with any *standard* in a code of practice prepared in terms of section 9 (2) is not liable to a fine in terms of section 55B if-

(*a*) the *standard* exceeds any compulsory *standard* in any relevant guideline issued by the *Chief Inspector of Mines*; and

(*b*) the conduct constituting the contravention or failure complies with the compulsory *standard* in any relevant guideline issued by the *Chief Inspector of Mines*.

[Sub-s. (1C) inserted by s. 37 (*b*) of Act No. 72 of 1997 and amended by s. 27 (*e*) of Act No. 74 of 2008.]

Wording of Sections

(2) . . . . . .

[Sub-s. (2) deleted by s. 27 (*f*) of Act No. 74 of 2008.]

Wording of Sections

(3) A person appointed under section 4 (1) to perform any function entrusted to an *employer* by *this Act* commits an offence if that person fails to exercise reasonable care in performing that function.

(4) Any *chief executive officer* or member of the board contemplated in section 2A who performs a function in terms of section 2A (1) or (3) commits an offence if that person fails to take reasonable steps in performing that function.

[Sub-s. (4) added by s. 37 (*c*) of Act No. 72 of 1997.]

92. Penalties.-(1) Any person convicted of an offence in terms of section 87, may be sentenced to a fine or to imprisonment to be determined by the court.

(2) Any person convicted of an offence in terms of section 90 (*a*) or (*b*) (i), may be sentenced to the penalty applicable to a similar offence in a magistrate's court.

(3) Any person convicted of an offence in terms of section 90 (*c*) (ii), may be sentenced to any penalty that may imposed in law for perjury.

(4) Any person convicted of an offence in terms of *this Act* for which no penalty is otherwise expressly determined, may be sentenced to a fine or to imprisonment for a period not exceeding six months.

(5) Any person convicted of an offence in terms of any section mentioned in Column 1 of Table 1 of Schedule 8 may be sentenced to a fine or to imprisonment for a period not exceeding the period mentioned in Column 2 of that Table opposite the number of that section.

[Sub-s. (5) substituted by s. 28 (*a*) of Act No. 74 of 2008. Table substituted by s. 38 of Act No. 72 of 1997 and deleted by s. 28 (*b*) of Act No. 74 of 2008.]

Wording of Sections

(6) Any *owner* convicted of an offence in terms of section 86 or 86A may be sentenced to-

(*a*) withdrawal or suspension of the permit; or

(*b*) a fine of three million rands or a period of imprisonment not exceeding five years or to both such fine or imprisonment.

[Sub-s. (6) added by s. 28 (*c*) of Act No. 74 of 2008.]

(7) In the event of a conviction, the court may, in addition to imposing a sentence in respect of the offence and making an order, order the person convicted to-

(*a*) repair any damage caused, to the satisfaction of the *Chief Inspector of Mines*, and

(*b*) comply with a provision of *this Act* within a specified period of time.

[Sub-s. (7) added by s. 28 (*c*) of Act No. 74 of 2008.]

93. Magistrate's court has jurisdiction to impose penalties.-Despite anything to the contrary contained in any other law, a magistrate's court has jurisdiction to impose any penalty provided for in *this Act*.

94. Serving of documents.-Unless otherwise provided in *this Act*, a notice, order or other document which, in terms of *this Act*, must be served on or delivered to a person, will have been properly served or delivered if it has been either-

(*a*) served on or delivered to that person; or

(*b*) sent by registered post to that person's last known address; or

(*c*) published in the *Gazette*.

95. Proof of facts.-In any legal proceedings in terms of *this Act*-

(*a*) if it is alleged that a person at a *mine* is or was an *employee*, that person is presumed to be an *employee* at that *mine*, unless the contrary is proved;

(*b*) if it is proved that a false statement, entry or information appears in or on a book, plan, *record* or other document, the person who kept that document is presumed to have made, entered, recorded or stored that statement, entry, *record* or information, unless the contrary is proved; and

(*c*) subject to the provisions of sections 63 (1), 63 (3) and 71 (2), any statement, entry or information in or on any book, plan, *record* or other document is admissible in evidence as an admission of the facts in or on it by the person who made, entered, recorded or stored it unless it is proved that that person did not make, enter, record or store it within the scope of their functions.

CHAPTER 8
GENERAL PROVISIONS

96. Delegation and exercise of power.-(1) The *Minister* may delegate any power conferred upon the *Minister* by or under *this Act*, except the power to make *regulations*, to the *Chief Inspector of Mines.*

(2) The *Chief Inspector of Mines* may delegate any power or assign the performance of any duty conferred or imposed upon the *Chief Inspector of Mines* by or under *this Act*, or any other law, to-

(*a*) any *inspector*;

(*b*) any other person with appropriate knowledge and experience who is under the control of the *Chief Inspector of Mines*; or

(*c*) any other person, after consulting the Council.

[Sub-s. (2) substituted by s. 39 of Act No. 72 of 1997.]

Wording of Sections

(3) A delegation or assignment under subsection (1) or (2) must be in writing, and may be subject to any conditions or restrictions determined by the *Minister* or *Chief Inspector of Mines*, as the case may be.

(4) A delegation under subsection (1) or (2) does not prevent the exercise of that power by the *Minister* or *Chief Inspector of Mines*, as the case may be.

97. Minister's power to add and change Schedules.-(1) The *Minister*, after consulting the *Council*, by notice in the *Gazette* may add to, change or replace any Schedule to *this Act* other than Schedules 2, 3 and 7 and, subject to subsection (5), Schedule 4.

[Sub-s. (1) substituted by s. 29 of Act No. 31 of 2003.]

Wording of Sections

(2) The *Minister*, after consulting the *Council*, by notice in the *Gazette* may add to *this Act* a further Schedule containing matters in respect of which *health and safety committees* may consult.

(3) The *Minister*, after consulting the *Council*, by notice in the *Gazette*, may add to *this Act* a further Schedule containing the constitution of the *Council* and its committees.

[Sub-s. (3) substituted by s. 40 (*a*) of Act No. 72 of 1997.]

Wording of Sections

(4) The *Minister*, after consulting the *Council* and the Mining Qualifications Authority, by notice in the *Gazette* may add to *this Act* a further Schedule containing the constitution of the Mining Qualifications Authority and its committees.

[Sub-s. (4) substituted by s. 40 (*a*) of Act No. 72 of 1997.]

(5) The *Minister*, after consulting the *Council*, by notice in the *Gazette* may add to Schedule 4 further items containing transitional provisions necessary for the implementation of *this Act.*

(6) The *Minister*, after consulting the *Council* and in consultation with the Minister of Health, by notice in the *Gazette* may add to *this Act* a further Schedule to suspend or vary the application of the Occupational Diseases in Mines and Works Act, 1973 (Act No. 78 of 1973), except in relation to the determination or payment of compensation.

(7) The *Minister* may add to, change or replace any page header or sidenote by notice in the *Gazette*.

98. Regulations.-(1) The *Minister*, after consulting the *Council*, by notice in the *Gazette* may make *regulations* regarding-

(*a*) *health* and *safety* of persons at *mines*;

(*b*) *health and safety standards*, codes of practice and the provision of protective clothing, equipment and facilities in connection with *health* and *safety* at *mines*;

(*c*) the performance of work by *employees* exposed to a *health hazard* and the measures to eliminate, control and minimise *health risks*;

(*d*) *health* and *safety* employment systems at *mines*;

(*e*) orderly operations at *mines*;

(*f*) the powers, duties, functions and responsibilities of *employees* at *mines* and of the *employers*;

(*g*) the issuing of permits for the use of *machinery*, equipment and material at *mines* and the accreditation of persons to test *machinery*, equipment and material for these purposes;

(*h*) the conditions under which *machinery*, equipment or material may be erected or used at *mines*;

(*i*) the elimination, control and minimisation of *health* and *safety hazards*;

(*j*) requirements for the safe use, handling, processing, storage, transport and disposal of hazardous *substances* used in the mining process and waste produced at the *mine*;

(*k*) the transport, handling, storage and use of explosives and the mixing of *substances* to make explosives at a *mine*;

(*l*) the protection of equipment, structures, water sources and the surface of land;

(*m*) the conditions in which equipment, structures, water sources or the surface of land may be used, and the prohibition on, or restriction of, the erection of equipment and structures and the use of water sources or the surface of land in the vicinity of the *working places* at a *mine*;

(*n*) the making safe of undermined ground and of dangerous excavations, tailings, waste dumps, ash dumps and structures of whatever nature made in the course of *prospecting* or mining operations or which are connected with those operations;

(*o*) the monitoring and control as contemplated in section 49 (3) (*a*) of those environmental aspects at *mines* which affect, or may affect, the *health* and *safety* of *employees* or other persons;

(*p*) standards of housing and nutrition of *employees* who are accommodated at the *mine*;

(*q*) initial standards of fitness to perform work involving exposure to a *health hazard*, standards of fitness to continue performing such work and the conditions under which *employees* may be withdrawn either temporarily or permanently from such work;

(*r*) standards of *occupational hygiene* measurement techniques, the frequency and manner in which measurements must be made, the manner of *record* keeping and reporting of *occupational hygiene* measurements made at *mines*;

(*s*) standards of medical tests or *biological monitoring* used in *medical surveillance*, the persons who may carry out those tests and that monitoring, the interpretation of results of *medical surveillance*, the frequency for carrying out periodic *medical surveillance*, the keeping of *records of medical surveillance* and the reporting of confidential extracts from *records of medical surveillance*;

(*t*) the manner of reporting *prescribed* accidents and *health* matters at *mines*, the keeping of *records* and statistics in relation to accidents and *health* matters and the provision of emergency medical treatment after an accident or in connection with a *health* matter;

(*u*) the manner of reporting *prescribed occupational diseases* at *mines*, the keeping of *records* in relation to *occupational diseases* and the control and provision of medical services in connection with *occupational diseases*;

(*v*) the form of an exit certificate and the content of medical examinations associated with an exit certificate;

(*w*) the form of any application to be made in terms of *this Act* and of any consent or document required to be submitted with an application, and the information or details which must accompany an application;

(*x*) the form of any register, *record*, notice, sketch plan or information to be kept, given, published or submitted in terms of or for the purposes of *this Act*, and the manner in which a register, *record*, notice, sketch plan or information is to be kept, given, published or submitted;

(*y*) the drawing up and keeping of *mine* plans and the submission of statistical and other reports in relation to *minerals*, *mines* and *machinery*;

(*z*) negotiations and consultations in terms of sections 26 and 33 and the time periods within which the negotiations and consultations must be completed;

(*z*A) qualifications for appointment as a *health and safety representative*, the election and terms of office of representatives, the circumstances in which a representative must vacate office, the circumstances in which a representative may be removed from office, the manner in which vacancies may be filled, the functions of representatives, the manner in which the functions of representatives must be conducted, the facilities and assistance that must be provided to representatives and the training of representatives;

(zB) the establishment of *health and safety committees*, the election and appointment of members to a committee, the terms of office of members of a committee, the circumstances in which a member must vacate office, the circumstances in which a member may be removed from office, the manner in which vacancies may be filled, meetings of the committees, the rules and procedures of the committees, the facilities and assistance that must be provided to committees and the training of the members of committees;

(*z*C) the appointment of members to the *Council* in accordance with the provisions of Schedule 2, the functions of the *Council*, the payment of allowances to members, the funding of the *Council* and its committees, and any other matter the regulation of which, in the opinion of the *Minister*, may be necessary for the proper functioning of the *Council* and its committees;

(zD) the appointment of members of the Mining Qualifications Authority in accordance with Schedule 2;

(*z*E) qualifications for *inspectors*;

(*z*F) the establishment of one or more accounts and the control of those accounts by the *Chief Inspector of Mines* with a view to funding-

(i) research and surveys regarding, and for the promotion of *health* and *safety* at *mines*; and

(ii) the administration costs of the overall programme for relevant *health* and *safety* research;

[Para. (*z*F) substituted by s. 41 (*a*) of Act No. 72 of 1997.]

Wording of Sections

(*z*G) the manner in which the presence of witnesses at inquiries must be obtained in terms of section 71, and the procedures to be followed at inquiries;

(*z*H) procedures to be followed in respect of appeals to the *Chief Inspector of Mines* or *Medical Inspector* under *this Act*;

(*z*I) fees payable in relation to applications, appeals and documents;

(*z*J) the payment of levies by *mines* on the basis of *health* and *safety risk* for-

(i) research and surveys regarding, and for the promotion of *health* and *safety* at *mines*; and

(ii) the administration costs of the overall programme for relevant *health* and *safety* research.

[Para. (*z*J) substituted by s. 41 (*b*) of Act No. 72 of 1997.]

Wording of Sections

(*z*K) the imposition of monetary and other obligations in connection with safe-making referred to in paragraph (*n*) on persons who-

(i) are or were responsible for the undermining of any ground or the making of any excavations, tailings, waste dumps, ash dumps or structures or for the dangerous condition of any of them; or

(ii) will benefit from that safe-making;

(*z*L) the assumption by the State of responsibility for safe-making referred to in paragraph (*n*) in particular cases;

(*z*M) the use of plain language in documents that are required to be published, displayed or distributed in terms of *this Act*;

(*z*N) any other matter the regulation of which may be necessary or desirable in order to achieve the objects of *this Act*;

[Para. (*z*N) substituted by s. 29 (*a*) of Act No. 74 of 2008.]

Wording of Sections

(*z*O) the system of fines contemplated in sections 55A and 55B, including *regulations* regarding forms and documents, periods of time, procedures, *records* to be kept and the payment of fines;

[Para. (*z*O) added by s. 41 (*c*) of Act No. 72 of 1997 and substituted by s. 29 (*b*) of Act No. 74 of 2008.]

Wording of Sections

(*z*P) minimum standards for the establishment, functioning, training, equipping and staffing of rescue services at *mines* and reporting by *employers* in respect of rescue services.

[Para. (*z*P) added by s. 29 (*c*) of Act No. 74 of 2008.]

(2) No *regulation* may be made relating to-

(*a*) State revenue or expenditure except with the concurrence of the Minister of Finance;

(*b*) any *health* matter, except after consultation with the Minister for Health.

(3) The *Minister*, after consultation with the Mining Qualifications Authority, by notice in the *Gazette*, may make *regulations* to provide for-

(*a*) the qualifications for employment in any occupation;

(*b*) conditions for acceptance as a candidate for examinations;

(*c*) the issuing of certificates of competency in respect of any occupation;

(*d*) the funding of the Mining Qualifications Authority including the manner by which such funds may be raised;

(*e*) procedures for assessing competency;

(*f*) the accreditation of assessors;

(*g*) the establishment of examination bodies;

(*h*) the appointment of examiners and moderators;

(*i*) the monitoring and administration of examinations;

(*j*) the setting of examination fees;

(*k*) the accreditation of providers of training;

(*l*) the establishment of quality assurance procedures;

(*m*) the issue of qualifications;

(*n*) the registering of qualifications; and

(*o*) any other matter, the regulation of which may be necessary or desirable in order to promote the activities of the Mining Qualifications Authority.

(4) *Regulations* made in terms of subsection (3) must be in accordance with the National Qualifications Framework approved in terms of the South African Qualifications Authority Act, 1995 (Act No. 58 of 1995).

(5) The *Minister* may incorporate all or part of any *health and safety standard*, without re-stating the text of it, in a *regulation* by referring to the number, title and year of issue of that *health and safety standard* or, to any other particulars by which that *health and safety standard* is sufficiently identified.

(6) The *Minister* must consult the *Council* before incorporating *a health and safety standard* in a *regulation.*

(7) The *Minister*, after consulting the *Council*, by notice in the *Gazette* may make *regulations* imposing any function of an *employer* on any person, other than the *employer*, who employs *employees*.

[Sub-s. (7) substituted by s. 41 (*d*) of Act No. 72 of 1997.]

Wording of Sections

(8) For the purposes of *this Act*, any *health and safety standard* referred to in subsection (5) incorporated in a *regulation* is deemed to be a *regulation*, in so far as it is not repugnant to any *regulation* made under subsection (1).

(9) Whenever a *health and safety standard* which has been incorporated in a *regulation* is subsequently amended or substituted by the competent authority, the *regulation* referred to in subsection (5) incorporating that *health and safety standard* is deemed to refer to that *health and safe standard* as so amended or substituted, unless a contrary intention is stated in the notice.

(10) The *Chief Inspector* must keep a register of particulars of-

(*a*) every amendment or substitution of a *health and safety standard* incorporated in the *regulations*;

(*b*) the publication of any amendment or substitutions;

(*c*) every publication in which a *health and safety standard* that has been incorporated in the *regulations* under subsection (5) was published; and

(*d*) the place in the Republic where each of those *standards* and publications is obtainable or otherwise available for inspection.

(11) The *Chief Inspector of Mines* must allow any person to inspect the register kept in terms of subsection (9) and to make an extract from it.

(12) The provisions of section 31 of the Standards Act, 1993 (Act No. 29 of 1993), do not apply to any incorporation of a *health and safety standard* or to any amendment or substitution of a *health and safety standard* under this section.

99. Amendment of laws.-Each of the laws referred to in Schedule 3 is hereby amended to the extent specified in that Schedule.

100. Transitional arrangements.-(1) The amendment of laws referred to in Schedule 3 does not affect any transitional arrangement made in Schedule 4.

(2) The transitional arrangements in Schedule 4 must be read and applied as substantive provisions of *this Act*.

101. Interpretation.-(1) . . . . . .

[Sub-s. (1) deleted by s. 42 of Act No. 72 of 1997.]

Wording of Sections

(2) Subject to sections 26 and 33, no agreement may affect any-

(*a*) provision of *this Act*;

(*b*) condition, notice, order, instruction, prohibition, authorisation, permission, consent, exemption, certificate or document determined, given, issued, promulgated or granted by or under *this Act* by the *Minister*, *Chief Inspector of Mines*, *inspector* or any other person authorised under *this Act*; or

(*c*) any condition contained in any exemption.

(3) Subsection (2) applies to any agreement whether entered into before or after the commencement of *this Act* or before or after the issuing of the documents referred to in subsection (2).

(4) Any notice, order or any other document issued in good faith in terms of *this Act*, is valid according to its terms, despite any want of form or lack of power on the part of any person to issue or authenticate it, provided the necessary power is subsequently conferred upon that person.

102. Definitions.-In *this Act*, unless the context otherwise indicates-

"biological monitoring" means a planned programme of periodic collection and analysis of body fluid, tissues, excreta or exhaled air in order to detect and quantify the exposure to or absorption of any *substance* or *organism*;

"chief executive officer" means the person who is responsible for the overall management and control of the business of an *employer*;

[Definition of "chief executive officer" inserted by s. 43 (*a*) of Act No. 72 of 1997.]

"Chief Inspector of Mines" means the *officer* appointed in terms of section 48 (1) and includes any officer acting in that capacity;

"Commission" means the Commission for Conciliation, Mediation and Arbitration established in terms of section 112 of the *Labour Relations Act*;

"Constitution" means the Constitution of South Africa;

[Definition of "Constitution" inserted by s. 30 (*a*) of Act No. 74 of 2008.]

"Council" means the Mine Health and Safety Council established by section 41 (1);

"Department" means the Department of Minerals and Energy;

[Definition of "Department" substituted by s. 43 (*b*) of Act No. 72 of 1997.]

Wording of Sections

"employee" means any person who is employed or working at a *mine*;

"employer" means an *owner*;

[Definition of "employer" substituted by s. 43 (*c*) of Act No. 72 of 1997.]

Wording of Sections

"engine" means any appliance or combination of appliances by which power, other than human or animal power, can be applied to do mechanical work;

"hazard" means a source of or exposure to danger;

"health" refers to *occupational health* at *mines*;

"health and safety committee" means a health and safety committee established in terms of section 34;

"health and safety equipment" means an article or part of an article that is manufactured, provided or installed in the interest of the *health* or *safety* of any person;

"health and safety representative" means an *employee* elected and appointed in terms of section 29;

"health and safety standard" means any *standard,* irrespective of whether or not it has the force of law, which, if applied for the purposes of *this Act*, will in the opinion of the *Minister* promote the attainment of an object of *this Act*;

"health hazard" means any physical, chemical or biological *hazard* to *health*, including anything declared to be a health hazard by the *Minister*;

"health-threatening occurrence" means any occurrence that has or may have the potential to cause *serious illness* or damage to *health*;

"healthy" means free from illness or injury attributable to occupational causes;

"inspector" means an *officer* appointed in terms of section 49 (1) (*c*), a *Medical Inspector* and any *Principal Inspector of Mines*;

[Definition of "inspector" substituted by s. 43 (*d*) of Act 72 of 1997.]

Wording of Sections

"Labour Court" means the Labour Court established by section 151 of the *Labour Relations Act*;

"Labour Relations Act" means the Labour Relations Act, 1995 (Act No. 66 of 1995);

"machinery" means any *engine*, boiler or appliance or any combination of them, which is situated at a *mine* and used or intended to be used-

(*a*) for generating, developing, receiving, storing, converting, transforming, transmitting or distributing any form of power or energy; or

(*b*) for conveying persons, material or *minerals*;

"manager" means any competent person appointed in terms of section 3 (1) (*a*);

"Medical Inspector" means a Medical Inspector appointed in terms of section 49 (1) (*b*);

"medical practitioner" means a medical practitioner as defined in the Medical, Dental and Supplementary Health Service Professions Act, 1974 (Act No. 56 of 1974);

"medical surveillance" means a planned programme of periodic examination, which may include clinical examinations, *biological monitoring* or medical tests, of *employees* by an *occupational health practitioner* or by an

occupational medical practitioner contemplated in section 13;

"mine" means, when-

(*a*) used as a noun-

(i) any borehole, or excavation, in any tailings or in the earth, including the portion of the earth that is under the sea or other water, made for the purpose of searching for or winning a *mineral*, whether it is being worked or not; or

(ii) any other place where a *mineral* deposit is being exploited, including the *mining area* and all buildings, structures, *machinery*, mine dumps, access roads or objects situated on or in that area that are used or intended to be used in connection with searching, winning, exploiting or *processing* of a *mineral*, or for *health* and *safety* purposes. But, if two or more excavations, boreholes or places are being worked in conjunction with one another, they are deemed to comprise one mine, unless the *Chief Inspector of Mines* notifies their *employer* in writing that those excavations, boreholes or places comprise two or more mines; or

(iii) a *works*; and

(*b*) used as a verb, the making of any excavation or borehole referred to in paragraph (*a*) (i), or the exploitation of any *mineral* deposit in any other manner, for the purpose of winning a *mineral*, including *prospecting* in connection with the winning of a *mineral*;

"mineral" means any *substance*, excluding water, but including sand, stone, rock, gravel and clay, as well as soil, other than top soil-

(*a*) whether that *substance* is in solid, liquid or gaseous form;

(*b*) that occurs naturally in or on the earth, in or under water or in tailings; and

(*c*) that has been formed by or subjected to a geological process;

"Mineral and Petroleum Resources Development Act" means the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002);

[Definition of "Mineral and Petroleum Resources Development Act" inserted by s. 30 (*b*) of Act No. 74 of 2008.]

"Minerals Act" . . . . . .

[Definition of "Minerals Act" deleted by s. 30 (*c*) of Act No. 74 of 2008.]

Wording of Sections

"mining area" means a prospecting area, mining area, retention area, exploration area and production area as defined in section 1 read with section 65 (2) (*b*) of the Petroleum and Mineral Resources Development Act, 2002 (Act No. 28 of 2002).

[Definition of "mining area" substituted by s. 110 of Act No. 28 of 2002.]

Wording of Sections

(Editorial Note: The reference to section 65 (2) (*b*) of the Petroleum and Mineral Resources Development Act, 2002, in the definition above, is incorrect as there is no such section in that Act. It is suggested that section 1 of the Petroleum and Mineral Resources Development Act, 2002, was intended. It is our policy to publish as per *Gazette*, but we have notified the relevant Government Department and await their response.)

"Minister" means the Minister of Minerals and Energy;

[Definition of "Minister" substituted by s. 43 (*e*) of Act No. 72 of 1997.]

Wording of Sections

"occupational disease" means any *health* disorder including a compensatable disease as contemplated by the Occupational Diseases in Mines and Works Act, 1973 (Act No. 78 of 1973), and an occupational disease contemplated by the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993);

[Definition of "occupational disease" substituted by s. 43 (*f*) of Act No. 72 of 1997.]

Wording of Sections

"occupational health" includes *occupational hygiene* and *occupational medicine*;

"occupational health practitioner" . . . . . .

[Definition of "occupational health practitioner" deleted by s. 30 (*d*) of Act No. 74 of 2008.]

Wording of Sections

"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;

"occupational medical practitioner" means a *medical practitioner* who holds a qualification in *occupational medicine*, or an equivalent qualification, recognised by the Health Professions Council of South Africa;

[Definition of "occupational medical practitioner" substituted by s. 30 (*e*) of Act No. 74 of 2008.]

Wording of Sections

"officer" means a woman or man who has been appointed permanently despite the fact that such appointment may be on probation to a post contemplated in section 8 (1) (*a*) of the Public Service Act, 1994 (Proclamation No. 103 of 1994), and includes a woman or man contemplated in section 8 (1) (*b*) or 8 (3) (*c*) of that Act;

"organism" means any biological entity which is capable of causing illness to persons;

"owner"-

(*a*) in relation to a *mine*, means-

(i) the holder of a *prospecting* permit or mining authorisation issued under the *Mineral and Petroleum Resources Development Act*;

[Sub-para. (i) substituted by s. 30 (*f*) of Act No. 74 of 2008.]

Wording of Sections

(ii) if a prospecting permit or mining authorisation does not exist, the person for whom the activities contemplated in paragraph (*b*) of the definition of "*mine*" are undertaken, but excluding an independent contractor; or

(iii) if neither (i) or (ii) is applicable, the last person who worked the *mine* or that person's successor in title; and

(*b*) in relation to a *works*, means the person who is undertaking the activities contemplated in the definition of "*works*", but excluding an independent contractor;

[Definition of "owner" substituted by s. 43 (*g*) of Act No. 72 of 1997.]

Wording of Sections

"prescribed" means prescribed by *regulation*;

"Principal Inspector of Mines" means the *officer* appointed by the *Chief Inspector of Mines* to be in charge of *health* and *safety* in any region established in terms of section 47 (2);

[Definition of "Principal Inspector of Mines" inserted by s. 43 (*h*) of Act No. 72 of 1997.]

"processing" means the recovering, extracting, concentrating, refining, calcining, classifying, crushing, milling, screening, washing, reduction, smelting or gasification of any *mineral*, and **"process"** has a similar meaning;

"prospecting" means intentionally searching for any *mineral* by means that disturb any tailings or the surface of the earth, including the portion of the earth that is under the sea or under other water, by means of excavation or drilling, but does not include *mine* as a verb;

"Public Finance Management Act" means the Public Finance Management Act, 1999 (Act No. 1 of 1999);

[Definition of "Public Finance Management Act" inserted by s. 30 (*g*) of Act No. 74 of 2008.]

"reasonably practicable" means practicable having regard to-

(*a*) the severity and scope of the *hazard* or *risk* concerned;

(*b*) the state of knowledge reasonably available concerning that *hazard* or *risk* and of any means of removing or mitigating that *hazard* or *risk*;

(*c*) the availability and suitability of means to remove or mitigate that *hazard* or *risk*; and

(*d*) the costs and the benefits of removing or mitigating that *hazard* or *risk*;

"record" includes information contained in or on a computer print-out, tape or disc or any other computer storage medium;

"record of medical surveillance" means a *record* kept in terms of section 13 (3);

"registered trade union" means a trade union registered in terms of the *Labour Relations Act*;

"regulation" means a regulation made under section 98 or in force in terms of item 4 of Schedule 4;

"representative trade union" means a *registered trade union*, or two or more *registered trade unions* acting

jointly, that have as members the majority of *employees* at a *mine*;

"risk" means the likelihood that occupational injury or harm to persons will occur;

"safety" means safety at *mines*;

"serious injury" means any injury which is reportable under *this Act*;

"serious illness" means any illness resulting from occupational exposure that affects the *health* of a person to the extent that it incapacitates the affected person from resuming that person's normal or similar occupation for four days or more;

"standard" means any provision occurring-

(*a*) in a specification, compulsory specification, code of practice or standard method as defined in section 1 of the Standards Act, 1993 (Act No. 29 of 1993); or

(*b*) in any specification, code or any other directive having standardisation as its aim and issued by an institution or organisation inside or outside the Republic which, whether generally or with respect to any particular article or matter and whether internationally or in any particular country or territory, seeks to promote standardisation;

"substance" includes any solid, liquid, vapour, gas or aerosol, alone or in any combination;

"this Act" includes-

(*a*) the section numbers, but not the page headers, headings or sidenotes;

(*b*) the Schedules;

(c) the *regulations*; and

(*d*) any condition, suspension, notice, order, instruction, prohibition, authorisation, permission, consent, exemption, certificate or document determined, given, issued, promulgated or granted by or under *this Act* by the *Minister*, *Chief Inspector of Mines*, an *inspector*, any person authorised under section 49 (4) or any person to whom a power has been delegated or the performance of a duty has been assigned under section 96;

[Para. (*d*) substituted by s. 43 (*i*) of Act No. 72 of 1997.]

Wording of Sections

"topsoil" means topsoil as defined in section 1 of the *Mineral and Petroleum Resources Development Act*;

[Definition of "topsoil" inserted by s. 43 (*j*) of Act No. 72 of 1997 and substituted by s. 30 (*h*) of Act No. 74 of 2008.]

Wording of Sections

"working place" means any place at a *mine* where *employees* travel or work;

"works" means any place, excluding a *mine*, where any person carries out-

(*a*) the transmitting and distributing to another consumer of any form of power from a *mine*, by the *employer* thereof, to the terminal point of bulk supply or where the supply is not in bulk, to the power supply meter on any such other consumer's premises; or

(*b*) training at any central rescue station; or

(*c*) the making, repairing, re-opening or closing of any subterranean tunnel; or

(*d*) any operations necessary or in connection with any of the operations listed in this paragraph.

103. Occupational Health and Safety Act, 1993, not applicable.-The Occupational Health and Safety Act, 1993 (Act No. 85 of 1993), is not applicable to any matter in respect of which any provision of *this Act* is applicable.

104. Civil liability of State.-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.*

[S. 104 substituted by s. 31 of Act No. 74 of 2008.]

Wording of Sections

105. Act binds State.-The provisions of *this Act* bind the State except in so far as any criminal liability is concerned.

106. Short title and commencement.-(1) *This Act* is called the Mine Health and Safety Act, 1996.

(2) *This Act* comes into operation on a date fixed by the President by proclamation in the *Gazette*.

Schedule 1

GUIDELINES FOR DETERMINING THE NUMBER OF FULL-TIME HEALTH AND SAFETY REPRESENTATIVES

1. Introduction

(1) This Schedule contains guidelines for determining the number of full-time *health and safety representatives.*

(2) *This Act* places the highest value on agreement. The parties referred to in section 26 must refer to this Schedule, using its guidelines in a manner that best suits the particular *mine.*

(3) If agreement is not reached, the Commissioner appointed by the *Commission* must refer to this Schedule, using its guidelines in a manner that best suits the particular *mine.*

2. Minimum threshold

(1) There should be a full-time *health and safety representative* in every *mine* that requires the use of a full-time *health and safety representative*, taking into account-

(*a*) the volume, size and physical location of the *mine*;

(*b*) the *health* and *safety record* of the *mine*;

(*c*) the number of designated *working places*; and

(*d*) the objects of *this Act.*

(2) The guidelines as to the size of the *mine* that should have a full-time *health and safety representative* is a *mine* with 500 *employees*.

3. Number of full-time health and safety representatives

(1) The formula for determining the number of full-time *health and safety representatives* should take into account-

(*a*) the nature, size and physical location of the *mine*;

(*b*) the *health* and *safety record* of the *mine*;

(*c*) the number of designated *working places*;

(*d*) the number of *health and safety representatives*;

(*e*) the number of shafts and the number of *employees* at the shaft; and

(*f*) the objects of *this Act.*

Schedule 2

NOMINATION AND APPOINTMENT OF MEMBERS TO TRIPARTITE INSTITUTIONS

[Schedule 2 amended by s. 44 of Act No. 72 of 1997.]

Wording of Sections

The *Minister* must make the regulations referred to in sections 42 (2) and 45 (2) in a manner that ensures that-

(*a*) members appointed to represent *employees* are either-

(i) all nominated by agreement between *registered trade unions* representing at least 75% of *employees* belonging to such trade unions in the mining industry; or

(ii) failing agreement in terms of subparagraph (i)-

(*aa*) at least half are persons nominated by a *registered trade union* or unions representing the majority of *employees* belonging to such trade unions in the mining industry; and

(*bb*) the rest are persons nominated by *registered trade unions* and appointed in accordance with the significance of the trade unions concerned; and

(*b*) members appointed to represent *employers* are either-

(i) all nominated by agreement between *employers*' organisations whose members employ at least 75% of *employees* in the mining industry; or

(ii) failing agreement in terms of subparagraph (i):

(*aa*) at least half are persons nominated by an *employers*' organisation or organisations whose members employ the majority of the *employees* in the mining industry; and

(*bb*) the rest are persons nominated by *employers*' organisations and appointed in accordance with the significance of the organisations concerned.

Schedule 3
AMENDMENT OF LAWS

[Schedule 3 amended by s. 45 of Act No. 72 of 1997.]

Wording of Sections

A. MINERALS ACT, 1991

1. *Amends section 1 of the Minerals Act, No. 50 of 1991, as follows:-paragraph (a) deletes the definitions of "certificated", "engine", "investigating officer", "machinery", "employer", "mine safety committee", "peace officer", "regional director", "regional mining engineer", "serious bodily harm" and "works"; paragraph (b) inserts the definition of "Chief Inspector of Mines"; and paragraph (c) inserts the definition of "Director: Mineral Development".*

2. *Amends section 2 of the Minerals Act, No. 50 of 1991, by deleting subsection (2).*

3. *Amends section 8 of the Minerals Act, No. 50 of 1991, by substituting subsection (1).*

4. *Amends section 9 of the Minerals Act, No. 50 of 1991, as follows:-paragraph (a) substitutes subsection (3) (a); paragraph (b) substitutes subsection (3) (c); paragraph (c) substitutes subsection (5) (c); paragraph (d) deletes the word "and" at the end of subsection (5) (d) and substitutes subsection (5) (e); paragraph (e) adds subsection (5) (f); and paragraph (f) adds subsections (7) and (8).*

5. *Amends section 12 of the Minerals Act, No. 50 of 1991, by adding subsection (2), the existing section becoming subsection (1).*

6. *Substitutes section 15 of the Minerals Act, No. 50 of 1991.*

7. *Amends section 25 of the Minerals Act, No. 50 of 1991, by substituting subsection (2).*

8. *Repeals sections 26 to 27 of the Minerals Act, No. 50 of 1991.*

9. *Amends section 39 (3) of the Minerals Act, No. 50 of 1991, by substituting the words following paragraph (c).*

10. *Amends section 41 of the Minerals Act, No. 50 of 1991, by substituting subsection (1).*

11. *Amends section 51 (2) of the Minerals Act, No. 50 of 1991, as follows:-paragraph (a) substitutes paragraph (b); and paragraph (b) deletes paragraph (d).*

12. *Inserts sections 53A, 53B, 53C and 53D in the Minerals Act, No. 50 of 1991.*

13. *Amends section 54 of the Minerals Act, No. 50 of 1991, by substituting subsection (1).*

14. *Amends section 60 of the Minerals Act, No. 50 of 1991, as follows:-paragraph (a) substitutes subsection (1); and paragraph (b) substitutes subsection (2).*

15. *Amends section 61 (1) of the Minerals Act, No. 50 of 1991, by deleting paragraphs (d), (e) and (f).*

16. *Amends section 63 of the Minerals Act, No. 50 of 1991, as follows:-paragraph (a) deletes subsection (1) (a), (b), (h)* (iv) *and* (v)*, (i), (j), (k), (l), (n), (u), (v), (w) and (x); paragraph (b) substitutes subsection (1) (m); paragraph (c) substitutes subsection (2); and paragraph (d) deletes subsection (3).*

17. *Substitutes the expression "Director: Mineral Development" for the expression "regional director", wherever it occurs in the Minerals Act, No. 50 of 1991.*

18. *Substitutes the long title of the Minerals Act, No. 50 of 1991.*

B. REFERENCE TO GOVERNMENT MINING ENGINEER IN CERTAIN ACTS

Substitution for Government Mining Engineer

The following Acts are hereby amended by the substitution for the expression "Government Mining Engineer", wherever it occurs, of the expression "Chief Inspector of Mines as contemplated in the Mine Health and Safety Act, l996,":

Advertising on Roads and Ribbon Development Act, 1940 (Act No. 21 of 1940);

Rand Water Board Statutes (Private) Act, 1950 (Act No. 17 of 1950);

Mines and Works Act, 1956 (Act No. 27 of 1956);

Atmospheric Pollution Act, 1965 (Act No. 45 of 1965);

National Roads Act, 1971 (Act No. 54 of l 971);

Occupational Diseases in Mines and Works Act, 1973 (Act No. 78 of 1973);

National Building Regulations and Building Standards Act, 1977 (Act No. 103 of 1977).

Schedule 4

TRANSITIONAL PROVISIONS

[Schedule 4 amended by s. 46 of Act No. 72 of 1997 and by s. 32 of Act No. 74 of 2008.]

Wording of Sections

(Editorial Note: Please take note that s. 34 of Act No. 74 of 2008 substituted the expression of "*Minerals Act*", with the expression "*Mineral and Petroleum Resources Development Act, 2002*". We have carried out the amendment as per the original *Government Gazette* instruction however it is suggested that the expression referring to the "*Minerals Act*" should have been retained in this Schedule.)

1. Any *health and safety standard* which, immediately prior to the commencement of *this Act*, was incorporated under the provisions of the *Mineral and Petroleum Resources Development Act* or the regulations made under that Act is deemed to be a *health* and *safety standard* incorporated under this item.
2. A certificate of fitness issued under the provisions of the Occupational Diseases in Mines and Works Act, 1973 (Act No. 78 of 1973), which was valid immediately before the commencement of *this Act* shall be deemed to be sufficient proof that the *employee* is fit to perform work until the certificate is cancelled or expires.
3. A declaration in respect of any work which has been declared under the Occupational Diseases in Mines and Works Act, 1973 (Act No. 78 of 1973), to be *risk* work at controlled *mines* is deemed to be a declaration made under section 76 (1) of *this Act* and remains in force until the declaration is withdrawn or superseded under *this Act.*
4. Any regulation made or deemed to be made under the *Mineral and Petroleum Resources Development Act* that relates to *health* and *safety* issues that can be regulated under *this Act*, may be amended under *this Act* and remains in force until repealed under *this Act*.
5. To the extent that it grants exemptions from the operation of a provision similar to a provision of *this Act*, an exemption is deemed to have been granted under section 79 if-

   (*a*) it was granted under the provisions of the *Mineral and Petroleum Resources Development Act*; and

   (*b*) it is still in force when *this Act* commences.
6. Section 85 does not apply to an *employee* employed at any *mine* immediately before the commencement of that section.
7. The Mine Health and safety Inspectorate continues to exist as a juristic person and the *Chief Inspector of Mines* is its accounting authority.

Schedule 5

SUSPENSION AND VARIATION OF APPLICATION OF OCCUPATIONAL DISEASES IN MINES AND WORKS ACT, 1973 (ACT NO. 78 OF 1973)

[Schedule 5 added by Government Notice No. R.848 of 21 June 1997.]

A. SUSPENSION OF APPLICATION OF ACT NO. 78 OF 1973

The application of the following sections of the Occupational Diseases in Mines and Works Act, 1973 (in this

Schedule referred to as the 1973 Act) is hereby suspended:

(*a*) Section 4 (2) (*b*).

(*b*) Section 15.

(*c*) Section 16 (1) (*b*) and (*c*).

(*d*) Section 23.

(*e*) Section 24.

(*f*) Section 25.

(*g*) Section 26.

(*h*) Section 27 (2), (3), (4) and (5).

(*i*) Section 28.

(*j*) Section 29.

(*k*) Section 30.

(*l*) Section 37 (2) (*a*).

(*m*) Section 121 (1) (*b*), (*h*) and (*i*).

(*n*) Section 124 (3) (*g*) and (*h*).

(*o*) Section 125.

(*p*) Section 126 (1), (2) (*a*) and (*b*) and (3) (*a*) and (*b*) (i).

B. VARIATION OF APPLICATION OF ACT NO. 78 OF 1973

1. The application of the following sections of the 1973 Act is hereby limited to medical examinations for the purpose of determining benefits:

(*a*) Section 4 (1) and (2) (*a*).

(*b*) Section 5.

(*c*) Section 31 (1).

(*d*) Section 36, subject to item 3 (*b*).

(*e*) Section 37 (1), (2) (*b*) and (3).

2. The application of section 27 (1) of the 1973 Act is hereby limited to instances where the director receives a communication as contemplated in section 33 (1).

3. The application of the following sections of the 1973 Act is hereby limited to persons employed at mines or works:

(*a*) Section 31 (1).

(*b*) Section 36 (1) (*a*).

Schedule 6

CONSTITUTION OF THE MINE HEALTH AND SAFETY COUNCIL

[Schedule 6 added by Government Notice No. R.1317 in *Government Gazette* 18352 of 10 October, 1997, amended by Government Notice No. R.906 in *Government Gazette* 23585 of 2 July, 2002, corrected by Government Notice No. R.1575 in *Government Gazette* 24168 of 13 December, 2002 (English only) and amended by s. 34 of Act No. 74 of 2008.]

[An italicised word or phrase is defined in section 102 of the Mine Health and Safety Act, 1996 (Act No. 29 of 1996), (*this Act*) and an italicised word or phrase in bold is defined in item 24 of this Constitution. In this Constitution all references to sections are references to sections in *this Act* unless otherwise indicated.]

Wording of Sections

1. Establishment of Council and committees.-(1) The *Council* and the *committees* of the *Council,* the Mining Regulation Advisory Committee, the Mining Occupational Health Advisory Committee and the Safety in Mines Research Advisory Committee are established by section 41 (1) and (2) of *this Act.*

(2) The *Council* may establish ad hoc committees and subcommittees for such periods as the *Council* may consider necessary, to achieve the object or perform the functions of the *Council.*

[Ad hoc and subcommittees are distinguished between in the definition of "***other committee***".]

(3) Every permanent or ad hoc committee may, subject to such conditions as the *Council* may determine, establish subcommittees, for such periods as the committee may consider necessary, to perform any function of that committee.

2. Legal status.-(1) The *Council is* a body corporate.

(2) All actions, suits or other proceedings at law, by or against any ***committee*** must be brought by or against the *Council*.

(3) The *Council* may authorise any person or persons to act on behalf of the *Council* and to sign all such documents and to take all such steps as may be necessary in connection with any proceedings at law brought by or against the *Council*.

3. Object of Council.-The object of the *Council is* to advise the *Minister* on *health* and *safety* at *mines.*

[Section 41 (1) prescribes the object of the *Council*.]

4. Functions of Council.-The *Council* must-

(*a*) advise the *Minister* on *health* and *safety* at *mines* including, but not limited to, any legislation on *mine* rehabilitation in so far as it concerns *health* and *safety*;

(*b*) co-ordinate the activities of the ***committees***;

(*c*) consider the reports of the ***committees***;

(*d*) liaise with the Mining Qualifications Authority on matters relating to *health* and *safety*;

(*e*) liaise with any other statutory bodies concerned with matters relating to *health* and *safety*;

(*f*) promote a culture of *health* and *safety* in the mining industry;

(*g*) at least once every two years arrange and co-ordiante a tripartite summit to review the state of *health* and *safety* at *mines*;

(*h*) for each year consider an overall programme for relevant *health* and *safety* for approval as *prescribed* and deliver a copy to the Minister of Finance for considerations; and

(*i*) perform every duty imposed upon the *Council* in terms of *this Act*.

[Section 43 (*a*) to (*f*) determine the duties of the *Council.*]

5. Functions of *committees*.-(1) The Mining Regulation Advisory Committee must advise the *Council* on-

(*a*) proposed changes to legislation to improve *health* or *safety* at *mines*;

(*b*) proposals for changes to legislation made by any committee;

(*c*) guidelines for codes of practice; and

(*d*) *standards* approved by the South African Bureau of Standards.

[Section 44 (1) (*a*) to (*d*) determine the duties of the MRAC.]

(2) The Mining Occupational Health Advisory Committee must advise the *Council* on-

(*a*) policy relating to *health*;

(*b*) *standards*, systems and procedures for assessing, avoiding, eliminating, controlling and minimising *health risks*;

(*c*) *regulations* on any aspect of *health*;

(*d*) *health* research; and

(*e*) collecting, processing and distributing *health* data in the mining industry.

[Section 44 (2) (*a*) to (*e*) determine the duties of the MOHAC.]

(3) The Safety in Mines Research Advisory Committee must advise the *Council* on-

(*a*) criteria for determining the funding of *health* and *safety* research;

[Section 98 (1) (*zJ*) empowers the *Minister* to make regulations for the payment of levies for funding research and surveys and for the promotion of *health* and *safety* at *mines*.]

(*b*) the need for research into *health* and *safety* at *mines;*

(*c*) research projects, including priorities of projects, cost, assessment, ratification and execution;

(*d*) communication and publication of research results; and

(*e*) the management of the cost of the overall programme.

[Sections 44 (3) (*a*) to (*e*) and 44 (4) (*a*) to (*d*) determine the duties of SIMRAC.]

(4) The Safety in Mines Research Advisory Committee must prepare the programme for relevant *health* and *safety* research for the *Council* to consider. The programme must include-

(*a*) a review of *health* and *safety* performance in the different mining sectors;

(*b*) an evaluation of the research proposals made by the *Council* or any ***committee***;

(*c*) the focus of *health* and *safety* research and priorities for the different sectors of mining; and

(*d*) an estimate of the cost of the programme.

[The *Council* considers the overall program in terms of item 4 (*h*).]

6. Functions of other committees.-***Other committees*** must perform the functions delegated or assigned to them in terms of item 7.

7. Delegation and assignment of functions.-(1) The *Council* may delegate or assign any of the functions of the *Council* by or under *this Act* to any ***committee***.

(2) Permanent and ad hoc committees may delegate or assign any of their functions to any of their subcommittees.

(3) A delegation or assignment under subitem (1) or (2)-

(*a*) must be in writing;

(*b*) is subject to such conditions and restrictions as determined by the *Council*, a permanent or an ad hoc committee, as the case may be; and

(*c*) does not prevent the performance of that function by the *Council*, a permanent or an ad hoc committee, as the case may be.

[Sections 42 (4) and (5) enable the *Council* to delegate any of its powers or assign any of its duties by or under *this Act* to ***committees***.]

8. Composition of Council and committees.-(1) The *Council* consists of-

(*a*) five members representing *employers* in the mining industry;

(*b*) five members representing *employees* in the mining industry;

(*c*) four members representing departments of State; and

(*d*) the *Chief Inspector of Mines*, who must chair the *Council*.

[Section 42 (1) prescribes the membership of the *Council*.]

(2) Every *committee* consists of-

(*a*) five members representing *employers* in the mining industry;

(*b*) five members representing *employees* in the mining industry;

(*c*) four members representing departments of State; and

(*d*) an *officer* of the Mine Health and Safety Inspectorate who must chair the committee.

(3) Every ***other committee*** consists of the number of members determined by the relevant ***establishing authority***.

(4) The ***parties*** are entitled to equal representation on ***other committees***.

9. Nomination and appointment of members.-(1) Members of the *Council* and *committees* are nominated and appointed in accordance with the *regulations* and members of any ***other committee*** are nominated an appointed in accordance with this item.

[Regulations 18.1 to 18.7 published by Government Notice No. R.93 in the *Gazette* of 15 January 1997.]

(2) Every ***party*** on the relevant ***establishing authority*** may nominate persons as members representing

their ***party*** on any ***other committee***.

(3) The relevant ***establishing authority***-

(*a*) must appoint the members; and

(*b*) may appoint one of the members as chairperson.

(4) If the relevant ***establishing authority*** does not appoint a chairperson, the ***members*** of the committee may appoint a chairperson from among their number.

(5) Members representing *employees* or *employers* on any ***other committee*** may hold office for such period as the relevant ***establishing authority*** may determine, which period may not exceed three years. A member whose period of office expires, may be re-appointed.

[Regulation 18.5 published by Government Notice No. R.93 in the *Gazette* of 15 January 1997 determines the term of office of members of the *Council* and its *committees*.]

(6) If the office of a member of any ***other committee*** is vacated before the end of the period of office of such member, a person to replace such member must, subject to the provisions of this Constitution-

(*a*) be nominated by the ***party*** that was represented by the member; and

(*b*) be appointed by the relevant ***establishing authority*** for a period not exceeding the balance of the period of office of the member in whose place the person is appointed.

[Mine Health and Safety Regulation 18 (6) deals with the filling of casual vacancies of the *Council* and *committees.*]

(7) The appointment of any member of any ***other committee*** is subject to any condition that the relevant ***establishing authority*** determine.

(8) The chairperson of the relevant ***establishing authority*** must in writing notify the members of their appointment.

(9) If a member appointed in terms of this item does not accept such appointment, a person to replace such person must be appointed in accordance with this item.

(10) Every ***party*** must appoint an ***alternate*** for each of its members on the *Council,* a permanent or ad hoc committee and must notify the chairperson of the *Council* or the relevant permanent or ad hoc committee, as the case may be, of such appointment.

(11) The relevant ***establishing authority***-

(*a*) may appoint ***alternates*** for members of subcommittees; and

(*b*) must notify

(i) the ***alternates*** of their appointment; and

(ii) the members of their respective ***alternates***.

10. Vacation of office.-(1) A ***member*** vacates office-

(*a*) on expiry of the ***member's*** period of office;

(*b*) if such **member**-

(i) is absent from two consecutive meetings of the *Council* or ***committee*** for which such ***member*** is appointed without notifying the ***chairperson*** before the meeting that the ***member*** will be absent;

(ii) resigns as a ***member***; or

(iii) is required to vacate office by the ***party*** or the organisation which that ***member*** represents;

(*c*) if such ***member*** was nominated by an organisation and that organisation no longer meets the criteria allowing it to nominate ***members***; or

(*d*) if the *Council* or ***committee*** on which the ***member*** serves, is abolished.

(2) If a member vacates office, the **alternate** appointed for such member ceases to hold office as **alternate**.

11. Functions of chairperson.-(1) Every ***chairperson*** must with regard to the *Council* or ***committee*** which the person chairs-

(*a*) allow each ***party*** to appoint from among its members a person to act as convenor or such ***party*** for communication purposes. If a ***party*** does not appoint such convenor, the ***chairperson*** may appoint any member of that ***party*** as convenor of the ***party***;

(*b*) cause meetings to be convened; and

(*c*) ensure the orderly conduct of meetings and that all resolutions are recorded.

(2) If in the opinion of the ***chairperson*** the behaviour of any ***member*** is disruptive to the orderly conduct of the meeting, the ***chairperson*** may order that ***member*** to leave a meeting.

(3) If the chairperson of the *Council* or a *committee* is unable to attend a meeting, the chairperson may designate another *officer* of the Mine Health and Safety Inspectorate to chair the meeting.

[If the chairperson of any ***other committee*** is unable to attend a meeting, a ***member*** of that committee may be elected in terms of item 16 (3) to chair the meeting.]

12. Appointment and functions of secretary.-(1) The *Chief Inspector of Mines* must appoint a secretary for-

(*a*) the *Council* and every permanent and ad hoc committee; and

(*b*) any subcommittee if the ***establishing authority*** so requires.

(2) If a secretary is not appointed for a sub-committee, the ***members*** of that committee must keep a record of and report to the relevant ***establishing authority*** on their activities.

(3) A secretary must, with regard to the *Council* or ***committee*** *of* which the secretary is appointed-

(*a*) prepare the agenda for every meeting;

(*b*) prepare the minutes of every meeting;

(*c*) record every resolution of such meeting and if so requested by a **member**, the views of that ***member***;

(*d*) keep general records, records of ***members****,* minutes, document and files of the *Council* or such ***committee****;* and

(*e*) serve every member with-

(i) a convening notice and the agenda of a meeting at least five ***clear days*** before the meeting or two ***clear days*** before an urgent meeting;

(ii) any reports or documentation to be considered at a meeting, a reasonable period before the meeting; and

(iii) the minutes of every meeting.

13. Rights and obligations of members.-(1) Any ***member*** who is unable to attend a meeting of the *Council* or any ***committee***-

(*a*) may designate any ***alternate*** of that ***member's party*** on the *Council* or that committee as the case may be, to represent the ***member*** at the meetings; and

(*b*) must before the meeting give notice of it to the ***chairperson****.*

(2) An **alternate** designated under subitem (1) has the rights and obligations of the member whom that ***alternate*** represents.

(3) Every ***member*** has the right to-

(*a*) be heard on any matter considered at the meeting;

(*b*) take part in the resolution of any matter before the meeting; and

(*c*) have their views, on any matter considered at the meeting, recorded in the minutes of the meeting and in any report or recommendation of the meeting.

[Section 42 (6) entitles ***members*** to have their views reflected in any report of the *Council* or ***committee****.*]

14. Meetings.-(1) The *Council* must meet at such intervals as required for the proper performance of the functions of the *Council*, but at least once every six months.

(2) Every permanent and ad hoc committee must meet at such intervals as required for the proper performance of the functions of the committee, but at least once every three months.

(3) Subcommittees must meet at such intervals as determined by their activities and the dates for the completion of their tasks.

(4) An urgent meeting of the *Council* or any ***committee*** may be called by the ***chairperson*** at the written request of at least two ***members*** or when the ***chairperson*** deems it necessary.

(5) The *Council* may direct any ***committee*** to call an urgent meeting to resolve any matter determined by the *Council*.

(6) A permanent or ad hoc committee may direct any of its subcommittees to call an urgent meeting to resolve any matter determined by such committee.

15. Quorum.-(1) Eight ***members*** form a quorum for any meeting of the *Council* or a *committee* provided that at least two ***members*** of each ***party*** are present.

(2) The quorum for any ***other committee*** must be determined by the relevant ***establishing authority***.

(3) Despite subitems (1) and (2), if the convenors of the ***parties*** in the *Council* or any ***committee*** so agree, a smaller number may constitute a quorum for an urgent meeting of the *Council* or that ***committee***, as the case may be.

(4) If a quorum is not present at a meeting, the meeting must be postponed to a date, time and place determined by the ***chairperson***. The ***members*** present at the subsequent meeting form a quorum for that meeting.

16. Procedures at meetings.-(1) Items may be added to the agenda of any meeting if the meeting so decides.

(2) Any ***member*** who has a direct or personal financial interest in any matter before the meeting must, before the matter is discussed by the meeting, declare such interest to the meeting and the ***chairperson*** must determine whether such ***member*** may participate in the consideration of that matter.

(3) If the designated ***chairperson*** is not present at a meeting the ***members*** may elect from among their number a ***chairperson*** for that meeting.

17. Resolution of meeting.-(1) The *Council* or any ***committee*** must endeavour to reach ***consensus*** on any matter that requires resolution.

(2) If ***consensus*** cannot be reached on any matter after sincere endeavours to do so, a decision of the majority of ***members*** present and voting at a meeting constitutes the resolution on that matter by the *Council* or any ***committee***, as the case may be.

(3) Any report or advice of the *Council* or any ***committee*** which reflects a resolution that was not reached by ***consensus***, must reflect-

(*a*) the different views of the ***members*** on the matter so resolved; and

(*b*) which ***members*** supported each view.

(4) No resolution nor any act authorised by the *Council* or any ***committee*** is invalid merely because of a vacancy on the *Council* or that ***committee*** or because any person not entitled to sit as a ***member*** sat at such meeting at the time the resolution was taken or the act was authorised if a quorum was constituted by the rest of the ***members*** present at the meeting and entitled to sit as ***members*** at the meeting.

(5) Despite sub item (1) to (3), if the ***members*** present and voting at a meeting reach consensus on the matter, the *Council* may resolve that any specific resolution of the *Council* may only be amended or revoked by a special resolution of the Council may only be amended or revoked by a special majority of, or the consensus of the *Council*.

18. Funds of Council.-(1) The funds of the *Council* consist of-

(*a*) moneys appropriated by Parliament to perform the functions of the *Council*;

(*b*) other moneys received in terms of *this Act*;

(*c*) revenue obtained from investments;

(*d*) fees or royalties obtained from intellectual property of the *Council*;

(*e*) donations or contributions received from any person, body, government or administration; and

(*f*) any other money received from any other source.

[Section 42 (7) empowers the *Minister* to provide funds for the administration of the *Council* and its ***committees*** from public funds.]

(2) Moneys appropriated by Parliament must be used for-

(*a*) the payment to ***members*** who are not in the full-time service of the State of such remuneration and allowances as the *Minister* may determine with the agreement of the Minister of Finance; and

(*b*) the payment for administrative functions of the *Council* and ***committees***.

[Section 42 (7) requires the agreement of the Minister of Finance for the provision of funds for the administration of the *Council* and its ***committees*** from public funds.]

(3) Moneys referred to in subitems (1) (*b*), (*c*), (*d*) or (*f*) may be-

(*a*) used as contemplated in *this Act*;

(*b*) invested with any bank registered as such under the Banks Act, 1990 (Act No. 94 of 1990), or invested in such other manner as may be determined by the *Minister* with the agreement of the Minister of Finance; and

(*c*) used to register or utilise any intellectual property of the *Council*.

(4) Moneys referred to in subitem (1) (*e*) must be utilised in accordance with the conditions, if any, imposed by the donor or contributor of such moneys.

(5) The chairperson of the *Council* must for each financial year submit a statement of estimated income and expenditure during such financial year to the *Minister* who, with the agreement of the Minister of Finance, must approve the budget for-

(*a*) the first financial year, before the first meeting of the *Council*; and

(*b*) every other financial year, before the beginning of such financial year.

19. Accountability.-(1) The chairperson of the *Council* is the accounting officer of the *Council*.

(2) The accounting officer is responsible of all moneys received and payments made by the *Council*.

(3) The financial year of the *Council* ends on 31 March in each year.

(4) The accounting officer must cause records to be kept in accordance with the Generally Accepted Accounting Principles that are necessary to represent fairly the state of affairs and business of the *Council* and to explain the transactions and financial position of the *Council*.

(5) Annual financial statements must be prepared in respect of every financial year. The statements must consist of-

(*a*) a balance sheet dealing with the state of affairs of the *Council*;

(*b*) a return of income received and expenses incurred by the *Council*; and

(*c*) a statement of cash flow information.

(6) The books of account, statements of account and annual financial statements of the *Council* must be audited annually by the Auditor-General. The Auditor-General must compile a report on the audit and submit a copy of it to the *Minister* and the chairperson of the *Council.*

(7) The secretary of the *Council* must supply each member of the *Council* with a copy of the report of the Auditor-General.

(8) As soon as practicable after the report of the Auditor-General has been submitted to the *Minister* in terms of subitem (6), the *Minister* must table it in Parliament.

20. Administrative, secretarial and other services.-(1) The *Council* may employ employees to provide such administrative, secretarial or other services to the *Council* and its ***committees*** as the *Council* may determine.

(2) Despite subitem (1), the *Council*, with approval of the *Minister*, may contract any person, or arrange for *officers* of the Mine Health and Safety Inspectorate, to provide such administrative, secretarial and other services to the *Council* and its ***committees*** as the *Council* may determine.

21. Abolition of Council or committee.-(1) The *Council* and the *committees* may be abolished by an Act of establishment of the Parliament.

(2) The *Council* may at any time abolish any ***other committee***.

(3) A permanent or ad hoc committee may at any time abolish any sub-committee established by that committee.

[See item 1 for the establishment of the *Council* and ***committees***.]

22. Limitation of liability.-(1) A ***member*** or an employee of the *Council* does not incur any civil liability only because of doing or failing to do something which such ***member*** or employee may do or is required to do in terms of *this Act* or this Constitution.

(2) The *Council* does not incur any civil liability only because a ***member***, or an employee of the *Council*, or any

person contracted to perform a function of the *Council* or a ***committee***, or an *officer* of the Mine Health and Safety Inspectorate assigned to perform such functions, took an action or failed to take an action under or in terms of *this Act* or this Constitution, and in taking or failing to take that action acted without negligence and in good faith.

23. Amendment of constitution.-(1) (*a*) If the *Minister* wants to amend the constitution, the *Minster* must furnish a proposal containing such amendments to the chairperson of the *Council*, who must convene a meeting to consider the proposal.

(*b*) At such meeting the *Council* must consider the proposal and resolve either to-

(i) support the proposal as it is;

(ii) support the proposal with certain amendments; or

(iii) oppose the proposal.

(*c*) The *Council* must submit its resolutions to the *Minister*.

(*d*) If the *Council* resolves to support the proposal with certain amendments or to oppose the proposal, the motivation for such resolution and the amendments, if any, must be included in the submission to the *Minister*.

(2) (*a*) If the *Council* wants the constitution to be amended, the *Council* must submit a proposal regarding such amendment to the *Minister*.

(*b*) Such proposal by the *Council* is deemed to be consultation by the *Minister* with the *Council* as contemplated in section 97 (1).

(*c*) If the *Minister* is not satisfied with the amendments or the motivation for the amendments, the *Minister* may refer the proposal back to the *Council* for further consideration.

[Section 97 (1) read with 97 (3) of this Act authorises the Minister to add to, change or replace this Constitution, after consultation with the *Council*, by publication in the *Gazette*.]

24. Definitions.-Unless the context otherwise indicates-

"alternate" means any person appointed as an alternate to a member under item 9 (10);

"chairperson" means any person who chairs any meeting of the *Council* or a **committee**;

"clear day" means any day of the week except Sundays and public holidays;

"committee" means any *committee* or ***other committee***;

"consensus" means unanimous agreement;

"establishing authority" means-

(i) in the case of the *Council* and a committee, Parliament by legislation;

(ii) in the case of an ad hoc committee, the *Council;* and

(iii) in the case of a sub-committee, the *Council,* or any permanent or ad hoc committee that establishes the sub-committee;

"member" means any member of the *Council* or any ***committee*** and includes any ***alternate*** designated by a member to represent that member at a meeting of the *Council* or ***committee***;

"other committee" means-

(*a*) an ad hoc committee established for a limited term to perform any function of the *Council* which is not a function of any committee; and

(*b*) a subcommittee established by-

(i) the *Council* to perform any function of the *Council* which is not assigned by or under *this Act* to a committee; and

(ii) a permanent or an ad hoc committee to perform any function of that committee; and

"party" means *employers*, *employees* or the State, as the case may be.

[If a function of the *Council* needs to be performed on a permanent basis by a ***committee***, the *Council* may either delegate or assign the function to a *committee* or request that a new *committee* be established by legislation to perform the function.]

Schedule 7

CONSTITUTION OF MINING QUALIFICATION AUTHORITY

[Schedule 7 added by Government Notice No. R.612 of 24 April, 1998 and amended by s. 34 of Act No. 74 of 2008.]

ARRANGEMENT OF CONSTITUTION

1. Establishment of Authority and committees
2. Legal status
3. Objects of Authority
4. Functions of Authority
5. Functions of *committees*
6. Functions of other committees
7. Composition of Authority and committees
8. Nomination and appointment of members of committees
9. Vacation of office
10. Appointment and functions of the executive officer
11. Delegation and assignment of functions
12. Functions of the chairperson
13. Appointment and functions of secretary
14. Rights and obligations of members
15. Meetings
16. Quorum
17. Procedures at meetings
18. Resolution of meeting
19. Funds of Authority
20. Accounting
21. Abolition of Authority and committees
22. Limitation of Liability
23. Amendments to constitution
24. Interpretation

CONSTITUTION OF THE MINING QUALIFICATIONS AUTHORITY (MQA)

To provide for the constitution of the Mining Qualifications Authority; for the promotion of the objectives of the National Qualifications Framework in the mining industry; for advising the Minister on matters relating to education and training standards and qualifications in the mining industry; and for matters connected therewith.

[In this Constitution all references to sections are references to sections in *this Act*, unless otherwise indicated.]

1. Establishment of Authority and committees.-(1) The ***Authority*** is established by section 41 (3).

[An italicised word or phrase is defined in section 102 of the Mine Health and Safety Act, 1996 (Act No. 29 of 1996) (*this Act*) and an italicised word or phrase in bold is defined in item 24 of this Constitution.]

Wording of Sections

(2) The ***Authority*** may establish permanent, ad hoc and subcommittees for such periods as the ***Authority*** may consider necessary, to achieve the objects or perform the functions of the ***Authority***.

(3) Every permanent or ad hoc committee may, subject to such conditions as the ***Authority*** may determine, establish subcommittees for such periods as the committee may consider necessary to achieve the objects or perform the functions of that committee.

[Section 46 (2) empowers the ***Authority*** to appoint permanent and ad hoc committees, and subcommittees, for any period and on any conditions. 1 (3)- Ad hoc and subcommittees are distinguished in the definition of ***"other committees"***.]

(4) In the case of *committees*, the ***chairperson*** of the ***Authority*** must inform the *Minister* of such establishment.

2. Legal status.-(1) The ***Authority*** is a body corporate.

(2) All actions, suits or other proceedings at law, by or against any ***committee*** must be brought by or against the ***Authority***.

(3) The ***Authority*** may authorise any person or persons to act on behalf of the ***Authority*** and to sign all such documents and to take all such steps as may be necessary in connection with any proceedings at law brought by or against the ***Authority***.

3. Objects of Authority.-(1) The objects of the ***Authority*** are to-

(*a*) advise the *Minister* on-

(i) *qualifications* and learning achievements in the mining industry to improve *health and safety standards* through proper training and education;

(ii) standards and competency setting, assessment, examinations, quality assurance and accreditation in the mining industry; and

(iii) proposals for the registration of education and training standards and qualifications in the mining industry on the ***National Qualifications Framework*** referred to in the South African Qualifications Authority Act, 1995 (Act No. 58 of 1995); and

[Section 41 (3) prescribes the objects of the ***Authority***.]

(*b*) promote the objectives of the ***National Qualifications Framework*** in the mining industry, which are to-

(i) create an integrated national framework for learning achievements;

(ii) facilitate access to, and mobility and progression within education, training and career paths;

(iii) enhance the quality of education and training;

(iv) accelerate the redress of past unfair discrimination in education, training and employment opportunities; and thereby

(v) contribute to the full personal development of each learner and the social and economic development of the nation at large.

[Section 2 of the ***SAQA Act*** determines the objectives of the ***National Qualifications Framework***.]

(2) In order to promote its objects the ***Authority*** must seek-

(*a*) registration in terms of the ***SAQA Act*** as a body responsible for generating ***education and training standards*** and ***qualifications*** as contemplated in section 5 (1) (*a*) (ii) (*aa*) of that Act; and

(*b*) accreditation in terms of the ***SAQA Act*** as a body responsible for monitoring and auditing achievements as contemplated in section *5* (1) (*a*) (ii) (*bb*) of that Act;

4. Functions of Authority.-(1) The ***Authority*** must

(*a*) generate ***education and training standards*** and ***qualifications*** in the mining industry;

(*b*) propose ***education and training standards and qualifications*** to bodies registered with the South African Qualifications Authority and responsible for developing ***education and training standards***;

(*c*) monitor and audit achievements in terms of those standards and qualifications;

(*d*) accredit providers, assessors and moderators of education and training in the mining industry;

(*e*) analyse and prioritise education and training needs in the mining industry and recommend on the provision of such education and training;

(*f*) promote a culture of ***learning*** in the mining industry;

(*g*) assure the quality of education and training in the mining industry, without itself being a provider of education and training;

(*h*) facilitate strategic human resources development planning in the mining industry;

(*i*) liaise with the South African Qualifications Authority, or other bodies, persons or institutions concerned with or directly affected by education and training in the mining industry;

(*j*) keep a record of learning for people in the mining industry;

(*k*) perform any other function required by the South African Qualifications Authority in terms of the ***Authority's*** registration or accreditation; and

(*l*) perform any other function that must be performed by the ***Authority*** in terms of *this Act* or any other applicable law.

(2) The ***Authority*** may perform any other function that may be performed by the ***Authority*** in terms of *this Act* or any other applicable law.

[Sections 46 (1) (*c*), (*d*) and (*e*) determine the advisory functions of the ***Authority***. Section 46 (5) requires that, in performing its functions, the ***Authority*** must comply with the policies and criteria formulated by the South African Qualifications Authority in terms of section 5 (1) (*a*) (ii) of the ***SAQA Act***.]

5. Functions of *committees*.-Every *committee*, at the relevant levels of the ***National Qualifications Framework*** in the mining industry, must-

(*a*) make recommendations to the ***Authority*** on-

(i) the generation of ***education and training standards and qualifications***;

(ii) the assessment of ***education and training standards*** and ***qualifications***; and

(iii) the accreditation and moderation of education and training providers and assessors;

(*b*) undertake activities necessary for the development and implementation of the ***National Qualifications Framework***;

(*c*) co-ordinate the activities and consider the reports of its subcommittees; and

(*d*) perform such other functions delegated or assigned to it by the ***Authority***.

6. Functions of other committees.-***Other committees*** must perform the functions assigned or delegated to them in terms of item 11.

7. Composition of Authority and committees.-(1) The ***Authority*** consists of-

(*a*) five members representing *employers* in the mining industry;

(*b*) five members representing *employees* in the mining industry;

(*c*) four members representing departments of State; and

(*d*) the *Chief Inspector of Mines* who must chair the ***Authority***.

[Section 45 (1) prescribes the membership of the ***Authority***.]

(2) Every *committee* of the ***Authority*** consists of the following members:

(*a*) five members representing *employers* in the mining industry;

(*b*) five members representing *employees* in the mining industry;

(*c*) five members representing departments of State; and

(*d*) an employee of the ***Authority*** who must chair the committee.

(3) Every ***other committee*** consists of the number of members determined by the relevant ***establishing authority***.

(4) The ***parties*** are entitled to equal representation on ***other committees***.

8. Nomination and appointment of members of committees.-(1) Members of the ***Authority*** are nominated and appointed in accordance with the *regulations* and members of any ***committee*** are nominated and appointed in accordance with this item.

[Regulations 18.1 to 18.7 published by Government Notice No. R.93 in the *Gazette* of 15 January 1997.]

(2) ***Members*** of *the* relevant ***establishing authority*** may nominate persons as members representing their ***party*** on any ***committee***.

(3) The relevant ***establishing authority***-

(*a*) must appoint the members; and

(*b*) may appoint one of the members as chairperson.

(4) If the relevant ***establishing authority*** does not appoint a chairperson, the ***members*** of the ***committee*** may appoint the chairperson from among their number.

(5) Members representing *employees* or *employers* on any ***committee*** may hold office for such period as the relevant ***establishing authority*** may determine, which period may not exceed three years. A member whose period of office expires, may be re-appointed.

[Regulation 18.5 published by Government Notice No. R.93 in the *Gazette* of 15 January 1997 determines the term of office of members of the ***Authority*** and its *committees*.]

(6) If the office of a member of any ***committee*** is vacated before the end of the period of office of such member, a person to replace such member must, subject to the provisions of this Constitution-

[Mine Health and Safety Regulation 18 (6) deals with the filling of casual vacancies of the ***Authority***.]

(*a*) be nominated by the ***party*** that was represented by the member; and

(*b*) be appointed by *the* relevant ***establishing authority*** for a period not exceeding the balance of the

period of office of the member in whose place the person is appointed.

(7) The appointment of any member of any ***committee*** is subject to any condition that the relevant ***establishing authority*** may determine.

(8) The chairperson of the relevant ***establishing authority*** must in writing notify the members of their appointment.

(9) If a member appointed in terms of this item does not accept such appointment, a person to replace such person must be appointed in accordance with this item.

(10) Every ***party*** must appoint an ***alternate*** for each of its members on the ***Authority***, a permanent or ad hoc committee and must notify the chairperson of the ***Authority*** or the relevant permanent or ad hoc committee, as the case may be, of such appointment.

(11) The relevant ***establishing authority***-

(*a*) may appoint ***alternates*** for members of subcommittees; and

(*b*) must notify-

(i) the ***alternates*** of their appointment; and

(ii) the members of their respective ***alternates***.

9. Vacation of office.-(1) *A* ***member*** vacates office-

(*a*) on expiry of the ***member's*** period of office; or

(*b*) if such ***member***-

(i) is absent from two consecutive meetings of the ***Authority*** or ***committee*** for which such ***member*** is appointed without notifying the ***chairperson*** before the meeting that the ***member*** will be absent;

(ii) resigns as a ***member***; or

(iii) is required to vacate office by the ***party*** or the organisation which that ***member*** represents;

(*c*) if such ***member*** was nominated by an organisation and that organisation no longer meets the criteria allowing it to nominate ***members***; or

(*d*) if the ***Authority*** or ***committee*** on which the ***member*** serves, is abolished.

(2) If a member vacates office, the ***alternate*** appointed for such member ceases to hold office as ***alternate***.

10. Appointment and functions of the executive officer.-(1) The *Minister*, after consulting the ***Authority***, must appoint a person with experience and expertise in matters relating to functions of the ***Authority*** as ***executive officer*** of the ***Authority***.

(2) The ***executive officer*** must perform such functions as may be assigned to the ***executive officer*** by *this Act* or by the ***Authority***.

(3) The ***executive officer*** must attend all meetings of the ***Authority***.

(4) If the ***executive officer*** is absent or for any reason is unable to perform the functions of the ***executive officer*** or if there is a vacancy in the office of the ***executive officer***, the chairperson of the ***Authority*** may designate an employee of the ***Authority*** to act as ***executive officer*** until the ***executive officer*** is able to resume the functions of ***executive officer*** or until an ***executive officer*** is appointed in terms of subitem (1).

(5) The ***Authority*** may, subject to the provisions of item 19 (2) (*b*), appoint persons as employees of the ***Authority*** to assist in the performance of the functions of the ***executive officer***.

(6) The terms and conditions of service of persons appointed under subitem (5) are determined by the *Minister* after consulting the ***Authority***.

11. Delegation and assignment of functions.-(1) The ***Authority*** may delegate any of its powers or assign any of its functions by or under *this Act* to any ***committee*** or the ***executive officer***.

(2) Any permanent or ad hoc committee may delegate or assign any of its functions to any of its subcommittees.

(3) The ***executive officer*** may delegate any power or assign the performance of any function conferred or imposed upon the ***executive officer*** to any employee of the ***Authority***.

(4) A delegation or assignment under subitem (1), (2) or (3)-

(*a*) must be in writing;

(*b*) may be subject to such conditions and restrictions as determined by the ***Authority***, a permanent or an ad hoc committee or the ***executive officer***, as the case may be; and

(*c*) does not prevent the exercise of that power or performance of that function by the ***Authority***, a permanent or an ad hoc committee or the ***executive officer***, as the case may be.

[Sections 46 (3) and (4) enable the ***Authority*** to delegate any of its powers or assign any of its duties by or under *this Act* in accordance with the constitution contemplated in section 97 (4).]

Wording of Sections

12. Functions of the chairperson.-(1) Every ***chairperson*** must, with regard to the ***Authority*** or ***committee*** which the person chairs-

(*a*) allow each ***party*** to appoint from among its members a person to act as convenor of such ***party*** for communication purposes. If a ***party*** does not appoint such convenor, the ***chairperson*** may appoint any member of that ***party*** as convenor of the ***party***;

(*b*) cause meetings to be convened; and

(*c*) ensure the orderly conduct of meetings and that all resolutions are recorded.

(2) *A* ***chairperson*** may order any ***member*** to leave a meeting if in the opinion of the ***chairperson*** the behaviour of such ***member*** is disruptive to the orderly conduct of the meeting.

(3) If the ***chairperson*** of the ***Authority*** is unable to attend a meeting, the ***chairperson*** may designate another *officer* of the Mine Health and Safety Inspectorate, to chair the meeting.

[If the ***chairperson*** of any ***other committee*** is unable to attend a meeting, a ***member*** *of* that committee may be elected in terms of item 17 (3).]

(4) If the ***chairperson*** of a committee is unable to attend a meeting, the ***executive officer*** may designate another *employee* of the ***Authority*** to chair the meeting.

13. Appointment and functions of secretary.-(1) The ***executive officer*** must appoint a secretary for-

(*a*) the ***Authority*** and every permanent and ad hoc committee; and

(*b*) any sub-committee if the ***establishing authority*** so requires.

(2) If a secretary is not appointed for a sub-committee, the ***members*** of that committee must keep a record of and report to the relevant ***establishing authority*** on their activities.

(3) A secretary must, with regard to the ***Authority*** or ***committee*** for which the secretary is appointed-

(*a*) prepare the agenda for every meeting;

(*b*) prepare the minutes of every meeting;

(*c*) record every resolution of such meeting and if so requested by a ***member***, the views of that ***member***;

(*d*) keep general records, records of ***members***, minutes, documents and files of the ***Authority***, or such ***committee***; and

(*e*) serve every member with-

(i) a convening notice and the agenda of a meeting at least five ***clear days*** before the meeting or two ***clear days*** before an urgent meeting;

(ii) any reports or documentation to be considered at a meeting, a reasonable period before the meeting; and

(iii) the minutes of every meeting.

14. Rights and obligations of members.-(1) Any ***member*** who is unable to attend a meeting of the ***Authority*** or any ***committee***-

(*a*) may designate any ***alternate*** of that ***member's party*** on the ***Authority*** or that committee, as the case may be, to represent the ***member*** at the meeting; and

(*b*) must before the meeting give notice of it to the ***chairperson***.

(2) An ***alternate*** designated under subitem 1 (*a*), has the rights and obligations of the ***member*** whom that ***alternate*** represents.

(3) Every ***member*** has the right to-

(*a*) be heard on any matter considered at the meeting;

(*b*) take part in the resolution of any matter before the meeting; and

(*c*) have their views, on any matter considered at the meeting, recorded in the minutes of the meeting and in any report or recommendation of the meeting.

15. Meetings.-(1) The ***Authority*** must meet at least once every three months.

(2) Every permanent and ad hoc committee must meet at least once every two months.

(3) Subcommittees must meet at such intervals and frequency as determined by their activities and the dates for the completion of their tasks.

(4) An urgent meeting of the ***Authority*** or any ***committee*** may be called by the ***chairperson*** at the written request of at least two ***members*** or when the ***chairperson*** deems it necessary.

(5) The ***Authority*** may direct any ***committee*** to call an urgent meeting to resolve any matter determined by the ***Authority***.

(6) A permanent or ad hoc committee may direct any of its subcommittees to call an urgent meeting to resolve any matter determined by such committee.

16. Quorum.-(1) Eight ***members*** form a quorum for any meeting of the ***Authority*** or a *committee* provided that at least two ***members*** of each ***party*** are present.

(2) The quorum for any ***other committee*** must be determined by the relevant ***establishing authority***.

(3) Despite subitems (1) and (2), if the convenors of the ***parties*** in the ***Authority*** or any ***committee*** so agree, a smaller number may constitute a quorum for an urgent meeting of the ***Authority*** or that ***committee***, as the case may be.

(4) If a quorum is not present at a meeting, the meeting must be postponed to a date, time and place determined by the ***chairperson***. The ***members*** present at the subsequent meeting form a quorum for that meeting.

17. Procedures at meetings.-(1) Items may be added to the agenda of any meeting if the meeting so decides.

(2) Any ***member*** who has a direct or personal financial interest in any matter before the meeting must, before the matter is discussed by the meeting, declare such interest to the meeting and the ***chairperson*** must determine whether such ***member*** may participate in the consideration of the matter.

(3) If the designated ***chairperson*** is not present at a meeting the ***members*** may elect from among their number a ***chairperson*** for that meeting.

18. Resolution of meeting.-(1) The ***Authority*** or any ***committee*** must endeavour to reach ***consensus*** on any matter that requires resolution.

(2) If ***consensus*** cannot be reached on any matter after sincere endeavours to do so, a decision of the majority of ***members*** present and voting at a meeting constitutes the resolution on that matter by the ***Authority*** or any ***committee***, as the case may be.

(3) Any report or advice of the ***Authority*** or any ***committee*** which reflects a resolution that was not reached by ***consensus***, must reflect-

(*a*) the different views of the ***members*** on the matter so resolved; and

(*b*) which ***members*** supported each view.

(4) No resolution nor any act authorised by the ***Authority*** or any ***committee*** is invalid merely because of a vacancy on the ***Authority*** or that ***committee*** or because any person not entitled to sit as a ***member*** sat at such meeting at the time the resolution was taken or the act was authorised if a quorum was constituted by the rest of the ***members*** present at the meeting and entitled to sit as ***members*** at the meeting.

(5) The chairperson of a *committee* has no voting right.

19. Funds of Authority.-(1) The funds of the ***Authority*** consist of-

(*a*) moneys appropriated by Parliament to perform its functions;

(*b*) moneys which accrue to the ***Authority*** in terms of regulations made under *this Act* or in terms of any other applicable law;

(*c*) revenue obtained from investments;

(*d*) fees obtained from services provided by the ***Authority***;

(*e*) donations received from any person, body, government or administration; and

(*f*) any other money received from any other source.

[In terms of Section 98 (3) (*d*) the *Minister*, after consulting the Mining Qualifications Authority, by notice in the *Gazette*, may make regulations to provide for the funding of the Mining Qualifications Authority including the manner in which such funds may be raised.]

(2) Moneys appropriated by Parliament must be used for-

(*a*) the payment to ***members*** who are not in the full-time service of the State of such remuneration and allowances as the *Minister* may determine with the agreement of the Minister of Finance;

(*b*) the payment of salaries, allowances, subsidies and other benefits as approved by the *Minister* with the agreement of the Minister of Finance to the ***executive officer*** and other employees of the ***Authority***; and

[The *regulations* under section 98 (3) (*d*) require the agreement of the Minister of Finance for the provision of funds for the administration of the ***Authority*** and its ***committees*** from public funds.]

(*c*) the payment for administrative functions of the ***Authority***.

(3) Moneys referred to in subitem (1) (*b*), (*c*), (*d*) or (*f*) may be-

(*a*) used as contemplated in *this Act*;

(*b*) invested with any bank registered as such under the Banks Act, 1990 (Act No. 94 of 1990), or invested in such other manner as may be determined, by the *Minister* with the agreement of the Minister of Finance; and

(*c*) used to register or utilise any intellectual property of the ***Authority***.

(4) Moneys referred to in subitem (1) (*e*) must be utilised in accordance with the conditions, if any, imposed by the donor of such moneys.

(5) The chairperson of the ***Authority*** must for each financial year, submit a statement of estimated income and expenditure during such financial year to the *Minister* who, with the agreement of the Minister of Finance, must approve the budget for-

(*a*) the first financial year, before the first meeting of the ***Authority***; and

(*b*) every other financial year, before the beginning of such financial year.

20. Accounting.-(1) The ***executive officer*** is the accounting officer of the Authority.

(2) The accounting officer is responsible for all moneys received and payments made by the ***Authority***.

(3) The financial year of the ***Authority*** ends on 31 March in each year.

(4) The accounting officer must cause records to be kept in accordance with the Generally Accepted Accounting Principles that are necessary to represent fairly the state of affairs and business of the ***Authority*** and to explain the transactions and financial position of the ***Authority***.

(5) Annual financial statements must be prepared in respect of every financial year. The statement must consist of-

(*a*) a balance sheet dealing with the state of affairs of the ***Authority***;

(*b*) a return of income received and expenses incurred by the ***Authority***; and

(*c*) a statement of cash flow information.

(6) The books of account, statements of account and annual financial statements of the ***Authority*** must be audited annually by the Auditor-General. The Auditor-General must compile a report on the audit and submit a copy of it to the *Minister* and the ***chairperson*** of the ***Authority***.

(7) The ***executive officer*** of the ***Authority*** must supply each member of the ***Authority*** with a copy of the report of the Auditor-General.

(8) As soon as practicable after the report of the Auditor-General has been submitted to the *Minister* in terms of subitem (6), the *Minister* must table it in Parliament.

[Section 46 (2) (*b*) provides that the Mining Qualifications Authority may administer and control its financial affairs.]

21. Abolition of Authority and committees.-(1) The ***Authority*** may be abolished by an Act of Parliament.

(2) The ***Authority*** may at any time abolish any ***committee***.

(3) A permanent or ad hoc committee may at any time abolish any sub-committee established by that committee.

22. Limitation of liability.-(1) A ***member*** does not incur any civil liability only because of doing or failing to do something which such ***member*** may do or is required to do in terms of *this Act*.

(2) The ***Authority*** does not incur any civil liability only because a ***member*** or employee of the ***Authority*** took an action or failed to take an action under or in terms of *this Act*, and in taking or failing to take that action such person acted without negligence and in good faith.

23. Amendments to constitution.-(1) If the *Minister* or the ***Authority*** wants to amend the constitution, the *Minister* or the ***Authority***, as the case may be, must serve a proposal containing such amendments to the chairperson of the *Council* who must convene a meeting to consider the proposal.

(2) At such meeting the *Council* after consulting the ***Authority*** must consider the proposal and resolve either to-

(i) support the proposal as it is; or

(ii) support the proposal with certain amendments; or

(iii) oppose the proposal.

(3) The *Council* must submit its resolution and the comments or the proposal of the ***Authority***, as the case may be, to the *Minister*.

(4) If the *Council* resolves to support the proposal with certain amendments or to oppose the proposal, the motivation for such resolution and the amendments, if any, must be included in the submission to the *Minister*.

(5) If the ***Authority*** wants the constitution to be amended-

(*a*) the proposal by the ***Authority*** is deemed to be consultation by the *Council* with the ***Authority*** contemplated in subitem (2); and

(*b*) the resolution of the *Council* on the proposal by the ***Authority*** is deemed to be consultation by the *Minister* with the *Council* as contemplated in section 97 (1).

(6) If the *Minister* is not satisfied with the amendments or the motivation for the amendments, the *Minister* may refer the proposal back to the *Council* for further consideration.

[Section 97 (1) read with 97 (4) of *this Act* authorises the *Minister* to add to, change or replace this Constitution, after consultation with the *Council* and the Mining Qualifications Authority, by publication in the *Gazette*.]

24. Interpretation.-Unless the context indicates otherwise-

"alternate" means any person appointed as an alternate to a *member* under item 8 (10);

"Authority" means the Mining Qualifications Authority established by section 41 (3);

"chairperson" means any person who chairs any meeting of the ***Authority*** or a ***committee***;

"clear day" means any day of the week except Sundays and public holidays;

"committee" means any *committee*, *ad hoc committee* or *sub-committee* of the ***Authority***;

"consensus" means unanimous agreement;

"education and training standards" means registered statements of desired education and training outcomes and their associated assessment criteria as defined in section 1 of the ***SAQA Act***;

"establishing Authority" means-

(i) in the case of the ***Authority***, Parliament by legislation;

(ii) in the case of a permanent or ad hoc committee, the ***Authority***; and

(iii) in the case of a sub-committee, the ***Authority*** or any permanent or ad hoc committee that establishes the sub-committee;

"executive officer" means the executive officer appointed in terms of item 10 (1) of designated in terms of item 10 (4);

"learning" means a process by which a person gains skills, knowledge and values;

"member" means any member of the ***Authority*** or any ***committee*** and includes any ***alternate*** designated by such member to attend a meeting of the ***Authority*** or any ***committee*** on behalf of such member;

"*National Qualifications Framework*" means the ***National Qualifications Framework*** as defined in section 1 of the ***SAQA Act***;

"other committee" means-

(*a*) an *ad hoc committee* established for a limited term to perform any function of the ***Authority*** which is not a function of any *committee*; and

(*b*) *a sub-committee* established by-

(i) the ***Authority*** to perform a function which is not assigned by or under *this Act* to a *committee*; and

(ii) a permanent or an *ad hoc committee* to perform any function of that *committee*;

[If a function of the ***Authority*** needs to be performed on a permanent basis by a ***committee***, the ***Authority*** may either delegate or assign the function to a *committee* or establish a new committee to perform the function.]

"party" means *employers*, *employees*, or the State, as the case may be;

"qualification" means the formal recognition of the achievement of the required number and range of credits and such other requirements at specific levels of the ***National Qualifications Framework*** as may be proposed by the Mining Qualifications Authority and determined by the South African Qualifications Authority as defined in section 1 of the ***SAQA Act***; and

"SAQA Act" means the South African Qualifications Authority Act, 1995 (Act No. 58 of 1995).

Schedule 8

Table 1
MAXIMUM FINES OR PERIOD OF IMPRISONMENT THAT CAN BE IMPOSED FOR OFFENCES

[Schedule 8 added by s. 33 of Act No. 74 of 2008.]

Column 1 *Section under which convicted*	*Column 2* *Maximum fine and term of imprisonment*
2	R1 000 000 or 5 yrs imprisonment
2A	R1 000 000 or 5 yrs imprisonment
3	R1 000 000 or 5 yrs imprisonment
5	R1 000 000 or 5 yrs imprisonment
6	R1 000 000 or 5 yrs imprisonment
7 (1)	R1 000 000 or 5 yrs imprisonment
10	R1 000 000 or 5 yrs imprisonment
11	R1 000 000 or 5 yrs imprisonment
15	R500 000 or five years imprisonment
16	R500 000 or five years imprisonment
21 (1), (3) or (4)	R500 000 or five years imprisonment
22	R200 000 or two years imprisonment
24	R500 000 or five years imprisonment
52	R200 000 or two years imprisonment
53	R200 000 or two years imprisonment
62	R200 000 or two years imprisonment
66 (3)	R200 000 or two years imprisonment
70	R200 000 or two years imprisonment
71	R200 000 or two years imprisonment
84	R200 000 or two years imprisonment

85	R200 000 or two years imprisonment
87, 88, 89, 90	R50 000 or six months imprisonment
88	R300 000 or three years imprisonment

Table 2

MAXIMUM FINES THAT CAN BE IMPOSED FOR CONTRAVENTIONS CONTEMPLATED IN SECTION 55B

The maximum fine that can be imposed in terms of section 55B may not exceed an amount of R1 000 000.

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OCCUPATIONAL DISEASES IN MINES AND WORKS ACT

78 OF 1973

as amended by

Occupational Diseases in Mines and Works Amendment Act, No. 27 of 1974
Occupational Diseases in Mines and Works Amendment Act, No. 67 of 1974
Occupational Diseases in Mines and Works Amendment Act, No. 45 of 1975
Occupational Diseases in Mines and Works Amendment Act, No. 117 of 1977
Occupational Diseases in Mines and Works Amendment Act, No. 30 of 1978
Occupational Diseases in Mines and Works Amendment Act, No. 83 of 1979
Pension Laws Amendment Act, No. 123 of 1984
(with effect from 1 October, 1984)
Pension and Related Matters Amendment Act, No. 105 of 1985
(with effect from 1 October, 1984)
Pension Laws Amendment Act, No. 89 of 1988
(with effect from 1 April, 1990)
Pension Laws Amendment Act, No. 117 of 1990
(with effect from 13 July, 1990)
Occupational Diseases in Mines and Works Amendment Act, No. 137 of 1991
Occupational Diseases in Mines and Works Amendment Act, No. 208 of 1993
Mine Health and Safety Act, No. 29 of 1996
Abolition of Restrictions on the Jurisdiction of Courts Act, No. 88 of 1996
(with effect from 22 November 1996)
Occupational Diseases in Mines and Works Amendment Act, No. 60 of 2002
Government Notice R1249 / GG 32845 / 20091228

GENERAL NOTES

Section 99 of Act No. 29 of 1996 substitutes the expression **"Chief Inspector"** as contemplated in the Mine Health and Safety Act, 1996" for the expression **"Government Mining Engineer"**, wherever it occurs in this Act.

Schedule 5 to Act No. 29 of 1996 suspends the application of certain sections and limits the application of certain other sections of this Act.

In terms of section 4 of Act No. 60 of 2002, the expressions in the principal Act are amended by—

(*a*) the addition of **"or she"** after the expression **"he"**, wherever it appears;

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(*b*) the addition of **"or her"** after the expression **"him"**, wherever it appears; and

(*c*) the addition of **"or herself"** after the expression **"himself"** wherever it appears, unless the context indicates otherwise.

REGULATIONS

Regulations relating to the basis on which owners of controlled mines and controlled works shall pay amounts in respect of risk shifts worked – GNR 1338 of 23 October 1998

Regulations – GNR 1813 of 5 October 1973

Increase of certain benefits – GNR 1165 of 8 October 1999

Increase of levies – GNR 227 of 17 March 2006

Increase of Levies – GNR 1009 of 26 October 2007

Increase of Levies – GNR 1131 of 04 December 2009

Amendment of Amounts to Increase Benefits – GNR 285 of 16 April 2010

Increase of levies – GNR 598 of 22 July 2011

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ACT

To consolidate and amend the law relating to the payment of compensation in respect of certain diseases contracted by persons employed in mines and works and matters incidental thereto.

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136. Repeal of laws
137. Short title and commencement
Schedule

1. Definitions

(1) In this Act, unless the context otherwise indicates -

"adopted child" ……..

[Definition of "adopted child" deleted by s. 1 of Act 208/93]

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"advisory committee" means the advisory committee established under section 59;

"Amendment Act" means the Occupational Diseases in Mines and Works Amendment Act, 1933;

[Definition of "Amendment Act" inserted by s. 1 of Act 208/93]

"benefit" means money which has been awarded or which is required to be awarded or money which has been paid or which is required to be paid or the payment of money or a claim for the payment of money, as the context may require, to or in respect of a person or to or in respect of the dependants of a person, on the ground that such person was under the previous Act found to be suffering from pneumoconiosis or tuberculosis, or has under this Act been found to be suffering from a compensatable disease, but does not include money awarded under the previous Act or this Act to a person in the form of a special grant or in the form of assistance in connection with the training of any person;

"Black affairs authority" ……

[Definition of "Black affairs authority" deleted by s. 7 of Act 89/88]

"Black person" ……..

[Definition of "Black person" deleted by s. 1 of Act 208/93]

"bureau" means the Medical Bureau for Occupational Diseases established under section 2;

"cardio-respiratory organs" means all or any of the following organs, namely larynx, trachea, bronchial tree, lung parenchyma, pleurae, lymphatic system of the lungs, vascular system of the lungs, nerve supply of the lungs, diaphragm and nerve supply to diaphragm, heart, pericardium and large intrathoracic bloodvessels;

"certificate of fitness" means a certificate of fitness issued to a person under this Act pursuant to a medical examination of such person;

"certification committee" means the Medical Certification Committee for Occupational Diseases established under section 39;

"child" …….

[Definition of "child" deleted by s. 1 of Act 208/93]

"Coloured person" ……

[Definition of "Coloured person" deleted by s. 1 of Act 208/93]

"Coloured female" …….

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[Definition of "Coloured female" deleted by s. 1 of Act 208/93]

"commissioner" means the Compensation Commissioner for Occupational Diseases appointed under section 54 (a);

"compensatable disease" means -

(a) pneumoconiosis;

(b) the joint condition of pneumoconiosis and tuberculosis;

(c) tuberculosis which, in the opinion of the certification committee, was contracted while the person concerned was performing risk work, or with which the person concerned was in the opinion of the certification committee already affected at any time within the twelve months immediately following the date on which that person performed such work for the last time;

(d) permanent obstruction of the airways which, in the opinion of the certification committee, is attributable to the performance of risk work;

[Para. (d) substituted by s. 1 of Act 30/78]

(e) any other permanent disease of the cardio-respiratory organs which in the opinion of the certification committee is attributable to the performance of risk work; or

(eA) progressive systemic sclerosis which, in the opinion of the certification committee, is attributable to the performance of risk work; or

[Para. (eA) inserted by s. 1 of Act 27/74]

(f) any other disease which the Minister, acting on the advice of a committee consisting of the director and not fewer than three other medical practitioners designated by the Minister, has, subject to the provisions of subsection (2), by notice in the Gazette declared to be a compensatable disease and which, in the opinion of the certification committee, is attributable to the performance of risk work at a mine or works;

[Para. (f) substituted by s. 2 of Act 45 of 1975]

"contractor" means a person who employs persons in connection with the performance of risk work at a controlled mine or a controlled works, which he or she has undertaken to perform on behalf of the owner of that mine or works;

"controlled mine" means a mine which is a controlled mine in terms of section 9 or which has been declared a controlled mine under section 10;

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"controlled works" means a works which is a controlled works in terms of section 9 or which has been declared a controlled works under section 10;

"dependant" ……..
[Definition of "dependant" deleted by s. 1 of Act 208/93]

"dependent child" …….

[Definition of "dependant child" deleted by s. 1 of Act 208/93]

"director" means the Director of the Medical Bureau for Occupational Diseases appointed under section 3 (1) (a);

"Director-General" means the Director-General: National Health and Population Development;

[Definition of "Director-General" inserted by s. 7 of Act 89/88]

"earnings" means -

(a) in the case of a person who was performing risk work on the relevant date contemplated in section 49, the amount determined in accordance with the provisions of section 80A;

(b) in the case of a person who was not performing risk work on the said date, the amount determined in accordance with the provisions of section 80B;

[Definition of "earnings" inserted by s. 1 of Act 208/93]

"financial year" means the period from 1 April in any year to 31 March in the next ensuing year;

"fixed date" means the date on which the Amendment Act comes into operation;

[Definition of "fixed date" inserted by s. 1 of Act 208/93]

"medical adviser" …….

[Definition of "medical adviser" deleted by s. 1 of Act 208/93]

"medical practitioner" means a person who is registered as a medical practitioner under the Medical, Dental and Supplementary Health Service Professions Act, 1974 (Act No. 56 of 1974);

[Definition of "medical practitioner" substituted by s. 1 of Act 208/93]

"mine" means -

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(a) any excavation in the earth, whether being worked or not, made for the purpose of searching for or winning a mineral; or

(b) any other place where a mineral deposit is being worked and any quarry, including the mining area or other places at or near a mine on which buildings, constructions, mine dumps, dams, machinery or objects are situated and which are used or intended to be used for the following operations or any operation necessary or incidental thereto, namely -

(i) the searching for or winning a mineral;

(ii) the crushing, reducing, dressing, concentration or smelting of a mineral;

(iii) the production of a product of commercial value, excluding a clay or earthenware product or cement, from a mineral; or

(iv) the extracting, concentration or refining of any constituent of a mineral:

Provided that if two or more such excavations or places are being worked in conjunction with one another, they shall be deemed to comprise one mine unless the Chief Inspector as contemplated in the Mine Health and Safety Act, 1996, notifies the owner thereof in writing that such excavations or places comprise two or more mines;

[Definition of "mine" substituted by s. 1 of Act 208/93]

"Minister" means the Minister for National Health and Welfare;

[Definition of "Minister" substituted by s. 7 of Act 89/88 and s. 1 of Act 208/93]

"one-sum benefit" means a benefit other than a pension or monthly allowance awarded to a person or in respect of a person to any other person under the previous Act or this Act, but does not include a special grant or any assistance to a person in respect of the training of any person;

"owner", in relation to a mine or works, includes the lessee of the mine or works and any person who has the right, or has, by virtue of any law or any agreement with the owner of the mine or works, acquired the right, to exploit a mine for his or her own benefit or to operate a works for his or her own benefit; and if the question arises whether a person is, for the purposes of this Act, the owner of a mine or a works, the Minister shall make a decision on such question;

[Definition of "owner" substituted by s. 50 of Act 88/96]

"pneumoconiosis" means a permanent lesion, excluding a calcified lesion, of the cardio-respiratory organs caused by the inhalation of dust in the course of the performance of risk work;
[Definition of "pneumoconiosis" substituted by s. 1 of Act 30/78]

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"prescribe" or "prescribed" means prescribe or prescribed by regulation;

"previous Act" means the Pneumoconiosis Compensation Act, 1962 (Act No. 64 of 1962), including the other laws repealed by section 136 and any laws relating to the payment of compensation to or in respect of persons in respect of miner's phthisis or silicosis or pneumoconiosis or tuberculosis contracted in the employment of mines or as a result of employment at mines, which preceded the Pneumoconiosis Compensation Act, 1962;

"regulation" means a regulation in force under this Act;

"Republic" ……..

[Definition of "Republic" deleted by s 1 of Act 208/93]

"reviewing authority" means the Medical Reviewing Authority for Occupational Diseases established under section 40;

"risk", in relation to a mine or a works, means the risk of contracting a compensatable disease, to which persons who perform risk work in or at or in connection with that mine or works are exposed, or the risk determined by the risk committee under section 20 or 21 in respect of that mine or works, as the context may require;

"risk committee" means the Risk Committee for Mines and Works established under section 18;

"risk work" means any work declared or deemed to have been declared risk work under section 13;

"secretary" ……
[Definition of "secretary" deleted by s. 7 of Act 89/88]

"this Act" includes any regulation;

"tuberculosis" means tuberculosis of the cardio-respiratory organs of a person who has worked at least 200 shifts in circumstances amounting to a risk and where silica dust or any other injurious dust was present, or any sequelae, complication or manifestation thereof, but does not include inactive or calcified foci;

[Definition of "tuberculosis" substituted by s. 1 of Act 208/93]

"White person" …….

[Definition of "White person" deleted by s. 1 of Act 208/93]

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"works" means any place, not being a mine or part of a mine, where any of the following operations and any operation necessary therefor or incidental thereto are carried out and constitute the main operation at such place, namely -

(a) the moving, transfer or handling of stone, rock, ore, coal or other minerals, including any loading operation at subsidiary sidings;

(b) the crushing, screening, washing, classifying or concentration of any mineral;

(c) the treating of any mineral, in the form obtained from a mine, for the production of coke or for the production of a base metal in any shape or form, including ingots, billets and rolled sections;

(d) the working or treating of mine tailings deposits or mine dumps for the recovery of any valuable content thereof;

(e) the extracting of any precious metal from any mineral or concentrate;

(f) the refining of any precious metal;

(g) the drying or calcining of any source material as defined in the Nuclear Energy Act, 1993 (Act No. 131 of 1993);

(h) the making, repairing, reopening or closing of any subterranean tunnel.

[Definition of "works" substituted by s. 1 of Act 208/93]

(2) (a) The Minister shall, before declaring a disease to be a compensatable disease in terms of paragraph (f) of the definition of "compensatable disease" in subsection (1), consider such representations (if any) as may have been submitted to him or her by owners of controlled mines or controlled works or by any organization acting on behalf of such owners or on behalf of persons who perform risk work at such mines or works.

(b) The Minister shall not declare any disease which is compensatable under the provisions of the Workmen's Compensation Act, 1941 (Act No. 30 of 1941), to be a compensatable disease as contemplated in the said paragraph (f), except after consultation with the Minister of Manpower.

[Para. (b) amended by s. 43 of Act 208/93]

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(3) Any finding made or deemed to have been made by the certification committee in accordance with the provisions of -

(a) section 44, before the commencement of the Amendment Act; and

(b) section 80 (4), 87 (4), 88 (2) or 106, before the repeal or substitution of those sections by the Amendment Act,

shall for the purposes of this Act be regarded -

(i) in the case of a finding contemplated in subsection (1) of the said section 44, or in the said section 80 (4), 87 (4), 88 (2) or 106, as a finding that the person concerned is suffering from a compensatable disease in the first degree;

(ii) in the case of a finding contemplated in subsection (2) of the said section 44, as a finding that the person concerned is suffering from a compensatable disease in the second degree.

[Sub-s. (3) inserted by s. 1 of Act 208/93]

CHAPTER I

BUREAU, DIRECTOR AND STAFF

2. Establishment of bureau

(1) There shall be established a bureau, to be called the Medical Bureau for Occupational Diseases, for the performance under the supervision and control of the director of such functions as may be necessary for the purpose of giving effect to the provisions of this Act and such other functions as may from time to time be assigned to it by the Minister.

(2) The Minister may make such rules as he or she may consider necessary or desirable for the effective performance of the functions of the bureau.

3. Appointment of director, medical officers and other staff of bureau

(1) The Minister shall appoint, subject to the laws governing the public service -

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(a) a Director of the Medical Bureau for Occupational Diseases, who shall be a medical practitioner and who shall exercise the powers and perform the functions conferred upon or assigned to him or her by this Act or by the Minister under this Act;

(b) as many deputy directors of the bureau as the Minister may consider necessary, of whom at least one shall be a medical practitioner;

(c) as many other officers, being medical practitioners, as the Minister may consider necessary for the performance of the medical examinations and other functions required to be performed by the bureau under this Act; and

(d) such other officers and persons as the Minister may consider necessary for the performance of the functions of the bureau.

(2) ……

[Sub-s. (2) deleted by s. 2 of Act 208/93]

(3) Whenever there is no director or the director is absent or for any other reason unable to perform his functions, the deputy-director appointed under subsection (1) (b) who is a medical practitioner, or, if there is more than one such deputy-director, such one of them as the Minister shall designate, shall act in the stead of the director.

4. Functions of director

(1) The director shall be charged with the direction and control of all medical examinations provided for in this Act, and may on such conditions as he may deem fit authorize or direct any medical practitioner to perform any such examination.

(2) The director may in writing authorize -

(a) any person appointed under section 3 (1) (b), (c) or (d) to issue or sign any certificate or other document which in terms of this Act is required to be issued or signed by the director; and

(b) the owner of a controlled mine or a controlled works or a contractor, as the case may be, to issue or renew, through his officers authorized thereto by him, on behalf of the director and subject to his directions, any certificate of fitness.

[Sub-s. (2) substituted by s. 3 of Act 208/93]

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5. Powers of director to enter upon places, perform tests and carry out inspections or investigations

(1) The director or any medical practitioner authorized thereto in writing by him, may -

(a) enter upon any place where a person who works or has worked or intends to work at a controlled mine or a controlled works is being or is to be medically examined in accordance with any provision of this Act, or where any person who works or has worked at a controlled mine or a controlled works is being nursed or medically treated;

(b) attend any medical examination of such a person and with his consent examine him or her medically or cause him or her to be medically examined by any other medical practitioner; and

(c) inspect any instrument or appliance which is being or has been used in connection with any medical examination or treatment of such a person and demand for inspection any book or document in which any information relating to any such examination or treatment has been recorded, and make copies of or extracts from it.

(2) The director or any person authorized thereto in writing by him or her may -

(a) enter upon any place where persons who work or have worked or intend to work at a mine or works are being or are to be radiologically examined, and at such place carry out such tests, measurements and observations as he or she may deem desirable;

(b) inspect, test or view any instrument, appliance or machine used in connection with any such examination; and

(c) demand for inspection any X-ray photograph taken at such an examination.

(3) If the director has reason to suspect that the owner of a mine or works or any person employed at a mine or works contravenes or fails to comply with any provision of this Act, the director or any person authorized thereto in writing by the director, may conduct such investigation in connection with the matter as he or she may deem expedient or as the director may require.

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(4) At the request of any person affected by the exercise of a power under this section, the director or the medical practitioner authorized under subsection (1) or person authorized under subsection (2) or (3), as the case may be, shall produce a certificate of his appointment as director or, in the case of a medical practitioner or person so authorized, his written authority to the person making the request.

6. Powers of director to demand information

(1) The director may require any person to submit to him, periodically or otherwise, and at such times as he or she may direct, any information available to such person which the director considers necessary for the effective performance of his functions, or to submit to him or her or his nominee any book or document in the possession or under the control of such person which contains or is suspected to contain any such information, and may examine and make copies of or take extracts from any such book or document.

(2) Information called for under subsection (1) may be required to be given in the form of a sworn declaration by the person furnishing such information.

(3) The director may, by notice in writing signed by him, require any person to appear before him or her at a time and place specified in the notice, to be interrogated or to produce any book or document referred to in subsection (1), and may administer an oath or affirmation to and question any person appearing before him, whether in pursuance of any such notice or otherwise.

(4) Nothing in this section contained shall be construed as empowering the director to require any person to furnish any information or produce any book or document which that person is by law prohibited from disclosing or producing or which is privileged in terms of any law, and the legal rules relating to privilege as applicable to a witness summoned to give evidence or produce any book or document in civil proceedings in a court of law, shall apply in connection with the interrogation of any person required to appear as contemplated in this section, and in connection with the production of any book, document or information which he or she is to produce in terms of such a requirement.

(5) The Director-General may, from moneys appropriated by Parliament for that purpose, compensate any person who has appeared in response to a notice under subsection (3), for any loss sustained or expenses incurred by him or her in connection with his appearance, if such person has produced all books and documents which he or she was obliged to produce and has satisfactorily answered all questions which he or she was bound to answer: Provided that the total amount paid by way of compensation to any such person shall not exceed the

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amount which would in like circumstances have been payable to him or her had he or she been summoned to appear as a witness in a civil case before a magistrate's court.

7. …….

[S. 7 repealed by s. 4 of Act 208/93]

8. Annual report by director

As soon as may be after the close of each financial year the director shall furnish the Minister with a report on the activities of the bureau, the certification committee and the reviewing authority.

CHAPTER II

CONTROL IN RESPECT OF MINES AND WORKS, AND DETERMINATION OF RISK

9. Existing control to continue

Every mine or works which immediately before the commencement of this Act was a controlled mine or a controlled works under the previous Act, shall as from such commencement be a controlled mine or a controlled works for the purposes of this Act until such time as the mine or works in question is released from control under section 11.

10. Declaration as controlled mine or controlled works

(1) Whenever it comes to the notice of the Minister that any persons are performing risk work at a mine or works which is not a controlled mine or a controlled works in terms of section 9 or a notice under this subsection, he or she shall, subject to the provisions of subsection (3) of this section, by notice in the Gazette declare the mine or works in question to be a controlled mine or a controlled works as from a date to be specified in the notice, not being a date earlier than thirty days after the day on which the notice is published in the Gazette.

(2) (a) A notice under subsection (1) shall contain the name and address of the owner of the mine or works in question and a true description of that mine or works in order that such mine or works may be readily identified.

(b) A copy of such notice shall be served on the owner of the mine or works in question not less than thirty days before the date on which that mine or works will become a controlled mine or a controlled works.

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(3) A mine or works shall not under subsection (1) be declared to be a controlled mine or a controlled works so long as the Minister, after consultation with the Chief Inspector as contemplated in the Mine Health and Safety Act, 1996, is satisfied that on account of the limited scale or the temporary nature of the operations at the mine or works in question or on account of the fact that the number of persons performing risk work thereat is less than thirty, the declaration of that mine or works as a controlled mine or a controlled works is not practicable or justified.

(4) The commissioner shall maintain a register containing the name and a description of every controlled mine and every controlled works.

11. Cancellation of control

(1) If the Minister is satisfied after consultation with the Chief Inspector as contemplated in the Mine Health and Safety Act, 1996 -

(a) that operations at a controlled mine or a controlled works have ceased; or

(b) that persons employed at a controlled mine or a controlled works no longer perform any risk work thereat; or

(c) that the number of persons who perform risk work at a controlled mine or a controlled works has decreased to less than thirty,

he may, subject to the provisions of section 17 (2), by notice in the Gazette declare that the mine or works in question shall cease to be a controlled mine or a controlled works as from a date to be specified in the notice, not being a date earlier than thirty days after the day on which the notice appears in the Gazette.

(2) The provisions of section 10 (2) shall apply mutatis mutandis with reference to a notice under subsection (1) of this section.

12. Ad hoc application of provision of Act

(1) The Minister may by notice in the Gazette and on such conditions as he or she may deem desirable, declare that, as from a date to be specified in the notice, not being a date earlier than thirty days after the day on which the notice is published in the Gazette -

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(a) any provision of this Act specified in the notice, which is applicable with reference to a controlled mine or a controlled works, shall apply with reference to a mine or works so specified which is not a controlled mine or a controlled works;

(b) subject to the provisions of section 10 (1), any provision of this Act specified in the notice, which is applicable with reference to persons employed at a controlled mine or a controlled works, shall apply with reference to persons performing risk work at a mine or works so specified which is not a controlled mine or a controlled works;

(c) risk work at a mine or works specified in the notice which is not a controlled mine or a controlled works, shall be deemed to be risk work at a controlled mine or a controlled works.

(2) The provisions of section 10 (2) shall mutatis mutandis apply with reference to any notice under subsection (1) of this section.

13. Risk work

(1) The Minister may by notice in the Gazette declare to be risk work any particular work or all work performed in or at or in connection with any mine or works or part of a mine or works, or at a particular place or under particular circumstances in or at or in connection with any mine or works.

(2) The Minister shall under subsection (1) declare any such work as is referred to in that subsection to be risk work if he or she is satisfied, after consultation with the risk committee and after consideration of such representations (if any) as may have been made to him or her by the owner of the mine or works in question or by any organization acting on behalf of such owner or on behalf of persons employed at that mine or works, that any person performing the work in question is exposed to -

(a) dust of which the composition and concentration is such that it is in the opinion of the Minister harmful or potentially harmful; or

(b) gases, vapours or chemical substances, or factors or working conditions, which, in the opinion of the Minister, are harmful or potentially harmful.

(3) In the exercise of his powers under this section the Minister may differentiate between mines and works or between mines and parts of a mine or between works and parts of a works or between different classes or groups of mines or works or between different occupations,

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trades or kinds of work or between different classes or groups of persons, as he or she may consider necessary or desirable.

(4) Any work performed at a mine referred to in section 9 at a place which immediately before the commencement of this Act was "dusty atmosphere" in terms of the definition of that expression in the previous Act, shall be deemed, until the Minister by notice in the Gazette declares otherwise, to have been declared risk work under this section.

(5) For the purpose of determining whether a person is entitled to a benefit under this Act -

(a) work performed at a controlled mine or a controlled works before the date on which that mine or works became a controlled mine or a controlled works; or

(b) work performed at a mine or works which, in the opinion of the Chief Inspector as contemplated in the Mine Health and Safety Act, 1996, would have been declared a controlled mine or a controlled works had it not closed down,

shall be deemed to be risk work performed at a controlled mine or a controlled works.

(6) ……..

[Sub-s. (6) deleted by s. 5 of Act 208/93]

(7) For the purpose of determining whether a person is entitled to a benefit in respect of tuberculosis, or for the purpose of determining the amounts which shall be levied from the owners of controlled mines or controlled works under this Act, a shift during which a person was required to perform risk work for a period of not less than fifteen minutes in the course of or in connection with the performance of his normal duties or in pursuance of an instruction issued by a person who has the authority to issue such an instruction, shall be deemed to be a shift during which risk work was performed at or in connection with a controlled mine or a controlled works and shall be so recorded by the owner of the mine or works in question.

[Sub-s. (7) amended by s. 43 of Act 208/93]

14. ……..

[S. 14 repealed by s. 6 of Act 208/93]

15. Prohibition of performance of risk work at controlled mine or works without a certificate of fitness

(1) Save as provided in subsection (2), no person shall perform risk work at a controlled mine or a controlled works, unless he or she is in possession of a current certificate of fitness, or

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otherwise than in accordance with or subject to the terms of that certificate, and no owner of a controlled mine or a controlled works and no contractor shall permit any person to perform risk work at such mine or works, except in so far as that person is authorized to perform such work by virtue of such a certificate: Provided that an initial or other certificate of fitness or a special certificate issued under the provisions of the previous Act and which was valid immediately before the commencement of this Act, shall be deemed to be a current certificate of fitness under this Act until the validity thereof expires or until it is cancelled or is replaced by a certificate of fitness under this Act.

[Sub-s. (1) amended by s. 43 of Act 208/93]

(2) The Minister may, after consultation with the Chief Inspector as contemplated in the Mine Health and Safety Act, 1996, and the director, and subject to such conditions as the Minister may determine, exempt the owner of a controlled mine or a controlled works or a contractor from the provisions of subsection (1) in respect of a particular person or group of persons in his service or in respect of a particular occupation, if the Minister is satisfied that special circumstances exist which make such exemption desirable or that the work performed by such person or group of persons is of a temporary nature or of short duration or that the risk to which such person or group of persons is exposed is negligible, and the Minister may at any time cancel such an exemption.

(3) The provisions of this section shall not be construed as prohibiting a person who is not in possession of a certificate as aforesaid, from performing at a mine or works which is not a controlled mine or a controlled works at the commencement of this Act, any work in which he or she is employed at that mine or works on the date on which it becomes a controlled mine or a controlled works, for a period not exceeding six months as from that date.

16. Register of persons performing risk work at controlled mine or works

(1) The owner of a controlled mine or a controlled works shall keep a register in which shall be recorded -

(a) the name of every person employed by him or her in connection with risk work at such mine or works, and the number assigned to such person by the bureau;

[Para. (a) amended by s. 43 of Act 208/93]

(b) the date of issue or renewal and the date of expiry of any certificate of fitness issued to such person;

(c) any restriction subject to which any such certificate may have been issued or renewed; and

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(d) such other information as may be prescribed.

(2) Every contractor shall keep a register in which shall be recorded, in respect of every person employed by him or her in connection with risk work at a controlled mine or a controlled works, the particulars mentioned in subsection (1), and shall upon completion of such work or when so requested by the owner of the mine or works in question, make such register or a copy thereof available to the said owner.

[Sub-s. (2) amended by s. 43 of Act 208/93]

(3) A register kept in terms of the provisions of subsection (1) or (2), shall be available for inspection by the director or by any other person appointed under section 3 (1) who has been authorized in writing by the director to inspect it, and at the request of the director or such a person, a copy of such register shall be made available to the director or that person.

17. Closure of controlled mine or works or alienation of assets by owner

(1) An owner of a controlled mine or a controlled works who owes the commissioner any amount under a provision of this Act, shall not discontinue the operations at his mine or works or sell or alienate his rights in connection with that mine or works unless -

(a) such owner has given not less than thirty days' notice in writing to the commissioner of his intention to do so; and

(b) the commissioner has issued to such owner a certificate to the effect that all amounts which he or she is required to pay the commissioner under the provisions of this Act have been fully paid or, as the case may be, that he or she has made arrangements which have been accepted by the commissioner, for the payment of any amount due by him or her to the commissioner.

(2) After the date on which the notice mentioned in subsection (1) was given to the commissioner, such owner shall not sell or alienate any asset which he or she has acquired or created for use in connection with the operation of his mine or works except with the approval in writing of the commissioner or until the commissioner has issued to such owner a certificate referred to in subsection (1) (b).

(3) The Minister shall not under section 11 release a controlled mine or a controlled works from control, unless he or she is satisfied that the owner of the mine or works in question has fully paid all amounts which he or she is required to pay to the commissioner under the provisions

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of this Act, or that he or she has made arrangements, which have been accepted by the commissioner, for the payment of any amount which is due by him or her to the commissioner.

(4) For the purposes of subsection (2), the Minister, acting on the advice of the Chief Inspector as contemplated in the Mine Health and Safety Act, 1996, shall make a decision on any question as to whether an asset which is or was held by an owner of a controlled mine or a controlled works was acquired or created for use in connection with the operation of that mine or works.

[Sub-s. (4) substituted by s. 51 of Act 88/96]

18. Establishment and constitution of risk committee

(1) There shall be established a committee, to be called the Risk Committee for Mines and Works, which shall exercise the powers and perform the functions conferred upon or assigned to it by this Act, and such other functions and duties as may from time to time be assigned to it by this Act, and such other functions and duties as may from time to time be assigned to it by the Minister.

(2) (a) The risk committee shall, subject to the provisions of subsection (4), consist of the Chief Inspector as contemplated in the Mine Health and Safety Act, 1996, the director and not less than three or more than four other members to be appointed by the Minister, of whom one shall be a medical practitioner.

(b) In appointing members of the risk committee the Minister shall consider such representations (if any) as may have been made to him or her by owners of controlled mines or controlled works or by any organization acting on behalf of such owners or on behalf of persons who perform risk work at controlled mines or controlled works.

(3) The Minister may appoint in respect of any member of the risk committee appointed by him, an alternate or so many alternates as he or she may consider necessary.

(4) The Chief Inspector as contemplated in the Mine Health and Safety Act, 1996, shall ex officio be the chairman of the risk committee, and when there is no Chief Inspector as contemplated in the Mine Health and Safety Act, 1996, or the Chief Inspector as contemplated in the Mine Health and Safety Act, 1996, is absent or is for any other reason unable to perform his functions as chairman of the risk committee, a Deputy Chief Inspector as contemplated in the

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Mine Health and Safety Act, 1996, designated by the Minister for that purpose shall act as chairman of the risk committee.

(5) (a) The quorum for a meeting of the risk committee shall be a majority of its members including the chairman.

(b) The Minister may make such rules as he or she may consider necessary or desirable for the proper functioning of the risk committee.

(6) A member of the risk committee, and an alternate to such a member, who is not in the full-time service of the State, shall be appointed at such remuneration and on such other conditions of service and for such period not exceeding five years as the Minister may determine in consultation with the Minister of Finance.

(7) If the Minister is of the opinion that a member of the risk committee who has been appointed by him, or an alternate to such a member, is not competent to serve as a member of the risk committee or as such an alternate, the Minister may by notice in writing terminate the appointment of the member or alternate concerned.

19. Powers of chairman of risk committee to enter upon premises, conduct investigations or obtain information

(1) The chairman of the risk committee or any person authorized thereto in writing by him or her may enter upon any place at a mine or works where any persons work or have worked or where it is intended to cause any persons to work, and carry out such observations, tests, experiments, measurements, investigations or surveys as he or she may consider necessary for the performance of the functions of the risk committee, and view any instrument, appliance or machinery used in connection with the operations at that mine or works or with which any observations, tests, experiments, measurements, investigations or surveys are carried out.

(2) The chairman of the risk committee shall have the same powers as those conferred upon the director by sections 5 (3) and 6, and the provisions of those sections relating to the exercise of such powers by the director shall mutatis mutandis apply with reference to the exercise of such powers by the said chairman.

20. Determination of risk of controlled mine or works

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(1) As soon as possible after the commencement of this Act, the risk committee shall, in respect of every mine or works which is in terms of section 9 a controlled mine or a controlled works, determine the risk of that mine or works: Provided that the pneumoconiosis risk which immediately before such commencement applied in respect of such a controlled mine under the previous Act, shall, for the purposes of this Act, be deemed to be the risk of that mine until the risk has been determined under this subsection.

(2) As soon as possible after the date on which a mine or works becomes a controlled mine or a controlled works in terms of section 10, but not later than sixty days after that date, the risk committee shall determine the risk of that mine or works.

(3) The risk committee shall determine the risk of any mine or works in accordance with the basis fixed by the Minister under subsection (5), or, if the Minister has not fixed any such basis, in such manner as the risk committee deems fit, and, in determining such risk, the risk committee shall consider such representations (if any) as may have been made to it by the owner of the mine or works in question or by any organization acting on behalf of persons performing risk work at that mine or works, and may -

(a) determine different risks in respect of separate mines or works or parts of mines or works or working places in or at mines or works or categories or kinds or groups of mines or works, or different categories or classes or groups of workers, or different occupations in or at or in connection with mines or works;

(b) take into consideration any factor which, in the opinion of the risk committee, may or is likely to affect the risk in any particular case or generally; and

(c) consult any person who in its opinion has special knowledge of any matter before the risk committee for consideration or on which the risk committee is required to make a decision.

(4) The risk committee shall express any risk which it determines in accordance with a scale or in a manner prescribed.

[Sub-s. (4) substituted by s. 7 of Act 208/93]

(5) (a) The Minister may, if he or she deems it expedient, determine the basis in accordance with which the risk of mines or works shall be determined by the risk committee.

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(b) In determining such basis, the Minister shall consider such representations (if any) as may have been made to him or her by owners of controlled mines or controlled works or by any organization acting on behalf of such owners or on behalf of persons who perform risk work at controlled mines or controlled works.

(c) Any determination made by the Minister under paragraph (a) shall be published for general information in the Gazette.

21. Review and alteration or redetermination of risk

The risk committee may at any time, of its own motion or on application by the owner of a controlled mine or a controlled works or by any organization acting on behalf of such owner or on behalf of persons who perform risk work at such controlled mine or such controlled works, review its determination of the risk of the mine or works in question and confirm or alter that determination or set it aside and redetermine the risk in question.

22. Notice of determination, alteration or redetermination of risk

When the risk committee has determined the risk of a controlled mine or a controlled works under section 20 or has altered its determination of such risk or has set it aside and redetermined the risk under section 21, the chairman of the risk committee or any person authorized thereto by him, shall give notice thereof in writing to the director, the commissioner and the owner of the mine or works in question and, where the alteration or the setting aside resulted from a review on application by an organization acting on behalf of persons who perform risk work at such mine or works, to that organization.

CHAPTER III

CERTIFICATES OF FITNESS, AND MEDICAL AND OTHER EXAMINATIONS

23. Certificate of fitness

(1) The director may, subject to the provisions of this Act, on application made in the prescribed manner by any person, or a contractor or an owner of a controlled mine or a controlled works who intends to employ a person to perform risk work at a mine or works, who is not in possession of a valid certificate of fitness, issue to such person a certificate of fitness in the form determined by the director.

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(2) An application in terms of subsection (1) shall be accompanied by the prescribed fee, if any, and the prescribed medical report on the person concerned.

(3) The director may -

(a) direct such person, contractor or owner to furnish such further information in respect of the application as the director deems necessary or expedient;

(b) cause the application to be investigated;

(c) obtain such further information as he or she may deem necessary for the consideration of the application;

(d) direct the person concerned to make himself or herself available, at his own expense, or at the expense of the contractor or owner, at the bureau or a sub-bureau or a place determined by the director, for such examinations as may be determined by the director.

(4) A certificate of fitness issued under subsection (1) shall be valid for such period, not exceeding three years, from the date of its issue as the director may determine, either generally or in any particular case, and the director may, in his discretion, in respect of such certificate impose restrictions limiting the holder thereof -

(a) to work at a particular controlled mine or controlled works; or

(b) to work at a controlled mine or a controlled works of a particular kind or group or category; or

(c) to work in a particular occupation at a controlled mine or a controlled works; or

(d) to work for a fixed period or fixed periods in a particular controlled mine or controlled works, or in controlled mines or controlled works of a particular kind or group or category.

(5) (a) Where any person has on such an examination been found permanently or temporarily unfit for risk work at a controlled mine or a controlled works, the director shall cause the finding to be communicated in writing to such person, and to the contractor or owner concerned, if appropriate.

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(b) A person who has been found temporarily unfit for such work, shall be entitled to a further medical examination free of charge if he or she presents himself or herself therefor within 90 days from a date determined by the director and communicated in writing to such person.

(6) The director shall prescribe the standard of fitness for risk work at a controlled mine or a controlled works which shall be applied at the medical examination of a person examined for the first time with a view to the issue to him or her of a certificate of fitness, and for that purpose the director may -

(a) prescribe different standards in respect of mines and works;

(b) prescribe different standards in respect of different groups, kinds or categories of mines and works;

(c) prescribe different standards in respect of different classes, groups or categories of persons or different occupations at controlled mines or controlled works.

[S. 23 substituted by s. 8 of Act 208/93]

24. Medical examination of person on mine or works becoming controlled mine or works

(1) The director shall within six months after the date on which a mine or works becomes a controlled mine or a controlled works by virtue of a notice under section 10 -

(a) cause to be medically examined every person who on that date is employed in risk work at that mine or works and who is not in possession of a current certificate of fitness; and

[Para. (a) amended by s. 43 of Act 208/93]

(b) subject to the provisions of subsection (3), cause a certificate of fitness to be issued to any such person who is found to be free from any compensatable disease or who is found to be suffering from a compensatable disease which does not disqualify him or her from obtaining a certificate of fitness, irrespective of whether or not such person complies with the standard of fitness determined under section 23 (6).

[Para. (b) amended by s. 43 of Act 208/93]

(2) A certificate referred to in subsection (1) (b) may be issued subject to any restriction contemplated in section 23 (4).

[Sub-s. (2) amended by s. 43 of Act 208/93]

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(3) The director may refuse the issue of a certificate of fitness to any person referred to in subsection (1) if his health is in the opinion of the director such that he or she may in the performance of his work endanger his own health or safety or the health or safety of other persons employed at the mine or works in question.

(4) If, after a medical examination of any person under subsection (1), the issue to him or her of a certificate of fitness is refused, the director shall in writing inform such person of the reasons for the refusal.

(5) The director shall as soon as possible after any person has in terms of subsection (1) been medically examined, in writing inform the owner of the mine or works in question of the finding at the examination.

25. Periodical medical examination for renewal of certificate of fitness

(1) Every person who performs risk work at a controlled mine or a controlled works, shall be medically examined at such intervals as may be prescribed by the Minister.

[Sub-s. (1) amended by s. 43 of Act 208/93]

(2) Regulations made under subsection (1) may -

(a) differentiate between controlled mines and controlled works, or between different groups, kinds or categories of controlled mines or controlled works, or between different working places at controlled mines or controlled works, or between different classes, groups or categories of persons, or between different occupations at controlled mines or controlled works;

(b) prescribe the nature of the examination to be carried out at any such examination; and

(c) prescribe the period for which any person who has obtained a certificate of fitness for the first time, shall have performed risk work at a controlled mine or a controlled works in order to be entitled to the renewal of his certificate of fitness.

(3) If a person referred to in subsection (1) is at an examination in terms of that subsection found to be free from any compensatable disease in the second degree within the meaning of section 44 (2), the director shall, subject to the provisions of subsections (4) and (5) of this section, cause the certificate of fitness of such person to be renewed for such period as the director may determine but not exceeding the prescribed period.

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(4) Any certificate of fitness may under subsection (3) of this section be renewed subject to any restriction contemplated in section 23 (4).

[Sub-s. (4) amended by s. 43 of Act 208/93]

(5) The director may refuse the renewal of the certificate of fitness of a person referred to in subsection (1), and may cancel such certificate, if his health is in the opinion of the director such that he or she may in the performance of his work endanger his own health or safety or the health or safety of other persons employed at the mine or works in question.

(6) Where the renewal of a certificate of fitness has been refused under this section, the director shall immediately cause the reasons for the refusal to be communicated in writing to the person concerned and a copy of such communication to be sent to the owner of the mine or works where that person is employed, or to the owner of the mine or works by whom he or she is employed.

[Sub-s. (6) substituted by s. 9 of Act 208/93]

26. Interim examination of holder of certificate of fitness

(1) Whenever the director has reason to suspect -

(a) that the health of the holder of a certificate of fitness has deteriorated substantially since his last medical examination; or

(b) that the holder of a certificate of fitness is performing work which he or she is not in terms of that certificate permitted to perform; or

(c) that the holder of a certificate of fitness is not complying with a restriction subject to which his certificate has been issued or renewed; or

(d) that the health of the holder of a certificate of fitness is such that the performance by him or her of risk work at a controlled mine or controlled works is likely to endanger his own health or safety or the health or safety of other workers,

the director shall, by notice in writing to the holder concerned, declare his certificate of fitness to be cancelled, and direct him or her -

(i) to surrender such certificate to a person and at a time and place specified in such notice; and

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(ii) to report at a time and place so specified, in order to undergo a medical examination.

(2) A copy of such notice shall forthwith be sent to the owner of the mine or works where the holder concerned is employed.

27. Procedure where presence of compensatable disease is suspected

(1) The director shall within fourteen days after a medical examination of the holder of a certificate of fitness -

(a) who has not previously been found to be suffering from a compensatable disease and who is considered or suspected to be suffering from such a disease; or

(b) who has previously been found to be suffering from a compensatable disease and who is considered or suspected to be suffering from a more advanced degree of the disease in question,

submit to the certification committee a full report on the result of the examination.

(2) Subject to the provisions of subsection (3), the director shall not issue a certificate of fitness to a person referred to in subsection (1) until the certification committee has determined whether or not he or she is suffering from a compensatable disease, and, if he or she is found or has previously been found to be suffering from a compensatable disease, the degree of that disease.

(3) The director may issue to a person referred to in subsection (1) -

(a) who is not considered or suspected to be suffering from tuberculosis or any other infectious disease; or

(b) who is considered or suspected to be suffering from tuberculosis which in the opinion of the director is non-infectious and is not likely to become infectious; and

(c) who is considered to be fit to perform risk work at a controlled mine or a controlled works,

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a temporary certificate of fitness which shall be valid for a period not exceeding sixty days to be specified therein, in order to enable that person to continue working until the decision of the certification committee is made known.

(4) If the certification committee finds the person concerned -

(a) to be free from a compensatable disease; or

(b) to be suffering from a compensatable disease which does not disqualify him or her from obtaining a certificate of fitness,

the director shall forthwith issue a certificate of fitness to that person.

(5) A certificate of fitness may be issued under subsection (4) of this section subject to any restriction contemplated in section 23 (4).

[Sub-s. (5) amended by s. 43 of Act 208/93]

28. Procedure where certificate of fitness has lapsed

(1) The director shall on application by any person whose certificate of fitness has lapsed, issue to such person a fresh certificate of fitness if after examination it appears -

(a) that he or she is not suffering from a compensatable disease and that his health is such that he or she is fit to perform risk work at a controlled mine or a controlled works; or

(b) that he or she is suffering from a compensatable disease which does not disqualify him or her from obtaining a certificate of fitness and that his health otherwise is such that he or she is fit to perform risk work at a controlled mine or a controlled works.

(2) The director may issue a certificate of fitness under this section subject to any restriction contemplated in section 24 (3).

[Sub-s. (2) amended by s. 43 of Act 208/93]

29. Limited certificate of fitness

(1) On application by any person, including any such person in the service of the State, who is not in possession of a current certificate of fitness and whose work or duties require him or her from time to time to perform risk work, or be in or at places where risk work is performed,

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at any controlled mine or controlled works for periods not exceeding in the aggregate four hours on any one day, the director shall cause the applicant to be medically examined.

[Sub-s. (1) amended by s. 43 of Act 208/93]

(2) If after an examination in terms of subsection (1) of a person referred to in that subsection, he or she is found -

(a) not to be suffering from a compensatable disease, or to be suffering from a compensatable disease which does not disqualify him or her from obtaining a certificate of fitness; and

(b) to be fit to perform the work which he or she is from time to time required to perform, without endangering his own health or safety or the health or safety of other workers,

the director shall issue to him or her a certificate of fitness which shall be valid for such period not exceeding one year as the director may determine, and which may be restricted in any manner the director deems fit.

(3) The director may at any time by notice in writing to the holder of a certificate of fitness issued under subsection (2), cancel such certificate and require such holder to report at a time and place determined by the director and stated in the notice, for the purpose of undergoing a medical examination.

(4) The director shall cause a copy of a notice under subsection (3) to be sent forthwith to the owner of the mine or works in question and to the employer of the person concerned, or, if he or she is in the service of the State, to the head of the department in which he or she is employed.

30. Restrictions on issue of certificate of fitness in certain cases

(1) Subject to the provisions of section 27 (3) and subsection (3) of this section, no certificate of fitness shall at any time be issued to any person -

(a) who according to a finding of the certification committee, is suffering from -

(i) tuberculosis; or

(ii) tuberculosis and pneumoconiosis; or

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(iii) any compensatable disease in the second degree within the meaning of section 44; or

(b) who, in the opinion of the director, is suffering from an infectious disease and has not been completely cured of such disease.

(2) A finding expressed under the provisions of the previous Act and by virtue of which a benefit was awarded to any person, shall for the purposes of subsection (1) be deemed -

(a) in the case of such a finding of pneumoconiosis which impaired the cardiorespiratory functions of the persons concerned by not less than twenty per cent but by not more than fifty per cent, not to be a finding of a compensatable disease in the second degree;

(b) in the case of such a finding of pneumoconiosis which impaired the cardiorespiratory functions of the person concerned by more than fifty per cent, to be a finding of a compensatable disease in the second degree;

(c) in the case of such finding of pneumoconiosis and tuberculosis, to be a finding of a compensatable disease in the second degree; and

(d) in the case of such a finding of tuberculosis, to be a finding of tuberculosis.

(3) If the certification committee is satisfied that any person who has been found by that committee to be suffering from tuberculosis, has received treatment for tuberculosis and that the disease has been completely cured, the director may issue to such person a certificate of fitness restricting the holder thereof to the performance, at a controlled mine or a controlled works, of work of a nature or at a place or for a period or periods specified in the certificate.

[Sub-s. (3) substituted by s. 2 of Act 83/79 and amended by s. 43 of Act 208/93]

(4) The director -

(a) may issue a certificate of fitness referred to in subsection (3) subject to such other restrictions as he or she may consider necessary in addition to the restrictions contemplated in that subsection;

(b) may at any time cancel such a certificate by written notice to the holder thereof;

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(c) shall cause a copy of any notice under paragraph (b) to be sent without delay to the owner of any controlled mine or controlled works where the said holder is employed.

31. Director may require certain persons to undergo medical examination

(1) The director may by notice in writing require -

(a) any person who performs any work other than risk work at a controlled mine or a controlled works; or

[Para. (a) amended by s. 43 of Act 208/93]

(b) any person who is employed at a mine or works which is not a controlled mine or a controlled works,

to report at a time and place, or from time to time at the times and places, determined by the director and specified in the notice, for the purpose of being medically examined.

(2) A copy of any notice under subsection (1) shall be sent to the owner of the mine or works where the person to whom the notice is directed is employed.

32. Application for medical examination for compensatable disease

(1) Any person who works or has worked at a mine or works, or any other person acting on behalf of such a person, may at any time apply to the director for a medical examination of such person for the purpose of determining whether such person is suffering from a compensatable disease, or, if he or she has previously been found to be suffering from such a disease, the degree of such disease.

(2) Upon receipt of such application, the director shall, subject to the provisions of subsection (3) -

(a) cause the person concerned to be medically examined as soon as possible;

(b) submit to the certification committee a detailed report on the condition of the health of that person; and

(c) cause such further examinations, tests and observations to be carried out as the director may deem necessary or as the certification committee may require.

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(3) The director may refuse such application if the person concerned was medically examined under this Act within the period of 24 months immediately preceding the date on which such application is received, unless the application is supported in writing by a medical practitioner.

[Sub-s. (3) substituted by s. 1 of Act 60/2002]

33. Report by medical practitioner on person who has worked at mine or works

(1) Whenever a medical practitioner in the Republic considers or suspects that any person medically examined or treated by him, who has to his knowledge worked at a mine or works, or who he or she believes on reasonable grounds to have so worked, is suffering from a compensatable disease, such practitioner shall forthwith communicate to the director his findings at the examination, and shall on demand by the director furnish such further information at his disposal in regard to the examination or the health of such person as the director may require.

(2) The director may in writing direct a medical practitioner who has communicated his findings at the examination of any person to the director as contemplated in subsection (1), to perform, with the consent of the person concerned, a further medical examination of that person or such an examination of a nature determined by the director, and a medical practitioner so directed who has performed an examination in accordance with the direction, shall forthwith submit to the director a detailed report on the result of the examination.

34. Duties of medical practitioner in regard to post-mortem examination or service

(1) The director may authorize or in writing direct any medical practitioner in the Republic to perform a post-mortem examination or other post-mortem service under this Act of a nature determined by the director, and a medical practitioner so authorized or directed who has performed a post-mortem examination or other post-mortem service in accordance with such authorization or direction, shall forthwith submit to the director a detailed report on the result of the examination or service performed by him.

(2) A medical practitioner in the Republic who attended a deceased person at the time of or immediately before his death, or has opened the body of a deceased person, and who knows or has reason to believe that such person worked at a mine or works, shall remove the cardio-respiratory organs and any other prescribed organs or parts of the body of the deceased and shall send such organs and parts of the body to the prescribed place or, if no place has been prescribed, to the bureau or to any other place specified by the director, in

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accordance with the prescribed procedure or, if no procedure has been prescribed, in accordance with such instructions as may be issued by the director.

(3) Notwithstanding anything contained in subsection (1) or (2), a medical practitioner shall not perform a post-mortem examination on any deceased person or remove his cardio-respiratory organs or any other parts of his body, without the consent of his widow (if any) or an adult near relative of the deceased, if the widow or such a relative can readily be consulted.

35. Arrangements for post-mortem examinations and services

The Minister may with the concurrence of the Minister of Finance enter into such agreement or make such other arrangements with any institution, hospital or organization as the Minister may consider necessary for the performance of any post-mortem examinations or post-mortem services required under this Act.

36. Cost of medical examinations

(1) The cost of any medical examination under this Act, and the cost incurred to keep a person under observation in accordance with any provision of this Act, shall -

(a) in the case of a person who works at a mine or works, or whom the owner of a mine or works intends to employ, be borne by the owner of the mine or works; and

(b) in the case of any other person, be paid by the Director-General from moneys appropriated by Parliament for that purpose.

(2) For the purposes of this section “mine or works” means a controlled mine or a controlled works or a mine or works in respect of which the Minister has under section 12 applied the provisions of this section.

[S. 36 substituted by s. 10 of Act 208/93]

36A. Medical expenses

(1) The owner of a controlled mine or a controlled works shall from the date of the commencement of a compensatable disease pay the legitimate and proven cost incurred by or on behalf of a person in his or her service, or who was in his or her service at the commencement of a compensatable disease, in respect of medical aid necessitated by such disease.

[Sub-s. (1) substituted by s. 2 of Act 60/2002]

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(2) If, in the opinion of the commissioner, further medical aid in addition to that referred to in subsection (1) will reduce the disease from which the person is suffering, he or she may pay the cost incurred in respect of such further aid or direct the owner concerned to pay it.

(3) For the purposes of this section "owner" includes a labour broker who against payment provides a person to a client for the rendering of a service or the performance of work, and for which service or work such person is paid by the labour broker, or where a person is employed by a contractor, such contractor.

[S. 36A inserted by s. 11 of Act 208/93]

36B. Medical aid provided by owners

(1) If an owner of a controlled mine or a controlled works makes arrangements to provide to persons in his service medical aid which in the opinion of the commissioner is not less favourable to such persons than that provided for in this Act, the commissioner may, subject to such conditions as he or she may determine, approve such arrangements.

(2) If the commissioner has approved the arrangements referred to in subsection (1) -

(a) the persons concerned shall be entitled to medical aid in accordance with the arrangements;

(b) the owner concerned shall not be required to provide or pay for medical aid except in accordance with the said arrangements;

(c) the commissioner may reimburse an owner so much as he or she may deem equitable.

(3) The commissioner may at any time withdraw the approval or amend the conditions referred to in subsection (1).

(4) For the purposes of this section, section 36A (3) shall apply mutatis mutandis.

[S. 36B inserted by s. 11 of Act 208/93]

36C. Arrangements regarding certain compensation

The provisions of sections 36A and 36B shall have no effect on any arrangement in force on the fixed date between the State and the owners of controlled mines and controlled works in terms of which the

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State compensates such owners in respect of medical expenses incurred by such owners in respect of the treatment of persons in their service for tuberculosis.

[S. 36C inserted by s. 11 of Act 208/93]

37. Medical practitioner and a person examined entitled to fee or costs under certain circumstances

(1) If a medical practitioner who is not in the full-time service of the State or of an institution of which the maintenance costs are defrayed wholly from State funds or of an owner of a controlled mine or a controlled works -

(a) has in terms of an authorization, request or direction by the director performed any medical or post-mortem examination or other post-mortem service under this Act; or

(b) has removed the cardio-respiratory or other organs or parts of the body of a deceased person in terms of section 34 (2) to the satisfaction of the director,

he shall be entitled to payment, from moneys appropriated by Parliament for that purpose, of -

(i) any cost reasonably and necessarily incurred by him or her in order to perform such examination or service; and

(ii) the fee determined by the Minister in consultation with the Minister of State Expenditure; or

[Para. (ii) amended by s. 43 of Act 208/93]

(iii) in the case of an examination or service performed elsewhere than in the Republic, the fee determined by agreement between the director and the medical practitioner concerned or the authority (if any) with which arrangements were made for the performance of the examination or service in question.

(2) If any person -

(a) who is in possession of a current certificate of fitness and who is employed at a controlled mine or a controlled works; or

(b) who is not in possession of a current certificate of fitness and who performs any work other than risk work at a controlled mine or controlled works or is employed at

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a mine or works on the date on which it becomes a controlled mine or a controlled works by virtue of a notice under section 10,

necessarily incurs any costs, or necessarily absents himself or herself from the service of the owner of the mine or works in question, in order to have his certificate of fitness renewed or to obtain a certificate of fitness in terms of any requirement of this Act or to undergo a medical examination pursuant to a direction by the director -

(i) the director shall, subject to such conditions as the Minister may determine in consultation with the Minister of State Expenditure, repay the said costs to that person from moneys appropriated by Parliament for that purpose;

[Para. (i) amended by s. 43 of Act 208/93]

(ii) the said owner shall pay to that person his normal remuneration in respect of the period for which he or she so absents himself or herself from the owner's service but not exceeding three days.

(3) Where an application under section 32 for the medical examination of any person has been granted, such person shall be entitled to repayment, from moneys appropriated by Parliament for that purpose, and in accordance with a scale prescribed by the Minister with the concurrence of the Minister of State Expenditure, of costs incurred by him or her in order to undergo such examination -

(a) if he or she is found for the first time, on the ground of such examination, to be suffering from a compensatable disease; or

(b) where he or she has previously been found to be suffering from a compensatable disease, if he or she is found for the first time, on the ground of such examination, to be suffering from a compensatable disease in the second degree, within the meaning of section 44 (2); or

(c) in any other case, if he or she has not received from the State a repayment of costs in respect of a medical examination which he or she underwent, during the year immediately preceding the day on which the said application reached the bureau, for the purpose of determining whether he or she is suffering from a compensatable disease.

[Sub-s. (3) amended by s. 2 of Act 27/74 and s. 43 of Act 208/93]

38. ……..

[S. 38 amended by s. 3 of Act 27/74 and repealed by s. 12 of Act 208/93]

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CHAPTER IV

CERTIFICATION OF COMPENSATABLE DISEASES

39. Establishment and constitution of certification committee

(1) There shall be established a committee, to be called the Medical Certification Committee for Occupational Diseases, which shall exercise the powers and perform the functions conferred upon or assigned to it by this Act.

(2) The certification committee shall consist of the director and not less than three or more than five other members to be appointed by the Minister, who shall be medical practitioners and of whom, subject to the provisions of subsection (4) -

(a) one shall be a medical practitioner whose name has been submitted to the Minister in terms of that subsection by the owners of controlled mines and controlled works or by an organization or organizations qualified, in the opinion of the Minister, to act on behalf of such owners; and

(b) one shall be a medical practitioner whose name has been so submitted by an organization or organizations qualified, in the opinion of the Minister, to act on behalf of persons who perform risk work at controlled mines or controlled works.

(3) The director shall ex officio be the chairman of the certification committee.

(4) (a) When a member of the certification committee is to be appointed under paragraph (a) or (b) of subsection (2), the Minister shall cause a written communication to be sent to the owners or the organization or organizations referred to in the said paragraph (a) or, as the case may be, to the organization or organizations referred to in the said paragraph (b), containing a request for the submission to him, for the purposes of the paragraph in question and within a period stated in the communication not being less than forty-five days, of the names of not less than three medical practitioners.

(b) If such request is not complied with, the Minister may appoint any medical practitioner as a member of the certification committee in the place of the member contemplated in the paragraph in question or, at his discretion and provided the

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certification committee already consists of not less than three members apart from the director, refrain from making any appointment.

(5) The Minister may appoint in respect of any member of the certification committee an alternate or so many alternates as he or she may consider necessary, who shall be a medical practitioner or medical practitioners and who, in the case of an alternate to a member appointed in terms of subsection (2) (a) or (b), shall be appointed in the same manner as such member.

(6) (a) The chairman and a majority of the other members of the certification committee shall constitute a quorum at any meeting thereof.

(b) The Minister may make such rules as he or she may consider necessary or desirable for the proper functioning of the certification committee.

40. Establishment and constitution of reviewing authority

(1) There shall be established a body, to be called the Medical Reviewing Authority for Occupational Diseases, which shall exercise the powers and perform the functions conferred upon or assigned to it by this Act.

(2) (a) The reviewing authority shall consist of not less than three or more than four members to be appointed by the Minister and who shall be medical practitioners.

(b) In appointing the members of the reviewing authority the Minister shall consider such representations (if any) as may have been made to him or her by owners of controlled mines or controlled works or by any organization acting on behalf of such owners or on behalf of persons who perform risk work at controlled mines or controlled works.

(3) The Minister shall appoint a member of the reviewing authority as its chairman and shall designate another member to act as chairman when there is no chairman or the chairman is absent or is for any other reason unable to perform his functions.

(4) A member of the certification committee or an alternate to such a member or a medical practitioner in the employ of the bureau shall not be eligible for appointment as a member of the reviewing authority.

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(5) The Minister may appoint in respect of any member of the reviewing authority an alternate or so many alternates as he or she may consider necessary, who shall be a medical practitioner or medical practitioners.

(6) (a) A majority of the members of the reviewing authority shall constitute a quorum at any meeting thereof.

(b) The Minister may make such rules as he or she may consider necessary or desirable for the proper functioning of the reviewing authority.

41. Conditions of service of member of certification committee or reviewing authority

(1) A member of the certification committee or of the reviewing authority, and an alternate to such a member, who is not in the full-time service of the State shall be appointed at such remuneration and on such other conditions of service and for such period not exceeding five years as the Minister may determine in consultation with the Minister of State Expenditure.

[Sub-s. (1) amended by s. 43 of Act 208/93]

(2) A member of the certification committee or of the reviewing authority and an alternate to such a member shall vacate his office -

(a) if he or she becomes insolvent;

(b) if he or she becomes of unsound mind;

(c) if he or she is convicted of an offence and sentenced to imprisonment without the option of a fine; or

(d) in the case of a member, if he or she absents himself or herself from five consecutive meetings of the certification committee or of the reviewing authority, as the case may be, without the leave of the certification committee or reviewing authority, which shall not be granted for any continuous period exceeding one hundred and eighty days.

(3) If the Minister is of the opinion that a member of the certification committee or of the reviewing authority or an alternate to such a member is not competent to serve as such a member or alternate, the Minister may by notice in writing remove the member or alternate concerned from office.

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42. Powers of chairmen of certification committee and reviewing authority

(1) The chairman of the certification committee and the chairman of the reviewing authority shall each have the same powers as those conferred upon the director by sections 5 (1) and 6, and the provisions of those sections relating to the exercise of such powers by the director shall mutatis mutandis apply with reference to the exercise of such powers by the chairman in question.

(2) The chairman of the certification committee may by notice in writing direct any medical practitioner who has performed a medical examination of a person who works or has worked at a controlled mine or a controlled works, to submit to that committee a full report on such examination, or to appear before that committee at a time and place specified in the notice, in order to answer such relevant questions as may be put to him or her by the said chairman or any other member of that committee.

(3) The chairman of the certification committee or the chairman of the reviewing authority may of his own motion or at the request of any person whose case is being dealt with by that committee or authority, as the case may be, by notice in writing direct such person to appear before that committee or authority at a time and place specified in the notice in order to answer such relevant questions as may be put to him or her by the chairman or any other member of that committee or authority, or in order to undergo a medical examination.

43. Standards for certification of compensatable diseases

(1) The Minister may, if he or she deems it expedient, after consultation with the director and the medical adviser (if there is one), determine the standards to be applied in the certification of compensatable diseases in terms of this Act.

(2) In determining such standards, the Minister shall consider such representations (if any) as may have been made to him or her by owners of controlled mines or controlled works or by any organization acting on behalf of such owners or on behalf of persons who perform risk work at controlled mines or controlled works.

(3) Any determination made by the Minister under subsection (1) shall be published for general information in the Gazette.

44. Degrees of compensatable diseases

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(1) For the purposes of this Act a person shall be deemed to be suffering from a compensatable disease in the first degree -

(a) in the case of pneumoconiosis, if the certification committee has found that he or she is suffering from pneumoconiosis, whether or not it has impaired his cardio-respiratory functions, and the certification committee has found a resultant permanent disability of more than 10 per cent but not more than 40 per cent;

(b) in the case of a compensatable disease referred to in paragraph (d) of the definition of "compensatable disease" in section 1 (in this section referred to as "the definition"), if the certification committee has found that he or she is suffering from such a disease and the certification committee has found a resultant permanent disability of more than 10 per cent but not more than 40 per cent;

(c) in the case of a compensatable disease referred to in paragraph (c), (e), (eA) or (f) of the definition, if the certification committee has found that he or she is suffering from such a disease which has permanently impaired his ability to perform his ordinary work by more than 10 per cent but by not more than 40 per cent.

[Sub-s. (1) substituted by s. 14 of Act 208/93]

(2) For the purposes of this Act a person shall be deemed to be suffering from a compensatable disease in the second degree -

(a) if the certification committee has found that he or she is suffering from more than one compensatable disease simultaneously which together have permanently impaired his ability to perform his ordinary work by more than forty percent, or that he or she is suffering from tuberculosis and another compensatable disease simultaneously;

(b) in the case of pneumoconiosis, if the certification committee has found that he or she is suffering from pneumoconiosis which has permanently impaired his cardio-respiratory functions by more than forty per cent;

(c) in the case of a compensatable disease referred to in paragraph (d) of the definition, if the certification committee has found that he or she is suffering from such a disease which has permanently impaired his cardio-respiratory functions by more than forty per cent;

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(d) in the case of a compensatable disease referred to in paragraph (e) of the definition, if the certification committee has found that he or she is suffering from such a disease which has permanently impaired his ability to perform his ordinary work by more than forty per cent;

(e) in the case of a compensatable disease referred to in paragraph (f) of the definition, if the certification committee has found that he or she is suffering from such a disease which has permanently impaired his ability to perform his ordinary work by more than forty per cent;

(f) in the case of a compensatable disease referred to in paragraph (c) or (eA) of the definition, if the certification committee has found that he or she is suffering from such a disease which has permanently impaired his ability to perform his ordinary work by more than 40 per cent.

[Para. (f) inserted by s. 14 of Act 208/93]

45. Director to submit certain medical and post-mortem reports to certification committee

When the director has obtained or has received from any medical practitioner any report or communication on the medical or post-mortem examination in terms of this Act of any person -

(a) who has not previously been found by the committee to be suffering from a compensatable disease and who is on the ground of such examination considered or suspected to be suffering from such a disease or to have been suffering from such a disease at the time of his death; or

(b) who has previously been found by the committee to be suffering from a compensatable disease and who is on the ground of such medical examination considered or suspected to be suffering from a compensatable disease in a more advanced degree,

the director shall as soon as practicable submit to the certification committee a full report on such examination, and, at the request of the said committee, cause such further examinations, tests or observation to be performed as that committee may require.

46. Certification committee to determine presence, nature and degree of compensatable disease

When the certification committee has received from the director a report in terms of section 45 or has obtained or received in terms of any other provision of this Act a report on the medical or post-mortem examination of any such person as is referred to in that section, the certification committee shall

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determine, in any manner it deems fit but with due regard to the prescribed standards and to the provisions of section 44 -

(a) in the case of a person who has not previously been found by the committee to be suffering from a compensatable disease, whether he or she is suffering from such a disease or, as the case may be, was suffering from such a disease at the time of his death, and if so, the nature and degree of the disease;

(b) in the case of a person who has previously been found by the certification committee to be suffering from a compensatable disease, the degree of the disease.

47. Certification committee may reconsider and alter own finding

(1) The certification committee may, when it has expressed a finding under the provisions of this Act, of its own motion or on application by the person to whom such finding relates, or on application by any other person acting on behalf of that person or any organization so acting, or, in the case of a deceased person, on application by the dependants of such person or by any other person acting on behalf of such dependants or any organization so acting, at any time reconsider and, subject to the provisions of subsection (2), alter such finding or rescind it and express a fresh finding in its place.

(2) The certification committee may not alter or rescind any finding by virtue of which any benefit has been awarded to any person, irrespective of whether such finding was expressed before or after the commencement of this Act.

(3) Where a finding is altered or is rescinded and a fresh finding is expressed in its place under subsection (1), such altered or fresh finding shall be deemed to have been expressed on the date on which the original finding was expressed.

48. Notice of finding of certification committee

(1) Whenever the certification committee has expressed a finding in accordance with the provisions of this Act, the chairman or a person authorized thereto in writing by him, shall issue a certificate in the prescribed form setting out such finding and containing such information as may be necessary for the purposes of this Act, and shall within ten days as from the date on which the finding was expressed, cause copies of such certificate to be sent -

(a) to the commissioner;

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(b) if the person to whom the certificate relates is still employed at a mine or works, to the owner of such mine or works;

(c) to the person to whom it relates, or if it relates to a deceased person, to the dependants, if any, of the deceased;

[Para. (c) substituted by s. 8 of Act 89/88]

(d) ……..

[Para. (d) deleted by s. 8 of Act 89/88]

(e) if it is a finding of tuberculosis, to the local authority in whose area the person is to whom the certificate relates.

(2) The chairman of the certification committee shall keep a register of all the findings of that committee.

49. Effective date of finding of certification committee

(1) A finding of the certification committee shall, save as is otherwise provided in this Act, be deemed to have been expressed -

(a) where it is based wholly or partly on a medical examination or two or more medical examinations of the person concerned, on the date on which such examination or the first of such examinations commenced;

(b) where it is based wholly or partly on a post-mortem examination, on the date on which the person concerned died;

(c) where it is based wholly or partly on a medical examination or two or more medical examinations of the person concerned carried out or commenced before the commencement of this Act, on the date on which such examination or the first of such examinations commenced.

(2) Notwithstanding the repeal of the previous Act, a finding referred to in subsection (1) (c) shall be expressed in accordance with the provisions of the previous Act and shall be deemed to be a finding of the Miners' Certification Committee (within the meaning of the previous Act) expressed before the commencement of this Act.

50. Review of finding by reviewing authority

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(1) The reviewing authority may review any finding expressed by the certification committee if an application for such review is lodged with the reviewing authority by the person to whom the finding relates or by any other person acting on his behalf or any organization so acting, or, in the case of a deceased person, by the dependants of the deceased or by any person or organization acting on behalf of such dependants, within ninety days as from the date on which notice of the finding was given by the certification committee.

(2) The reviewing authority may on such review confirm the finding in question or request the chairman of the certification committee to submit the case for review to a joint meeting of that committee and the reviewing authority.

51. Joint meeting of certification committee and reviewing authority

(1) The chairman of the certification committee shall, within fourteen days after the receipt of a request under section 50 (2), convene a joint meeting of the certification committee and the reviewing authority, at which the chairman of the certification committee shall preside, and every member of the certification committee or the reviewing authority present thereat shall have a vote on any matter relating to the finding under review.

(2) The Minister shall determine the quorum for a joint meeting of the certification committee and the reviewing authority and may make such rules as he or she deems necessary for the conduct of the business of such joint meeting.

52. Review by joint meeting

(1) A joint meeting of the certification committee and the reviewing authority may confirm any finding under review by such meeting or rescind it and substitute for it such meeting's own finding.

(2) Where a finding is rescinded as aforesaid, the finding substituted for it by the joint meeting shall be deemed to be a finding of the certification committee and to have been expressed on the date on which the rescinded finding was expressed.

(3) The provisions of section 48 shall mutatis mutandis apply in respect of a finding substituted by such a joint meeting for a finding of the certification committee.

53. ……

[S. 53 repealed by s. 16 of Act 155/93]

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CHAPTER V

COMMISSIONER, ADVISORY COMMITTEE AND COMPENSATION FUND

54. Appointment of commissioner and staff

The Minister shall appoint, subject to the laws governing the public service -

(a) an officer to be styled the Compensation Commissioner for Occupational Diseases, who shall exercise the powers and perform the functions conferred upon or assigned to him or her by this Act or by the Minister under this Act;

(b) an officer, to be styled the Deputy Compensation Commissioner for Occupational Diseases, to act in the place of the commissioner whenever there is no commissioner or the commissioner is absent or is for any other reason unable to perform his functions;

(c) such other officers and persons as he or she may consider necessary, to assist the commissioner in the performance of the functions which in terms of this Act are required to be performed by him.

55. Powers of commissioner to enter upon premises and obtain information

(1) The commissioner shall for the purpose of performing his functions have the same powers as those conferred on the director by sections 5 (3) and 6, and the provisions of those sections relating to the exercise of such powers by the director shall mutatis mutandis and subject to the provisions of subsection (2) of this section apply with reference to the exercise of such powers by the commissioner.

(2) (a) Notwithstanding anything contained in section 6 (4) or any law relating to income tax, the Secretary for Inland Revenue shall convey to the commissioner at his request any information required by the commissioner in connection with the application of any provision of this Act.

(b) The commissioner shall, except in the performance of his duties under this Act, preserve secrecy in regard to any information conveyed to him or her under paragraph (a).

56. Commissioner may delegate powers

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The commissioner may in writing delegate to the deputy commissioner or any other officer on his staff or, with the approval of the Minister, to any other person in the service of the State, any power conferred upon the commissioner by this Act, and may at any time vary or withdraw any such delegation.

57. ……..

[S. 57 repealed by s. 17 of Act 208/93]

58. Supreme Court rulings

(1) The commissioner may with the consent of the Minister state a special case for the ruling of the Transvaal Provincial Division of the Supreme Court of the Republic of South Africa on any question of law which has arisen in connection with any matter in which the commissioner has given or is required to give a decision under this Act.

(2) Any person who has an interest in the decision in question, may appear in person or be represented by counsel at the hearing of any such case.

(3) Where any such ruling has been given, the commissioner shall in any future instance act in conformity with that ruling, and if the ruling is in conflict with any decision already given by the commissioner, such decision shall be modified so as to bring it into conformity with the ruling: Provided that any person affected by such ruling, and (with the consent of the Minister) the commissioner, may without obtaining leave to do so, appeal against such ruling to the Appellate Division.

(4) When a provincial or local division of the Supreme Court of the Republic of South Africa has given a decision or ruling which affects the administration of this Act, the Minister may submit that decision or ruling to the Appellate Division in order that it may determine the said question for the guidance of all courts.

59. Establishment and constitution of advisory committee

(1) There shall be established an advisory committee which shall perform the functions assigned to it by or under this Act and such other functions as may from time to time be assigned to it by the Minister.

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(2) The advisory committee shall consist of the commissioner and not more than 12 other members to be appointed by the Minister, of whom, subject to the provisions of subsection (3) -

(a) half shall be persons whose names have been submitted to the Minister in terms of that subsection by the owners of controlled mines and controlled works or by an organization or organizations qualified, in the opinion of the Minister, to act on behalf of such owners; and

(b) half shall be persons whose names have been so submitted by an organization or organizations qualified, in the opinion of the Minister, to act on behalf of persons who perform risk work at controlled mines or controlled works.

[Sub-s. (2) substituted by s. 18 of Act 208/93]

(3) (a) When the members contemplated in paragraph (a) or (b) of subsection (2) are to be appointed, the Minister shall cause a written communication to be sent to the owners or the organization or organizations referred to in the said paragraph (a), or, as the case may be, to the organization or organizations referred to in the said paragraph (b), containing a request for the submission to him, for the purposes of the paragraph in question and within a period stated in the communication not being less than 45 days, of the names of not less than seven persons.

[Para. (a) substituted by s. 18 of Act 208/93]

(b) If such request is not complied with, the Minister may appoint any person as a member of the advisory committee in the place of a member contemplated in the paragraph in question.

(4) The commissioner shall ex officio be the chairman of the advisory committee.

(5) The Minister may appoint in respect of any member of the advisory committee who has been appointed by him, an alternate or so many alternates as he or she may consider necessary, in the same manner as that in which the member concerned has been appointed.

(6) A member of the advisory committee, and an alternate to such a member, who is not in the full-time service of the State, shall be appointed at such remuneration and on such other conditions of service and for such period not exceeding five years, as the Minister may determine in consultation with the Minister of State Expenditure.

[Sub-s. (6) amended by s. 43 of Act 208/93]

60. Consultation by commissioner

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(1) The commissioner may at his discretion consult the advisory committee and, with the approval of the Minister, any other person or organization on any matter which he or she is required to deal with, consider or decide in the exercise of his functions under this Act.

(2) Where consultation by the commissioner under subsection (1) involves the payment of remuneration to any person or organization, such remuneration shall be paid from moneys appropriated by Parliament for that purpose, on a scale determined by the Minister in consultation with the Minister of State Expenditure.

[Sub-s. (2) amended by s. 43 of Act 208/93]

61. Establishment and management of compensation fund

(1) There is hereby established a fund to be called the Mines and Works Compensation Fund.

(2) The compensation fund shall subject to the provisions of this Act be controlled and managed by the commissioner.

(3) There shall be transferred to the compensation fund -

(a) all assets and moneys which immediately before the commencement of this Act were the property or stood to the credit of the General Council for Pneumoconiosis Compensation, or the Pneumoconiosis Compensation Fund, which existed under the previous Act; and

(b) all liabilities which immediately before such commencement were liabilities of the said council.

(4) The commissioner shall receive all moneys payable to or for the benefit of the compensation fund in terms of this Act and shall credit to the compensation fund, in accordance with the provisions of this Act, all such moneys and all moneys which in terms of this Act are to be paid to and are received by the commissioner.

(5) The commissioner shall deposit the moneys of the compensation fund in a bank approved by the Minister for that purpose, and no money so deposited shall be paid out by the commissioner otherwise than by means of an order signed by two persons approved by the Director-General in consultation with the Secretary to the Treasury, directing payment on behalf of the commissioner.

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62. Amounts payable by owner of controlled mine or works

(1) The commissioner shall determine in respect of each controlled mine or controlled works, in such manner and on such basis as may be prescribed, an amount payable by the owner of that mine or works to the commissioner, for the benefit of the compensation fund, in respect of each shift worked by any person at or in connection with that mine or works during which such person performed risk work, in order to enable the commissioner to pay to or in respect of every person who performs risk work at or in connection with that mine or works and who is after the commencement of this Act found to be suffering from a compensatable disease, such amounts as may or are likely to become payable under this Act.

[Sub-s. (1) substituted by s. 2 of Act 30/78 and s. 19 of Act 208/93]

(2) The commissioner may determine different amounts in respect of -

(a) controlled mines and controlled works;

(b) different categories, groups or classes of controlled mines or controlled works;

(c) different categories, groups or classes of persons;

(d) different trades, occupations or work at or in connection with controlled mines or controlled works;

(e) different sections of controlled mines or controlled works, or different working places at controlled mines or controlled works;

(f) different compensatable diseases.

(3) Whenever the commissioner has made a determination under subsection (1), he or she shall in writing notify the owner of the mine or works in question thereof, and in such notice the commissioner shall set out such details and information as he or she may consider adequate for the purposes of explaining the determination, and specify the date as from which the determination takes effect.

(4) The owner of a controlled mine or a controlled works shall pay to the commissioner, not later than the twentieth day of each month, the amounts which, by virtue of a determination under subsection (1), such owner owes in respect of persons who performed risk work at or in connection with his mine or works in the preceding month, and when any such payment is made the owner concerned shall furnish full details of the composition of the amount of his

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payment and, in the prescribed form, such other details as may be required by the commissioner: Provided that the commissioner may, on application by an owner of a controlled mine or a controlled works, authorize the owner concerned to pay any amounts which are due by that owner at longer intervals but not exceeding three-monthly intervals.

(5) When the commissioner has under subsection (1) determined the amount which the owner of a controlled mine or a controlled works is to pay as contemplated in this section, the commissioner may, of his own motion or on application by that owner, and the commissioner shall when the risk of the mine or works in question has been altered by the risk committee under section 21, review and, if he or she deems it necessary, alter the amount so determined, and if the commissioner has altered such amount he or she shall forthwith in writing notify the owner concerned.

63. Amounts payable by owner of controlled mine or works for research

(1) The owner of a controlled mine or a controlled works shall pay to the commissioner for the benefit of the compensation fund, in respect of each shift worked by a person at or in connection with the mine or works in question during which such person performed risk work, such amount for purposes of research contemplated in section 120 as the Minister may determine.

(2) The amount so determined shall not exceed two cents per shift.

[Sub-s. (2) substituted by s. 4 of Act 27/74 and s. 20 of Act 208/93]

(3) The provisions of subsection (2) of section 62 shall mutatis mutandis apply in connection with the determination of an amount by the Minister under subsection (1) of this section, and the provisions of subsections (3) and (4) of the first-mentioned section shall mutatis mutandis apply with reference to any amount so determined.

64. Interest on amount in arrear

An owner of a controlled mine or a controlled works shall pay interest to the commissioner, at the standard interest rate determined in terms of section 26 (1) of the Exchequer Act, 1975 (Act No. 66 of 1975), on any amount due to the commissioner under the provisions of section 62 or 63 which was not paid on the day on which it became payable, and such interest shall be calculated from the said day to the day preceding the day on which the amount in question is paid.

[S. 64 substituted by s. 21 of Act 208/93]

65. Penalty for failure to pay amount due

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(1) The commissioner may impose on an owner of a controlled mine or a controlled works who fails to pay any amount which he or she is required to pay the commissioner under section 62 or 63 in respect of any shift during which any person performed risk work at or in connection with such mine or works, a penalty not exceeding ten rand for each such shift in respect of which the amount has not been paid.

(2) The commissioner shall credit any penalty recovered under subsection (1) to the Mines Account or the Works Account or the Research Account, as the case may be, and the provisions of section 64 shall mutatis mutandis apply with reference to any such penalty.

66. Recovery of amount due

Whenever any amount is due to the commissioner under any provision of this Act by an owner of a mine or works, the commissioner may take such steps as he or she deems fit or as the Minister has directed him or her to take to recover the amount due, and any such amount may be recovered together with interest thereon from the due date at a rate determined by the commissioner and approved by the Minister, and any costs incurred in connection with such recovery.

67. Commissioner to keep certain separate accounts

The commissioner shall maintain separate accounts for the purposes of the compensation fund, to be called the State Account, the Mines Account, the Works Account and the Research Account, respectively, to which shall be credited the amounts and to which shall be debited the payments provided for in the applicable provisions of this Act.

68. Commissioner to make certain adjustment between accounts

(1) As soon as practicable after the commencement of this Act, the commissioner shall, in consultation with an actuary approved by the Minister for that purpose, determine the amounts which would have been payable, had the previous Act not been repealed, respectively out of the A-account and B-account which were established under the previous Act, in respect of every person who was found for the first time before the commencement of this Act, to be suffering from pneumoconiosis or tuberculosis.

(2) The commissioner shall credit the Mines Account and debit the State Account with the difference between the amounts which, immediately before the commencement of this Act, stood to the credit of the accounts referred to in subsection (1) and the amounts determined by him or her under that subsection.

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69. State Account

(1) The commissioner shall credit to the State Account all the assets and moneys transferred to the compensation fund under section 61 (3).

(2) The Minister shall from time to time, in consultation with the Minister of State Expenditure, pay to the commissioner for the credit of the State Account, from moneys appropriated by Parliament for that purpose, such amounts as the Minister may deem necessary in order to enable the commissioner to meet the obligations payable from that account.

[Sub-s. (2) amended by s. 43 of Act 208/93]

(3) The commissioner shall debit the State Account with every payment under a provision of this Act -

(a) to or in respect of any person who was found for the first time, before the commencement of this Act, to be suffering from pneumoconiosis or tuberculosis;

(b) to or in respect of any person on the ground of a finding that he or she is or was suffering from a compensatable disease which he or she contracted as the result of work performed by him or her in the service of the State in or at or in connection with any mine or works;

(c) in respect of service rendered at a mine which ceased, before the commencement of this Act, to be a controlled mine in terms of the provisions of the previous Act.

(4) Any credit balance in the State Account after all the obligations payable from it have been extinguished, shall be paid into the State Revenue Fund.

[Sub-s. (4) amended by s. 43 of Act 208/93]

70. Mines Account

(1) The commissioner shall credit to the Mines Account all amounts paid to him or her by the owners of controlled mines in terms of the provisions of this Act, except any such amounts so paid as are referred to in section 73 (1).

(2) The commissioner shall, subject to the provisions of section 69 (3) (b) and (c) and section 72, debit the Mines Account with every payment in terms of a provision of this Act to or in respect of any person who, after the commencement of this Act, was found for the first time to be suffering or to have suffered from a compensatable disease which, in the opinion of the

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certification committee, he or she contracted as a result of work at or in connection with a controlled mine.

71. Works Account

(1) The commissioner shall credit the Works Account with all amounts paid to him or her by the owners of controlled works in terms of the provisions of this Act, except any such amounts so paid as are referred to in section 73 (1).

(2) The commissioner shall, subject to the provisions of section 69 (3) (b) and (c) and section 72, debit the Works Account with every payment in terms of a provision of this Act to or in respect of any person who, after the commencement of this Act, was found for the first time to be suffering or to have suffered from a compensatable disease which, in the opinion of the certification committee, he or she contracted as a result of work at or in connection with a controlled works.

72. Payments from State Account, Mines Account or Works Account according to circumstances

(1) Every payment in terms of a provision of this Act to or in respect of any person other than a person referred to in section 69 (3) (b), on the ground of work performed at or in connection with a mine or works, not being a controlled mine or a controlled works, and in respect of which the Minister has under section 12 declared that it shall be deemed to be risk work at a controlled mine or a controlled works, shall be made -

(a) if no amounts were payable under section 62 by the owner of the mine or works in question in respect of such work, from the State Account;

(b) if any amounts were payable under section 62 by that owner in respect of such work, from the Mines Account or the Works Account, according to the circumstances.

(2) Subject to the provisions of subsections (1) and (3) of this section and section 69 (3) (b) and (c), any payments in terms of a provision of this Act to or in respect of a person who was employed at a controlled mine and at a controlled works and who, after the commencement of this Act, was found for the first time to be suffering or to have suffered from a compensatable disease, shall be paid partly from the Mines Account and partly from the Works Account in such proportion as the commissioner at his discretion may determine on the basis of the respective periods for which that person was employed as aforesaid.

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(3) If the commissioner is of the opinion that a person referred to in subsection (2) was employed mainly at a controlled mine or mainly at a controlled works, the commissioner may at his discretion debit the payments referred to in that subsection entirely against the Mines Account or the Works Account, according to the circumstances.

73. Research Account

(1) The commissioner shall credit to the Research Account all amounts paid to him or her in terms of the provisions of section 63, and all amounts paid under section 64, 65 or 66 by way of interest, penalty or cost in respect of any amount or the recovery of any amount which is to be credited to the Research Account.

(2) The commissioner shall not pay any moneys from the Research Account except on a written direction by the Minister for the purposes of section 120.

74. Minister to make good certain losses in and payments from the compensation fund

The Minister shall pay, from moneys appropriated by Parliament for that purpose, to the commissioner for the credit of the relevant account of the compensation fund -

(a) any amount which is due to the commissioner by an owner of a controlled mine or a controlled works under any provision of this Act and which the commissioner is unable to recover from that owner, but excluding any interest due under section 64 or 66 or any penalty imposed under section 65;

(b) any amount paid from the compensation fund to any person who was not entitled to receive such amount, and which the commissioner is unable to recover from such person;

(c) any loss suffered by the compensation fund through the negligence, dishonesty or other act or omission of any person in the service of the State, or any person, institution, organization or authority who or which has acted on behalf of the commissioner in terms of any provision of this Act, and which the commissioner is unable to recover from the person, institution, organization or authority concerned;

(d) any amount paid from the compensation fund under a provision of this Act to or in respect of a person who contracted a compensatable disease wholly or partly as a result of his duties at or in connection with mines or works while he or she was in the service of the State or while he or she performed a service on behalf of the State;

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(e) any amount paid from the compensation fund under a provision of this Act to or in respect of a person in connection with work performed at a mine or works which has ceased operations and at the time of such cessation was not a controlled mine or a controlled works.

[Para. (e) substituted by s. 5 of Act 27/74]

75. Investments of moneys by commissioner

(1) The commissioner shall invest with the Public Investment Commissioners any moneys in the State Account which are available for investment.

[Sub-s. (1) substituted by s. 3 of Act 45/75 and amended by s. 43 of Act 208/93]

(2) The commissioner may after consultation with the advisory committee -

(a) invest any moneys in the Mines Account, the Works Account or the Research Account which are available for investment, in Government stock, Treasury bills, any stock guaranteed by the Government or any stock of a municipal or divisional council or public utility company, or with any commercial bank, building society or other financial institution approved by the Minister in consultation with the Minister of State Expenditure;

[Para. (a) substituted by s. 3 of Act 45/75 and amended by s. 43 of Act 208/93]

(b) invest such moneys with the Public Investment Commissioners.

[Para. (b) amended by s. 43 of Act 208/93]

(3) Any profit or loss on realization of moneys deposited with the Public Investment Commissioners shall accrue to or be borne by the account from which the deposit was made.

[Sub-s. (3) amended by s. 43 of Act 208/93]

(4) Where the commissioner has lent any money on the security of a pledge or mortgage bond, he or she may, when enforcing his claim for repayment of the loan, with the approval of the advisory committee buy in the pledged or mortgaged property and thereafter sell that property.

76. Records and accounts of compensation fund

(1) The commissioner shall keep full and true records of the transactions of the compensation fund, and shall cause the books and accounts relating to such transactions to be balanced as at the thirty-first day of March in each year and thereafter prepare a statement showing in all necessary detail the income and expenditure of the compensation fund during the preceding financial year, and a balance sheet showing the assets and liabilities of the compensation fund as at the end of that financial year.

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(2) The accounts and balance sheet of the commissioner shall be audited by the Auditor-General.

[Sub-s. (2) amended by s. 43 of Act 208/93]

(3) As soon as may be after the accounts and balance sheet for any financial year have been audited, the commissioner shall submit copies to the Minister and to the advisory committee.

77. Records and annual report of commissioner

(1) The commissioner shall compile such statistical records as may be necessary to enable him or her to carry out his duties under this Act, and such other records as he or she may deem necessary or as the Minister may direct.

(2) As soon as may be after the close of each financial year the commissioner shall furnish the Minister with a report on his activities which shall contain all the necessary information in connection with the compensation fund.

77A. Actuarial valuation and services

(1) The compensation fund shall within three years from the fixed date be valued by an actuary appointed by the Minister, and thereafter the said fund shall be valued by such an actuary at such intervals, not exceeding three years, as the Minister may determine.

(2) Notwithstanding the provisions of section 60, the cost of any actuarial valuation in terms of subsection (1) and, subject to the directions of the Minister, any actuarial services to give effect to any provision of this Act shall be paid from the compensation fund, the respective accounts mentioned in section 67 to be debited with such amounts of such costs as may be determined by the Minister after consultation with the advisory committee.

(3) For the purposes of this section "actuary" means any Fellow of any institute, faculty, society or chapter of actuaries approved by the Minister of Finance.

[S. 77A inserted by s. 22 of Act 208/93]

CHAPTER VI

COMPENSATION GENERALLY

[Heading substituted by s. 23 of Act 208/93]

78. Application for and award of benefits

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(1) No right to a benefit to which a person became entitled under the previous Act, but which was not awarded to that person before the commencement of this Act, and no right to a benefit in respect of a compensatable disease under this Act, shall become effective until such benefit has been awarded by the commissioner.

(2) No benefit shall be awarded by the commissioner except on an application made by or on behalf of the person concerned on a form provided for that purpose by the commissioner, which shall be accompanied by such information and documents as the commissioner may require: Provided that -

(a) no application shall be required in respect of a right to a pension which supersedes a pension awarded under the previous Act, and any such right shall take effect at the commencement of this Act; and

(b) the commissioner may in his discretion award any benefit even though application for it has not been made, and give effect to the award from a date determined by him or her but not preceding the date upon which the beneficiary became entitled to the benefit.

(3) …….

Sub-s. (3) deleted by s. 9 of Act 89/88]

(4) …….

[Sub-s. (4) deleted by s. 9 of Act 89/88]

(5) Any application for a benefit in terms of this Act on account of a finding of the certification committee, given before the fixed date, shall be disposed of in terms of the provisions of this Act which were in force immediately prior to the fixed date and as if the Amendment Act was not enacted.

[Sub-s. (5) substituted by s. 24 of Act 208/93]

79. Benefits to person (excluding widow) who received pension under previous Act

(1) Any person, except a widow, who immediately before the commencement of this Act was entitled to a pension in respect of himself or herself and his dependants, if any, on account of a finding given before the commencement of the Amendment Act shall, as from the said commencement, be entitled to -

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(a) in the case of a finding of pneumoconiosis which has impaired his cardiorespiratory functions by not more than 50 per cent, a monthly pension of R312;

(b) in the case of a finding of pneumoconiosis which has impaired his cardiorespiratory functions by more than 50 per cent but by not more than 75 per cent, a monthly pension of R504;

(c) in the case of a finding of pneumoconiosis which has impaired his cardiorespiratory functions by more than 75 per cent, or a finding of pneumoconiosis together with tuberculosis, a monthly pension of R725;

(d) in the case of a finding of tuberculosis, a monthly pension of R504.

(2) Any person who has accepted a one-sum benefit in lieu of a monthly pension, and his dependants, shall not at any time have a further right or claim to a monthly pension under this Act.

(3) When the certification committee has found that a person who accepted a one-sum benefit in lieu of a monthly pension is suffering from a compensatable disease in the second degree, the commissioner shall award to such a person or, if the said committee has after his death found that he or she had so suffered, to his widow or dependants, an additional sum which shall be equal to the difference between the amounts comtemplated in paragraphs (a) and (b) (i) of section 80 (3).

(4) When the certification committee has found that a person mentioned in subsection (1) (a) to whom a one-sum benefit was not awarded in lieu of a monthly pension, is suffering from pneumoconiosis which has impaired his cardio-respiratory functions by more than 50 per cent but by not more than 75 per cent, the commissioner shall award to that person a monthly pension of R504.

(5) When the certification committee has found that a person mentioned in subsection 1 (a) or (b) to whom a one-sum benefit was not awarded in lieu of a pension, is suffering from pneumoconiosis which has impaired his cardio-respiratory functions by more than 75 per cent, or that such person or a person mentioned in subsection (1) (d) is suffering from tuberculosis together with another compensatable disease, the commissioner shall award the person concerned a monthly pension of R725.

[S. 79 amended by s. 6 of Act 27/74, s. 1 of Act 67/74 and s. 1 of Act 105/85 and substituted by s. 25 of Act 208/93]

80. Benefits payable after fixed date

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(1) When a person is suffering from tuberculosis which does not render him or her permanently unfit to do his ordinary work or to ply his trade or skills, if any, and the certification committee finds after the fixed date that -

(a) the said tuberculosis was contracted while the person was performing risk work at or in connection with a controlled mine or controlled works; or

(b) the said person was affected at any time within 12 months immediately after the date on which he or she performed work referred to in paragraph (a) for the last time,

the commissioner may, on application of that person made in the prescribed manner, award to him or her an amount which is equal to 75 per cent of his loss of earnings during the period in which he or she has so suffered a loss of earnings, but not exceeding six months.

(2) When the certification committee finds after the fixed date that a person is suffering from a compensatable disease which he or she contracted as a result of risk work at or in connection with a controlled mine or a controlled works, the commissioner shall award to such person a one-sum benefit calculated in accordance with the formula -

$(A \times 12) \times B$

in which formula "A" represents the person's earnings, but not exceeding an amount of R3 000, and "B" represents -

(a) in the case of a person who is found for the first time to be suffering from a compensatable disease in the first degree, 1,31;

(b) in the case of a person who is found for the first time to be suffering from a compensatable disease in the second degree and -

(i) who did not previously become entitled to any benefit in terms of this Act, 2,917;

(ii) who previously became entitled to a one-sum benefit in respect of a compensatable disease in the first degree, 1,607;

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(iii) who previously became entitled to a one-sum benefit in respect of tuberculosis in terms of subsection (3) of this section before the substitution of the said section by the Amendment Act, 2,362;

(iv) who previously became entitled to a one-sum benefit in respect of tuberculosis in terms of section 87 (4) or 88 (2) before the repeal of the said sections by the Amendment Act, 2,598; or

(v) who previously became entitled to a one-sum benefit in respect of tuberculosis in terms of the previous Act or section 106 (c) before the repeal of the said section by the Amendment Act, 2,81.

[Subs. (2) amended by GN R1249/2009 w.e.f. 1 August 2009]

(3) The benefit calculated in accordance with the provisions of subsection (2) shall be an amount of at least R34 458.

[Subs. (3) amended by GN R1249/2009 w.e.f. 1 August 2009]

(4) If a person who died after the fixed date was found to be suffering, at the time of his death, from a compensatable disease, there shall be payable to that person's dependants designated by the commissioner an amount which shall be equal to the one-sum benefit which would have been payable to him or her in terms of subsection (2) as well as in terms of section 79 (3) had he or she not died.

(5) Any one-sum benefit or any amount payable in terms of subsection (4) to the deceased's dependants shall be divided among them in such proportion as the commissioner may determine.

(6) In awarding any one-sum benefit or any amount in terms of this section a fraction of a rand shall be calculated to the next completed rand.

[S. 80 amended by s. 2 (1) of Act 123/84 and substituted by s. 26 of Act 208/93]

80A. Manner of calculating earnings of persons performing risk work

(1) In order to determine benefits, the commissioner shall calculate the earnings of a person in such manner as in his opinion is best to determine the monthly rate at which the person was being remunerated by the owner of a controlled mine or a controlled works at the date contemplated in section 49, which shall include -

(a) the value of any food or quarters or both supplied by such owner up to the said date;

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(b) any overtime payment or other special remuneration in cash or in kind of a regular nature or for work ordinarily performed,

but which shall exclude -

(i) payment for intermittent overtime;

(ii) payment for non-recurrent occasional services;

(iii) amounts paid by such owner to the person to cover any special expenses;

(iv) ex gratia payments whether by such owner or any other person.

(2) If a person's remuneration is determined in accordance with a rate calculated upon work performed, his earnings shall be deemed to be his remuneration for similar work upon the same conditions of remuneration for as long a period as possible prior to the date contemplated in section 49 but not exceeding 12 months.

(3) If by reason of the short duration of the service of a person with the owner of a controlled mine or a controlled works it is impracticable to calculate his earnings in such service, his earnings shall, if possible, be calculated on the basis of the amount which the person with similar work at the same conditions of remuneration earned with another owner of a controlled mine or a controlled works during the 12 months immediately prior to the date contemplated in section 49, or on the basis of the amount which during the 12 months immediately prior to the said date was earned by other persons in the service of the first-mentioned owner with similar work and on the same conditions of remuneration, or would have been earned by the person during the previous 12 months had he or she been so employed.

(4) If a person has entered into contracts of service with two or more owners and has in terms of those contracts worked at one time for one owner of a controlled mine or a controlled works and at another time for another owner of a controlled mine or a controlled works, his earnings shall be calculated as if his earnings under all such contracts were earnings in the service of the owner for which he or she was working at the date contemplated in section 49.

(5) If in the opinion of the commissioner it is not practicable to calculate the earnings of a person in accordance with the preceding provisions, the commissioner may calculate those earnings

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in such manner as he or she may deem equitable, but with due regard to the principles laid down in those provisions.

(6) This section shall not be construed as prohibiting the calculation of earnings on a weekly basis, but where earnings are so calculated the monthly earnings shall be calculated as equal to four and one-third times the amount of such weekly earnings.

(7) For the purposes of this section, section 36A (3) shall apply mutatis mutandis.

[S. 80A inserted by s. 27 of Act 208/93]

80B. Manner of calculating earnings of persons no longer performing risk work

If a person is no longer performing risk work at the time of the date contemplated in section 49, his earnings shall be calculated on the basis of the earnings that he or she would probably have been earning had he or she still been performing risk work.

[S. 80B inserted by s. 27 of Act 208/93]

81. Unpaid benefits at death of beneficiary

(1) If a person who became entitled to a one-sum benefit under this Act or the previous Act and to whom such benefit was not paid in full, has died, the commissioner may in his discretion award to his widow or to his dependent children, if any, a benefit which shall be equal to not more than the unpaid balance of such one-sum benefit.

(2) If a benefit equal to such unpaid balance has not been awarded in terms of subsection (1), or if any portion of such unpaid balance has not been so awarded, the commissioner may, in his discretion, award a benefit equal to such unpaid balance, or such portion thereof, as the case may be, to any person or persons for whose maintenance the deceased, in the opinion of the commissioner, was responsible before his death.

[S. 81 substituted by s. 4 of Act 45/75 and s. 28 of Act 208/93]

82. ……..

[S. 82 amended by s. 7 of Act 27/74, s. 5 of Act 45/75, s. 3 of Act 123/84 and s. 2 of Act 105/85 and repealed by s. 29 of Act 208/93]

83. Benefits to widows of pensioners and widows entitled to pension

(1) If a person who was entitled to a pension under the previous Act and to whom a one-sum benefit was not awarded in lieu of such pension, has died, the commissioner shall award to his widow a one-sum benefit of R31 420.

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(2) If a widow was immediately before the commencement of this Act entitled to a pension under the previous Act, such widow shall, as from the fixed date, be entitled to a monthly pension of R401.

[S. 83 amended by s. 6 of Act 45/75 and substituted by s. 30 of Act 208/93]

84. **……**

[S. 84 amended by s. 2 of Act 67/74 and repealed by s. 31 of Act 208/93]

85. **……..**

[S. 85 repealed by s. 31 of Act 208/93]

86. **……**

[S. 86 amended by s. 3 of Act 67/74 and repealed by s. 31 of Act 208/93]

87. **……**

[S. 87 amended by s. 4 of Act 123/84 and repealed by s. 31 of Act 208/93]

88. **……**

[S. 88 repealed by s. 31 of Act 208/93]

89. **……**

[S. 89 repealed by s. 31 of Act 208/93]

90. **……..**

[S. 90 substituted by s. 8 of Act 27/74 and repealed by s. 31 of Act 208/93]

91. **…….**

[S. 91 repealed by s. 31 of Act 208/93]

92. **……..**

[S. 92 amended by s. 4 of Act 67/74 and repealed by s. 31 of Act 208/93]

93. **……..**

[S. 93 repealed by s. 31 of Act 208/93]

94. **Payment of, and interest on, benefits awarded**

(1) Subject to the provisions of subsection (2), the commissioner shall pay a one-sum benefit awarded under this Act, in a single payment.

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(2) The commissioner shall, at the request in writing of a beneficiary, pay a one-sum benefit referred to in subsection (1) or any portion thereof as elected by the beneficiary, in such monthly or three-monthly instalments as may be determined from time to time by the beneficiary in question.

(3) The commissioner may pay any pension or any instalment of a one-sum benefit awarded under the previous Act or this Act -

(a) to the beneficiary himself or herself; or

(b) in part to the beneficiary and in part to his dependants; or

(c) in full to his dependants; or

(d) for the benefit of the beneficiary or his dependants, to any other person or any institution, organization or Government Department; or

(e) in part to the beneficiary and in part, for the benefit of the beneficiary or his dependants, in accordance with paragraph (d).

(4) The commissioner shall add interest to any one-sum benefit or any other amount awarded under the previous Act or this Act, or to the balance of any such benefit or amount, as the case may be, at a rate determined from time to time by the commissioner after consultation with the advisory committee, as from the first day of the month following the month in which such benefit or amount was awarded until the last day of the month preceding the month in which such benefit or amount or the final instalment thereof was paid: Provided that no interest shall be paid on any amount which has remained in the possession of the commissioner for less than thirty days.

[S. 94 amended by s. 3 of Act 30/78 and substituted by s. 10 of Act 89/88]

95. Gratuity payable on remarriage of widow entitled to pension

If a widow who is entitled to a pension under this Act, remarries, her pension shall lapse and the commissioner shall pay to her an amount equal -

(a) in the case of a widow who received a pension for a period of at least six years, to thirty times the amount of her monthly pension;

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(b) in the case of a widow who received a pension for a period of less than six years but more than three years, to forty times the amount of her monthly pension; and

(c) in the case of a widow who received a pension for a period not exceeding three years, to fifty times the amount of her monthly pension.

[S. 95 substituted by s. 7 of Act 45/75]

96. Death of beneficiary

(1) A right to any benefit under this Act to which any person became entitled, shall lapse on the death of the person concerned, except in so far as any part of the benefit was paid out to or for the benefit of such person.

[Sub-s. (1) amended by s. 43 of Act 208/93]

(2) When a right to a one-sum benefit to which the widow of a deceased person became entitled under any provision of the previous Act or this Act, has lapsed as aforesaid, the commissioner shall pay the benefit in question or the unpaid balance thereof to any person or persons for whose maintenance she was, in the opinion of the commissioner, responsible.

[Sub-s. (2) substituted by s. 32 of Act 208/93]

(3) When any person who was entitled to a pension under this Act has died, the commissioner shall pay the full pension in respect of the month in which such person has died -

(a) to the dependants of the deceased, if any; or

(b) if there are no dependants, to any person or persons for whose maintenance the deceased was, in the opinion of the commissioner, responsible; or

(c) if there is no such person, to any person who or organization which cared for or medically treated the deceased immediately before his death.

(d) …….

[Para. (d) deleted by s. 32 of Act 208/93]

97. Pensioner becoming permanent inmate of State institution

When any person who is entitled to a pension under this Act has become a permanent inmate of any institution the cost of maintenance of which is paid in full or in part from State funds, the commissioner may discontinue payment of such pension or retain so much thereof as is not required to pay the cost

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of maintenance of the person concerned or of any person or persons for whose maintenance that person is responsible.

98. Cessation of pension to widow who remarries

A pension awarded under the previous Act or this Act to the widow of a deceased person, shall cease, if she remarries, on the last day of the month in which she remarries.

[S. 98 amended by s. 8 of Act 45/75 and s. 4 of Act 30/78 and substituted by s. 33 of Act 208/93]

99. Where disease not due exclusively to work or risk work at mine or works

(1) No person shall be entitled to any benefit or other amount under this Act in respect of any compensatable disease which, in the opinion of the certification committee, is attributable exclusively to work other than work at a mine or works.

[Sub-s. (1) substituted by s. 5 of Act 30/78]

(2) When the certification committee has found that any person is, or that any deceased person was at the time of his death, suffering from a compensatable disease (including tuberculosis) attributable mainly to the performance at a mine or works of work other than risk work, benefits shall be awarded to or in respect of such person as if the disease were attributable to the performance of risk work at a controlled mine or a controlled works.

(3) When the certification committee has found that any person is suffering from a compensatable disease which, in the opinion of that committee, is attributable partly but not mainly to work at a mine or works, the commissioner may in his discretion award to or in respect of such person who is not in receipt of full benefits in respect of that disease under the Workmen's Compensation Act, 1941 (Act No. 30 of 1941), or any other law, benefits not exceeding one-half of the benefits provided for in this Act.

100. No person entitled to benefits from more than one source in respect of same disease

(1) No person shall be entitled to benefits under this Act in respect of any disease for which he or she has received or is still receiving full benefits under the Workmen's Compensation Act, 1941 (Act No. 30 of 1941).

(2) Notwithstanding anything in any other law contained, no person who has a claim to benefits under this Act in respect of a compensatable disease as defined in this Act, on the ground that such person is or was employed at a controlled mine or a controlled works, shall be entitled, in respect of such disease, to benefits under the Workmen's Compensation Act, 1941 (Act No. 30 of 1941), or any other law.

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101. Special awards, and allowance in respect of permanent attendant

(1) If a special award was made under the provisions of the previous Act to any person the commissioner may in his discretion continue payment of the award in question for any such period or during any such periods as he or she may deem necessary, but subject to the provisions of subsections (2) and (3).

(2) No special award shall be paid to any person who is in receipt of a pension or to whom a one-sum benefit was awarded after the commencement of this Act in respect of a compensatable disease other than tuberculosis.

(3) A special award, except an award referred to in subsection (1), shall be paid -

(a) in the case of a female, after she has attained the age of sixty years; or

(b) in the case of a male, after he or she has attained the age of sixty-five years.

[Sub-s. (3) amended by s. 1 of Act 137/91]

(4) ……

[Sub-s. (4) amended by s. 9 of Act 45/75 and s. 11 of Act 89/88 and deleted by s. 34 of Act 208/93]

(5) The commissioner may, subject to the provisions of subsection (3), discontinue or increase or decrease any special award made to any person under the previous Act or this Act.

(6) If any person received an allowance in respect of a permanent attendant in terms of any provision of the previous Act immediately before the commencement of this Act, the commissioner may in his discretion and on such conditions as he or she may deem desirable, continue to pay such allowance, and decrease or cancel such allowance at any time.

102. ……..

[S. 102 amended by s. 2 of Act 177/77 and repealed by s. 35 of Act 208/93]

103. Commissioner may demand proof of continuance of right to benefit

The commissioner may require proof that a person to whom any benefit or other amount has been awarded under the previous Act or this Act, is still alive, or, in the case of a pension or monthly allowance, that the person concerned has not ceased to be entitled to such pension or monthly allowance, and may, if such proof is not furnished to his satisfaction, discontinue payment of the pension or allowance until such proof is furnished.

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104. Recovery by commissioner of amount wrongly paid

Any amount paid by the commissioner to or for the benefit of a person who was not entitled to the payment thereof, may be recovered by the commissioner either directly or by deducting it from any amount to which the person concerned is or becomes entitled under this Act.

105. Arrangements by commissioner for payment of benefits on his behalf

The commissioner may with the approval of the Minister make arrangements with any other Government Department or any other institution, organization or authority to undertake the payment, on behalf of the commissioner, of benefits or other amounts awarded under the previous Act or this Act.

105A. Amendment of Act by Minister so as to increase benefits

(1) The Minister may, after consultation with the advisory committee and, in the case of any benefit payable from the State Revenue Account, with the concurrence of the Minister of State Expenditure, by notice in the Gazette amend any amount appearing in sections 79, 80 and 83, so as to increase any benefit.

(2) Any amendment contemplated in subsection (1) shall take effect on a date mentioned in the notice.

[S. 105A inserted by s. 36 of Act 208/93]

CHAPTER VII

COMPENSATION TO BLACK PERSONS

106. …….

[S. 106 amended by s. 10 of Act 45/75 and repealed by s. 37 of Act 208/93]

107. …….

[S. 107 repealed by s. 37 of Act 208/93]

108. …….

[S. 108 repealed by s. 12 of Act 89/88]

109. …….

[S. 109 repealed by s. 12 of Act 89/88]

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110. …….

[S. 110 repealed by s. 12 of Act 89/88]

111. …….

[S. 111 repealed by s. 12 of Act 89/88]

112. …….

[S. 112 amended by s. 12 of Act 89/88 and repealed by s. 37 of Act 208/93]

113. ……

[S. 113 repealed by s. 12 of Act 89/88]

114. ……

[S. 114 repealed by s. 12 of Act 89/88]

115. …….

[S. 115 substituted by s. 3 of Act 117/77 and repealed by s. 12 of Act 89/88]

116. …….

[S. 116 repealed by s. 12 of Act 89/88]

117. …….

[S. 117 repealed by s. 12 of Act 89/88]

118. …….

[S. 118 repealed by s. 12 of Act 89/88]

119. …….

[S. 119 repealed by s. 12 of Act 89/88]
[Chapter VII repealed by s. 37 of Act 208/93]

CHAPTER VIII

GENERAL

120. Research and special medical treatment

(1) The Minister may make such arrangements as he or she deems necessary or desirable for the proper investigation of all matters affecting the health of persons employed in or at mines or works and for the medical treatment of persons suffering from any compensatable disease.

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(2) The Minister may in his discretion from moneys in the Research Account and, in consultation with the Minister of State Expenditure, from moneys appropriated by Parliament for that purpose -

(a) on such conditions as the Minister deems fit, subsidize or pay wholly or partly the cost of maintenance and other expenses of, any institution or organization having as its object the doing of research with a view to the protection of the health of persons employed in or at or in connection with mines or works, or the prevention or alleviation of diseases to which such persons are exposed, or establish such an institution or organization;

(b) on such conditions and in such manner and in such amounts as the Minister deems fit, subsidize any person or group of persons whose object is the doing of research in connection with any disease or working conditions to which persons employed in or at or in connection with mines or works are exposed, or award to such person or group of persons a bursary or bursaries;

(c) on such conditions and in such manner as the Minister deems fit, subsidize or pay wholly or partly the cost of maintenance of any institution or organization having as its object the medical treatment or the care of persons suffering from compensatable diseases;

(d) on such conditions and in such manner as the Minister deems fit, establish institutions for the medical treatment of persons suffering from compensatable diseases and pay the cost of maintenance in whole or in part and any other costs of any such institutions;

(e) on such conditions and in such manner and on such scale as the Minister deems fit, pay the travelling or other costs incurred by persons suffering from compensatable diseases in order to enable such persons to undergo medical treatment.

[Sub-s. (2) amended by s. 38 of Act 208/93]

(3) …….

[Sub-s. (3) deleted by s. 38 of Act 208/93]

121. Regulations

(1) The Minister may make regulations relating to -

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(a) the standards to be applied in the certification in terms of this Act of persons suffering from compensatable diseases;

(b) the employment of medical practitioners by owners of controlled mines or controlled works;

(c) the particulars to be recorded by the owner of a controlled mine or a controlled works or by any contractor in connection with persons employed by him or her at or in connection with the mine or works in question;

(d) the information, particulars, documents or reports to be submitted or made available by the owner of a controlled mine or a controlled works with reference to any person in his service in connection with his mine or works, or in the service of any other person in connection with the mine or works of such owner, or with reference to any medical examination of such first-mentioned person;

(e) the medical examination of persons who were employed at or in connection with controlled mines or controlled works but who are no longer in the service of an owner of such a mine or works, and the payment of the cost in connection with such examinations;

(f) the accommodation and maintenance of any person by the owner of a controlled mine or a controlled works pending a finding by the certification committee or pending the award of compensation to the person concerned, and the payment of the cost of such accommodation and maintenance;

(g) the notice which the director or the owner of a controlled mine or a controlled works shall give of the result of any medical examination of a person under this Act, and the person to whom such notice shall be given;

(h) the repatriation or return of persons recruited by the owner of a controlled mine or a controlled works, or by a contractor or by any organization acting for or on behalf of such owner or contractor, for employment at or in connection with a controlled mine or a controlled works, and the payment of the cost of such repatriation or return;

(i) the medical examination of persons who are recruited outside the Republic for employment at or in connection with a controlled mine or a controlled works, and the payment of the cost of any such examination;

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(j) the exercise of control over the payment of benefits;

(k) any matter which is to be or may be prescribed by regulation in terms of this Act;

(l) in general, any matter which the Minister may deem necessary or expedient to prescribe for achieving the objects of this Act, the generality of this paragraph not being limited by the preceding paragraphs of this subsection.

(2) Any regulation prescribing or providing for the payment of any cost or expense from the State Revenue Fund shall be made with the concurrence of the Minister of State Expenditure.

(3) Different regulations may be made in respect of different areas, or in respect of different mines or works or classes, groups or categories of mines or works, or in respect of different classes, groups or categories of persons, or in respect of different occupations or work or places at mines or works.

(4) Regulations made under subsection (1) (a) may, by reference thereto, prescribe any manner or method set out in a publication which in the opinion of the Minister is generally recognized as authoritative.

(5) The Minister shall, not less than two months before making any regulation under this section, cause the text of the proposed regulation to be published in the Gazette together with a notice declaring his intention to make such regulation and inviting interested persons to furnish him or her with any comments or representations they may wish to make in regard to the proposed regulation.

(6) The provisions of subsection (5) shall not apply in respect of a proposed regulation which, after the provisions of that subsection have been complied with, has been amended by the Minister in consequence of comments or representations received by him or her in pursuance of a notice published in terms of that subsection.

(7) The regulations may prescribe penalties not exceeding a fine of R3 000 for a contravention of or failure to comply with any provision thereof.

[S. 121 substituted by s. 39 of Act 208/93]

122. Minister to table annual reports

The Minister shall lay copies of any annual report furnished to him or her under section 8 or 77 upon the Table in the Senate and in the House of Assembly within fourteen days after its receipt, if

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Parliament is then in ordinary session, or, if Parliament is not then in ordinary session, within fourteen days after the commencement of its next ensuing ordinary session.

123. Minister may delegate powers

(1) The Minister may in his discretion and on such conditions as he or she may deem fit, delegate in writing to the Director-General or any other officer in the Department of Mines any power vested in him or her under this Act, and may at any time cancel any such delegation.

(2) A delegation under subsection (1) shall not divest the Minister of the power delegated, and he or she may at any time set aside any decision made on his behalf under such delegation: Provided that if any benefit or other amount has been awarded to any person by virtue of a decision made under such delegation, the Minister shall not set aside that decision with reference to that person.

124. Offences by persons generally

(1) Any person who -

(a) knowingly makes a false statement or misrepresentation or conceals any fact of material importance with intent to obtain for himself or herself or herself, or assist any other person to obtain, a certificate of fitness or any other document or advantage under this Act;

(b) forges, or alters with intent to deceive, any certificate of fitness or any other document for which provision was made in the previous Act or is made in this Act, or which was issued under the previous Act or this Act; or

(c) in exchange for services rendered in respect of assistance in claiming any benefit in terms of this Act, charges a fee or claims remuneration from a person who is claiming such benefit in terms of this Act which is in excess of 0,5% of the benefit awarded to such person or any amount stipulated by the Director-General,

shall be guilty of an offence and liable on conviction to any penalty which may in law be imposed on a conviction of fraud.

[Sub-s. (1) substituted by s. 3 of Act 60/2002]

(2) Any person who in any sworn declaration under subsection (2) of section 6 or under that subsection as applied by section 19 (2), 42 (1) or 55 (1), or in answering any question under

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oath or affirmation administered under subsection (3) of section 6 or under the last-mentioned subsection as so applied, makes a statement which he or she knows to be false, shall be guilty of an offence and liable on conviction to any penalty which may in law be imposed on a conviction of perjury.

(3) Any person who -

(a) hinders or obstructs any other person in the exercise by such other person of a power conferred upon him or her by or under a provision of section 5 or 6 or by or under such provision as applied by section 19 (2), 42 (1) or 55 (1); or

(b) is in control of any place, or has in his possession or is in control of any book, document, appliance, instrument, machine or X-ray photograph contemplated in any provision of section 5 or 6, and who refuses or fails to afford any other person all reasonable facilities required by such other person in order to enable him or her to exercise with reference to such place, book, document, appliance, instrument, machine or X-ray photograph any power conferred upon him or her by or under the provision in question or by or under that provision applied as aforesaid; or

(c) without reasonable excuse, fails to comply with any direction under subsection (1) or (3) of section 6 or under the relevant subsection applied as aforesaid, or under section 42 (3); or

(d) when appearing in compliance with a direction referred to in paragraph (c), refuses to answer to the best of his knowledge and belief any lawful question put to him, or refuses to be sworn or to affirm when required by a competent person to do so; or

(e) in reply to a direction under subsection (1) of section 6 or under that subsection applied as aforesaid, furnishes (otherwise than in a sworn declaration) any information which is false, knowing it to be false; or

(f) contravenes the provisions of section 15 (1); or

[Para. (f) amended by s. 43 of Act 208/93]

(g) without reasonable excuse fails to comply with the requirements of a notice addressed to him or her under section 26 (1), 29 (3) or 30 (4); or

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(h) after having received a notice referred to in paragraph (g), performs risk work at a controlled mine or a controlled works without being in possession of a certificate of fitness thereafter issued to him or her under this Act,

shall be guilty of an offence and, subject, in the case of an offence contemplated in paragraph (f), to the provisions of section 126 (1) (a), liable on conviction to a fine not exceeding two hundred rand.

125. Offences by holder of certificate of fitness

A holder of a certificate of fitness issued to him or her under this Act or the previous Act, who -

(a) at a controlled mine or a controlled works performs work which his certificate of fitness does not authorize him or her to perform; or

(b) performs work at a controlled mine or a controlled works otherwise than in accordance and compliance with any restriction subject to which that certificate has been issued or renewed,

shall be guilty of an offence and liable on conviction to a fine not exceeding two hundred rand.

126. Offences by owner, or person in control of, controlled mine or works, or contractor

(1) An owner of a controlled mine or a controlled works, or person in control of such a mine or works or a part thereof, or contractor who -

(a) contravenes the provisions of section 15 (1); or

[Para. (a) substituted by s. 40 of Act 208/93]

(b) by virtue of an exemption under section 15 (2) employs any person in risk work at a controlled mine or a controlled works and who fails to comply with any condition subject to which the exemption has been granted,

[Para. (b) substituted by s. 40 of Act 208/93]

shall be guilty of an offence and liable on conviction to a fine not exceeding four hundred rand.

(2) An owner of a controlled mine or a controlled works or contractor who -

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(a) knowingly permits the performance at a controlled mine or a controlled works, by a holder of a certificate of fitness in his service, of work which his certificate of fitness does not authorize him or her to perform; or

(b) knowingly permits the performance of any work by such a holder otherwise than in accordance and compliance with a condition subject to which his permit has been issued or renewed; or

(c) fails to keep a register in accordance with the provisions of section 16 (1) or (2), as the case may be; or

(d) fails to afford the director or an authorized person referred to in section 16 (3) all reasonable facilities and assistance to inspect any such register, or make a copy thereof available at the request of the director or such authorized person,

shall be guilty of an offence and liable on conviction to a fine not exceeding four hundred rand.

(3) An owner of a controlled mine or a controlled works who -

(a) after having received a copy of a notice issued under section 26 (1), 29 (3) or 30 (4), permits the performance of risk work by the person to whom the notice was addressed at such owner's mine or works before a fresh certificate has been issued to that person under this Act; or

(b) contravenes the provisions of section 17 (1) or any provision of Chapter V,

shall be guilty of an offence and liable on conviction -

(i) in the case of the offence referred to in paragraph (a), to a fine not exceeding four hundred rand; and

(ii) in the case of an offence referred to in paragraph (b), to a fine not exceeding one thousand rand.

127. Offences by medical practitioner

(1) A medical practitioner who without reasonable excuse fails to comply with any provision of section 33 or 34 or with any requirement or direction by the director thereunder or by the

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chairman of the certification committee under section 42 (2), shall be guilty of an offence and liable on conviction to a fine not exceeding four hundred rand.

(2) The provisions of section 124 (3) (d) and (e) shall mutatis mutandis apply with reference to a medical practitioner who has been directed under section 42 (2) to submit any report to the certification committee or to appear before that committee.

[Sub-s. (2) amended by s. 9 of Act 27/74]

128. .....

[S. 128 repealed by s. 4 of Act 117/90]

129. Notice, demand, direction or payment by registered post

Any notice, demand, direction or payment under this Act shall be deemed, unless the contrary is proved -

(a) to have been properly given, served or made if the notice, demand, direction or amount in question was sent in a correctly addressed, registered envelope; and

(b) to have been given, served or made at the time when the said envelope may be expected to have reached the address in question in normal circumstances.

[S. 129 substituted by s. 6 of Act 30/78]

130. Exemption from certain taxes and duties

(1) The income of the compensation fund under the provisions of this Act, shall be free from any form of taxation on income.

(2) Notwithstanding anything in any other law contained, any benefit or other amount paid to any person under this Act on the ground of a finding expressed by the certification committee or by any similar authority under the previous Act, shall be free from any form of taxation on income.

(3) Every document issued under this Act, and every affidavit or solemn or attested declaration which is intended for use under this Act, shall be free from stamp duty.

131. Benefits and service gratuity free from attachment

(1) A right to a benefit to which any person is entitled under this Act, and a right to a gratuity under section 133, shall not be capable of being ceded by the holder thereof, and such a

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right or any money paid by the commissioner as such a benefit or gratuity to or for the benefit of the person entitled thereto, or any money paid by the commissioner to or for the benefit of any person as a special award or a special allowance under any provision of this Act, shall not be subject to attachment in execution of a judgment or order of a court of law, except at the instance of the commissioner acting under section 104, and if the estate of the holder of such a right or of a person to whom or for whose benefit such money has been paid, is sequestrated as insolvent, the said right or money shall not form part of his insolvent estate.

[Sub-s. (1) amended by s. 13 of Act 89/88 and s. 43 of Act 208/93]

(2) If a person to whom or for whose benefit such a benefit (other than a monthly pension or allowance) or such a gratuity has been paid, has purchased any immovable or movable property, and the purchase price or not less than one-quarter of the purchase price has been paid out of the benefit or gratuity, that property shall not be subject to attachment for a debt (or a novation thereof) which arose before the benefit or gratuity in question was paid to or for the benefit of the judgment debtor.

132. .....

[S. 132 repealed by s. 41 of Act 208/93]

133. Service gratuity payable to certain persons

(1) Any person -

(a) who from any date after 1 August 1946 continuously remained in the fulltime service of the bureau or the council or the State and who has not contributed to the Public Service Pension Fund referred to in section 2 (1) of the Government Service Pensions Act, 1965 (Act No. 62 of 1965), in respect of such service; and

(b) who immediately before the commencement of this Act was eligible for a gratuity referred to in section 135 of the previous Act, but to whom such gratuity had not been awarded before such date,

shall be eligible, in lieu of such gratuity, for a service gratuity which shall be equal to the salary (other than any temporary or personal allowance) which he or she received for the two months immediately preceding the date of termination of his service, multiplied by the number of years, including any fraction of a year, of his service and such service gratuity shall be increased by one per cent for each year, including any fraction of a year, by which the period of his service exceeds ten years: Provided that if his service is terminated by retirement before he or she has attained the age of sixty years in terms of subsection (4) on account of permanent poor health or any permanent physical or mental defect, or he or she dies before

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he or she has attained the age of sixty years, a period of five years shall be added to his service.

[Sub-s. (1) substituted by s. 11 of Act 45/75]

(2) Any person -

(a) who would have been eligible for a gratuity referred to in subsection (1) had he or she not at any date after 1st August, 1946, resigned from the service referred to in subsection (1); and

(b) who before he or she so resigned, had been in such service for a period of not less than ten years and had not contributed to the Public Service Pension Fund referred to in subsection (1); and

(c) who has returned to such service,

shall be eligible for a service gratuity which shall be equal to one-eighth of the salary (other than any temporary or personal allowance) which he or she after his return received for the twelve months immediately preceding the date of termination of his service, multiplied by the number of years, including any fraction of a year, of service before he or she resigned as contemplated in paragraph (a).

(3) If the service of a person who is eligible for a service gratuity referred to in subsection (1) or (2), is terminated by death, such service gratuity shall, notwithstanding the provisions of subsection (4), be awarded -

(a) to his widow; or

(b) if there is no widow, to his dependent children; or

(c) if there are no dependent children, to any person for whose maintenance he or she was responsible immediately before his death; or

(d) if there is no such person, to his estate.

(4) If the service of a person who is eligible for a service gratuity referred to in subsection (1) or (2), is terminated before he or she has attained the age of sixty years, he or she shall not be awarded such service gratuity unless his service is terminated by retirement on account of permanent poor health or any permanent physical or mental defect, on the recommendation

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of two or more medical practitioners, and with the approval of the Minister, or he or she dies before he or she has attained the age of sixty years.

[Sub-s. (4) substituted by s. 11 of Act 45/75]

(5) A service gratuity referred to in subsection (1) or (2) which has been awarded to any person whose service has been terminated by his retirement, may, in the discretion of the commissioner, be paid in a single payment or in instalments, and if paid in instalments the commissioner shall add to the balance of such service gratuity interest calculated at a rate determined by the commissioner and approved by the Minister.

(6) If any person to whom a service gratuity referred to in subsection (1) or (2) has been awarded and to whom it is being paid in instalments dies before such service gratuity has been paid in full, the commissioner shall pay the balance thereof -

(a) to his widow; or

(b) if he or she has no widow, to his dependent children; or

(c) if he or she has no dependent children, to any person for whose maintenance he or she was responsible immediately before his death; or

(d) if there is no such person, to his estate.

(7) Any service gratuity awarded in terms of this section shall be paid out of the compensation fund and any payment by way of such gratuity shall be debited in equal proportions to the State Account and the Mines Account.

(8) In subsection (1) -

"bureau" includes the Miners' Medical Bureau within the meaning of the previous Act;

"council" means the General Council for Pneumoconiosis Compensation within the meaning of the previous Act.

134. State to bear cost of administration of Act

All expenditure incurred to give effect to any provision of this Act shall, except in so far as any such expenditure is in terms of this Act to be defrayed from another source, be defrayed by the Minister from moneys appropriated by Parliament for that purpose.

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135. ……..

[S. 135 repealed by s. 42 of Act 208/93]

136. Repeal of laws

(1) Subject to the provisions of subsection (2), the laws specified in the Schedule are hereby repealed to the extent set out in the third column thereof.

(2) Any regulation, notice, prohibition, order, direction, approval or document made, given, imposed or issued and any other thing done in terms of a provision of any law repealed by subsection (1), shall, except in so far as may be otherwise required by this Act, be deemed to have been made, given, imposed, issued or done under the corresponding provision of this Act.

137. Short title and commencement

This Act shall be called the Occupational Diseases in Mines and Works Act, 1973, and shall come into operation on the first day of October, 1973.

Schedule

LAWS REPEALED

No. and year of law	Title	Extent of repeal
Act No. 64 of 1962	Pneumoconiosis Compensation Act, 1962	The whole
Act No. 77 of 1962	Finance Act, 1962	Section 6
Act No. 50 of 1964	Pneumoconiosis Compensation Amendment Act, 1964	The whole
Act No. 92 of 1965	Pneumoconiosis Compensation Amendment Act, 1965	The whole
Act No. 103 of 1967	Finance Act, 1967	Section 8
Act No. 83 of 1968	Pneumoconiosis Compensation Amendment Act, 1968	The whole
Act No. 8 of 1970	Pneumoconiosis Compensation Amendment Act, 1970	The whole
Act No. 91 of 1971	Finance Act, 1971	Section 8

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Act No. 88 of 1972	Finance Act, 1972	Section 6
Act No. 95 of 1972	Pneumoconiosis Compensation Laws Amendment Act, 1972	The whole
Act No. 97 of 1972	Pension Laws Amendment Act, 1972	Section 11

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Regulations relating to the basis on which owners of controlled mines and controlled works shall pay amounts in respect of risk shifts worked - GNR 1338 of 23 October 1998

The Minister of Health has, in terms of section 121 (1) (k), read with section 62, of the Occupational Diseases in Mines and Works Act, 1973 (Act No. 78 of 1973), made the regulations in the Schedule.

SCHEDULE

Definitions

1. In these regulations any expression to which a meaning has been assigned in the Act shall bear that meaning and, unless inconsistent with the context—

"annexure" means the annexure to these regulations;

"the Act" means the Occupational Diseases in Mines and Works Act, 1973 (Act No. 78 of 1973).

Basis and amounts payable

2. The basis according to which the commissioner shall determine the amounts payable by the owner of each controlled mine or controlled works for the benefit of the compensation fund in respect of each shift worked by any person at or in connection with that mine or works during which such person performed risk work shall be as set out in the Annexure.

ANNEXURE

Industry	Rand per shift
Andalusite	0,27
Asbestos	2,34
Clay	0,22
Coal	0,24
Copper	0,53
Diamonds	0,29
Fluorspar	0,26
Gold	0,39
Iron	0,27

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Lead	0,31
Manganese	0,40
Mica and Feldspar	0,23
Phosphate	0,26
Platinum	0,19
Quarries	0,44
Tin	0,51
Vanadium	0,23
Works	0,50
Other industries which are not listed separately	0,36

Repeal

3. Government Notice No. R. 1689 of 27 October 1995 is hereby repealed.

N. C. DLAMINI ZUMA
Minister of Health

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Regulations - GNR 1813 of 5 October 1973

DEPARTMENT OF MINES

as amended by

Notice	**Go*vernment Gazette***	**Date**
R.2222	5342	26 November 1976
R.2176	5790	28 October 1977
R.2711	8482	17 December 1982

The Minister of Mines has, by virtue of the powers conferred upon him by section 121 of the Occupational Diseases in Mines and Works Act, 1973 (Act 78 of 1973), prescribed the following regulations.

The regulations promulgated under section 133 of the Pneumoconiosis Compensation Act, 1962 (Act 64 of 1962) and published under Government Notice R.1874 of the 25 November 1966, are hereby repealed.

LIST OF REGULATIONS

1.1-3 Issue and renewal of certificates of fitness

2.1-3 Owners of controlled mines and controlled works shall employ medical practitioners

3.1-3 Record to be kept in respect of Black persons

4.1-9 Engagement and medical examinations of Black persons

5.1-5 Cost of medical examinations and treatment and discharge of Black persons

6.1-3 Keeping of registers and records

6A. General provisions

7. Penalty provisions

8. Forms

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In these regulations, unless the context otherwise indicates, "the Act" shall mean the Occupational Diseases in Mines and Works Act, 1973 (Act 78 of 1973) and any expression to which a meaning has been assigned in the said Act and which is used in these regulations or in any form prescribed by these regulations, shall bear the meaning so assigned thereto.

1.1 Issue and renewal of certificates of fitness.—

The amounts payable under section 23 (1) of the Act in respect of a medical examination by the Bureau of a White person or Coloured person who applies for a certificate of fitness under the said section, shall be R5 and R2, respectively, which amounts must be paid by means of uncancelled Revenue stamps.

1.2 The holder of a certificate of fitness issued to him for the first time, shall not be entitled to the renewal of such certificate unless he has performed not less than 10 shifts risk work.

1.3 Every White person or Coloured person who performs risk work at a controlled mine or a controlled works shall be examined medically—

(*a*) in the case of a person not older than 30 years, at least once every four years; and

(*b*) in the case of a person over the age of 30 years, at least once every two years; for the renewal of his certificate of fitness and such an examination shall include a clinical and radiological examination.

(Reg. 1.3 substituted by GNR.2222 of 1976.)

2.1 Owners of controlled mines and controlled works shall employ medical practitioners.—

Every owner of a controlled mine or a controlled works shall employ in full-time or part-time capacity so many medical practitioners as the director may in writing direct, to examine medically in accordance with any applicable provision of these regulations, all Black persons employed at his mine or works or whom he intends to employ for work at his mine or works.

2.2 When an owner of a controlled mine or controlled works has engaged in his service a medical practitioner in accordance with the provisions of regulation 2.1, he shall forthwith in writing inform the director of the name of that medical practitioner and indicate whether he has been engaged in a full-time or part-time capacity and whether for a fixed period or indefinitely or for a particular occasion.

2.3 The Minister may at any time, after consultation with the director and the medical adviser (if any) by notice in writing direct the owner of a controlled mine or a controlled works to discontinue the

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employment of any medical practitioner for the performance of any function required to be performed under these regulations.

3.1 Record to be kept in respect of Black persons.—

Every owner of a controlled mine or a controlled works or a contractor shall keep a record of all Black persons in his service for work at or in connection with a controlled mine or a controlled works and shall record therein the particulars prescribed by regulation 6.2.

3.2 An owner of a controlled mine or a controlled works or a contractor shall allocate a service number to every Black person in his service for work at or in connection with a controlled mine or a controlled works and such number shall be inscribed on every medical report, X-ray film or information in respect of the Black person concerned.

3.3 A contractor, upon completion of a contract at a controlled mine or a controlled works or when so requested by the owner of the mine or works concerned, shall make available to such owner a copy of the records kept under regulation 3.1.

4.1 Engagement and medical examinations of Black persons.—

No owner of a controlled mine or a controlled works and no contractor shall permit a Black person to perform risk work at a controlled mine or a controlled works or engage a Black person for such work, if he knows or has reason to suspect that such person is suffering from a compensatable disease (including tuberculosis) unless prior approval has been obtained from the director for the employment of such person.

4.2 No owner of a controlled mine or a controlled works or a contractor shall engage a Black person for work at or in connection with a controlled mine or a controlled works, unless such person has within a period of 30 days prior to the date on which he commenced undergone a medical examination which consisted of a medical and radiological examination and the medical examiner who performed such examination is of the opinion—

(*a*) that he is not suffering from a compensatable disease (including tuberculosis);

(*b*) that he is not suffering from an infectious disease;

(*c*) that he is not suffering from any disease or defect of the cardio-respiratory organs;

(*d*) that his sight and hearing are normal; and

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(*e*) that he is physically fit for the work which was hired to perform:

Provided that—

(*a*) a Black person who is suffering from a compensatable disease other than tuberculosis, or who is considered by the examining medical practitioner to be suffering from inactive tuberculosis, may be engaged for work other than risk work;

(*b*) the director may authorise the employment in risk work of a Black person who has been found by the certification committee to be suffering from a compensatable disease (including tuberculosis) subject to any conditions which the director may consider necessary or advisable, except that in the case of a finding of tuberculosis the director, before such approval is granted, shall be satisfied that the tuberculosis has been cured.

(Reg. 4.2 amended by GNR.2711 of 1982.)

4.3 An owner of a controlled mine or a controlled works or a contractor or an organization acting on behalf of such an owner or contractor, who recruits Black persons outside the Republic for work at or in connection with a controlled mine or a controlled works, shall cause such Black persons to be examined clinically and radiologically before they are brought to the Republic and no Black person shall be brought to the Republic unless he complies with the requirements prescribed under regulation 4.2: Provided that the secretary may, after consultation with the director and the Black affairs authority, on such conditions as he deems desirable, in writing grant exemption from the provisions of this regulation if he is satisfied—

(*a*) that the medical examination of Black persons who are recruited outside the Republic before they are brought to the Republic, is impracticable; and

(*b*) that the owner or contractor or organization concerned has made arrangements which are acceptable to the secretary, to ensure that such Black persons who, at a medical examination in the Republic in accordance with the provisions of regulation 4.2, are found unfit for work at or in connection with a controlled mine or controlled works, are forthwith returned to the country and place of recruitment at the cost of the owner or contractor for whose service such Black persons were recruited or at the cost of the recruiting organization.

4.4 If, at a medical examination under these regulations, a Black person who has been recruited by or on behalf of an owner of a controlled mine or a controlled works or a contractor in a district or area other than that in which the mine or works concerned is situated, is found unfit for work at or in connection with a controlled mine or a controlled works, such owner or contractor shall as soon as possible return

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such Black person to the place of recruitment and the cost involved in the return of such Black person shall be borne by such owner or contractor or the person or organization who performed the recruitment.

4.5 Whenever after the commencement of the Act, a mine or works becomes a controlled mine or a controlled works, the owner of such mine or works shall, within a period determined by the secretary after consultation with the director and notified in writing to such owner, cause every Black person whom he employs at such mine or works and who has not been medically examined within a period of 60 days immediately prior to a date specified in the notice, to be medically examined and such examination shall consist of a clinical and a radiological examination.

4.6 Every owner of a controlled mine or a controlled works or a contractor shall cause every Black person who performs work at or in connection with a controlled mine or a controlled works, to be medically examined not less than once in every period of nine months and such examination shall include a radiological examination: Provided that the director may, on written application by or on behalf of such owner or contractor, on such conditions as he deems desirable, in writing, extend the interval between such medical examinations to a maximum period of 18 months.

(Reg. 4.6 amended by GNR.2176 of 1977.)

4.7 At a medical examination of a Black person under these regulations, the examining medical practitioner shall record his findings in a form which conforms to the form prescribed by regulation 8.

4.8 If at a medical examination of a Black person who is employed at or in connection with a controlled mine or a controlled works, such person is considered by the examining medical practitioner to be suffering from a compensatable disease (including tuberculosis), or if it is considered or suspected that a Black person whom the owner of a controlled mine or a controlled works or a contractor intends to engage for work at or in connection with a controlled mine or a controlled works, is suffering from such disease, such owner or contractor shall forthwith—

(*a*) if the Black person is employed, cease to employ him in risk work;

(*b*) submit to the director—

(i) a comprehensive report by the examining medical practitioner on the examination and any tests and observation performed by him;

(ii) an X-ray film of a size not less than 30 cm by 38 cm or such smaller size as agreed to in writing by the director, of the chest of the Black person which is acceptable to the director;

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(iii) such information as he may possess in regard to the different types of work performed by the Black person at mines or works; and

(*c*) if it is considered or suspected that the Black person is suffering from tuberculosis which is infectious, take all reasonable measures to prevent him from making contact with other persons and report the case in writing to—

(i) the authority who has jurisdiction in regard to State health services in the area in which the examination was performed; and

(ii) if the Black person is in the area of another such authority, also to that other authority.

4.9 The director shall forthwith submit the report and X-ray film and information received by him under regulation 4.8 (*b*) to the certification committee: Provided that the director may in writing direct the owner or contractor concerned to perform such further examinations, tests and observations as he considers necessary or as the certification committee may require or to bring the Black person concerned to a place and at a time determined by him and notified in writing to such owner or contractor, in order to enable a medical practitioner authorized by the director to examine the Black person or to keep such person under observation.

5.1 **Cost of medical examinations and treatment and discharge of Black persons.**—The costs incurred in connection with the maintenance in a medical institution of a Black person who is considered or suspected to be suffering from a compensatable disease, for the purpose of keeping such person under observation in pursuance of a direction by the director or for the purpose of awaiting the finding of the certification committee—

(*a*) for any period not exceeding 30 days from the date on which the director has received, to his satisfaction, the report, X-ray film and information required in terms of regulation 4.8; and

(*b*) in the case where further reports, X-ray films or information is required in terms of regulation 4.9, for any period not exceeding 30 days from the date on which the director has received, to his or the certification committee's satisfaction, as the case may be, such further reports, X-ray films or information; shall be borne by the owner of the mine or works concerned or the contractor concerned, and the costs so incurred after the expiration of that period until such owner or contractor has been notified in writing by the director of the finding of the certification committee shall be paid out of moneys appropriated by Parliament for the purpose.

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(Reg. 5.1 substituted by GNR.2711 of 1982.)

5.2 The costs incurred in connection with the maintenance of a Black person by the owner of a controlled mine or a controlled works or a contractor after receipt of the finding of the certification committee and such owner or contractor has been authorized by the Black affairs authority to discharge the Black person concerned, shall be paid by the Minister of Black Administration and Development out of moneys appropriated by Parliament for the purpose.

5.3 No owner of a controlled mine or a controlled works shall discharge from his service a Black person who has worked at a controlled mine or a controlled works, unless such Black person has on the date of his discharge, or within 30 days prior to the said date, undergone a medical examination which has consisted of a clinical and radiological examination and the examining medical practitioner is of the opinion that he is not suffering from a compensatable disease or, if the said medical practitioner is of the opinion or suspects that the Black person is suffering from a compensatable disease, until his case has been considered by the certification committee and the finding of the said committee has been notified in writing to the owner or contractor concerned and the discharge of such person has been authorized by the Black affairs authority.

5.4 Whenever by arrangement between the owner of a controlled mine or a controlled works or a contractor or an association or organization acting on behalf of such owner or contractor and the Minister of Health, such owner or contractor or organization has undertaken the treatment of a Black person who is suffering from tuberculosis, the Minister of Health shall refund to such owner or contractor or association or organization, out of moneys appropriated by Parliament for the purpose, at a rate determined by the Minister of Health in consultation with the Minister of Finance, the costs necessarily incurred by such owner or contractor or organization in connection with such treatment.

5.5 If the Black affairs authority has reason to believe that a Black person who has performed work at or in connection with a controlled mine or a controlled works and who is no longer employed at or in connection with such a mine or works may be entitled to any benefit under the Act, that authority shall afford such Black person such means and assistance as may be necessary to enable him to undergo a medical examination directed by the director. Any costs incurred in giving effect thereto, other than the costs incurred in connection with the medical examination which shall be paid out of moneys appropriated by Parliament for that purpose, shall be paid by the Minister of Black Administration and Development out of moneys likewise appropriated: Provided that if such examination is undertaken at a hospital or institution maintained by the Department of Health, the costs incurred in connection with the examination shall be paid by the Minister of Health out of moneys so appropriated.

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6.1 Keeping of registers and records.—

An owner of a controlled mine or a controlled works or a contractor who keeps a register in accordance with the provisions of section 16 of the Act, shall in addition to the information required by the said section, enter into such register in respect of every White person and Coloured person in his service who performs or has performed risk work, the following information:

(*a*) date of birth;

(*b*) in the case of a register kept by a contractor, the name of the controlled mine or controlled works at which the person concerned performs or has performed risk work; and

(*c*) the number of shifts and the periods according to dates, during which such person performed risk work.

6.2 The records kept in accordance with regulation 3.1, shall contain the following information in respect of every Black person:

(*a*) full names (in accordance with pass book, passport or other identification document, if any);

(*b*) identity number (in accordance with identity book or other identity document, if any):

(*c*) service number;

(*d*) date of employment:

(*e*) date of every medical examination;

(*f*) the name of the medical practitioner who performed every examination;

(*g*) the number of shifts and the periods according to dates during which the Black person concerned performed risk work; and

(*h*) in the case of a record kept by a contractor, the name of the controlled mine or the controlled works at which the Black person concerned performs or performed risk work.

6.3 The information kept in respect of a Black person under regulation 6.2 shall be kept by the owner or contractor concerned for a period of not less than five years from the date on which the said person

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has left the service of the said owner or contractor, and the information so kept shall at all times during the said period be made available to the director upon the request of the director.

6A. General provisions.—

When the owner of a controlled mine or a controlled works enters into a contract with a contractor which will require the employment by the contractor of Black persons, such owner shall inform the contractor in writing of the contractor's obligations under these regulations.

(Reg. 6A added by GNR.2711 of 1982.)

7. Penalty provisions.—

An owner of a controlled mine or a controlled works or a contractor who contravenes any provision of these regulations or who, without reasonable excuse, fails to comply therewith or with a direction by the Minister under regulation 2.3 or by the director under regulation 4.9, shall be guilty of an offence and liable on conviction to a fine not exceeding R400.

7. Forms.—

The following forms are prescribed for use under the Act:

(a) Application for examination for certificate of fitness

(b) Certificate of fitness

(c) Initial and periodical examinations (Bantu persons)

(d) Certificate of finding i.r.o. Bantu person

(e) Certificate of finding of the Medical Certification Committee for Occupational Diseases

(f) Levy assessment

(g) Application for conversion of a pension into a one-sum benefit

(Contact CCI for a copy of the Forms)

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Increase of certain benefits - GN 1165 of 8 October 1999

I, Mantombazana Tshabalala-Msimang, Minister of Health, hereby, in terms of section 105A of the Occupational Diseases in Mines and Works Act, 1973 (Act No. 78 of 1973), with the concurrence of the Minister of Finance increase the benefits which were payable from the State Revenue Fund in terms of that said Act immediately prior to 1 July 1999 as from the date, in the case of a benefit contemplated in sections 79 (1) (*a*), (*b*), (*c*) and (*d*) and 83 (2) of the Act, by 4 percent.
In calculating such benefits a fraction of a rand shall be calculated to the next complete rand.

M TSHABALALA-MSIMANG
Minister of Health

Increase of levies – GNR 227 in Government Gazette 28606 of 17 March 2006

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I, Manto Tshabalala-Msimang, Minister of Health, hereby, in terms of section 62 of the Occupational Diseases in Mines and Works Act, 1973 (Act No. 78 of 1973), increase the levies which are payable from the controlled mines and works in terms of the said Act immediately with effect from 01 February 2006.

Levies will be increased per risk shift performed with an average amount of R1.00, as recommended by Actuaries and the Advisory Committee to the Compensation Commissioner (see the enclosed table).

TABLE

Proposed 2005 Levies (R/risk shift) by mine type				
Mine Type	**Base**		**New Rate**	
Andalusite	4.73		0.84	
Asbestos	41.03		7.25	
Coal	1.54		0.27	
Copper	9.29		1.64	
Diamond	5.09		0.90	
Flourspar	4.56		0.81	
Gold	7.53		1.33	
Iron	4.73		0.84	
Lead	5.44		0.96	
Manganese	7.01		1.24	
Mica & Felspar	4.03		0.71	
Other	10.98		1.94	
Phosphate	4.56		0.81	
Platinum	1.89		0.33	
Quarries	7.72		1.36	
Unknown	22.10		3.90	
Vanadium	4.03		0.71	
Works	8.77		1.55	
All Mines	5.67		1.00	

DR MANTO TSHABALALA-MSIMANG
MINISTER OF HEALTH

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Increase of Levies - GNR 1009 of Government Gazette no. 30393 of 26 October 2007

I, Manto Tshabalala - Msimang, Minister of Health, hereby, in terms of Section 62 of the Occupational Diseases in Mines and Works Act, 1973 (Act no. 78 of 1973), increase the levies which are payable from the controlled mines and works in terms of the said Act immediately with effect from 01 January 2008.

Levies will be increased per risk shift performed from an average amount of R1.00 to R1.75 (75%), as recommended by Actuaries and the Advisory Committee to the Compensation Commissioner (see the enclosed table).

DR MANTO TSHABALALA
MSIMANG MINISTER OF HEALTH

Approved 2008 Levies (R/risk shift) by mine type

Mine Type	New Rate (2008)	Current Rate
Andalusite	1.47	0.84
Asbestos	12.69	7.25
Coal	0.47	0.27
Copper	2.87	1.64
Diamond	1.58	0.90
Flourspar	1.42	0.81
Gold	2.33	1.33
Iron	1.47	0.84
Lead	1.68	0.96
Manganese	2.17	1.24
Mica and Felspar	1.24	0.71
Other	3.40	1.94
Phosphate	1.42	0.81
Platinum	0.58	0.33
Quarries	2.38	1.36
Unknown	6.83	3.90
Vanadium	1.24	0.71
Works	2.71	1.55

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All Mines	1.75	1.00

Increase of Levies – GNR 1131 of 04 December 2009

I, Aaron Motsoaledi, Minister of Health, hereby, in terms of Section 62 of the Occupational Diseases in Mines and Works Act, 1973 (Act no. 78 of 1973), increase the levies which are payable from the controlled mines and works in terms of the said Act immediately with effect from 01 January 2010.

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Levies will be increased per risk shift performed from an average amount of R1.75 to R3.06 (75%), as recommended by Actuaries and the Advisory Committee to the Compensation Commissioner (see the enclosed table).

(Signed)
DR AARON MOTOALEDI
MINISTER OF HEALTH
9/11/2009

Proposed 2010 Levies (R/risk shift) by mine type

Mine Type	New Rate (2010)	Current Rate
Andalusite	2.57	1.47
Asbestos	22.21	12.69
Coal	0.82	0.47
Copper	5.02	2.87
Diamond	2.77	1.58
Flourspar	2.49	1.42
Gold	4.08	2.33
Iron	2.57	1.47
Lead	2.94	1.68
Manganese	3.80	2.17
Mica and Felspar	2.17	1.24

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Other	5.95	3.40	
Phosphate	2.49	1.42	
Platinum	1.02	0.58	
Quarries	4.17	2.38	
Unknown	11.95	6.83	
Vanadium	2.17	1.24	
Works	4.74	2.71	
All Mines	3.0625	1.75	

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Amendment of Amounts to Increase Benefits – GNR 285 in Government Gazette 33102 of 16 April 2010

The following amendment to Government Notice No R 1249 published on 28 December 2009, is hereby published for general information.

The abovementioned Notice is hereby amended by the addition of the following paragraphs immediately after paragraph (b) thereof:

(c) 1 August 2009, being the date:

(i) on which an examination to determine the presence, nature and degree of a compensable disease was conducted; or

(ii) the day on which the first of such examinations commenced, or

(iii) the day on which a post-mortem examination was partially or wholly conducted on the person who allegedly died of a compensable disease,

(Signed)
DR A. MOTSOALEDI, MP
MINISTER OF HEALTH
DATE: 6/4/2010

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Increase of levies – GNR 598 in Government Gazette No. 34462 of 22 July 2011

I, Aaron Motsoaledi, Minister of Health, hereby, in terms of Section 62 of the Occupational Diseases in Mines and Works Act, 1973 (Act no. 78 of 1973), increase the levies which are payable from the controlled mines and works in terms of the said Act immediately with effect from 01 January 2011.

Levies will be increased per risk shift performed from an average amount of R3.06 to R5.36 (75 percent), as recommended by Actuaries and the Advisory Committee to the Compensation Commissioner (see the enclosed table).

(Signed)
DR AARON MOTSOALEDI
MINISTER OF HEALTH

Proposed 2010 Levies (R/risk shift) by mine type

Mine Type	Current rate	New Rate (2011)
Andalusite	2.57	4.50
Asbestos	22.21	38.87
Coal	0.82	1.44
Copper	5.02	8.79
Diamond	2.77	4.85
Flourspar	2.49	4.36
Gold	4.08	7.14
Iron	2.57	4.50
Lead	2.94	5.15
Manganese	3.80	6.65
Mica and Felspar	2.17	3.80
Other	5.95	10.41
Phosphate	2.49	4.36
Platinum	1.02	1.79
Quarries	4.17	7.30
Unknown	11.95	20.91
Vanadium	2.17	3.80
Works	4.74	8.30
All Mines	3.0625	5.359

Please note that most Acts are published in English and another South African official language. Currently we only have capacity to publish the English versions. This means that this document will only contain even numbered pages as the other language is printed on uneven numbered pages.



REPUBLIC OF SOUTH AFRICA

GOVERNMENT GAZETTE

STAATSKOERANT

VAN DIE REPUBLIEK VAN SUID-AFRIKA

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STATE PRESIDENT'S OFFICE

No. 1158. 2 July 1993

It is hereby notified that the State President has assented to the following Act which is hereby published for general information:—

No. 85 of 1993: Occupational Health and Safety Act, 1993.

KANTOOR VAN DIE STAATSPRESIDENT

No. 1158. 2 Julie 1993

Hierby word bekend gemaak dat die Staatspresident sy goedkeuring geheg het aan die onderstaande Wet wat hierby ter algemene inligting gepubliseer word:—

No. 85 van 1993: Wet op Beroepsgesondheid en Veiligheid, 1993.

ACT

To provide for the health and safety of persons at work and for the health and safety of persons in connection with the use of plant and machinery; the protection of persons other than persons at work against hazards to health and safety arising out of or in connection with the activities of persons at work; to establish an advisory council for occupational health and safety; and to provide for matters connected therewith.

(English text signed by the State President.)
(Assented to 23 June 1993.)

BE IT ENACTED by the State President and the Parliament of the Republic of South Africa, as follows:—

Definitions

1. (1) In this Act, unless the context otherwise indicates—

(i) "approved inspection authority" means an inspection authority approved by the chief inspector: Provided that an inspection authority approved by the chief inspector with respect to any particular service shall be an approved inspection authority with respect to that service only; (xxiv)

(ii) "biological monitoring" means a planned programme of periodic collection and analysis of body fluid, tissues, excreta or exhaled air in order to detect and quantify the exposure to or absorption of any substance or organism by persons; (xi)

(iii) "building" includes—

(a) any structure attached to the soil;

(b) any building or such structure or part thereof which is in the process of being erected; or

(c) any prefabricated building or structure not attached to the soil; (xv)

(iv) "chief executive officer", in relation to a body corporate or an enterprise conducted by the State, means the person who is responsible for the overall management and control of the business of such body corporate or enterprise; (xxviii)

(v) "chief inspector" means the officer designated under section 27 as chief inspector, and includes any officer acting as chief inspector; (xxvii)

(vi) "Council" means the Advisory Council for Occupational Health and Safety established by section 2; (xli)

(vii) "danger" means anything which may cause injury or damage to persons or property; (xxiii)

(viii) "Department" means the Department of Manpower; (xii)

(ix) "employee" means, subject to the provisions of subsection (2), 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; (liii)

(x) "employer" means, subject to the provisions of subsection (2), any person who employs or provides work for any person and remunerates that person or expressly or tacitly undertakes to remunerate him, but excludes a labour broker as defined in section 1(1) of the Labour Relations Act, 1956 (Act No. 28 of 1956); (lii)

(xi) "employment" or "employed" means employment or employed as an employee; (xiii)

(xii) "explosives" means any substance or article as listed in Class I: Explosives in the South African Bureau of Standards Code of Practice for the Identification and Classification of Dangerous Substances and Goods, SABS 0228; (xxxvii)

(xiii) "hazard" means a source of or exposure to danger; (ii)

(xiv) "health and safety committee" means a committee established under section 19; (xix)

(xv) "health and safety equipment" means any article or part thereof which is manufactured, provided or installed in the interest of the health or safety of any person; (xxi)

(xvi) "health and safety representative" means a person designated in terms of section 17(1); (xxii)

(xvii) "health and safety standard" means any standard, irrespective of whether or not it has the force of law, which, if applied for the purposes of this Act, will in the opinion of the Minister promote the attainment of an object of this Act; (xx)

(xviii) "healthy" means free from illness or injury attributable to occupational causes; (xviii)

(xix) "incident" means an incident as contemplated in section 24(1); (l)

(xx) "industrial court" means the industrial court referred to in section 17 of the Labour Relations Act, 1956 (Act No. 28 of 1956); (xxxvi)

(xxi) "inspection authority" means any person who with the aid of specialized knowledge or equipment or after such investigations, tests, sampling or analyses as he may consider necessary, and whether for reward or otherwise, renders a service by making special findings, purporting to be objective findings, as to—

(a) the health of any person;

(b) the safety or risk to health of any work, article, substance, plant or machinery, or of any condition prevalent on or in any premises; or

(c) the question of whether any particular standard has been or is being complied with, with respect to any work, article, substance, plant or machinery, or with respect to work or a condition prevalent on or in any premises, or with respect to any other matter,

and by issuing a certificate, stating such findings, to the person to whom the service is rendered; (xxix)

(xxii) "inspector" means a person designated under section 28; (xxx)

(xxiii) "listed work" means any work declared to be listed work under section 11; (xvii)

(xxiv) "local authority" means—

(a) any institution or body contemplated in section 84(1)*(f)* of the Provincial Government Act, 1961 (Act No. 32 of 1961);

(b) any regional services council established under section 3 of the Regional Services Councils Act, 1985 (Act No. 109 of 1985);

(c) any other institution or body or the holder of any office declared by the Minister by notice in the *Gazette* to be a local authority for the purposes of this Act; (xl)

(xxv) "machinery" means 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; (xxxiii)

(xxvi) "major hazard installation" means an installation—

(a) where more than the prescribed quantity of any substance is or may be kept, whether permanently or temporarily; or

(b) where any substance is produced, processed, used, handled or stored in such a form and quantity that it has the potential to cause a major incident; (xxvi)

(xxvii) "major incident" means an occurrence of catastrophic proportions, resulting from the use of plant or machinery, or from activities at a workplace; (xiv)

(xxviii) "mandatary" includes an agent, a contractor or a subcontractor for work, but without derogating from his status in his own right as an employer or a user; (xxxii)

(xxix) "medical surveillance" means a planned programme of periodic examination (which may include clinical examinations, biological monitoring or medical tests) of employees by an occupational health practitioner or, in prescribed cases, by an occupational medicine practitioner; (xxxiv)

(xxx) "Minister" means the Minister of Manpower; (xxxv)

(xxxi) "occupational health" includes occupational hygiene, occupational medicine and biological monitoring; (viii)

(xxxii) "occupational health practitioner" means an occupational medicine practitioner or a person who holds a qualification in occupational health recognized as such by the South African Medical and Dental Council as referred to in the Medical, Dental and Supplementary Health Service Professions Act, 1974 (Act No. 56 of 1974), or the South African Nursing Council as referred to in the Nursing Act, 1978 (Act No. 50 of 1978); (ix)

(xxxiii) "occupational hygiene" means the anticipation, recognition, evaluation and control of conditions arising in or from the workplace, which may cause illness or adverse health effects to persons; (x)

(xxxiv) "occupational medicine" means the prevention, diagnosis and treatment of illness, injury and adverse health effects associated with a particular type of work; (vi)

(xxxv) "occupational medicine practitioner" means a medical practitioner as defined in the Medical, Dental and Supplementary Health Service Professions Act, 1974 (Act No. 56 of 1974), who holds a qualification in occupational medicine or an equivalent qualification which qualification or equivalent is recognized as such by the South African Medical and Dental Council referred to in the said Act; (vii)

(xxxvi) "office" means an office as defined in section 1(1) of the Basic Conditions of Employment Act, 1983 (Act No. 3 of 1983); (xxxi)

(xxxvii) "officer" means an officer or employee as defined in section 1(1) of the Public Service Act, 1984 (Act No. 111 of 1984); (i)

(xxxviii) "organism" means any biological entity which is capable of causing illness to persons; (xxxviii)

(xxxix) "plant" includes fixtures, fittings, implements, equipment, tools and appliances, and anything which is used for any purpose in connection with such plant; (iii)

(xl) "premises" includes any building, vehicle, vessel, train or aircraft; (xxxix)

(xli) "prescribed" means prescribed by regulation; (xlix)

(xlii) "properly used" means used with reasonable care, and with due regard to any information, instruction or advice supplied by the designer, manufacturer, importer, seller or supplier; (iv)

(xliii) "reasonably practicable" means practicable having regard to—

(a) the severity and scope of the hazard or risk concerned;

(b) the state of knowledge reasonably available concerning that hazard or risk and of any means of removing or mitigating that hazard or risk;

(c) the availability and suitability of means to remove or mitigate that hazard or risk; and

(d) the cost of removing or mitigating that hazard or risk in relation to the benefits deriving therefrom; (xlii)

(xliv) "regulation" means a regulation made under section 43; (xliii)

(xlv) "remuneration" means any payment in money or in kind or both in money and in kind, made or owing to any person in pursuance of such person's employment; (v)

(xlvi) "risk" means the probability that injury or damage will occur; (xliv)

(xlvii) "safe" means free from any hazard; (xlvii)

(xlviii) "sell" includes—

(a) offer or display for sale or import into the Republic for sale; or

(b) exchange, donate, lease or offer or display for leasing; (xlviii)

(xlix) "shop" means a shop as defined in section 1(1) of the Basic Conditions of Employment Act, 1983 (Act No. 3 of 1983); (lv)

(l) "standard" means any provision occurring—

(a) in a specification, compulsory specification, code of practice or standard method as defined in section 1 of the Standards Act, 1993 (Act No. 29 of 1993); or

(b) in any specification, code or any other directive having standardization as its aim and issued by an institution or organization inside or outside the Republic which, whether generally or with respect to any particular article or matter and whether internationally or in any particular country or territory, seeks to promote standardization; (xlv)

(li) "substance" includes any solid, liquid, vapour, gas or aerosol, or combination thereof; (xlvi)

(lii) "this Act" includes any regulation; (xxv)

(liii) "user", in relation to plant or machinery, means 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; (xvi)

(liv) "work" means work as an employee or as a self-employed person, and for such purpose an employee is deemed to be at work during the time that he is in the course of his employment, and a self-employed person is deemed to be at work during such time as he devotes to work as a self-employed person; (li)

(lv) "workplace" means any premises or place where a person performs work in the course of his employment. (liv)

(2) The Minister may by notice in the *Gazette* declare that a person belonging to a category of persons specified in the notice shall for the purposes of this Act or any provision thereof be deemed to be an employee, and thereupon any person vested and charged with the control and supervision of the said person shall for the said purposes be deemed to be the employer of such person.

(3) This Act shall not apply in respect of—

(a) a mine, a mining area or any works as defined in the Minerals Act, 1991 (Act No. 50 of 1991), except in so far as that Act provides otherwise;

(b) any load line ship (including a ship holding a load line exemption certificate), fishing boat, sealing boat and whaling boat as defined in section 2(1) of the Merchant Shipping Act, 1951 (Act No. 57 of 1951), or any floating crane, whether or not such ship, boat or crane is in or out of the water within any harbour in the Republic or within the territorial waters thereof,

or in respect of any person present on or in any such mine, mining area, works, ship, boat or crane.

Establishment of Advisory Council for Occupational Health and Safety

2. There is hereby established an Advisory Council for Occupational Health and Safety.

Functions of Council

3. (1) The Council shall—

(a) advise the Minister with regard to—

(i) matters of policy arising out of or in connection with the application of the provisions of this Act;

(ii) any matter relating to occupational health and safety;

(b) perform the functions assigned to it by this Act or referred to it by the Minister.

(2) The Council may—

(a) with a view to the performance of its functions, do such research and conduct such investigations as it may deem necessary;

(b) make rules relating to the calling of meetings of the Council, the determining of a quorum for and the procedure at such meetings, and generally relating to all matters which may be necessary for the effective performance of the functions of the Council or, subject to section 6, of a technical committee;

(c) advise the Department concerning—

(i) the formulation and publication of standards, specifications or other forms of guidance for the purpose of assisting employers, employees and users to maintain appropriate standards of occupational health and safety;

(ii) the promotion of education and training in occupational health and safety; and

(iii) the collection and dissemination of information on occupational health and safety.

(3) The Council may for the purposes of the performance of any of its functions, with the approval of the Minister, and with the concurrence of the Minister of State Expenditure, enter into an agreement for the performance of a particular act or particular work or for the rendering of a particular service, on such conditions and at such remuneration as may be agreed upon, with anybody who in the opinion of the Council is fit to perform such act or work or to render such service.

(4) Subject to the laws governing the Public Service, the Minister shall provide the Council with such personnel as he may deem necessary for the effective performance of the functions of the Council, and such persons shall perform their functions subject to the control and directions of the chief inspector.

Constitution of Council

4. (1) The Council shall consist of 20 members, namely—

(a) the chief inspector, *ex officio*, who shall be the chairman;

(b) one officer serving in the Department;

(c) the Workmen's Compensation Commissioner, or his nominee;

(d) one person nominated by the Minister for National Health and Welfare;

(e) one person nominated by the Minister of Mineral and Energy Affairs;

(f) six persons to represent the interests of employers;

(g) six persons to represent the interests of employees;

(h) one person who in the opinion of the Minister has knowledge of occupational safety matters;

(i) one person who in the opinion of the Minister has knowledge of occupational medicine and who was recommended by the Minister for National Health and Welfare;

(j) one person who in the opinion of the Minister has knowledge of occupational hygiene.

(2) The members referred to in subsection (1)*(b)* up to and including *(j)* shall be appointed by the Minister.

Period of office and remuneration of members of Council

5. (1) The members of the Council referred to in section 4(2) shall be appointed for a period of three years, and on such conditions as the Minister may determine with the concurrence of the Minister of State Expenditure.

(2) Any person whose period of office as a member of the Council has expired shall be eligible for reappointment.

(3) A member referred to in section 4(1)*(f)*, *(g)*, *(h)*, *(i)* or *(j)* who is not an officer may be paid from money appropriated for such purpose by Parliament such allowances as the Minister may determine with the concurrence of the Minister of State Expenditure.

Establishment of technical committees of Council

6. (1) The Council may with the approval of the Minister establish one or more technical committees to advise the Council on any matter regarding the performance by the Council of its functions.

(2) A member of a technical committee shall be appointed by the Council by reason of his knowledge of the matter for which the committee is established, and such a member need not be a member of the Council.

(3) A meeting of a technical committee shall be held at such time and place as may be determined by the chairman of the Council, and in accordance with rules approved by the Council.

(4) A member of a technical committee who is not an officer may be paid from money appropriated for such purpose by Parliament such allowances as the Minister may determine with the concurrence of the Minister of State Expenditure.

Health and safety policy

7. (1) The chief inspector may direct—

(a) any employer in writing; and

(b) any category of employers by notice in the *Gazette*,

to prepare a written policy concerning the protection of the health and safety of his employees at work, including a description of his organization and the arrangements for carrying out and reviewing that policy.

(2) Any direction under subsection (1) shall be accompanied by guide-lines concerning the contents of the policy concerned.

(3) An employer shall prominently display a copy of the policy referred to in subsection (1), signed by the chief executive officer, in the workplace where his employees normally report for service.

General duties of employers to their employees

8. (1) Every employer shall provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of his employees.

(2) Without derogating from the generality of an employer's duties under subsection (1), the matters to which those duties refer include in particular—

(a) the provision and maintenance of systems of work, plant and machinery that, as far as is reasonably practicable, are safe and without risks to health;

(b) taking such steps as may be reasonably practicable to eliminate or mitigate any hazard or potential hazard to the safety or health of employees, before resorting to personal protective equipment;

(c) making arrangements for ensuring, as far as is reasonably practicable, the safety and absence of risks to health in connection with the production, processing, use, handling, storage or transport of articles or substances;

(d) establishing, as far as is reasonably practicable, what hazards to the health or safety of persons are attached to any work which is performed, any article or substance which is produced, processed, used, handled, stored or transported and any plant or machinery which is used in his business, and he shall, as far as is reasonably practicable, further

establish what precautionary measures should be taken with respect to such work, article, substance, plant or machinery in order to protect the health and safety of persons, and he shall provide the necessary means to apply such precautionary measures;

(e) providing such information, instructions, training and supervision as may be necessary to ensure, as far as is reasonably practicable, the health and safety at work of his employees;

(f) as far as is reasonably practicable, not permitting any employee to do any work or to produce, process, use, handle, store or transport any article or substance or to operate any plant or machinery, unless the precautionary measures contemplated in paragraphs *(b)* and *(d)*, or any other precautionary measures which may be prescribed, have been taken;

(g) taking all necessary measures to ensure that the requirements of this Act are complied with by every person in his employment or on premises under his control where plant or machinery is used;

(h) enforcing such measures as may be necessary in the interest of health and safety;

(i) ensuring that work is performed and that plant or machinery is used under the general supervision of a person trained to understand the hazards associated with it and who have the authority to ensure that precautionary measures taken by the employer are implemented; and

(j) causing all employees to be informed regarding the scope of their authority as contemplated in section 37(1)*(b)*.

General duties of employers and self-employed persons to persons other than their employees

9. (1) Every employer shall conduct his undertaking in such a manner as to ensure, as far as is reasonably practicable, that persons other than those in his employment who may be directly affected by his activities are not thereby exposed to hazards to their health or safety.

(2) Every self-employed person shall conduct his undertaking in such a manner as to ensure, as far as is reasonably practicable, that he and other persons who may be directly affected by his activities are not thereby exposed to hazards to their health or safety.

General duties of manufacturers and others regarding articles and substances for use at work

10. (1) Any person who designs, manufactures, imports, sells or supplies any article for use at work shall ensure, as far as is reasonably practicable, that the article is safe and without risks to health when properly used and that it complies with all prescribed requirements.

(2) Any person who erects or installs any article for use at work on or in any premises shall ensure, as far as is reasonably practicable, that nothing about the manner in which it is erected or installed makes it unsafe or creates a risk to health when properly used.

(3) Any person who manufactures, imports, sells or supplies any substance for use at work shall—

(a) ensure, as far as is reasonably practicable, that the substance is safe and without risks to health when properly used; and

(b) take such steps as may be necessary to ensure that information is available with regard to the use of the substance at work, the risks to health and safety associated with such substance, the conditions necessary to ensure that the substance will be safe and without risks to health when properly used and the procedures to be followed in the case of an accident involving such substance.

(4) Where a person designs, manufactures, imports, sells or supplies an article or substance for or to another person and that other person undertakes in writing

to take specified steps sufficient to ensure, as far as is reasonably practicable, that the article or substance will comply with all prescribed requirements and will be safe and without risks to health when properly used, the undertaking shall have the effect of relieving the first-mentioned person from the duty imposed upon him by this section to such an extent as may be reasonable having regard to the terms of the undertaking.

Listed work

11. (1) The Minister may, subject to the provisions of subsections (2) and (3), by notice in the *Gazette* declare any work, under the conditions or circumstances specified in the notice, to be listed work.

(2) *(a)* Before the Minister declares any work to be listed work, he shall cause to be published in the *Gazette* a draft of his proposed notice and at the same time invite interested persons to submit to him in writing within a specified period, comments and representations in connection with the proposed notice.

(b) A period of not less than three months shall elapse between the publication of the draft notice and the notice under subsection (1).

(3) The provisions of subsection (2) shall not apply—

(a) if the Minister in pursuance of comments and representations received in terms of subsection (2)*(a)*, decides to publish the notice referred to in subsection (1) in an amended form; and

(b) to any declaration in terms of subsection (1) in respect of which the Minister is of the opinion that the public interest requires that it be made without delay.

(4) A notice under subsection (1) may at any time be amended or withdrawn by like notice.

General duties of employers regarding listed work

12. (1) Subject to such arrangements as may be prescribed, every employer whose employees undertake listed work or are liable to be exposed to the hazards emanating from listed work, shall, after consultation with the health and safety committee established for that workplace—

(a) identify the hazards and evaluate the risks associated with such work constituting a hazard to the health of such employees, and the steps that need to be taken to comply with the provisions of this Act;

(b) as far as is reasonably practicable, prevent the exposure of such employees to the hazards concerned or, where prevention is not reasonably practicable, minimize such exposure; and

(c) having regard to the nature of the risks associated with such work and the level of exposure of such employees to the hazards, carry out an occupational hygiene programme and biological monitoring, and subject such employees to medical surveillance.

(2) Every employer contemplated in subsection (1) shall keep the health and safety representatives designated for their workplaces or sections of the workplaces, informed of the actions taken under subsection (1) in their respective workplaces or sections thereof and of the results of such actions: Provided that individual results of biological monitoring and medical surveillance relating to the work of the employee, shall only with the written consent of such employee be made available to any person other than an inspector, the employer or the employee concerned.

Duty to inform

13. Without derogating from any specific duty imposed on an employer by this Act, every employer shall—

(a) as far as is reasonably practicable, cause every employee to be made conversant with the hazards to his health and safety attached to any work

which he has to perform, any article or substance which he has to produce, process, use, handle, store or transport and any plant or machinery which he is required or permitted to use, as well as with the precautionary measures which should be taken and observed with respect to those hazards;

(b) inform the health and safety representatives concerned beforehand of inspections, investigations or formal inquiries of which he has been notified by an inspector, and of any application for exemption made by him in terms of section 40; and

(c) inform a health and safety representative as soon as reasonably practicable of the occurrence of an incident in the workplace or section of the workplace for which such representative has been designated.

General duties of employees at work

14. Every employee shall at work—

(a) take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions;

(b) as regards any duty or requirement imposed on his employer or any other person by this Act, co-operate with such employer or person to enable that duty or requirement to be performed or complied with;

(c) carry out any lawful order given to him, and obey the health and safety rules and procedures laid down by his employer or by anyone authorized thereto by his employer, in the interest of health or safety;

(d) if any situation which is unsafe or unhealthy comes to his attention, as soon as practicable report such situation to his employer or to the health and safety representative for his workplace or section thereof, as the case may be, who shall report it to the employer; and

(e) if he is involved in any incident which may affect his health or which has caused an injury to himself, report such incident to his employer or to anyone authorized thereto by the employer, or to his health and safety representative, as soon as practicable but not later than the end of the particular shift during which the incident occurred, unless the circumstances were such that the reporting of the incident was not possible, in which case he shall report the incident as soon as practicable thereafter.

Duty not to interfere with or misuse things

15. No person shall intentionally or recklessly interfere with or misuse anything which is provided in the interest of health or safety.

Chief executive officer charged with certain duties

16. (1) Every chief executive officer shall as far as is reasonably practicable ensure that the duties of his employer as contemplated in this Act, are properly discharged.

(2) Without derogating from his responsibility or liability in terms of subsection (1), a chief executive officer may assign any duty contemplated in the said subsection, to any person under his control, which person shall act subject to the control and directions of the chief executive officer.

(3) The provisions of subsection (1) shall not, subject to the provisions of section 37, relieve an employer of any responsibility or liability under this Act.

(4) For the purpose of subsection (1), the head of department of any department of State shall be deemed to be the chief executive officer of that department.

Health and safety representatives

17. (1) Subject to the provisions of subsection (2), every employer who has more

than 20 employees in his employment at any workplace, shall, within four months after the commencement of this Act or after commencing business, or from such time as the number of employees exceeds 20, as the case may be, designate in writing for a specified period health and safety representatives for such workplace, or for different sections thereof.

(2) An employer and his employees or their representatives shall consult in good faith regarding the arrangements and procedures for the nomination or election, period of office and subsequent designation of health and safety representatives in terms of subsection (1): Provided that if such consultation fails, the matter shall be referred for arbitration to an inspector, whose decision shall be final.

(3) Arbitration by an inspector in terms of subsection (2) shall not be subject to the provisions of the Arbitration Act, 1965 (Act No. 42 of 1965), and a failure of the consultation contemplated in that subsection shall not be deemed to be a dispute in terms of the Labour Relations Act, 1956 (Act No. 28 of 1956).

(4) Only those employees employed in a full-time capacity at a specific workplace and who are acquainted with conditions and activities at that workplace or section thereof, as the case may be, shall be eligible for designation as health and safety representatives for that workplace or section.

(5) The number of health and safety representatives for a workplace or section thereof shall in the case of shops and offices be at least one health and safety representative for every 100 employees or part thereof, and in the case of all other workplaces at least one health and safety representative for every 50 employees or part thereof: Provided that those employees performing work at a workplace other than that where they ordinarily report for duty, shall be deemed to be working at the workplace where they so report for duty.

(6) If an inspector is of the opinion that the number of health and safety representatives for any workplace or section thereof, including a workplace or section with 20 or fewer employees, is inadequate, he may by notice in writing direct the employer to designate such number of employees as the inspector may determine as health and safety representatives for that workplace or section thereof in accordance with the arrangements and procedures referred to in subsection (2).

(7) All activities in connection with the designation, functions and training of health and safety representatives shall be performed during ordinary working hours, and any time reasonably spent by any employee in this regard shall for all purposes be deemed to be time spent by him in the carrying out of his duties as an employee.

Functions of health and safety representatives

18. (1) A health and safety representative may perform the following functions in respect of the workplace or section of the workplace for which he has been designated, namely—

(a) review the effectiveness of health and safety measures;

(b) identify potential hazards and potential major incidents at the workplace;

(c) in collaboration with his employer, examine the causes of incidents at the workplace;

(d) investigate complaints by any employee relating to that employee's health or safety at work;

(e) make representations to the employer or a health and safety committee on matters arising from paragraphs *(a)*, *(b)*, *(c)* or *(d)*, or where such representations are unsuccessful, to an inspector;

(f) make representations to the employer on general matters affecting the health or safety of the employees at the workplace;

(g) inspect the workplace, including any article, substance, plant, machinery or health and safety equipment at that workplace with a view to the health and safety of employees, at such intervals as may be agreed upon

with the employer: Provided that the health and safety representative shall give reasonable notice of his intention to carry out such an inspection to the employer, who may be present during the inspection;

(h) participate in consultations with inspectors at the workplace and accompany inspectors on inspections of the workplace;

(i) receive information from inspectors as contemplated in section 36; and

(j) in his capacity as a health and safety representative attend meetings of the health and safety committee of which he is a member, in connection with any of the above functions.

(2) A health and safety representative may, in respect of the workplace or section of the workplace for which he has been designated—

(a) visit the site of an incident and attend any inspection *in loco*;

(b) attend any investigation or formal inquiry held in terms of this Act;

(c) in so far as is reasonably necessary to perform his functions, inspect any document which the employer is required to keep in terms of this Act;

(d) accompany an inspector on any inspection;

(e) with the approval of the employer (which approval shall not be unreasonably withheld), be accompanied by a technical adviser, on any inspection; and

(f) participate in any internal health or safety audit.

(3) An employer shall provide such facilities, assistance and training as a health and safety representative may reasonably require and as have been agreed upon for the carrying out of his functions.

(4) A health and safety representative shall not incur any civil liability by reason of the fact only that he failed to do anything which he may do or is required to do in terms of this Act.

Health and safety committees

19. (1) An employer shall in respect of each workplace where two or more health and safety representatives have been designated, establish one or more health and safety committees and, at every meeting of such a committee as contemplated in subsection (4), consult with the committee with a view to initiating, developing, promoting, maintaining and reviewing measures to ensure the health and safety of his employees at work.

(2) A health and safety committee shall consist of such number of members as the employer may from time to time determine: Provided that—

(a) if one health and safety committee has been established in respect of a workplace, all the health and safety representatives for that workplace shall be members of the committee;

(b) if two or more health and safety committees have been established in respect of a workplace, each health and safety representative for that workplace shall be a member of at least one of those committees; and

(c) the number of persons nominated by an employer on any health and safety committee established in terms of this section shall not exceed the number of health and safety representatives on that committee.

(3) The persons nominated by an employer on a health and safety committee shall be designated in writing by the employer for such period as may be determined by him, while the health and safety representatives shall be members of the committee for the period of their designation in terms of section 17(1).

(4) A health and safety committee shall hold meetings as often as may be necessary, but at least once every three months, at a time and place determined by the committee: Provided that an inspector may by notice in writing direct the members of a health and safety committee to hold a meeting at a time and place determined by him: Provided further that, if more than 10 per cent of the employees at a specific workplace has handed a written request to an inspector, the inspector may by written notice direct that such a meeting be held.

(5) The procedure at meetings of a health and safety committee shall be determined by the committee.

(6) *(a)* A health and safety committee may co-opt one or more persons by reason of his or their particular knowledge of health or safety matters as an advisory member or as advisory members of the committee.

(b) An advisory member shall not be entitled to vote on any matter before the committee.

(7) If an inspector is of the opinion that the number of health and safety committees established for any particular workplace is inadequate, he may in writing direct the employer to establish for such workplace such number of health and safety committees as the inspector may determine.

Functions of health and safety committees

20. (1) A health and safety committee—

(a) may make recommendations to the employer or, where the recommendations fail to resolve the matter, to an inspector regarding any matter affecting the health or safety of persons at the workplace or any section thereof for which such committee has been established;

(b) shall discuss any incident at the workplace or section thereof in which or in consequence of which any person was injured, became ill or died, and may in writing report on the incident to an inspector; and

(c) shall perform such other functions as may be prescribed.

(2) A health and safety committee shall keep record of each recommendation made to an employer in terms of subsection (1)*(a)* and of any report made to an inspector in terms of subsection (1)*(b)*.

(3) A health and safety committee or a member thereof shall not incur any civil liability by reason of the fact only that it or he failed to do anything which it or he may or is required to do in terms of this Act.

(4) An employer shall take the prescribed steps to ensure that a health and safety committee complies with the provisions of section 19(4) and performs the duties assigned to it by subsections (1) and (2).

General prohibitions

21. (1) The Minister may by notice in the *Gazette* declare—

(a) that no employer shall require or permit any employee belonging to a category of employees specified in the notice to perform work on or in any premises on or in which an activity specified in the notice is carried out which in the opinion of the Minister is an activity which threatens or is likely to threaten the health or safety of an employee belonging to that category of employees, or that no employer shall require or permit any such employee to perform any work on or in such premises otherwise than on the conditions specified in the notice;

(b) that no employer shall require or permit any employee to perform any work in connection with the carrying out of a process specified in the notice which in the opinion of the Minister is a process which threatens or is likely to threaten the health or safety of an employee, or that no employer shall require or permit an employee to perform any work in connection with the carrying out of such a process otherwise than on the conditions specified in the notice; and

(c) that no employer shall require or permit any employee, otherwise than on the conditions specified in the notice, to perform any work on or in any premises where an article or substance specified in the notice is produced, processed, used, handled, stored or transported which in the opinion of the Minister is an article or substance which threatens or is likely to threaten the health or safety of an employee.

(2) *(a)* The Minister shall, before he publishes a notice under subsection (1), cause a draft of his proposed notice to be published in the *Gazette* and at the same time invite interested persons to submit to him in writing, within a specified period, comments and representations in connection with the proposed notice.

(b) The provisions of paragraph *(a)* shall not apply if the Minister, in pursuance of comments and representations received, decides to publish the notice referred to in subsection (1) in an amended form.

(3) A notice under subsection (1) may at any time be amended or withdrawn by like notice.

(4) A notice shall not be issued under subsection (1) or (3) unless the Minister for National Health and Welfare and the Council have been consulted.

(5) A notice issued or deemed to have been issued under section 13 of the Machinery and Occupational Safety Act, 1983 (Act No. 6 of 1983), and which was in force immediately prior to the commencement of this Act, shall be deemed to have been issued under this section.

Sale of certain articles prohibited

22. Subject to the provisions of section 10(4), if any requirement (including any health and safety standard) in respect of any article, substance, plant, machinery or health and safety equipment or for the use or application thereof has been prescribed, no person shall sell or market in any manner whatsoever such article, substance, plant, machinery or health and safety equipment unless it complies with that requirement.

Certain deductions prohibited

23. No employer shall in respect of anything which he is in terms of this Act required to provide or to do in the interest of the health or safety of an employee, make any deduction from any employee's remuneration or require or permit any employee to make any payment to him or any other person: Provided that where an employee intentionally causes loss of or damage to health or safety equipment, his employer may, after a proper investigation, recover such loss or damage from that employee.

Report to inspector regarding certain incidents

24. (1) Each incident occurring at work or arising out of or in connection with the activities of persons at work, or in connection with the use of plant or machinery, in which, or in consequence of which—

(a) any person dies, becomes unconscious, suffers the loss of a limb or part of a limb or is otherwise injured or becomes ill to such a degree that he is likely either to die or to suffer a permanent physical defect or likely to be unable for a period of at least 14 days either to work or to continue with the activity for which he was employed or is usually employed;

(b) a major incident occurred; or

(c) the health or safety of any person was endangered and where—

(i) a dangerous substance was spilled;

(ii) the uncontrolled release of any substance under pressure took place;

(iii) machinery or any part thereof fractured or failed resulting in flying, falling or uncontrolled moving objects; or

(iv) machinery ran out of control,

shall, within the prescribed period and in the prescribed manner, be reported to an inspector by the employer or the user of the plant or machinery concerned, as the case may be.

(2) In the event of an incident in which a person died, or was injured to such an extent that he is likely to die, or suffered the loss of a limb or part of a limb, no

person shall without the consent of an inspector disturb the site at which the incident occurred or remove any article or substance involved in the incident therefrom: Provided that such action may be taken as is necessary to prevent a further incident, to remove the injured or dead, or to rescue persons from danger.

(3) The provisions of subsections (1) and (2) shall not apply in respect of—

(a) a traffic accident on a public road;

(b) an incident occurring in a private household, provided the householder forthwith reports the incident to the South African Police; or

(c) any accident which is to be investigated under section 12 of the Aviation Act, 1962 (Act No. 74 of 1962).

(4) A member of the South African Police to whom an incident was reported in terms of subsection (3)*(b)*, shall forthwith notify an inspector thereof.

Report to chief inspector regarding occupational disease

25. Any medical practitioner who examines or treats a person for a disease described in the Second Schedule to the Workmen's Compensation Act, 1941 (Act No. 30 of 1941), or any other disease which he believes arose out of that person's employment, shall within the prescribed period and in the prescribed manner report the case to the person's employer and to the chief inspector.

Victimization forbidden

26. No employer shall dismiss an employee, or reduce the rate of his remuneration, or alter the terms or conditions of his employment to terms or conditions less favourable to him, or alter his position relative to other employees employed by that employer to his disadvantage, by reason of the fact, or because he suspects or believes, whether or not the suspicion or belief is justified or correct, that that employee has given information to the Minister or to any other person charged with the administration of a provision of this Act which in terms of this Act he is required to give or which relates to the terms, conditions or circumstances of his employment or to those of any other employee of his employer, or has complied with a lawful prohibition, requirement, request or direction of an inspector, or has given evidence before a court of law or the industrial court, or has done anything which he may or is required to do in terms of this Act or has refused to do anything which he is prohibited from doing in terms of this Act.

Designation and functions of chief inspector

27. (1) The Minister shall designate an officer serving in the Department as chief inspector for the purposes of this Act.

(2) The chief inspector shall perform his functions subject to the control and supervision of the Director-General of the Department and may perform any function assigned to an inspector by this Act.

(3) *(a)* The chief inspector may delegate any power conferred upon him by this Act, excluding a power referred to in section 35(1) or delegated to him under section 42, to any other officer or authorize any such officer to perform any duty assigned to him by this Act.

(b) No delegation of a power under paragraph *(a)* shall prevent the exercise of such power by the chief inspector himself.

(4) Whenever the chief inspector is absent or unable to perform his functions as chief inspector or whenever the designation of a chief inspector is pending, the Minister may designate any other officer serving in the Department to act as chief inspector during the chief inspector's absence or incapacity or until a chief inspector is designated.

(5) Any person who immediately prior to the commencement of this Act was designated as chief inspector under section 19 of the Machinery and Occupational Safety Act, 1983 (Act No. 6 of 1983), shall be deemed to have been designated as chief inspector under subsection (1) of this section.

Designation of inspectors by Minister

28. (1) The Minister may designate any person as an inspector to perform, subject to the control and directions of the chief inspector, any or all of the functions assigned to an inspector by this Act.

(2) Each inspector designated under subsection (1) shall be furnished with a certificate signed by or on behalf of the Minister and stating that he has been designated as an inspector: Provided that if his designation as inspector is limited to any particular function or functions, his certificate shall state such limitation.

(3) Whenever an inspector designated under subsection (1) performs a function under this Act in the presence of any person affected thereby the inspector shall on demand by such person produce to him the certificate referred to in subsection (2).

(4) Any officer who immediately prior to the commencement of this Act was designated as an inspector under section 20 of the Machinery and Occupational Safety Act, 1983 (Act No. 6 of 1983), shall be deemed to have been designated as an inspector under subsection (1) of this section.

Functions of inspectors

29. (1) An inspector may, for the purposes of this Act—

(a) without previous notice, at all reasonable times, enter any premises which are occupied or used by an employer or on or in which an employee performs any work or any plant or machinery is used, or which he suspects to be such premises;

(b) question any person who is or was on or in such premises, either alone or in the presence of any other person, on any matter to which this Act relates;

(c) require from any person who has control over or custody of a book, record or other document on or in those premises, to produce to him forthwith, or at such time and place as may be determined by him, such book, record or other document;

(d) examine any such book, record or other document or make a copy thereof or an extract therefrom;

(e) require from such a person an explanation of any entry in such book, record or other document;

(f) inspect any article, substance, plant or machinery which is or was on or in those premises, or any work performed on or in those premises or any condition prevalent on or in those premises or remove for examination or analysis any article, substance, plant or machinery or a part or sample thereof;

(g) seize any such book, record or other document or any such article, substance, plant or machinery or a part or sample thereof which in his opinion may serve as evidence at the trial of any person charged with an offence under this Act or the common law: Provided that the employer or user of the article, substance, plant or machinery concerned, as the case may be, may make copies of such book, record or document before such seizure;

(h) direct any employer, employee or user, including any former employer, employee or user, to appear before him at such time and place as may be determined by him and question such employer, employee or user either alone or in the presence of any other person on any matter to which this Act relates;

(i) perform any other function as may be prescribed.

(2) *(a)* An interpreter, a member of the South African Police or any other assistant may, when required by an inspector, accompany him when he performs his functions under this Act.

(b) For the purposes of this Act an inspector's assistant shall, while he acts under the instructions of an inspector, be deemed to be an inspector.

(3) When an inspector enters any premises under subsection (1) the employer occupying or using those premises and each employee performing any work

thereon or therein and any user of plant or machinery thereon or therein, shall at all times provide such facilities as are reasonably required by the inspector to enable him and his assistant (if any) to perform effectively and safely his or their functions under this Act.

(4) When an inspector removes or seizes any article, substance, plant, machinery, book, record or other document as contemplated in subsection (1)*(f)* or *(g)*, he shall issue a receipt to the owner or person in control thereof.

Special powers of inspectors

30. (1) *(a)* Whenever an employer performs an act or requires or permits an act to be performed, or proposes to perform an act or to require or permit an act to be performed, which in the opinion of an inspector threatens or is likely to threaten the health or safety of any person, the inspector may in writing prohibit that employer from continuing or commencing with the performance of that act or from requiring or permitting that act to be continued or commenced with, as the case may be.

(b) Whenever a user of plant or machinery uses or proposes to use any plant or machinery, in a manner or in circumstances which in the opinion of an inspector threatens or is likely to threaten the health or safety of any person who works with such plant or machinery or who is or may come within the vicinity thereof, the inspector may in writing prohibit that user from continuing or commencing with the use of such plant or machinery or in that manner or those circumstances, as the case may be.

(c) An inspector may in writing prohibit an employer from requiring or permitting an employee or any employee belonging to a category of employees specified in the prohibition to be exposed in the course of his employment for a longer period than a period specified in the prohibition, to any article, substance, organism or condition which in the opinion of an inspector threatens or is likely to threaten the health or safety of that employee or the employee belonging to that category of employees, as the case may be.

(d) A prohibition imposed under paragraph *(a)*, *(b)* or *(c)* may at any time be revoked by an inspector in writing if arrangements to the satisfaction of the inspector have been made to dispose of the threat which gave rise to the imposition of the prohibition.

(2) In order to enforce a prohibition imposed under subsection (1)*(a)* or *(b)*, an inspector may block, bar, barricade or fence off that part of the workplace, plant or machinery to which the prohibition applies, and no person shall interfere with or remove such blocking, bar, barricade or fence.

(3) Whenever an inspector is of the opinion that the health or safety of any person at a workplace or in the course of his employment or in connection with the use of plant or machinery is threatened on account of the refusal or failure of an employer or a user, as the case may be, to take reasonable steps in the interest of such person's health or safety, the inspector may in writing direct that employer or user to take such steps as are specified in the direction within a specified period.

(4) Whenever an inspector is of the opinion that an employer or a user has failed to comply with a provision of a regulation applicable to him, the inspector may in writing direct that employer or user to take within a period specified in the direction such steps as in the inspector's opinion are necessary to comply with the said provision, and are specified in the direction.

(5) A period contemplated in subsection (3) or (4) may at any time be extended by an inspector by notice in writing to the person concerned.

(6) An employer shall forthwith bring the contents of a prohibition, direction or notice under this section to the attention of the health and safety representatives and employees concerned.

Investigations

31. (1) An inspector may investigate the circumstances of any incident which has occurred at or originated from a workplace or in connection with the use of plant or machinery which has resulted, or in the opinion of the inspector could have resulted, in the injury, illness or death of any person in order to determine whether it is necessary to hold a formal investigation in terms of section 32.

(2) After completing the investigation in terms of subsection (1) the inspector shall submit a written report thereon, together with all relevant statements, documents and information gathered by him, to the attorney-general within whose area of jurisdiction such incident occurred and he shall at the same time submit a copy of the report, statements and documents to the chief inspector.

(3) Upon receipt of a report referred to in subsection (2), the attorney-general shall deal therewith in accordance with the provisions of the Inquests Act, 1959 (Act No. 58 of 1959), or the Criminal Procedure Act, 1977 (Act No. 51 of 1977), as the case may be.

(4) An inspector holding an investigation shall not incur any civil liability by virtue of anything contained in the report referred to in subsection (2).

Formal inquiries

32. (1) The chief inspector may, and he shall when so requested by a person producing *prima facie* evidence of an offence, direct an inspector to conduct a formal inquiry into any incident which has occurred at or originated from a workplace or in connection with the use of plant or machinery which has resulted, or in the opinion of the chief inspector could have resulted, in the injury, illness or death of any person.

(2) For the purposes of an inquiry referred to in subsection (1) an inspector may subpoena any person to appear before him on a day and at a place specified in the subpoena and to give evidence or to produce any book, document or thing which in the opinion of the inspector has a bearing on the subject of the inquiry.

(3) Save as is otherwise provided in this section, the law governing criminal trials in magistrates' courts shall *mutatis mutandis* apply to obtaining the attendance of witnesses at an inquiry under this section, the administering of an oath or affirmation to them, their examination, the payment of witness fees to them and the production by them of books, documents and things.

(4) Any inquiry under this section shall be held in public: Provided that the presiding inspector may exclude from the place where the inquiry is held, any person whose presence is, in his opinion, undesirable or not in the public interest.

(5) *(a)* The presiding inspector may designate any person to lead evidence and to examine any witness giving evidence at a formal inquiry.

(b) Any person who has an interest in the issue of the formal inquiry may personally or by representative, advocate or attorney put such questions to a witness at the inquiry to such extent as the presiding inspector may allow.

(c) The following persons shall have an interest as referred to in paragraph *(b)*, namely—

(i) any person who was injured or suffered damage as a result of the incident forming the subject of the inquiry;

(ii) the employer or user, as the case may be, involved in the incident;

(iii) any person in respect of whom in the opinion of the presiding inspector it can reasonably be inferred from the evidence that he could be held responsible for the incident;

(iv) a trade union recognized by the employer concerned or any trade union of which a person referred to in subparagraph (i) or (iii) is a member;

(v) any owner or occupier of any premises where the said incident occurred;

(vi) any other person who, at the discretion of the presiding inspector, can prove such interest.

(6) *(a)* An inquiry may, if it is necessary or expedient, be adjourned at any time by the presiding inspector.

(b) An inquiry adjourned under paragraph *(a)* may at any stage be continued by an inspector other than the inspector before whom the inquiry commenced, and may after an adjournment again be continued by the inspector before whom the inquiry commenced.

(7) An affidavit made by any person in connection with the incident in respect of which the inquiry is held, shall at the discretion of the presiding inspector upon production be admissible as proof of the facts stated therein, and the presiding inspector may, at his discretion, subpoena the person who made such an affidavit to give oral evidence at the inquiry or may submit written interrogatories to him for reply, and such interrogatories and any reply thereto purporting to be a reply from such person shall likewise be admissible in evidence at the inquiry: Provided that the presiding inspector shall afford any person present at the inquiry the opportunity to refute the facts stated in such document, evidence or reply.

(8) *(a)* Whenever in the course of any inquiry it appears to the presiding inspector that the examination of a witness is necessary and that the attendance of such witness cannot be procured without a measure of delay, expense or inconvenience which in the circumstances would be unreasonable, the presiding inspector may dispense with such attendance and may appoint a person to be a commissioner to take the evidence of such witness, whether within or outside the Republic, in regard to such matters or facts as the presiding inspector may indicate.

(b) Any person referred to in subsection (5)*(b)* may in person or through a representative, advocate or attorney appear before such commissioner in order to examine the said witness.

(c) The evidence recorded in terms of this subsection shall be admissible in evidence at the inquiry.

(9) At the conclusion of an inquiry under this section, the presiding inspector shall compile a written report thereon.

(10) The evidence given at any inquiry under this section shall be recorded and a copy thereof shall be submitted by the presiding inspector together with his report to the chief inspector, and in the case of an incident in which or as a result of which any person died or was seriously injured or became ill, the inspector shall submit a copy of the said evidence and the report to the attorney-general within whose area of jurisdiction such incident occurred.

(11) Nothing contained in this section shall be construed as preventing the institution of criminal proceedings against any person or as preventing any person authorized thereto from issuing a warrant for the arrest of or arresting any person, whether or not an inquiry has already commenced.

(12) Upon receipt of a report referred to in subsection (10), the attorney-general shall deal therewith in accordance with the provisions of the Inquests Act, 1959 (Act No. 58 of 1959), or the Criminal Procedure Act, 1977 (Act No. 51 of 1977), as the case may be.

(13) An inspector presiding at any formal inquiry shall not incur any civil liability by virtue of anything contained in the report compiled in terms of subsection (9).

Joint inquiries

33. (1) The provisions of section 32 shall not affect the provisions of any law requiring and regulating inquests or other inquiries in case of death resulting from other than natural causes, and in respect of each incident referred to in that section in which or in consequence of which any person has died there shall be held, in addition to an inquiry under the said section, such inquest or inquiry as is required by any such law, but an inquiry under the said section and an inquest held by a judicial officer under the Inquests Act, 1959 (Act No. 58 of 1959), may be held jointly.

(2) At such a joint inquiry and inquest the judicial officer shall preside and thereupon the provisions of the Inquests Act, 1959, shall apply, but the inspector

and the judicial officer shall each make the report required of them by section 32(9) and that Act, respectively.

Obstruction of investigation or inquiry or presiding inspector or failure to render assistance

34. No person shall, in relation to any investigation or inquiry held in terms of section 31 or 32—

(a) without reasonable justification fail to comply with any lawful direction, subpoena, request or order issued or given by the presiding inspector;

(b) refuse or fail to answer to the best of his knowledge any question lawfully put to him by or with the concurrence of the presiding inspector: Provided that no person shall be obliged to answer any question whereby he may incriminate himself;

(c) in any manner whatsoever advise, encourage, incite, order or persuade any person who has been directed, subpoenaed, requested or ordered to do something by the presiding inspector, not to comply with such direction, subpoena, request or order or in any manner prevent him from doing so;

(d) refuse or fail, when required thereto by the presiding inspector, to furnish him with the means or to render him the necessary assistance for holding such inquiry;

(e) refuse or fail, when required thereto by the presiding inspector, to attend an inquiry; or

(f) intentionally insult the presiding inspector or his assistant or intentionally interrupt the proceedings thereof.

Appeal against decision of inspector

35. (1) Any person aggrieved by any decision taken by an inspector under a provision of this Act may appeal against such decision to the chief inspector, and the chief inspector shall, after he has considered the grounds of the appeal and the inspector's reasons for the decision, 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.

(2) Any person who wishes to appeal in terms of subsection (1), shall within 60 days after the inspector's decision was made known, lodge such an appeal with the chief inspector in writing, setting out the grounds on which it is made.

(3) Any person aggrieved by a decision taken by the chief inspector under subsection (1) or in the exercise of any power under this Act, may appeal against such decision to the industrial court, and the industrial court shall inquire into and consider the matter forming the subject of the appeal and confirm, set aside or vary the decision or substitute for such decision any other decision which the chief inspector in the opinion of the industrial court ought to have taken.

(4) Any person who wishes to appeal in terms of subsection (3), shall within 60 days after the chief inspector's decision was given, lodge such appeal with the registrar of the industrial court in accordance with the rules of the industrial court.

(5) An appeal under subsection (1) or (3) in connection with a prohibition imposed under section 30(1)*(a)* or *(b)* shall not suspend the operation of such prohibition.

Disclosure of information

36. No person shall disclose any information concerning the affairs of any other person obtained by him in carrying out his functions in terms of this Act, except—

(a) to the extent to which it may be necessary for the proper administration of a provision of this Act;

(b) for the purposes of the administration of justice; or

(c) at the request of a health and safety representative or a health and safety committee entitled thereto.

Acts or omissions by employees or mandataries

37. (1) Whenever an employee does or omits to do any act which it would be an offence in terms of this Act for the employer of such employee or a user to do or omit to do, then, unless it is proved that—

(a) in doing or omitting to do that act the employee was acting without the connivance or permission of the employer or any such user;

(b) it was not under any condition or in any circumstance within the scope of the authority of the employee to do or omit to do an act, whether lawful or unlawful, of the character of the act or omission charged; and

(c) all reasonable steps were taken by the employer or any such user to prevent any act or omission of the kind in question,

the employer or any such user himself shall be presumed to have done or omitted to do that act, and shall be liable to be convicted and sentenced in respect thereof; and the fact that he issued instructions forbidding any act or omission of the kind in question shall not, in itself, be accepted as sufficient proof that he took all reasonable steps to prevent the act or omission.

(2) The provisions of subsection (1) shall *mutatis mutandis* apply in the case of a mandatary of any employer or user, except if the parties have agreed in writing to the arrangements and procedures between them to ensure compliance by the mandatary with the provisions of this Act.

(3) Whenever any employee or mandatary of any employer or user does or omits to do an act which it would be an offence in terms of this Act for the employer or any such user to do or omit to do, he shall be liable to be convicted and sentenced in respect thereof as if he were the employer or user.

(4) Whenever any employee or mandatary of the State commits or omits to do an act which would be an offence in terms of this Act, had he been the employee or mandatary of an employer other than the State and had such employer committed or omitted to do that act, he shall be liable to be convicted and sentenced in respect thereof as if he were such an employer.

(5) Any employee or mandatary referred to in subsection (3) may be so convicted and sentenced in addition to the employer or user.

(6) Whenever the employee or mandatary of an employer is convicted of an offence consisting of a contravention of section 23, the court shall, when making an order under section 38(4), make such an order against the employer and not against such employee or mandatary.

Offences, penalties and special orders of court

38. (1) Any person who—

(a) contravenes or fails to comply with a provision of section 7, 8, 9, 10(1), (2) or (3), 12, 13, 14, 15, 16(1) or (2), 17(1), (2) or (5), 18(3), 19(1), 20(2) or (4), 22, 23, 24(1) or (2), 25, 26, 29(3), 30(2) or (6), 34 or 36;

(b) contravenes or fails to comply with a direction or notice under section 17(6), 19(4) or (7), 21(1) or 30(1)*(a)*, *(b)* or *(c)* or (3), (4) or (6);

(c) contravenes or fails to comply with a condition of an exemption under section 40(1);

(d) in any record, application, statement or other document referred to in this Act wilfully furnishes information or makes a statement which is false in any material respect;

(e) hinders or obstructs an inspector in the performance of his functions;

(f) refuses or fails to comply to the best of his ability with any requirement or request made by an inspector in the performance of his functions;

(g) refuses or fails to answer to the best of his ability any question which an inspector in the performance of his functions has put to him;

(h) wilfully furnishes to an inspector information which is false or misleading;

(i) gives himself out as an inspector;

(j) having been subpoenaed under section 32 to appear before an inspector, without sufficient cause (the onus of proof whereof shall rest upon him) fails to attend on the day and at the place specified in the subpoena, or fails to remain in attendance until the inspector has excused him from further attendance;

(k) having been called under section 32, without sufficient cause (the onus of proof whereof shall rest upon him)—

(i) refuses to appear before the inspector;

(ii) refuses to be sworn or to make affirmation as a witness after he has been directed to do so;

(iii) refuses to answer, or fails to answer to the best of his knowledge and belief, any question put to him; or

(iv) refuses to comply with a requirement to produce a book, document or thing specified in the subpoena or which he has with him;

(l) tampers with or discourages, threatens, deceives or in any way unduly influences any person with regard to evidence to be given or with regard to a book, document or thing to be produced by such a person before an inspector under section 32;

(m) prejudices, influences or anticipates the proceedings or findings of an inquiry under section 32 or 33;

(n) tampers with or misuses any safety equipment installed or provided to any person by an employer or user;

(o) fails to use any safety equipment at a workplace or in the course of his employment or in connection with the use of plant or machinery, which was provided to him by an employer or such a user;

(p) wilfully or recklessly does anything at a workplace or in connection with the use of plant or machinery which threatens the health or safety of any person,

shall be guilty of an offence and on conviction be liable to a fine not exceeding R50 000 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

(2) Any employer who does or omits to do an act, thereby causing any person to be injured at a workplace, or, in the case of a person employed by him, to be injured at any place in the course of his employment, or any user who does or omits to do an act in connection with the use of plant or machinery, thereby causing any person to be injured, shall be guilty of an offence if that employer or user, as the case may be, would in respect of that act or omission have been guilty of the offence of culpable homicide had that act or omission caused the death of the said person, irrespective of whether or not the injury could have led to the death of such person, and on conviction be liable to a fine not exceeding R100 000 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

(3) Whenever a person is convicted of an offence consisting of a failure to comply with a provision of this Act or of any direction or notice issued thereunder, the court convicting him may, in addition to any punishment imposed on him in respect of that offence, issue an order requiring him to comply with the said provision within a period determined by the court.

(4) Whenever an employer is convicted of an offence consisting of a contravention of a provision of section 23, the court convicting him shall inquire into and determine the amount which contrary to the said provision was deducted from the remuneration of the employee concerned or recovered from him and shall then act with respect to the said amount *mutatis mutandis* in accordance with sections 28 and 29 of the Basic Conditions of Employment Act, 1983 (Act No. 3 of 1983), as if such amount is an amount underpaid within the meaning of those sections.

Proof of certain facts

39. (1) Whenever in any legal proceedings in terms of this Act it is proved that any person was present on or in any premises, that person shall, unless the contrary is proved, be presumed to be an employee.

(2) In the absence of satisfactory proof of age, the age of any person shall, in any legal proceedings in terms of this Act, be presumed to be that stated by an inspector to be in his opinion the probable age of the person; but any person having an interest who is dissatisfied with that statement of opinion may, at his own expense, require that the person whose age is in question appear before and be examined by a district surgeon, and a statement contained in a certificate by a district surgeon who examined that person as to what in his opinion is the probable age of that person shall, but only for the purpose of the said proceedings, be conclusive proof of the age of that person.

(3) In any legal proceedings in terms of this Act, any statement or entry contained in any book or document kept by any employer or user or by his employee or mandatary, or found on or in any premises occupied or used by that employer or user, and any copy or reproduction of any such statement or entry, shall be admissible in evidence against him as an admission of the facts set forth in that statement or entry, unless it is proved that that statement or entry was not made by that employer or user or by any employee or mandatary of that employer or user within the scope of his authority.

(4) Whenever in any legal proceedings in terms of this Act it is proved that any untrue statement or entry is contained in any record kept by any person, he shall be presumed, until the contrary is proved, wilfully to have falsified that record.

(5) *(a)* Whenever at the trial of any person charged with a contravention of section 22 it is proved that the accused sold or marketed any article, substance, plant, machinery or health and safety equipment contemplated in that section, it shall be presumed, until the contrary is proved, that such article, substance, plant, machinery or health and safety equipment did not at the time of the sale or marketing thereof comply with the said requirements.

(b) At any trial any document purporting to be a certificate or statement by an approved inspection authority and in which it is alleged that the article, substance, plant, machinery or health and safety equipment forming the subject of the charge complies with the requirements prescribed in respect thereof or with any particular standard, shall on its mere production at that trial by or on behalf of the accused be accepted as *prima facie* proof of the facts stated therein.

(6) Notwithstanding the provisions of section 31(3) of the Standards Act, 1993 (Act No. 29 of 1993), whenever in any legal proceedings in terms of this Act the question arises whether any document contains the text of a health and safety standard incorporated in the regulations under section 44, any document purporting to be a statement by a person who in that statement alleges that he is an inspector and that a particular document contains the said text, shall on its mere production at those proceedings by any person be *prima facie* proof of the facts stated therein.

(7) The records to be kept by a health and safety committee in terms of section 20(2), including any document purporting to be certified by an inspector as a true extract from any such records, shall on their mere production at any legal proceedings by any person be admissible as evidence of the fact that a recommendation or report recorded in such records was made by a health and safety committee to an employer or inspector concerned.

Exemptions

40. (1) The Minister may, for such period and on such conditions as may be

determined by him, exempt any employer or user or any category of employers or users, generally or with respect to any particular employee or category of employees or users or with respect to any matter, from any of or all the provisions of this Act or the provisions of a notice or direction issued under this Act.

(2) The period for which exemption may be granted under subsection (1) may commence on a date earlier than the date on which exemption is granted, but not earlier than the date on which application for such exemption was made to the Minister.

(3) An exemption under subsection (1) shall—

(a) in the case of the exemption of a particular employer or user, be granted by issuing to such employer or user a certificate of exemption in which his name and the scope, period and conditions of the exemption are specified;

(b) in the case of the exemption of a category of employers or of a category of such users, be granted by the publication in the *Gazette* of a notice in which that category of employers or users is described and the scope, period and conditions of the exemption are specified:

Provided that the Minister may grant exemption—

(i) to an organization of employers or an organization of users in accordance with the requirements of either paragraph *(a)* or paragraph *(b)*;

(ii) from any health and safety standard incorporated in the regulations under section 44, in any manner which he may deem expedient.

(4) A certificate of exemption contemplated in subsection (3)*(a)* and a notice contemplated in subsection (3)*(b)* may at any time be amended or withdrawn by the Minister.

(5) An exemption under subsection (1) shall lapse—

(a) upon termination of the period for which it was granted;

(b) upon withdrawal of the relevant certificate or notice under subsection (4).

(6) Any exemption granted under section 32 of the Machinery and Occupational Safety Act, 1983 (Act No. 6 of 1983), to the extent to which it grants exemption from the operation of a provision similar to a provision in respect of which exemption may be granted under subsection (1) of this section, which exemption has at the commencement of this Act not lapsed as contemplated in subsection (5) of the said section 32, shall be deemed to have been granted under this section.

This Act not affected by agreements

41. Subject to the provisions of sections 10(4) and 37(2), a provision of this Act or a condition specified in any notice or direction issued thereunder or subject to which exemption was granted to any person under section 40, shall not be affected by any condition of any agreement, whether such agreement was entered into before or after the commencement of this Act or before or after the imposition of any such condition, as the case may be.

Delegation and assignment of functions

42. (1) The Minister may delegate any power conferred upon him by or under this Act, except the power contemplated in section 43, to an officer.

(2) A delegation under subsection (1) shall not prevent the exercise of the relevant power by the Minister himself.

(3) The Minister may authorize any provincial administration or local authority to perform any function referred to in this Act.

(4) An authorization under subsection (3) shall not prevent the performance of the relevant function by the Minister, the chief inspector or an inspector, as the case may be.

Regulations

43. (1) The Minister may make regulations—

(a) as to any matter which in terms of this Act shall or may be prescribed;

(b) which in the opinion of the Minister are necessary or expedient in the interest of the health and safety of persons at work or the health and safety of persons in connection with the use of plant or machinery, or the protection of persons other than persons at work against risks to health and safety arising from or connected with the activities of persons at work, including regulations as to—

(i) the planning, layout, construction, use, alteration, repair, maintenance or demolition of buildings;

(ii) the design, manufacture, construction, installation, operation, use, handling, alteration, repair, maintenance or conveyance of plant, machinery or health and safety equipment;

(iii) the training, safety equipment or facilities to be provided by employers or users, the persons to whom and the circumstances in which they are to be provided and the application thereof;

(iv) the health or safety measures to be taken by employers or users;

(v) the occupational hygiene measures to be taken by employers or users;

(vi) any matter regarding the biological monitoring or medical surveillance of employees;

(vii) the production, processing, use, handling, storage or transport of, and the exposure of employees and other persons to, hazardous articles, substances or organisms or potentially hazardous articles, substances or organisms, including specific limits, thresholds or indices of or for such exposure;

(viii) the performance of work in hazardous or potentially hazardous conditions or circumstances;

(ix) the emergency equipment and medicine to be held available by employers and users, the places where such equipment and medicine are to be held, the requirements with which such equipment and medicine shall comply, the inspection of such equipment and medicine, the application of first-aid and the qualifications which persons applying first-aid shall possess;

(x) the compilation by employers of health and safety directives in respect of a workplace, the matters to be dealt with in such directives and the manner in which such directives shall be brought to the attention of employees and other persons at such a workplace;

(xi) the registration of persons performing hazardous work or using or handling plant or machinery, the qualifications which such persons shall possess and the fees payable to the State in respect of such registration;

(xii) the accreditation, functions, duties and activities of approved inspection authorities;

(xiii) the consultations between an employer and employees on matters of health and safety;

(xiv) subject to section 36, the provision of information by an employer or user to employees or the public on any matter to which this Act relates;

(xv) the conditions under which any employer is prohibited from permitting any person to partake of food or to smoke on or in any premises where a specified activity is carried out;

(xvi) the conditions under which the manufacture of explosives and activities incidental thereto may take place;

(c) as to the preventive and protective measures for major hazard installations with a view to the protection of employees and the public against the risk of major incidents;

(d) as to the registration of premises where employees perform any work or where plant or machinery is used and the fee payable to the State in respect of such registration;

(e) whereby provision is made for the continuation of any registration under this Act;

(f) as to the registration of plant and machinery and the fee payable to the State in respect of such registration;

(g) as to the establishment of one or more committees for the administration of a provision of the regulations, the constitution of such committees, the functions of such committees, the procedure to be followed at meetings of such committees, the allowances which may be paid to members of such committees from money appropriated by Parliament for such purpose and the person by whom such allowances shall be fixed;

(h) prescribing the records to be kept and the returns to be rendered by employers and users and the person or persons to whom such returns shall be rendered;

(i) as to the designation and functions of health and safety representatives and health and safety committees and the training of health and safety representatives;

(j) as to the activities of self-employed persons; and

(k) as to any other matter the regulation of which is in the opinion of the Minister necessary or desirable for the effective carrying out of the provisions of this Act.

(2) No regulation shall be made by the Minister except after consultation with the Council, and no regulation relating to State income or expenditure or to any health matter shall be made by the Minister except after consultation also with the Minister of State Expenditure and the Minister for National Health and Welfare, respectively.

(3) In making regulations the Minister may apply any method of differentiation that he may deem advisable: Provided that no differentiation on the basis of race or colour shall be made.

(4) A regulation may in respect of any contravention thereof or failure to comply therewith prescribe a penalty of a fine, or imprisonment for a period not exceeding 12 months, and, in the case of a continuous offence, not exceeding an additional fine of R200 or additional imprisonment of one day for each day on which the offence continues: Provided that the period of such additional imprisonment shall not exceed 90 days.

(5) A regulation made under section 35 of the Machinery and Occupational Safety Act, 1983 (Act No. 6 of 1983), which was in force immediately prior to the commencement of this Act and which could have been made under this section, shall be deemed to have been made under this section.

Incorporation of health and safety standards in regulations

44. (1) The Minister may by notice in the *Gazette* incorporate in the regulations any health and safety standard or part thereof, without stating the text thereof, by mere reference to the number, title and year of issue of that health and safety standard or to any other particulars by which that health and safety standard is sufficiently identified.

(2) No health and safety standard shall be incorporated in the regulations except after consultation with the Council.

(3) Any health and safety standard incorporated in the regulations under subsection (1) shall for the purposes of this Act, in so far as it is not repugnant to any regulation made under section 43, be deemed to be a regulation, but not before the expiry of two months from the date of incorporation thereof.

(4) Whenever any health and safety standard is at any time after the incorporation thereof as aforesaid, amended or substituted by the competent authority, the notice incorporating that health and safety standard shall, unless

otherwise stated therein, be deemed to refer to that health and safety standard as so amended or substituted, as the case may be.

(5) The chief inspector shall keep a register of particulars of every publication in which a health and safety standard incorporated in the regulations under subsection (1), and every amendment or substitution of any such health and safety standard, was published, and also of the place in the Republic where such publication is obtainable or otherwise available for inspection, and he shall make that register or an extract therefrom available free of charge to persons having an interest, for inspection.

(6) The provisions of section 31 of the Standards Act, 1993 (Act No. 29 of 1993), shall not apply to any incorporation of a health and safety standard or of any amendment or substitution of a health and safety standard under this section.

(7) Any safety standard which was immediately prior to the commencement of this Act incorporated under section 36 of the Machinery and Occupational Safety Act, 1983 (Act No. 6 of 1983), in the regulations made under that Act, shall be deemed to be a health and safety standard incorporated under this section.

Serving of notices

45. Unless another method is prescribed, a notice under this Act shall be served—

(a) by delivering a copy thereof to the person upon whom it is to be served;

(b) by leaving such a copy at the usual or last known place of residence or business of such a person; or

(c) by sending such a copy by registered post to the usual or last known place of residence or business of such a person.

Jurisdiction of magistrates' courts

46. Notwithstanding anything to the contrary contained in any law—

(a) a magistrate's court shall have jurisdiction to impose any penalty or to make any order provided for in this Act;

(b) no magistrate's court shall be competent to pronounce upon the validity of any regulation made under this Act.

State bound

47. This Act shall bind the State.

Conflict of provisions

48. In so far as any provision of the Explosives Act, 1956 (Act No. 26 of 1956), is repugnant to a provision of this Act the provisions of this Act shall apply.

Repeal of laws

49. The Machinery and Occupational Safety Act, 1983 (Act No. 6 of 1983), the Machinery and Occupational Safety Amendment Act, 1989 (Act No. 40 of 1989), and the Machinery and Occupational Safety Amendment Act, 1991 (Act No. 97 of 1991), are hereby repealed.

Short title and commencement

50. (1) This Act shall be called the Occupational Health and Safety Act, 1993, and shall come into operation on a date fixed by the State President by proclamation in the *Gazette*.

(2) Different dates may be so fixed in respect of different provisions of this Act.

Government Gazette

REPUBLIC OF SOUTH AFRICA

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THE PRESIDENCY

No. 88 28 January 2002

It is hereby notified that the President has assented to the following Act, which is hereby published for general information:–

No. 63 of 2001: Unemployment Insurance Act, 2001



AIDS HELPLINE: 0800-123-22 Prevention is the cure

(English text signed by the President.)
(Assented to 13 January 2002.)

ACT

To establish the Unemployment Insurance Fund; to provide for the payment from the Fund of unemployment benefits to certain employees, and for the payment of illness, maternity, adoption and dependant's benefits related to the unemployment of such employees; to provide for the establishment of the Unemployment Insurance Board, the functions of the Board and the designation of the Unemployment Insurance Commissioner; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

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CHAPTER 1

INTRODUCTORY PROVISIONS

Definitions

1. (1) In this Act unless the context indicates otherwise—

"actuary" means a person appointed in terms of section 9(1);

"agent" means any person appointed under section 58(9);

"benefits" means benefits contemplated in section 12;

"Board" means the Unemployment Insurance Board established in terms of section 47;

"CCMA" means the Commission for Conciliation, Mediation and Arbitration established by section 112 of the Labour Relations Act, 1995 (Act No. 66 of 1995);

"claims officer" means any claims officer appointed in terms of section 46;

"child" means a person as contemplated in section 30(2) who is under the age of 21 years and includes any person under the age of 25 who is a learner and who is wholly or mainly dependent on the deceased;

"Commissioner" means the Unemployment Insurance Commissioner designated as such under section 43;

"contribution" means the amount payable by the employer or a contributor in terms of the Unemployment Insurance Contributions Act;

"contributor" means a natural person—

(a) who is or was employed;

(b) to whom this Act, in terms of section 3, applies; and

(c) who can satisfy the Commissioner that he or she has made contributions for purposes of this Act;

"Director-General" means the Director-General of the Department of Labour and any officer in the Department of Labour to whom the Director-General has delegated any function in terms of section 58(3);

"domestic worker" means an employee who performs domestic work in the home of his or her employer, and includes a—

(a) gardener;

(b) person employed by a household as a driver of a motor vehicle; and

(c) person who takes care of any person in that home,

but does not include a farm worker.

"employee" means any natural person who receives remuneration or to whom remuneration accrues in respect of services rendered or to be rendered by that person, but excludes any independent contractor;

"employee's contribution" means the amount prescribed in terms of the Unemployment Insurance Contributions Act;

"employer" means any person, including a person acting in a fiduciary capacity, who pays or is liable to pay to any person any amount by way of remuneration, and any person responsible for the payment of any amount by way of remuneration to any person under the provisions of any law or out of public funds, excluding any person who is not acting as a principal;

"employment office" means any office of the Department of Labour or any agency designated for this purpose by the Director-General in terms of section 58(9);

"financial year" means the period between the first day of April in any year and the thirty-first day of March in the next year, both dates included;

"Fund" means the Unemployment Insurance Fund established by section 4;

"labour inspector" means—

(a) an inspector appointed under section 63 of the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997); or

(b) any person designated by the Minister under that section to perform any function of a labour inspector;

"Minister" means the Minister of Labour;

"month" means the period extending from a day in one month to a day preceding the day corresponding numerically to that day in the following month, both days included[1];

1. For example 10 March to 9 April.

"NEDLAC" means the National Economic, Development and Labour Council established by section 2 of the National Economic, Development and Labour Council Act, 1994 (Act No. 35 of 1994);
"officer" means an officer as defined in section 1 of the Public Service Act, 1994 (Proclamation No. 103 of 1994);
"prescribed" means prescribed by regulation;
"public service" means the public service as contemplated in section 197 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996);
"regulation" means a regulation made under this Act;
"remuneration" means "remuneration" as defined in section 1 of the Unemployment Insurance Contributions Act;
"seasonal worker" means any person who is employed by an employer for an aggregate period of at least three months over a 12 month period with the same employer and whose work is interrupted by reason of a seasonal variation in the availability of work;
"this Act" includes any regulation made in terms of this Act;
"Unemployment Insurance Contributions Act" means an Act passed by Parliament after this Act, providing for unemployment contributions;
"week" means any period of seven consecutive days.

Purpose of this Act

2. The purpose of this Act is to establish an unemployment insurance fund to which employers and employees contribute and from which employees who become unemployed or their beneficiaries, as the case may be, are entitled to benefits and in so doing to alleviate the harmful economic and social effects of unemployment.

Application of this Act

3. (1) This Act applies to all employers and employees, other than—

(a) employees employed for less than 24 hours a month with a particular employer, and their employers;

(b) employees who receive remuneration under a learnership agreement registered in terms of the Skills Development Act, 1998 (Act No. 97 of 1998), and their employers;

(c) employers and employees in the national and provincial spheres of government;

(d) persons who enter the Republic for the purpose of carrying out a contract of service, apprenticeship or learnership within the Republic if upon the termination thereof the employer is required by law or by the contract of service, apprenticeship or learnership, as the case may be, or by any other agreement or undertaking, to repatriate that person, or that person is so required to leave the Republic, and their employers.

(2) Despite subsection (1), this Act will only apply to domestic and seasonal workers and their employers 12 months after this Act takes effect.

(3) *(a)* The Minister must, as soon as possible after this Act takes effect, designate or appoint a body which must seek to investigate and make recommendations regarding the administration of this Act to domestic and seasonal workers.

(b) The investigation must be concluded within 12 months from the date that this section takes effect.

(c) The Minister must consult the Board on the outcome of the investigation.

CHAPTER 2

UNEMPLOYMENT INSURANCE FUND

Establishment of Unemployment Insurance Fund

4. (1) The Unemployment Insurance Fund is hereby established.

(2) The Fund consists of—

(a) the contributions made by employers and employees and collected by the Commissioner of the South African Revenue Service in terms of the Unemployment Insurance Contributions Act;

(b) the contributions made by employers and employees and collected by the Commissioner in terms of the Unemployment Insurance Contributions Act;

(c) money appropriated by Parliament;

(d) any penalties and fines imposed in terms of this Act other than by a court of law;

(e) any interest or return on investment made by the Fund;

(f) any money paid erroneously to the Fund which, in the opinion of the Director-General, cannot be refunded;

(g) any bequest or donation received by the Fund;

(h) any movable or immovable property purchased or otherwise acquired by the Fund; and

(i) any other money to which the Fund may become entitled.

Application of Fund

5. The Fund must be used for the—

(a) payment of benefits in terms of this Act;

(b) reimbursement of excess contributions to employers;

(c) payment of—

(i) remuneration and allowances to members of the Unemployment Insurance Board and its committees; and

(ii) any other expenditure reasonably incurred and relating to the application of this Act.

Raising of funds, loans and obtaining bank overdraft facilities

6. The raising of funds by way of loans and bank overdraft facilities in respect of the Fund must be done in terms of the Public Finance Management Act, 1999 (Act No. 1 of 1999).

Investment of money of Fund

7. (1) The money of the Fund other than money required to meet the current expenditure of the Fund may be deposited on behalf of the Fund by the Director-General with the Public Investment Commissioners to be invested in terms of the Public Investment Commissioners Act, 1984 (Act No. 45 of 1984).

(2) Any profit on investments accrues to the Fund and any loss must be borne by the Fund.

Donations and bequests to Fund

8. (1) Any person, body, corporation, organisation or financial or other institution may make a donation or bequest to the Fund.

(2) The Director-General may accept donations or bequests for and on behalf of the Fund.

Appointment of and annual review by actuary

9. (1) The Director-General must appoint an actuary who is a member of the Actuarial Society of South Africa or who is supervised by a member of that Society to perform the functions assigned to the actuary in this Act.

(2) Within two months after the end of each financial year, the actuary must review the financial soundness of the Fund for that financial year, and provide an actuarial valuation report to the Director-General.

(3) The actuarial valuation report must contain—

(a) a statement—

(i) reflecting the actuarial value of the assets and liabilities of the Fund;

(ii) on the financial soundness of the Fund; and

(iii) on whether or not there was a surplus or deficit in the Fund in the financial year in question;

(b) an indication of—

(i) the basis and method used to value the assets and liabilities of the Fund;

(ii) any changes to the basis and method used to value the Fund as compared with the actuarial valuation report of the previous year; and

(iii) any special consideration or restriction that the Director-General brought to the attention of or made applicable to the actuary in performing the functions in terms of this section;

(c) an explanatory note on any matter relevant to obtaining a true and meaningful statement of the financial position of the Fund;

(d) recommendations for the maintenance or improvement of the financial soundness of the Fund.

Surplus and deficit in Fund

10. (1) Subject to subsection (2), the Director-General must report and make recommendations to the Minister if the difference between income and expenditure of the Fund is—

(a) greater than is required to meet payments for benefits; or

(b) insufficient or not increasing at a sufficient rate to meet payments for benefits that may reasonably be anticipated.

(2) The Director-General may only submit the report contemplated in subsection (1) after having consulted with the Board and the actuary on the contents of the report.

(3) In respect of a report contemplated in subsection (1)*(a)*, the Minister, after consultation with the Board, may utilise the surplus to give effect to the purposes of this Act, including—

(a) improving the administrative efficiency and capacity of the Board and Fund; and

(b) establishing a reserve fund.

(4) In respect of a report contemplated in subsection (1)*(b)*, the Minister may request the Minister of Finance to adjust the national budget in the manner contemplated in sections 16 and 30 of the Public Finance Management Act, 1999 (Act No. 1 of 1999), in order to cover any deficit in the Fund.

Accounting, auditing and financial reporting

11. (1) Despite section 49(2) to (5) of the Public Finance Management Act, 1999 (Act No. 1 of 1999), the Director-General is the accounting authority for the Fund.

(2) *(a)* At the beginning of each financial year, the Commissioner must file a business plan with the National Treasury.

(b) The Minister must compile the business plan with the concurrence of the Director-General and the Commissioner, and they are to be assisted by the actuary and the Board.

(3) In addition to the matters which must be included in the annual report and financial statements referred to in section 55 of the Public Finance Management Act, 1999 (Act No. 1 of 1999), the annual report must set out and contain a statement showing—

(a) the total number of persons who received benefits in terms of this Act;

(b) the total number of employers who paid contributions in terms of the Unemployment Insurance Contributions Act;

(c) the total number of contributors who paid contributions in terms of the Unemployment Insurance Contributions Act;

(d) the total number of persons deemed to be contributors under section 45;

(e) the total monetary value of benefits provided in respect of each category of benefit;

(f) a statement setting out the loans, overdrafts, advances and financial commitments of the Fund;

(g) the particulars of all donations and bequests received by the Fund;

(h) the actuarial valuation report contemplated in section 9;

(i) particulars of the use of all immovable and movable property acquired by the Fund for purposes contemplated in section 58(6) and (7);

(j) any amount written off in terms of section 58(8); and

(k) any other matter determined by the Minister.

CHAPTER 3

CLAIMING BENEFITS

Part A: Right to benefits

Right to benefits

12. (1) Subject to the provisions of this Act, a contributor or a dependant, as the case may be, is entitled to the following benefits:

(a) Unemployment benefits contemplated in Part B of this Chapter;

(b) illness benefits contemplated in Part C of this Chapter;

(c) maternity benefits contemplated in Part D of this Chapter;

(d) adoption benefits contemplated in Part E of this Chapter; and

(e) dependant's benefits contemplated in Part F of this Chapter.

(2) An example of the scale of benefits to which a contributor is entitled is contained in Schedule 3, as calculated from Schedule 2.

(3) *(a)* The Minister may, with the concurrence of the Minister of Finance, by notice in the *Gazette* and subject to subsection (4), amend the scale of benefits contained in Schedule 3 in accordance with a maximum monthly rate of remuneration of a skilled manual labourer as determined by the Social Security (Minimum Standards) Convention, 1953 (Convention No. 102), of the International Labour Organisation.

(b) The scale of benefits contemplated in paragraph *(a)* may vary between a maximum rate of 60% of remuneration for lower income contributors and a lower rate of remuneration for higher income contributors as will be determined by thresholds as set out in Schedule 3.

(4) When acting in accordance with subsection (3), the Minister must—

(a) consult with the Board and must have regard to budgeted—

(i) contribution and investment income from the Fund;

(ii) payment of benefits;

(iii) provision to meet expenses related to administering this Act; and

(iv) provision for contingency reserves; and

(b) comply with the procedure set out in section 55, with the changes required by the context.

Calculation of benefits

13. (1) Subject to subsection (2), for purposes of calculating the benefits payable to a contributor, the daily rate of remuneration of a contributor, subject to the prescribed maximum, must be determined—

(a) if paid monthly, by multiplying the monthly remuneration by 12 and dividing it by 365;

(b) if paid weekly, by multiplying the weekly remuneration by 52 and dividing it by 365.

(2) If the contributor's remuneration fluctuates significantly from period to period, the calculation must be based on the average remuneration of that contributor over the previous six months.

(3) Subject to subsection (5), a contributor's entitlement to benefits in terms of this Chapter accrues at a rate of one day's benefit for every completed six days of employment as a contributor subject to a maximum accrual of 238 days benefit in the four year period immediately preceding the date of application for benefits in terms of this Chapter, less any days of benefit received by the contributor during this period.

(4) For purposes of determining completed days of employment as contemplated in subsection (3), the period includes—

(a) the day that a contributor commenced employment and runs up to and including the day on which employment was terminated; and

(b) any period in respect of which—

(i) an employee was paid remuneration in lieu of notice;

(ii) a merchant seaman received remuneration in terms of section 140 of the Merchant Shipping Act, 1951 (Act No. 57 of 1951).

(5) The days of benefits that a contributor is entitled to in terms of subsection (3) may not be reduced by the payment of maternity benefits in terms of Part D of this Chapter.[2]

2. Method of calculating days of benefits that a contributor is entitled to:

Step 1 - Determine total number of days that an employee was employed as a contributor in the four-year period immediately preceding the date of application for benefits in terms of this Chapter.

Step 2 - Divide total number of days by 52 multiplied by seven and disregard any fraction of the resultant figure.

Step 3 - Subtract from this amount any days benefits (excluding maternity benefits) received in the four-year period immediately preceding the date of application for benefits in terms of this Chapter.

Step 4 - The resultant figure determines the days of benefits that a contributor is entitled to.

Contributor not entitled to benefits under certain circumstances

14. A contributor is not entitled to benefits for any period that the contributor—

(a) was in receipt of—

(i) a monthly pension from the State;

(ii) any benefit from the Compensation Fund established under the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993), as a result of an occupational injury or disease, which injury or disease caused the total or temporary unemployment of that contributor;

(iii) benefits from any unemployment fund or scheme established by a council under section 28*(g)* or 43(1)*(c)* of the Labour Relations Act, 1995 (Act No. 66 of 1995);

(b) fails to comply with any provision of this Act or any other law relating to unemployment; or

(c) is suspended from receiving benefits in terms of section 36(1).

Part B: Unemployment benefits

Calculation of period of unemployment under this Part

15. (1) For purposes of this Part, any period of unemployment must be calculated from the date of unemployment.

(2) The date contemplated in subsection (1) may be moved to a date prior to the application if the claims officer is satisfied that any delay in making the application was caused by circumstances beyond the control of the contributor.

Right to unemployment benefits

16. (1) Subject to section 14, an unemployed contributor is entitled to unemployment benefits contemplated in this Part for any period of unemployment lasting more than 14 days, if—

(a) the reason for the unemployment is—

(i) the termination of the contributor's contract of employment by the employer of that contributor or the ending of a fixed term contract,

(ii) the dismissal of the contributor, as defined by section 186 of the Labour Relations Act, 1995 (Act No. 66 of 1995), or

(iii) insolvency in terms of the provisions of the Insolvency Act, 1936 (Act No. 24 of 1936);

(b) application is made in accordance with the prescribed requirements and the provisions of this Part;

(c) the contributor is registered as a work-seeker with a labour centre established under the Skills Development Act, 1998 (Act No. 97 of 1998); and

(d) subject to subsection (3), the contributor is capable of and available for work.

(2) An unemployed contributor is not entitled to the benefits referred to in subsection (1) if—

(a) the contributor fails to report at the times and dates stipulated by the claims officer in terms of section 17(4)*(d)*; or

(b) the contributor refuses without just reason to undergo training and vocational counselling for employment under any scheme approved by the Director-General in terms of this Act or any other law.

(3) Despite subsection (1)*(d)* and subject to section 20(1)*(a)*, a contributor who becomes ill while in receipt of unemployment benefits, remains entitled to unemploy-

ment benefits if the claims officer is satisfied that the illness is not likely to prejudice the contributor's chance of securing employment.

Application for unemployment benefits

17. (1) Application for unemployment benefits must be made in the prescribed form at an employment office.

(2) The application must be made within six months of the termination of the contract of employment, but the Commissioner may accept an application made after the six-month time limit has expired on just cause shown.

(3) The claims officer must investigate the application and, if necessary, request further information regarding the applicant's continued unemployment.

(4) If the application complies with the provisions of this Chapter, the claims officer must—

(a) approve the application;

(b) determine—

(i) the amount of benefits for purposes of section 13(3);

(ii) the benefits the applicant is entitled to in terms of section 13(4);

(c) authorise the payment of the benefits; and

(d) stipulate when the applicant must report to the employment office for purposes of confirming that the contributor—

(i) has been unemployed for the period in respect of which the unemployment benefit has been claimed; and

(ii) is capable of and available for work.

(5) If the application does not comply with the provisions of this Chapter, the claims officer must advise the applicant in writing that the application is defective and of the reasons why it is defective.

Payment of unemployment benefits

18. (1) The Director-General must pay the unemployment benefits to the contributor at the employment office at which the application was made or any other employment office determined by the applicant at the time of application.

(2) If the contributor receives unemployment benefits and without just reason refuses to accept appropriate, available work, or to undergo appropriate training or vocational counselling, the claims officer may impose a penalty of up to a maximum of thirteen weeks during which no benefits may be paid to the contributor.

Part C: Illness benefits

Determination of period of illness under this Part

19. (1) For purposes of this Part, the period of illness must be determined from the date the contributor ceases to work as a result of the illness.

(2) Subsection (1) applies with the necessary changes in respect of the determination of the periods of maternity and adoption benefits contemplated in sections 24(2) and 27(3), respectively.

Right to illness benefits

20. (1) Subject to section 14, a contributor is entitled to the illness benefits contemplated in this Part for any period of illness if—

(a) the contributor is unable to perform work on account of illness;
(b) the contributor fulfils any prescribed requirements in respect of any specified illness; and
(c) application is made for illness benefits in accordance with the prescribed requirements and the provisions of this Part.

(2) A contributor is not entitled to illness benefits—
(a) if the period of illness is less than 14 days; and
(b) for any period during which the contributor—
(i) is entitled to unemployment benefits in terms of Part B of this Chapter or adoption benefits in terms of Part E of this Chapter; or
(ii) without just reason, refuses or fails to undergo medical treatment or to carry out the instructions of a medical practitioner, chiropractor or homeopath.

Calculation of illness benefits

21. (1) Subject to subsection (2), the contributor must be paid the difference between any sick leave paid to that contributor in terms of any other law, collective agreement or contract of employment for the period contemplated in section 19, and the maximum benefit payable in terms of section 12(2).

(2) When taking into account any sick leave paid to the contributor in terms of any other law, or any collective agreement or contract of employment, the illness benefit may not be more than the remuneration the contributor would have received if the contributor had not been ill.

Application for illness benefits

22. (1) *(a)* Application for illness benefits must be made personally in the prescribed form at an employment office.

(b) If the contributor cannot lodge the application personally, the claims officer may authorise any other person to lodge the application on behalf of the applicant.

(2) The application for illness benefits must be made within six months of the commencement of the period of illness, but the Commissioner may accept an application made after the six-month time limit has expired on good cause shown.

(3) The claims officer must investigate the application and, if necessary, request any further information regarding the period that the applicant was not working or received reduced remuneration as a result of the illness.

(4) If the application complies with the provisions of this Chapter, the claims officer must—
(a) approve the application;
(b) determine—
(i) the amount of benefits for purposes of section 13(3);
(ii) the benefits the applicant is entitled to in terms of section 13(4);
(c) authorise the payment of the benefits; and
(d) stipulate how the benefits are to be paid.

(5) If the application does not comply with the provisions of this Chapter, the claims officer must advise the applicant in writing that the application is defective and of the reasons why it is defective.

Payment of illness benefits

23. The Director-General must pay the illness benefits—

(a) at the employment office at which the application was made or any other employment office determined by the applicant at the time of application; and

(b) to the contributor or any other person authorised by the contributor who is accepted by the claims officer to be so authorised.

Part D: Maternity benefits

Right to maternity benefits

24. (1) Subject to section 14, a contributor who is pregnant is entitled to the maternity benefits contemplated in this Part for any period of pregnancy or delivery and the period thereafter, if application is made in accordance with prescribed requirements and the provisions of this Part.

(2) Subject to subsection (3), the contributor must be paid the difference between any maternity benefit paid to that contributor in terms of any other law or any collective agreement or contract of employment for the period contemplated in section 19(2), and the maximum benefit payable in terms of section 12(2).

(3) When taking into account any maternity leave paid to the contributor in terms of any other law or any collective agreement or contract of employment, the maternity benefit may not be more than the remuneration the contributor would have received if the contributor had not been on maternity leave.

(4) For purposes of this section the maximum period of maternity leave is 17,32 weeks.

(5) A contributor who has a miscarriage during the third trimester or bears a still-born child is entitled to a maximum maternity benefit of six weeks after the miscarriage or stillbirth.

Application for maternity benefits

25. (1) An application for maternity benefits must be made in the prescribed form at an employment office at least eight weeks before childbirth.

(2) The Commissioner may on good cause shown—

(a) accept an application after the period of eight weeks referred to in subsection (1);

(b) extend the period of submission of the application up to a period of six months after the date of childbirth.

(3) The claims officer must investigate the application and, if necessary, request further information.

(4) If the application complies with the provisions of this Chapter, the claims officer must—

(a) approve the application;

(b) determine—

(i) the amount of the benefits for purposes of section 13(3);

(ii) the benefits the applicant is entitled to in terms of section 13(4); and

(c) stipulate how the benefits are to be paid.

(5) If the application does not comply with the provisions of this Chapter, the claims officer must advise the applicant in writing that the application is defective and of the reasons why it is defective.

Payment of maternity benefits

26. The Director-General must pay the maternity benefits to the contributor at the employment office at which the application was made or any other employment office determined by the applicant at the time of application.

Part E: Adoption benefits

Right to adoption benefits

27. (1) Subject to section 14, only one contributor of the adopting parties is entitled to the adoption benefits contemplated in this Part in respect of each adopted child and only if—

(a) the child has been adopted in terms of the Child Care Act, 1983 (Act No. 74 of 1983);

(b) the period that the contributor was not working was spent caring for the child;

(c) the adopted child is below the age of two; and

(d) the application is made in accordance with the prescribed requirements and the provisions of this Part.

(2) The entitlement contemplated in subsection (1) commences on the date that a competent court grants an order for adoption in terms of the Child Care Act, 1983 (Act No. 74 of 1983).

(3) Subject to subsection (4), the contributor must be paid the difference, if any, between any adoption benefit paid to that contributor in terms of any other law or any collective agreement or contract of employment for the period contemplated in section 19(2) and the maximum benefit payable in terms of section 12(2).

(4) When taking into account any leave paid to the contributor in terms of any other law or any collective agreement or contract of employment, the benefit may not be more than the remuneration the employer would have paid the contributor if the contributor had been at work.

Application for adoption benefits

28. (1) An application for adoption benefits must be made in the prescribed form at an employment office.

(2) The application must be made within six months after the date of the order for adoption, but the Commissioner may accept an application after the six-month period on good cause shown.

(3) The claims officer must investigate the application and, if necessary, request further information regarding the period the applicant was not working in order to care for the adopted child.

(4) If the application complies with the provisions of this Chapter, the claims officer must—

(a) approve the application;

(b) determine—

(i) the amount of the benefits for purposes of section 13(3);

(ii) the benefits the applicant is entitled to in terms of section 13(4);

(c) authorise the payment of the benefits; and

(d) stipulate how the benefits are to be paid.

(5) If the application does not comply with the provisions of this Chapter, the claims officer must advise the applicant in writing that the application is defective and of the reasons why it is defective.

Payment of adoption benefits

29. The Director-General must pay the adoption benefits to the contributor at the employment office at which the application was made or any other employment office determined by the applicant at the time of application.

Part F: Dependant's benefits

Right to dependant's benefits

30. (1) The surviving spouse or a life partner of a deceased contributor is entitled to the dependant's benefits contemplated in this Part, if application is made—

(a) in accordance with prescribed requirements and the provisions of this Part; and

(b) within six months of the death of the contributor except that, on just cause shown, the Commissioner may accept an application after the six-month period.

(2) Any dependent child of a deceased contributor is entitled to the dependant's benefits contemplated in this Part if application is made in accordance with the provisions of this Part and—

(a) there is no surviving spouse or life partner; or

(b) the surviving spouse or life partner has not made application for the benefits within six months of the contributor's death.

(3) The benefit payable to the dependant is the unemployment benefit referred to in Part B of this Chapter that would have been payable to the deceased contributor if the contributor had been alive.

Application for dependant's benefits

31. (1) An application for dependant's benefits must be made in the prescribed form at an employment office.

(2) The application must be made within the period referred to in section 30(1)*(b)* or within 14 days after the period referred to in section 30(2)*(b)*, as the case may be.

(3) The claims officer must investigate the application and, if necessary, request further information relevant to processing the application.

(4) If the application complies with the provisions of this Chapter, the claims officer must—

(a) approve the application;

(b) determine—

(i) the amount of the benefits for purposes of section 13(3);

(ii) the benefits the applicant is entitled to in terms of section 13(4); and

(iii) to whom it must be paid;

(c) authorise the payment of the benefits; and

(d) stipulate how the benefits are to be paid.

(5) If the application does not comply with the provisions of this Chapter, the claims officer must advise the applicant in writing that the application is defective and of the reasons why it is defective.

Payment of dependant's benefits

32. The Director-General must pay the dependant's benefits to the dependant at the employment office at which the application was made or any other employment office determined by the applicant at the time of application.

Part G: General provisions relating to claiming benefits

Benefits not to be assigned, attached or set off

33. (1) Benefits may not be—

(a) assigned;

(b) attached by the order of any court, except by any court order relating to maintenance of the dependants, including a former spouse, of that contributor; or

(c) set off against any debt;

(2) For purposes of subsection (1), "debt" does not include a debt arising from benefits paid in error under the provisions of this Act.

Benefits not subject to taxation

34. Benefits payable to contributors and dependants in terms of this Act are not subject to taxation in terms of the Income Tax Act, 1962 (Act No. 58 of 1962).

Recovery of benefits paid in error

35. (1) Contributors or dependants who have been paid benefits that they are not entitled to in terms of this Act or paid benefits in excess of their entitlement must repay such benefits to the Fund.

(2) If the Commissioner determines that a person contemplated in subsection (1) has been paid benefits in error or in excess of the person's entitlement, the Commissioner must, within eighteen months of the date of the determination, make a written demand for repayment from that person.

(3) A written demand contemplated in subsection (2) must include—

(a) a statement of the amount paid in error;

(b) an explanation as to why that person was ineligible to receive the funds; and

(c) evidence that the person to whom the demand is addressed actually received the funds.

(4) The persons contemplated in subsection (1) must refund the amount within 90 days of the written demand.

Suspension of contributor's right to benefits

36. (1) After giving a contributor or a dependant an opportunity to make written representations, the Commissioner may, on written notice with reasons provided, suspend a contributor or dependant for a period of up to five years from receiving benefits in terms of this Act if the contributor or dependant—

(a) made a false statement in an application for benefits;

(b) submitted a fraudulent application for benefits;

(c) failed to inform a claims officer of the resumption of work during the period in respect of which benefits were being paid; or

(d) failed to comply with a written demand issued in terms of section 35(2).

(2) The period of suspension may be imposed irrespective of whether or not actual payment was made to the contributor or dependant.

(3) The decision to suspend a contributor from receiving payments does not—

(a) absolve an employer from that employer's duty to contribute to the Fund; or

(b) limit an employer's right to be reimbursed for any contribution paid on behalf of the suspended contributor.

Disputes relating to payment or non-payment of benefits

37. (1) A person who is entitled to benefits in terms of this Act may appeal to the appeals committee of the Board if that person is aggrieved by a decision of—

(a) the Commissioner to suspend such person's right to benefits; or

(b) a claims officer relating to the payment or non-payment of benefits.

(2) A person who is dissatisfied with the decision of the appeals committee may refer the matter for arbitration to the CCMA.

CHAPTER 4

ENFORCEMENT

Securing undertakings

38. (1) A labour inspector who has reasonable grounds to believe that an employer has not complied with any provision of this Act or has committed an offence in terms of this Act, must endeavour to secure a written undertaking by the employer to comply with the relevant provision.

(2) In endeavouring to secure the undertaking, the labour inspector—

(a) may seek to obtain an agreement from the employer as to any step that the employer must take in terms of this Act;

(b) may seek to obtain an agreement from the employer as to any amount owed to the Fund in terms of the Unemployment Insurance Contributions Act; and

(c) must provide a receipt for any payment received.

Compliance order

39. (1) A labour inspector may issue a compliance order if the labour inspector has reasonable grounds to believe that an employer has not complied with—

(a) an undertaking obtained in terms of section 38;

(b) an order given in terms of subsection (2); or

(c) any provision of this Act.

(2) A compliance order must set out—

(a) the name of the employer, and the location of every workplace to which the compliance order applies;

(b) any provision of this Act that the employer has not complied with and details of the conduct constituting non-compliance;

(c) any amount that the employer is required to pay to the Fund in terms of the Unemployment Insurance Contributions Act;

(d) any written undertaking by the employer in terms of section 38 and any failure by the employer to comply with a written undertaking;

(e) any steps that the employer is required to take including, if necessary, the cessation of the contravention in question and the period within which those steps must be taken; and

(f) the maximum fine that may be imposed upon the employer for a failure to comply with a provision of this Act.

(3) A labour inspector must deliver a copy of the compliance order to the employer.

(4) An employer must comply with the compliance order within the period stated in the order unless the employer objects in terms of section 40.

Objections to compliance order

40. An employer may object to a compliance order by referring the dispute for resolution to the Director-General in the prescribed manner.

Compliance order may be made an order of Labour Court

41. The Director-General may apply to the Labour Court for a compliance order to be made an order of the Labour Court if the employer has not complied with the order.

Duty of employer

42. An employer must ensure that every statement or other information which must be kept and submitted in terms of this Act is correct.

CHAPTER 5

COMMISSIONER AND CLAIMS OFFICERS

Designation of Unemployment Insurance Commissioner

43. The Minister must designate an employee of the Department of Labour as the Unemployment Insurance Commissioner.

Report of Commissioner, and delegation and assignment of powers and duties

44. (1) The Commissioner must furnish the Director-General with a report on the activities of the Fund during the preceding financial year within six months of the end of each financial year or as soon as it is practical thereafter.

(2) The Commissioner may not delegate any power or assign any duty conferred or imposed on the Commissioner in terms of this Act, unless the Director-General consents to the delegation or assignment.

(3) Any power exercised or duty performed by or under a delegation or in terms of an assignment contemplated in subsection (1) must be regarded as having been exercised or performed by the Commissioner.

(4) A delegation or assignment in terms of this section does not limit the Commissioner's authority to exercise or perform the delegated power or assigned duty.

Commissioner may deem person to be contributor

45. The Commissioner may deem a person to be a contributor for purposes of this Act if it appears that the person should have received benefits in terms of this Act but, because of circumstances beyond the control of that person, is not entitled to benefits.

Appointment of claims officers

46. Subject to the laws governing the Public Service, the Director-General must appoint claims officers to assist the Commissioner to process applications of claims made in terms of this Act.

CHAPTER 6

UNEMPLOYMENT INSURANCE BOARD

Establishment of Unemployment Insurance Board

47. The Minister must establish the Unemployment Insurance Board.

Powers and duties of Unemployment Insurance Board

48. (1) The Board must—
- *(a)* advise the Minister on—
  - (i) unemployment insurance policy; and
  - (ii) policies arising out of the application of this Act;
  - (iii) policies for minimising unemployment; and
  - (iv) the creation of schemes to alleviate the effects of unemployment;
- *(b)* make recommendations to the Minister on changes to legislation in so far as it impacts on policy on unemployment or policy on unemployment insurance; and
- *(c)* perform any other function which may be requested by the Minister for purposes of giving effect to this Act.

(2) The powers and duties of the Board must be exercised and performed subject to—
- *(a)* the provisions of this Act and its constitution contemplated in section 50;
- *(b)* any directions issued by the Minister; and
- *(c)* any guidelines determined by the Director-General.

Composition of Unemployment Insurance Board

49. (1) The Unemployment Insurance Board consists of—
- *(a)* a chairperson, who has a deliberative vote in addition to a casting vote and is appointed by the Minister;
- *(b)* twelve voting members appointed by the Minister; and
- *(c)* the Commissioner, who has a vote.

(2) Of the members referred to in subsection (1)*(b)*—
- *(a)* three members must be nominated by NEDLAC to represent organised labour;
- *(b)* three members must be nominated by NEDLAC to represent organised business;
- *(c)* three members must be nominated by NEDLAC to represent organisations of community and development interests; and
- *(d)* three members must be appointed by the Minister to represent the interests of the State.

(3) A member of the Board contemplated in—
- *(a)* subsection (1)*(a)* and *(b)* holds office for a period of three years and is eligible for reappointment; and
- *(b)* subsection (1)*(c)* is in an official capacity a member of the Board.

(4) A member vacates office if that member—
- *(a)* is removed from office by the Minister as contemplated in subsection (5); or
- *(b)* resigns by written notice addressed to the Minister.

(5) The Minister may remove a member from the Board—
- *(a)* in the case of any member contemplated in subsection (2)*(a)*, *(b)* or *(c)*, on the request of NEDLAC;
- *(b)* for serious misconduct;
- *(c)* for permanent incapacity;
- *(d)* for being absent from three meetings of the Board without prior permission of the Board unless just cause is shown by the member; or
- *(e)* for engaging in any activity that might undermine the functions of the Board.

(6) If a member of the Board vacates office before the expiry of his or her period of office, the Minister must fill the vacancy in accordance with subsections (1) and (2) for the unexpired portion of that period.

Constitution of Unemployment Insurance Board

50. (1) The Board must as soon as possible after the appointment of its members, prepare and adopt a constitution subject to approval by the Minister.

(2) The constitution of the Board—

(a) must provide for—

(i) the establishment and functions of committees of the Board, which must include an appeals committee;

(ii) subject to subsection (3), the rules for convening and conducting meetings of the Board and its committees, including the quorum required, and for the keeping of minutes;

(iii) subject to section 49(1), the voting rights of the different members of, and the manner in which decisions are to be taken by, the Board and its committees;

(iv) a code of conduct for Board members;

(v) the determination through arbitration of any dispute concerning the interpretation and application of the constitution;

(vi) subject to subsection (4), a procedure for amending the constitution; and

(b) may provide for—

(i) the delegation and assignment of powers and duties of the Board to its members, committees and employees: Provided that the Board may—

(aa) impose conditions for any delegation or assignment;

(bb) not be divested of any power or duty by virtue of the delegation of that power or assignment of that duty; and

(cc) may vary or set aside any decision made under any delegation or assignment; and

(ii) any other matter necessary for the performance of the functions of the Board.

(3) At least thirty days' notice must be given for a meeting of the Board at which a proposed amendment of the constitution is to be considered.

(4) A supporting vote of at least two thirds of the members of the Board and the approval of the Minister is required for an amendment of the constitution.

Administration and provision of resources to Unemployment Insurance Board

51. (1) The Commissioner is responsible for administering the affairs of the Board.

(2) In order to enable the Board to perform its functions effectively the Director-General must provide the Board with the necessary financial and administrative resources and, subject to the laws governing the Public Service, with the necessary personnel.

(3) As soon as it is practicable after the end of every month, the Commissioner must, after consultation with the Board—

(a) determine the value of the service and resources provided by the Unemployment Insurance Fund to the Board; and

(b) pay for the utilisation of these services and resources out of the Unemployment Insurance Fund.

Remuneration and allowances to members of Unemployment Insurance Board

52. A member of the Board or its committees who is not in the full-time employment of the State must be paid remuneration and allowances determined by the Minister in terms of the Treasury Instructions issued by the National Treasury.

Indemnification of members of Unemployment Insurance Board

53. A member of the Board is indemnified in respect of all proceedings, costs and expenses incurred by such member when defending or opposing legal proceedings arising out of *bona fide* acts of such member in terms of this Act.

CHAPTER 7

REGULATIONS

Regulations

54. The Minister, after consultation with the Board, may make regulations regarding any matter—

(a) arising from, or consequential to, the transitional provisions contemplated in Schedule 1; or

(b) which it is necessary or expedient to prescribe in order to give effect to the purpose and provisions of this Act.

Procedure when issuing regulations

55. (1) Unless public interest requires a regulation to be issued without delay, the Minister must comply with the following procedure when intending to issue regulations:

(a) The intention to issue the regulation must be announced by notice in the *Gazette* and at least one other means of communication circulated throughout the Republic;

(b) the notice must state—

(i) that a draft regulation has been developed for comment;

(ii) the nature of the draft regulation;

(iii) where a copy of the draft regulation may be obtained; and

(iv) where comments are to be returned to;

(c) a period of at least one month from the date of the announcement must be allowed for interested parties to comment on the regulation; and

(d) the comments received and the content of all discussions and consultations must be considered before issuing or amending the regulation.

(2) Subsection (1) does not apply—

(a) to any regulation correcting a textual error; or

(b) when the Minister withdraws any regulation or notice made or issued under the Unemployment Insurance Act, 1966 (Act No. 30 of 1966), as contemplated in item 2 of Schedule 1.

(3) Any regulation affecting State revenue or expenditure may only be issued or amended with the concurrence of the Minister of Finance.

CHAPTER 8

GENERAL

Information to be supplied by employer

56. (1) Every employer must, as soon as it commences activities as an employer, provide the information referred to in subsection (2) regarding its employees to the Commissioner, irrespective of the earnings of such employees.

(2) The information contemplated in subsection (1) must—

(a) include the street address of the business, and any of its branches, of the employer;

(b) if the employer is not resident in the Republic, or is a body corporate not registered in the Republic, include the particulars of the authorised person who is required to carry out the duties of the employer in terms of this Act; and

(c) include the names, identification numbers and monthly remuneration of each of its employees, and must state the address at which the employee is employed.

(3) Every employer must, before the seventh day of each month, inform the Commissioner of any change during the previous month in any information furnished in terms of subsection (1).

(4) The Commissioner may request the employer to provide such additional particulars as may reasonably be required to give effect to the purpose of this Act within 30 days of the request, or within such extended period as the Commissioner may allow.

Creation and maintenance of database

57. (1) The Commissioner must create and maintain a database of contributors, beneficiaries and employers.

(2) Payment of any benefit in terms of this Act must be based on the information contained in the database and provided—

(a) by the contributor or dependant;

(b) in terms of section 56 of this Act; and

(c) in terms of the Unemployment Insurance Contributions Act.

(3) *(a)* In order to determine the payment of benefits in terms of this Act, the Commissioner may access any information on a database of the State that contains information regarding social security.

(b) For purposes of paragraph *(a)* the Commissioner must co-operate with other State institutions to link their respective databases.

Powers and duties of Director-General

58. (1) The powers and duties conferred or imposed on the Director-General in terms of this Act are in addition to the powers and duties conferred or imposed on the Director-General as head of the Department of Labour.

(2) The Director-General must perform the fiduciary duties in respect of the Fund in terms of the Public Finance Management Act, 1999 (Act No. 1 of 1999).

(3) Subject to such conditions as the Director-General may determine, the Director-General may delegate any power or assign any duty conferred or imposed on the Director-General in terms of this Act to any officer of the Fund.

(4) Any power exercised or duty performed under a delegation or assignment in terms of this section must be regarded as having been exercised or performed by the Director-General.

(5) A delegation or assignment in terms of this section does not limit the Director-General's authority to exercise the delegated power or perform the assigned duty.

(6) The Director-General may, after consultation with the Board—

(a) purchase or otherwise acquire immovable property required for purposes of this Act;

(b) alienate or let any immovable property so acquired; or

(c) permit the use of any immovable property so acquired to give effect to any other law on such terms as the Director-General may determine.

(7) The Director-General may purchase or otherwise acquire any movable property required for purposes of giving effect to this Act, and may—

(a) sell or otherwise write off losses and deficiencies in respect of this property; or

(b) permit the use of any movable property so acquired to give effect to any other law on such terms as the Director-General may determine.

(8) Whenever the Director-General is of the opinion that any amount due to the Fund, or any amount paid by the Fund including moneys obtained fraudulently from the Fund, cannot or should not be recovered, the Director-General may direct that such amount be written off.

(9) The Director-General may—

(a) appoint agents or designate agency offices to serve as employment offices as may be necessary to assist the Director-General, Commissioner, Board or Fund in properly administering this Act; and

(b) confer on the agents or the officers of such offices such functions as may be necessary to give effect to this objective.

(10) Notwithstanding section 10(1), if the Director-General is of the opinion that the income of the Fund is insufficient or is not increasing at the rate required to meet the expenditure of the Fund or to meet reasonably anticipated future applications for benefits, the Director-General must—

(a) inform the Minister, the actuary and the Board of this fact; and

(b) after consulting with the Board make recommendations to the Minister on this matter.

(11) The Director-General may borrow money on behalf of the Fund in terms of section 66(3)*(b)* of the Public Finance Management Act, 1999 (Act No. 1 of 1999).

(12) Notwithstanding section 11, the Director-General must within six months of the end of each financial year or as soon as practicable thereafter, submit a written report to the Minister regarding—

(a) the manner in which the Board and the committees are performing their functions;

(b) the number of unemployed contributors to whom benefits have been paid and the total amount of such benefits;

(c) the number of contributors to whom illness, maternity and adoption benefits, respectively, have been paid and the total amount of such payments; and

(d) the number of deceased contributors in respect of whom dependant's benefits were paid and the total amount of such payments.

(13) The report contemplated in subsection (12) together with the statement of income and expenditure and the balance sheet of the Fund, must be tabled in the National Assembly within 30 days after its receipt by the Minister if Parliament is then sitting and, if Parliament is not sitting, within fourteen days of the commencement of the next sitting.

Certain instruments exempt from stamp duty

59. Any instrument issued in terms of this Act is exempt from stamp duty, if that duty is legally payable by the Fund.

Recovery of losses caused by employees of Fund

60. (1) For purposes of this section, causing loss or damage to the Fund includes—

(a) the making or authorising of—

(i) an irregular payment of Fund moneys;

(ii) a payment without a proper supporting voucher;

(b) the failure to carry out a duty leading to a fruitless expenditure of Fund moneys;

(c) a deficiency in any Fund moneys, stamps, securities, documents with face or potential value, or Fund property;

(d) damage to any Fund property; and

(e) an act or omission leading to a court claim against the Fund.

(2) If an employee of the Fund causes any loss or damage to the Fund, the Director-General may—

(a) institute an enquiry into the loss or damage;

(b) determine whether the employee is liable for the loss or damage;

(c) if the employee is found to be liable for the loss or damage, determine—

(i) the amount of the loss or damage; and

(ii) how and when the amount is to be paid by the employee; and

(d) notify the employee in writing of any determination made in terms of this subsection.

(3) If, at the termination of an employee's employment, there remains any amount outstanding in respect of a determination made in terms of subsection (2), that outstanding amount may be deducted from any moneys due to the employee.

(4) Any employee who is aggrieved by a determination made by the Director-General may, within 30 days of the date of notification in terms of subsection (2)*(d)*, appeal to the Minister in accordance with the grievance procedure applicable to state employees.

(5) Nothing in this section prevents the Director-General from—

(a) instituting proceedings in a competent court to recover any loss or damage caused by an employee who is or was in the public service; or

(b) instituting disciplinary proceedings against an employee contemplated in paragraph *(a)*; or

(c) instituting proceedings contemplated in both paragraphs *(a)* and *(b)*.

Recovery of loss generally

61. (1) For purposes of this section, loss or damage to the Fund means—

(a) an employer's irregular payment or failure to pay moneys due to the Commissioner in terms of this Act or the Unemployment Insurance Contributions Act;

(b) a contributor's failure to inform the claims officer of the resumption of work during the period in respect of which benefits were being paid;

(c) payment of Fund moneys as a result of a false statement or fraudulent claim;

(d) any failure to comply with a duty imposed by the provisions of this Act leading to loss or damage to the Fund.

(2) Any person who causes any loss or damage to the Fund, is guilty of an offence.

(3) A court may, on convicting a person for the commission of an offence contemplated in subsection (2), determine the amount of the loss or damage caused to the Fund.

(4) Any person found guilty of an offence as contemplated in subsection (2) must refund the loss to the Fund on such terms and conditions as the Director-General may determine.

(5) The Director-General may permit payment of the amount in instalments.

(6) If the loss to the Fund is due to a fraudulent benefit claim, the loss may be recovered from any outstanding benefit payments due to be made to the contributor or dependant under the provisions of this Act.

(7) Nothing in this section prevents the Director-General from instituting legal proceedings in any competent court to recover any loss or damage caused to the Fund by any person.

Evidence

62. (1) If any of the following documents are produced in a court of law, they are presumed to be certified by their author without proof of the author's signature unless evidence is led to the contrary:

(a) A record of a decision made by the Director-General, the Board or any committee;

(b) a copy of or extract from an entry in any book or record kept by the Director-General, the Board or any committee; or

(c) any document filed with the Director-General, the Board or any committee.

(2) In any proceedings under this Act, an affidavit purporting to be made by the Director-General is evidence of any of the following facts stated in the affidavit:

(a) That any person or body of persons is an employer or a contributor under this Act;

(b) that any person is or was lawfully required under this Act to pay any amount to the Director-General; or

(c) that any amount referred to in paragraph *(b)* or any portion thereof had or had not been paid on a date specified in the affidavit.

(3) *(a)* A presiding officer at the proceedings in which any affidavit referred to in subsection (2) is presented in evidence, may of his or her own accord, or must at the request of any party to the proceedings, require the deponent under subpoena to give oral evidence, or answer any written question submitted to the presiding officer under oath.

(b) Any question and answer from that deponent is admissible as evidence in the proceedings.

(4) A contributor is presumed, unless the contrary is proved, to remain in the employ of an employer until that employer has notified the Director-General that the contributor is no longer employed with that employer.

(5) In any proceedings under this Act, any of the following documents are admissible in evidence against an employer and constitute an admission of the facts contained in the document unless it is proved that the statement was not made by the employer:

(a) A statement or entry contained in any book, record or document kept by any employer;

(b) any such statement or entry found on any premises occupied by the employer;

(c) any such statement or entry found on any vehicle used in the business of the employer; and

(d) any copy or reproduction of any such statement or entry, certified by a commissioner of oath to be a true copy or reproduction of the original statement.

(6) No answer to any question put by a person in the course of an enquiry in terms of section 60(2)*(a)* or by a labour inspector may be used against that person in any criminal proceedings except proceedings in respect of a charge of perjury or making a false statement.

Disclosure of information

63. (1) Subject to the provisions of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000), no person may disclose any information obtained by that person in the performance of functions contemplated in this Act, except—

(a) to the extent to which it may be necessary for the proper administration of a provision of this Act;

(b) for purposes of the administration of justice; or

(c) at the request of the Minister, the Director-General or any other person entitled to the information.

(2) Any person who contravenes subsection (1) is guilty of an offence.

General prohibited conduct

64. (1) No person may—

(a) knowingly make a statement or cause a statement to be made which is materially false or which results in an incorrect payment of benefits in an application for benefits in terms of this Act;

(b) wilfully make any false entry on a contributor's record card or any other book, record or document relating to either a contributor's employment history or to a contributor's claim for benefits; or

(c) contravene, or refuse or fail to fully comply with any provision of this Act or of any regulation or notice issued in terms of this Act.

(2) Any person who contravenes subsection (1)*(a)*, *(b)* or *(c)* is guilty of an offence.

Penalties

65. Any person convicted of an offence in terms of this Act is liable to a fine or to imprisonment, or to both a fine and imprisonment.

Jurisdiction of Labour Court

66. Unless this Act provides otherwise, the Labour Court has jurisdiction in respect of all matters in terms of this Act, except in respect of an offence in terms of this Act.

Stating of case to Labour Court

67. (1) If any question of law arises concerning the application of this Act, the Director-General may of his or her own initiative, or at the request of a party with sufficient interest in this matter, state a case for decision by the Labour Court.

(2) The Director-General must set out in the stated case—

(a) the facts that were found to be proved; and

(b) the view of the law which was adopted in relation to those facts.

(3) If the Director-General has any doubt as to the correctness of a decision given by the Labour Court regarding a question of law concerning the application of this Act, the Director-General may submit such decision to the Labour Appeal Court.

Delegation and assignment by Minister

68. (1) The Minister may in writing delegate or assign to the Director-General or any employee in the public service, any power or duty conferred or imposed upon the Minister in terms of this Act, except the Minister's powers in terms of sections 43, 47, 48(2)*(b)*, 50(1) and (4), 52, this section, section 69 and the Minister's power to make regulations or to issue notices.

(2) A delegation or assignment in terms of subsection (1) does not limit or restrict the Minister's authority to exercise or perform the delegated power or assigned duty.

(3) Any person to whom a power is delegated or a duty is assigned in terms of subsection (1) must exercise or perform that power or duty subject to the direction of the Minister.

(4) The Minister may at any time—

(a) withdraw a delegation or assignment made in terms of subsection (1); and

(b) withdraw or amend any decision made by a person exercising or performing a power or duty delegated or assigned in terms of subsection (1).

Persons regarded as contributors for purposes of Act

69. (1) The Minister may, after receipt of an application in a prescribed form and with the concurrence of the Board, by notice in the *Gazette*, declare that as from a date specified in the notice any specified class of persons, or any person employed in any specified business or section of a business or in any specified area, must be regarded as contributors for purposes of this Act.

(2) The procedure referred to in section 55(1) applies with the necessary changes to a notice issued under subsection (1).

Repeal of laws

70. The Unemployment Insurance Act, 1966 (Act No. 30 of 1966), is hereby repealed except to the extent mentioned in Schedule 1.

Transitional arrangements

71. The provisions of Schedule 1 apply to the transition from other laws to this Act.

Act binds State

72. This Act binds the State.

Short title and commencement

73. (1) This Act is called the Unemployment Insurance Act, 2001, and takes effect on a date to be fixed by the President by proclamation in the *Gazette*.

(2) Different dates may be fixed under subsection (1) in respect of different provisions of this Act.

SCHEDULE 1

TRANSITIONAL ARRANGEMENTS

Definitions

1. In this Schedule "Unemployment Insurance Act, 1966" means the Unemployment Insurance Act, 1966 (Act No. 30 of 1966).

Regulations

2. Any regulation made under the Unemployment Insurance Act, 1966, which is in force immediately before the commencement of this item, remains in force until withdrawn by the Minister by notice in the *Gazette*.

Transferral of assets, liabilities, rights and obligations of Unemployment Insurance Fund

3. All assets, liabilities, rights and obligations of the Unemployment Insurance Fund established under the Unemployment Insurance Act, 1966, are hereby transferred to the Fund established by section 4.

Continuity of Unemployment Insurance Board

4. (1) The Board and its subcommittees, established under the Unemployment Insurance Act, 1966, continue to exist until the Minister establishes the Board in terms of section 47.

(2) The members of the Board appointed under the Unemployment Insurance Act, 1966, remain in office until the Minister has appointed the members of the Board in terms of section 49.

Claims against Unemployment Insurance Fund

5. All claims against the Fund made under the Unemployment Insurance Act, 1966, remain in force and must be finalised in terms of that Act.

Appeals against decisions of claims officers

6. (1) Any appeal in terms of the Unemployment Insurance Act, 1966, against a decision of claims officers remains in force and must be finalised in terms of that Act.

(2) For purposes of subitem (1), the Benefit Appeals Committees established under the Unemployment Insurance Act, 1966, continue to exist until all appeals have been dealt with.

Investigations and prosecutions

7. (1) Any investigation undertaken in terms of the Unemployment Insurance Act, 1966, which is not completed at the commencement of this Act, must be finalised in terms of that Act.

(2) Any prosecution instituted in terms of the Unemployment Insurance Act, 1966, which is not completed at the commencement of this Act, must be finalised in terms of that Act.

Duty of employer to provide particulars of employees at commencement of this item

8. (1) Within seven days after the commencement of this item, every employer must provide the information specified in section 56(2) of all employees employed with it to the Commissioner, irrespective of the earnings of such employees.

(2) The Commissioner may request the employer to provide, within 30 days of the request, or within an extended period as the Commissioner may allow, such additional particulars as may be reasonably required to give effect to the purpose of this Act.

SCHEDULE 2

MATHEMATICAL CALCULATION OF CONTRIBUTOR'S ENTITLEMENT

The benefit to which a contributor is entitled is calculated in one of two ways, depending on a contributor's income prior to becoming unemployed:

1. Contributors who earned **less** than a particular amount (known as the "benefit transition income level") are entitled to a percentage of their previous pay.
2. Contributors who earned **more** than the benefit transition income level are entitled to a flat benefit, equal to the entitlement of a contributor who was previously paid at the benefit transition income level.

The benefit transition income level

The 1953 International Labour Organisation Convention (Convention No. 102) stipulates that the wage of a skilled manual worker should determine the appropriate income level at which to set a ceiling for membership of a social insurance scheme. Over the years, South Africa's Unemployment Insurance scheme has roughly kept pace with this guideline. The benefit transition income level is therefore linked to this rate.

The current income ceiling is R8 099 per month. This will become the initial benefit transition income level for the purposes of this Act. However, in terms of section 12(3)*(a)*, the Minister may change the benefit transition income level from time to time to reflect changing patterns of income.

Contributors who previously earned less than the benefit transition income level

For contributors who earned less than the benefit transition income level, entitlement to benefit is earnings-related. A contributor's entitlement is calculated according to the following formula:

Benefit = Daily Income * IRR

where IRR is the Income Replacement Rate corresponding to the contributor's daily income.

Daily Income

If a contributor was paid weekly, daily income is the weekly rate of pay divided by 7.

If a contributor was paid fortnightly, daily income is the fortnightly rate of pay divided by 14.

If a contributor was paid monthly, daily income is the monthly rate of pay multiplied by 12, then divided by 365.

Income Replacement Rate

The Income Replacement Rate (IRR) determines the percentage of a contributor's previous income to which the contributor is entitled in the form of benefits. The IRR is a variable, so it defines a sliding scale. A contributor who previously earned a low wage is entitled to receive benefits representing a larger proportion of her or his previous income than a contributor who previously earned a higher wage.

The IRR is at its maximum when income equals zero, and it reaches its minimum where income is equal to the benefit transition income level. The maximum IRR is fixed at 60%. The minimum IRR is currently set at 38%. However, the Minister may vary the minimum IRR in terms of section 12(3)*(b)*.

Using current values, the IRR can be calculated according to the following formula:

$$IRR = 29.2 + (99779.68 / (3239.6 + Y_i))$$

where Y_i represents a contributor's **monthly** rate of income. (Consistency of units is essential. To calculate IRR from daily or weekly rates of pay, please refer to the more detailed explanation of the IRR formula in the technical note below.)

Contributors who previously earned more than the benefit transition income level

Contributors who earned more than the benefit transition income level are entitled to a flat benefit equal to the benefit transition income level multiplied by the minimum IRR.

At the current benefit transition income level of R8 099 per month, this works out to R101.18 per day:

Daily income = (8099 * 12) / 365) = 266.2685
IRR = 38% or 0.38
Benefit = 266.2685 * 0.38 = 101.18

Duration of benefits

In terms of section 13(3), a contributor is eligible to receive one day's benefit for every six completed days of employment, up to a maximum of 238 days (34 weeks). A contributor will therefore be eligible to claim benefits for the maximum duration after being continuously employed for four years. If a contributor has already drawn benefits (other than maternity benefits) in terms of this Act in the preceding four years, the number of days for which the contributor is eligible to claim benefits will be reduced accordingly.

To calculate the number of days of benefits to which a contributor is entitled:

1. Determine the total number of days that the contributor was employed (and contributing) in the four-year period immediately preceding the date of application for benefits.
2. Divide the total number of days by 6, disregarding any remainder or fractional portion of the result.
3. Subtract the number of days (if any) for which the contributor claimed benefits (other than maternity benefits) in terms of this Act during the preceding four years.

Amount of benefit payment

The benefit payment to which a contributor is entitled in any given period shall be the amount of the benefit entitlement multiplied by the number of days for which the contributor is eligible to receive benefits during the payment period.

Technical note on the Calculation of IRR

The sliding scale for the Income Replacement Rate (IRR) is represented by a portion of the curve (rectangular hyperbola) produced by a graph of the function y = 1/x, where the y axis represents the IRR and the x axis represents income. However, in order to associate this curve with values that are meaningful for this purpose, it is necessary to apply adjusting formulae.

Calculating the IRR associated with any given level of income below the benefit transition income level can be done in three steps:

1. The rate of income is transformed into a corresponding value on the x axis (x_i). The formula for this is:

$$Y_i = (x_i - x_1)\ YLRR\ /\ (x_2 - x1)\ (1)$$

where:
Y_i is the contributor's rate of income;
Y_{LRR} is the benefit transition income level; and
x_1 and x_2 are constants that determine the portion of the curve that is used to calculate IRR.

The current values of the parameters Y_{LRR}, x_1 and x_2 are:
Y_{LRR} = R8 099 per month
$x_1 = 2$
$x_2 = 7$

Using these values, expression (1) can be simplified to:

$$x_i = 2 + (Y_i / 1619.8) \quad (1a)$$

where Y_i is expressed as a monthly rate of income. [It is important to ensure that both the contributor's rate of income (Y_i) and the benefit transition income level (Y_{LRR}) are expressed in the same units—monthly, weekly, or daily.]

2. The y values corresponding to the x values are calculated using the general formula:

$$y = 1 / x \quad (2)$$

thus:

$$y_1 = 1 / x_1$$
$$y_2 = 1 / x_2$$
$$y_i = 1 / x_i$$

3. The y_i value is then converted to the corresponding IRR. The formula for this is:

$$IRR = LRR + (y_i - y_2)(URR - LRR) / (y_1 - y_2) \quad (3)$$

where:
IRR is the income replacement rate;
LRR is the lower (minimum) income replacement rate; and
URR is the upper (maximum) income replacement rate.
The current values of the parameters LRR, URR, y_1 and y_2 are:
LRR = 38%
URR = 60%
$y_1 = 1/2$
$y_2 = 1/7$

Using these values, expression (3) can be simplified to:

$$IRR = 61.6y_i + 29.2 \quad (3a)$$

SCHEDULE 3

SCALE OF CONTRIBUTOR'S ENTITLEMENT TO BENEFITS

(Section 12(2))

(1) Table One is the scale of benefits to which a contributor may be entitled. A contributor's monthly rate of remuneration is set out in column 1. The percentage of the contributor's monthly income that will be paid as a benefit is set out in column 2. The actual benefit payable in Rand terms is set out in column 3.

(2) Benefits below the transitional income level are earnings-related and fall as a proportion of income as income rises.

(3) Contributors and employers of contributors earning above the income threshold of R97 188 per annum shall contribute 1% of the threshold and such income contributors shall receive benefits payable at this threshold level.

Tables to illustrate benefits at various earnings levels

Based on a transition income of R97 188 per annum
The various amounts on these tables are calculated in terms of the equation in Schedule 2

IRR = Income replacement rate

Approximate benefits payable on monthly basis

Income	IRR =	UI benefit
150.00	58.64	87.96
300.00	57.39	172.17
500.00	55.88	279.41
700.00	54.53	381.69
1 000.00	52.74	527.35
1 500.00	50.25	753.79
2 000.00	48.24	964.87
3 000.00	45.19	1 355.74
3 075.57	45.00	1 384.01
4 000.00	42.98	1 719.30
5 000.00	41.31	2 065.49
6 000.00	40.00	2 399.95
7 410.00	38.57	2 857.99
8 099.00	38.00	3 077.62
10 000.00	30.78	3 077.62

Approximate benefits payable on weekly basis

Income	IRR =	UI benefit
34.62	58.64	20.30
69.23	57.39	39.73
115.38	55.88	64.48
161.54	54.53	88.08
230.77	52.74	121.70
346.15	50.25	173.95
461.54	48.24	222.66
692.31	45.19	312.86
709.75	45.00	319.39
923.08	42.98	396.76
1 153.85	41.31	476.65
1 384.62	40.00	553.83
1 710.00	38.57	659.54
1 869.00	38.00	710.22
2 307.69	30.78	710.22

Approximate benefits payable on daily basis

Income		IRR = UI benefit
4.93	58.64	2.89
9.86	57.39	5.66
16.44	55.88	9.19
23.01	54.53	12.55
32.88	52.74	17.34
49.32	50.25	24.78
65.75	48.24	31.72
98.63	45.19	44.57
101.11	45.00	45.50
131.51	42.98	56.52
164.38	41.31	67.91
197.26	40.00	78.90
243.62	38.57	93.96
266.27	38.00	101.18
328.77	30.78	101.18

The UI benefits payable in the tables will be paid for the duration of benefit days that have been accrued by a contributor. 5



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REPUBLIEK VAN SUID AFRIKA

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DEPARTMENT OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS

NO. R. 398 **25 MARCH 2020**

DISASTER MANAGEMENT ACT, 2002: AMENDMENT OF REGULATIONS ISSUED IN TERMS OF SECTION 27(2)

I, Dr Nkosazana Dlamini Zuma, Minister of Cooperative Governance and Traditional Affairs, designated under section 3 of the Disaster Management Act, 2002 (Act No. 57 of 2002), having declared a national state of disaster, published in Government Gazette No. 43096 on 15 March 2020, hereby in terms of section 27(2) of the Disaster Management Act, 2002, after consultation with the Minister of Health, made the Regulations in the Schedule.

NC Zuma

DR NKOSAZANA DLAMINI ZUMA, MP
MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS
DATE: 25.03.2020

SCHEDULE

Definitions

1. In these regulations, "the Regulations" means the regulations published by Government Notice No. 318 of 18 March 2020.

Insertion of heading in Regulations

2. The Regulations are hereby amended by the insertion of the following heading after the heading "SCHEDULE":

"CHAPTER 1".

Amendment of regulation 1 of the Regulations

3. Regulation 1 of the Regulations is hereby amended by the—

(a) insertion of the following definitions after the definition of "adequate space";

"**'clinical case'** means a patient that presents with clinical signs and symptoms of COVID-19;

'Constitution' means the Constitution of the Republic of South Africa, 1996;";

(b) substitution for the definition of "gathering" for the following definition:

"**'gathering'** means any assembly, concourse or procession in or on—

(a) any public road, as defined in the National Road Traffic Act, 1996 (Act No. 93 of 1996); or

(b) any other building, place or premises, including wholly or partly in the open air, and including, but not limited to, any premises or place used for any sporting, entertainment, funeral, recreational, religious, or cultural purposes;";

(c) the insertion of the following definitions after the definition of "gathering":
"'**institutions of higher learning**' means 'higher education college' and 'higher education institution' as defined in section 1 of the Higher Education Act, 1997 (Act No. 101 of 1997);
'**laboratory confirmed case**' means a patient who has been diagnosed with COVID-19 through a Department of Health approved laboratory diagnostic method;";

(d) insertion of the following definition after the definition of "liquor":
"'**quarantine**' means the restriction of activities or separation of a person, who was exposed, or potentially exposed, to COVID-19 and could be a possible source of the spread of the disease, from other non-exposed persons, in such a manner so as to prevent the possible spread of infection or contamination to healthy individuals;" and

(e) the substitution for the definition of "school" for the following definition:
"'**school**' means a school as defined in section 1 of the South African Schools Act, 1996 (Act No. 84 of 1996);".

Insertion of regulation 1A in Regulations

4. The following regulation is hereby inserted in the Regulations:

"**Application of Chapters 1 and 2**

1A. (1) Chapter 1 and any direction issued pursuant to the Regulations shall continue to be force and effect, save that if there are any inconsistencies between Chapter 1 and Chapter 2, Chapter 2 shall prevail to the extent of the inconsistency.

(2) Chapter 2 of these Regulations will apply as from 26 March 2020 at 24H00 until 16 April 2020 at 24H00, or on a date to be determined by the Cabinet member designated under section 3 of the Disaster Management Act.".

Amendment of Regulation 4 of the Regulations

5. Regulation 4 of the Regulations is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) No person who has been confirmed, as a clinical case or as a laboratory confirmed case as having contracted COVID-19, or who is suspected of having contracted COVID-19, or who has been in contact with a person who is a carrier of COVID–19, may refuse consent to—

(a) submission of that person to a medical examination, including but not limited to the taking of any bodily sample by a person authorised in law to do so;

(b) admission of that person to a health establishment or a quarantine or isolation site; or

(c) submission of that person to mandatory prophylaxis, treatment, isolation or quarantine, or isolation in order to prevent transmission:

Provided that if a person does not comply with the instruction or order of the enforcement officer, that person must be placed in isolation or quarantine for a period of 48 hours, as the case may be, pending a warrant being issued by a competent Court, on application by an enforcement officer for the medical examination contemplated in paragraph *(a)*.".

Amendment of Regulation 5 of the Regulations

6. Regulation 5 of the Regulations is hereby amended by the substitution for subregulation (2) of the following subregulation:

"(2) A member of the provincial Executive Council responsible for public works must identify and make available sites to be used as isolation and quarantine facilities within each province as the need arises: Provided that if a person refuses to go to such a site of isolation or quarantined facility a magistrate in whose jurisdiction such a person is, an order as contemplated in Annexure A, must be made by that magistrate to force such a person to go to such site of isolation, quarantined facility, or medical examination.".

Amendment of regulation 11 of the Regulations

7. Regulation 11 of the Regulations is hereby amended by the substitution for subsection (2) of the following subsection:

"(2) A person is guilty of an offence if that person fails to comply with or contravenes the provisions of regulations 6 and 8 of these Regulations.".

Insertion of Chapter 2 into the Regulations

8. The following Chapter is hereby inserted into the Regulations after regulation 11:

"CHAPTER 2

Definitions

11A. For purposes of this Chapter, unless the context otherwise indicates—

'**essential goods**' means the goods referred to in paragraph A of Annexure B, as may be amended from time to time by the Cabinet member designated under section 3 of the Disaster Management Act;

'**essential services**' means the services as defined in section 213 of the Labour Relations Act, 1995 (Act No. 66 of 1995), and designated in terms of section 71(8) of the Labour Relations Act, 1995 (and which designation remains valid as at the date of publication of this regulation), and as listed in paragraph B of Annexure B, as may be amended from time to time;

'**head of an institution**' means the accounting officer of a public institution and the chief executive officer or the equivalent of a chief executive officer of a private institution;
'**institution**' means any public or private institution that is engaged in the supply or distribution of an essential good or service;
'**lockdown**' means the restriction of movement of persons during the period for which this regulation is in force and effect namely from 23H59 on Thursday, 26 March 2020, until 23H59 on Thursday 16 April 2020, and during which time the movement of persons is restricted; and
'**movement**' means entering or leaving a place of residence or, in the case of people not ordinarily resident in the Republic, their place of temporary residence while in the Republic.

Restriction on the movement of persons and goods

11B. (1)*(a)* For the period of lockdown-

(i) every person is confined to his or her place of residence, unless strictly for the purpose of performing an essential service, obtaining an essential good or service, collecting a social grant, or seeking emergency, life-saving, or chronic medical attention;

(ii) every gathering, as defined in regulation 1 is hereby prohibited, except for funeral as provided for in subregulation (8);

(iii) movement between provinces is prohibited; and

(iv) movement between the metropolitan and district areas, is prohibited.

(b) All businesses and other entities shall cease operations during the lockdown, save for any business or entity involved in the manufacturing, supply, or provision of an essential good or service.

(c) Retail shops and shopping malls must be closed, except where essential goods are sold and on condition that the person in control of the said store must put in place controls to ensure that customers keep a distance of at least one square meter from each other, and that all directions in respect of hygienic conditions and the exposure of persons to COVID-19 are adhered to.

(c) Retail stores selling essential goods is prohibited from selling any other goods.

(d) The Cabinet member designated under section 3 of the Act may amend the list contemplated in paragraph *(c)* as required from time to time.

(e) Any place not involved in the provision of an essential good or service must remain closed to all persons for the duration of the lockdown.

(2) The head of an institution must determine essential services to be performed by his or her institution, and must determine the essential staff who will perform those services: Provided that the head of an institution may delegate this function, as may be required in line with the complexity and size of the business operation.

(3) Persons performing essential services as determined in subregulation (2), must be duly designated in writing by the head of an institution, on a form that corresponds substantially with Form 1 in Annexure C.

(4) All places or premises provided for in Annexure D must be closed to the public except to those persons rendering security and maintenance services at those places or premises.

(5) All persons performing essential services, obtaining essential goods or seeking medical attention, may be subjected to screening for COVID-19 by an enforcement officer.

(6)*(a)* All borders of the Republic are closed during the period of lockdown, except for transportation of fuel, and essential goods.

(b) The Cabinet member responsible for home affairs, or a person designated by him or her, may allow a person who requires to enter the Republic for emergency medical attention for a life-threatening condition.

(c) All foreign tourists who arrived in the Republic prior to, or after, the lockdown, and who remain in the Republic, must remain in their place of temporary residence in the Republic for the duration of the lockdown or 14 days, as the case may be, and may be subject to screening for COVID-19 and be quarantined or isolated as required.

(7) The Minister may issue directions to provide further conditions that will apply to activities referred to in subregulation (1), or other activities, and may vary the directions as the circumstances require.

(8) Attendance at a funeral is limited to 50 people and will for purposes of these Regulations not be regarded as a prohibited gathering: Provided that no night vigil shall be held and that all safety measures are strictly adhered to.

Prohibition of public transport

11C. (1) All commuter transport services including passenger rail services, bus services, taxi services, e-hailing services, maritime and air passenger transport is prohibited, except bus services, taxi services, e-hailing services and private motor vehicles for purposes of rendering essential services, obtaining essential goods, seeking medical attention, funeral services and to receive payment of grants: Provided that such vehicle carries no more than 50% of the licensed capacity and all directions in respect of hygienic conditions and the limitation of exposure of persons to COVID-19, are adhered to.

(2) Where a person rendering essential services is unable to travel to and from his or her place of employment, the employer must make the necessary transport arrangements: Provided that no more than 50% of the licensed capacity of the vehicle or vessel is exceeded and all directions in respect of hygienic conditions and the limitation of exposure to persons with COVID-19, are adhered to.

(3) The Cabinet member responsible for transport must issue directions for the transportation of persons who must obtain essential goods or services and where such person has no other means of transport except public

transport as contemplated in subregulation (1), provided that no more than 50% of the licensed capacity of the vehicle or vessel is exceeded and all directions in respect of hygienic conditions and the limitation of exposure to persons with COVID-19, are adhered to.

Resources by the State during lockdown

11D. (1) For the period of the declaration of a lockdown, a person refusing to be evacuated from any place subject to lockdown, may be evacuated by an enforcement officer to a temporary shelter, if such action is necessary for the preservation of life.

(2) The State shall identify—

(a) temporary shelters that meet the necessary hygiene standards for homeless people; and

(b) temporary sites for quarantine and self-isolation that meet the necessary hygiene standards for people who cannot isolate or quarantine in their homes.

(3) The provision of the State's resources listed herein shall be for the duration of the lockdown, and the use thereof will be subject to conditions determined by the Cabinet member responsible for such resources.

Loss or damage

11E. No person is entitled to compensation for any loss or damage arising out of any *bona fide* action or omission by an enforcement officer under these regulations.

Powers and indemnity

11F. These Regulations do not limit any powers or indemnities of security services provided for in any law.

Offences and penalties

11G. For purposes of this Chapter any person who contravenes regulation 11B(1) and (4), shall be guilty of an offence and, on conviction, liable to a fine or to imprisonment for a period not exceeding six months or to both such fine and imprisonment.".

Addition of Annexures to the Regulations

9. The following Annexures are hereby added to the Regulations:

"ANNEXURE A
ORDER FOR A PERSON TO GO TO A SITE OF ISOLATION, QUARANTINED FACILITY, OR FOR A PERSON TO GO FOR MEDICAL EXAMINATION
Regulation 5(2)

IN THE MAGISTRATES COURT FOR THE DISTRICT OF _____ HELD AT_____ON THIS _____DAY OF _____2020.

BEFORE ME _____ MAGISTRATE FOR THE AFOREMENTIONED DISTRICT IN CHAMBERS

WHEREAS it appears that_____(name of person)
Being a person:

☐ who has been clinically, or by a laboratory, confirmed as having COVID-19

☐ who is suspected of having contracted COVID-19

☐ who has been in contact with a person who is a carrier of COVID-19

and who has refused consent for the—

☐ submission to a medical examination, including but not limited to the taking of any bodily sample by a person authorised in law to do so

☐ admission to a site to be used as isolation or a quarantine facility

☐ submission to mandatory prophylaxis, treatment, isolation or quarantine or isolation in order to prevent transmission.

I hereby issue a warrant for the submission of the said person to a medical examination, including but not limited to the taking of any bodily sample by a person authorised in law to do so.

..... **DATE** .....
MAGISTRATE

NOTE: *This warrant remains in force until one of the following occurs:*
(a) it is executed;
(b) it is cancelled by the person who issued it or, if such person is not available, by any person with like authority;
(c) the expiry of ninety days from the date of its issue; or
(d) the purpose for the issuing of the warrant has lapsed.

ANNEXURE B
CATEGORISATION OF ESSENTIAL GOODS AND SERVICES DURING LOCKDOWN
Regulation 11A

A. GOODS

1. Food
   - (i) Any food product, including non-alcoholic beverages;
   - (ii) Animal food; and
   - (iii) Chemicals, packaging and ancillary products used in the production of any food product.
2. Cleaning and Hygiene Products
   - (i) Toilet Paper, sanitary pads, sanitary tampons, condoms;
   - (ii) Hand sanitiser, disinfectants, soap, alcohol for industrial use, household cleaning products, and personal protective equipment; and
   - (iii) Chemicals, packaging and ancillary products used in the production of any of the above.
3. Medical:
   - (i) Medical and Hospital Supplies, equipment and personal protective equipment; and
   - (ii) Chemicals, packaging and ancillary products used in the production of any of the above.
4. Fuel, including coal and gas
5. Basic goods, including airtime and electricity.

B. SERVICES

Categories of essential services shall be confined to the following services:

1. Medical, Health (including Mental Health), Laboratory and Medical services;
2. Disaster Management, Fire Prevention, Fire Fighting and Emergency services;
3. Financial services necessary to maintain the functioning of the banking and payments environment, including the JSE and similar exchanges, as well as Insurance services;
4. Production and sale of the goods listed in category A, above;
5. Grocery stores, including spaza shops;
6. Electricity, water, gas and fuel production, supply and maintenance;
7. Critical jobs for essential government services as determined by Head of National or Provincial Departments in accordance with the guidance by the DPSA, including Social Grant Payments;
8. Birth and death certificates, and replacement identification documents;
9. Essential municipal services;
10. Care services and social relief of distress provided to older persons, mentally ill, persons with disabilities, the sick, and children;
11. Funeral services, including mortuaries;
12. Wildlife Management, Anti-poaching, Animal Care and Veterinary services;
13. Newspaper, broadcasting and telecommunication infrastructure and services;
14. Production and sale of any chemicals, hygiene products, pharmaceuticals for the medical or retail sector;
15. Cleaning, sanitation, sewerage, waste and refuse removal services;

16. Services related to the essential functioning of courts, judicial officers, the Master of the High Court, Sheriffs and legal practitioners required for those services;
17. Essential SARS services defined by the Commissioner of SARS;
18. Police, peace officers, traffic officers, military medical personnel and soldiers, correctional services officials and traffic management services;
19. Postal services and courier services related to transport of medical products;
20. Private security services;
21. Air-traffic Navigation, Civil Aviation Authority, Cargo Shipping and dockyard services;
22. Gold, gold refinery, coal and essential mining;
23. Accommodation used for persons rendering essential services, quarantine, isolation and the lockdown;
24. Production, manufacturing, supply, logistics, transport, delivery, critical maintenance and repair in relation to the rendering of essential services including components and equipment;
25. Transport services for persons rendering essential services and goods, and transportation of patients;
26. Services rendered by the Executive, members of Parliament, Members of the Provincial Legislature, Members of Local Councils, the Judiciary, traditional leaders and National Office Bearers of Political Parties represented in Parliament;
27. Commissioners of the South African Human Rights Commission, Gender Commission, and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, and the Public Protector and Deputy Public Protector; and
28. Transport and logistics in respect of essential goods as set out in A above to neighboring countries.

ANNEXURE C
FORM 1
PERMIT TO PERFORM ESSENTIAL SERVICE
Regulation 11B(3)

- *Please note that the person to whom the permit is issued must at all times a form of identification to be presented together with this permit. If no identification is presented the person to whom the permit is issued will have to return to his or her place of residence during the lockdown*

I,

Surname				
Full names				
Identity number				
Contact details	**Cell nr.**	**Tel Nr(W)**	**Tel Nr(H)**	**e-mail address**

Physical Address of Institution	

Hereby certify that:

Surname	
Full names	
Identity number	

Signed at _____, on this the _____ day of _____ 2020.

_____
Signature of Head of Institution

Official stamp of Institution

ANNEXURE D
PLACES AND PREMISES CLOSED TO THE PUBLIC
Regulation 11B(4)

The following places and premises are closed to the public:

(a) Any place or premises normally open to the public where religious, cultural, sporting, entertainment, recreational, exhibitional, organisational or similar activities may take place;

(b) any place or premises normally open to the public where goods other than essential goods are procured, acquired, disposed of or sold;

(c) any place or premises normally open to the public such as—

(i) public parks, beaches and swimming pools;
(ii) flea markets;
(iii) open air food markets;
(iv) fêtes and bazaars;
(v) night clubs;
(vi) casinos;
(vii) hotels, lodges and guest houses, except to the extent that they are required for remaining tourists confined to hotels, lodges and guest houses;
(viii) private and public game reserves except to the extent that they are required for remaining tourists confined to private and public game reserves;
(ix) holiday resorts except to the extent that they are required for remaining tourists confined to such holiday resort;

(x) on-consumption premises, including taverns, shebeens, *shisanyama* where liquor is sold;

(xi) off-consumption premises, including bottle stores, where liquor is sold

(xii) off-consumption areas in supermarkets where liquor is sold;

(xiii) theatres and cinemas;

(xiv) shopping malls and centres (excluding grocery stores and pharmacies); and

(xv) taxi ranks, bus depots, train stations and airports; and

(d) any other place or premises determined by the Cabinet member responsible for cooperative governance and traditional affairs by direction in the *Gazette*.".

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GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

DEPARTMENT OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS

NO. R. 465 **16 APRIL 2020**

DISASTER MANAGEMENT ACT, 2002: AMENDMENT OF REGULATIONS ISSUED IN TERMS OF SECTION 27(2)

I, Dr Nkosazana Dlamini Zuma, Minister of Cooperative Governance and Traditional Affairs, designated under section 3 of the Disaster Management Act, 2002 (Act No. 57 of 2002), having declared a national state of disaster, published in Government *Gazette* No. 43096 on 15 March 2020, hereby in terms of section 27(2) of the Disaster Management Act, 2002, after consultation with the relevant Cabinet members, make the Regulations in the Schedule.

NC Zuma

DR NKOSAZANA DLAMINI ZUMA, MP
MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS
DATE: 16th April 2020.

SCHEDULE

Definitions

1. In these regulations, "the Regulations" means the regulations published by Government Notice No. 318 of 18 March 2020, as amended by Government Notices Nos. R. 398 of 25 March 2020, R.419 of 26 March 2020 and R. 446 of 2 April 2020.

Amendment of regulation 6 of the Regulations

2. Regulation 6 of the Regulations is hereby amended by the substitution of the following regulation —

"Schools and partial care facilities must be closed by 18 March 2020 until 30 April 2020, which period may be extended by way of directions by the Cabinet member responsible.".

Amendment of regulation 1A of the Regulations

3. Regulation 1A of the Regulations is hereby amended by the substitution for the following regulation:

"Application of Chapters 1, 2, 3 and 4

1A. (1) Chapter 1 and any direction issued pursuant to the Regulations shall continue to be in force and effect, save that if there are any inconsistencies between Chapter 1 and Chapters 2 to 4, Chapters 2 to 4 shall prevail to the extent of the inconsistency.

(2) Chapters 2, 3 and 4 of these Regulations will apply as from 26 March 2020 at 23h59 until 30 April 2020 at 23h59: Provided that Chapter 3 will remain in force for the period of the national state of disaster, or for such periods as may be extended."

Substitution of regulation 7 of the Regulations

4. Regulation 7 of the Regulations is hereby substituted of the following regulation:

"Suspension of visits

7. All visits by members of the public to—

(*a*) Correctional Centres;
(*b*) Remand Detention Facilities;
(*c*) Holding Cells;
(*d*) Military Detention Facilities; and
(*e*) Department of Social Development facilities, including Child and Youth Care Centres, shelters, One Stop Centres, and Treatment Centres,

are suspended for the period of lockdown from the date of publication of this Notice, which period may be extended for any period, but not beyond the duration of the national state of disaster, by the cabinet member responsible.".

Amendment of regulation 8 of the Regulations

5. Regulation 8 of the Regulations is hereby amended by the addition of subregulation (6) after subregulation (5) —

"(6) The transportation of liquor is prohibited, except where alcohol is required for industries producing hand sanitizers, disinfectants, soap, alcohol for industrial use and household cleaning products.".

Amendment of Regulation 10 of the Regulations

6. Regulation 10 of the Regulations is hereby amended by the addition of the following subregulation :

"(9) All directions issued in terms of these Regulations shall continue to apply unless, varied, amended or withdrawn by the Cabinet member responsible for such directions.".

Amendment of regulation 11A of the Regulations

7. Regulation 11A of the Regulations is hereby amended by the substitution for the definition of "lockdown" of the following definition:

'"**lockdown**' means the restriction of movement of persons during the period for which Chapters 2, 3 and 4 of these Regulations apply, namely from 23H59 on 26 March 2020, until 23H59 on 30 April 2020; and".

Amendment of regulation 11B of the Regulations

8. Regulation 11B of the Regulations is hereby amended by—

(a) the substitution for item *(bb)* of subparagraph (iii) of paragraph *(a)* of subregulation (1) of the following item:

"*(bb)* transportation of—

(*bb*A) essential goods;

(*bb*B) transportation of cargo from ports of entry to their intended destination; and

(*bb*C) cargo currently at ports of entry, for export of goods to decongest the ports of entry;";

(b) the insertion of the following paragraph after paragraph *(f)* of subregulation (1):

"*(g)* Stores selling hardware products and vehicle components must maintain a register of persons buying essential goods listed in Part A of Annexure B, and must keep a record of a signed declaration, which corresponds substantially with Form 4 of Annexure C by the buyer of goods attesting that the goods are essential goods as defined in the Regulations.";

(c) the substitution for paragraph *(b)* of subregulation (4A) of the following paragraph:

"*(b)* The Cabinet members responsible for health and social services and trade, industry and competition may, by directions, designate services which are necessary to provide or maintain essential health and social services and international trade or industrial activities listed in Annexure B to the Regulations.";

(d) the deletion of paragraph *(h)* of subregulation (8); and

(e) the addition of the following subregulations after subregulation (8):

"(9)*(a)* Movement of children between co-holders of parental responsibilities and rights or a caregiver, as defined in section 1(1) of the Children's Act, 2005 (Act No. 38 of 2005), during the lockdown period, is prohibited, except where arrangements are in place for a child to move from one parent to another, in terms of—

(i) a court order;

(ii) where a parental responsibilities and rights agreement or parenting plan, registered with the family advocate, is in existence, or

(iii) the co-holder of parental responsibilities and rights is in possession of a birth certificate or certified copy of a birth certificate of the child or children to prove a legitimate relationship between the co-holders of parental responsibilities and rights:

Provided that in the household to which the child has to move, there is no person who is known to have come into contact, or is reasonably suspected to have come into contact with any other person known to have contracted, or is reasonably suspected to have contracted COVID-19 in the household which the child has to move to.

(b) The parent or caregiver transporting the child concerned must have in his or her possession, the court order or the parental responsibilities and rights agreement or parenting plan or the birth certificate of the child or children, as required.

(10) All forms must be completed in full, including full names, identification or passport numbers and full contact details as required in the form and failure to do so will result in the form being rejected as invalid.".

Insertion of regulation 11CA after regulation 11C

9. The following regulation is hereby inserted after regulation 11C:

"**Prohibition on evictions**

11CA. No person may be evicted from their place of residence, regardless of whether it is a formal or informal residence or a farm dwelling, for the duration of the lockdown.".

Substitution of regulation 11G of the Regulations

10. Regulation 11G of the Regulations is hereby substituted for the following regulation:

" **Offences and penalties**

11G. For the purposes of this Chapter, any person who contravenes—

(a) regulation 11B(1)*(a), (b), (c), (d), (f)* or 11B(4); or

(b) regulations 11C(1) and 11CA,

commits an offence and is, on conviction, liable to a fine or to imprisonment for a period not exceeding six months or to both such fine and imprisonment.".

Amendment of regulation 11H of the Regulations

11. Regulation 11H of the Regulations is hereby amended by the substitution for subregulation (13) of the following subregulation:

"(13) The Cabinet member responsible for justice and correctional services shall, in terms of section 7(1)*(a)* read with paragraph *(d)* of the definition of "service" in section 1(1) of Judges' Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001) request a judge or a Constitutional Court Judge who has been discharged from active service to perform service as a COVID-19 Designated Judge as provided for in the Regulations.".

Substitution of regulation 11I of the Regulations

12. Regulation 11I of the Regulations is hereby substituted for the following regulation:

"**Offences and penalties**

11I. (1) A failure to comply with—

(*a*) an obligation imposed in terms of regulation 11H(5), (9), (11), (17); or

(*b*) a direction issued in terms of regulation 11H(10) or (18),

constitutes an offence.

(2) A person who fails to comply with an obligation imposed in terms of regulation 11H(5), (9), (11) or (17) or a direction issued in terms of regulation 11H(10) or (18), commits an offence and is, on conviction, liable to a fine or to imprisonment for a period not exceeding six months or to both such fine and imprisonment.".

Insertion of Chapter 4 into the Regulations

13. The following Chapter is hereby inserted into the Regulations:

"**CHAPTER 4**

Energy and petroleum products supply

11J. To ensure the continuous supply of energy and petroleum products to society as referred to in paragraph 6 of Part B of Annexure B—

(a) collieries that supply Eskom must continue to operate at full capacity; and

(b) refineries must operate at full capacity to avoid shortage of fuel, and such operations must include smelters, plants and furnaces.

Mining Operations

11K. (1) Mining operations, as referred to in paragraph 22 of Part B of Annexure B, must be conducted at a reduced capacity of not more than 50% during the period of lockdown, and thereafter at increasing capacity as determined by direction issued by the Cabinet member responsible for mineral resources and energy.

(2) The following conditions apply to the starting and increasing of capacity:

(a) A rigorous screening and testing program must be implemented as employees return to work;

(b) the mining industry must provide quarantine facilities for employees who have tested positive for the COVID-19;

(c) data collected during the screening and testing programme must be submitted to the relevant authority;

(d) mining companies must make arrangements to transport their South African employees from their homes to their respective areas of operations;

(e) workers from neighbouring Southern African Development Community countries must be recalled to their place of employment at the end of lockdown in their respective countries in accordance with these Regulations and regulations applicable in those countries.

(3) The monitoring and impact assessment of seismicity through the Council for Geoscience must be intensified with immediate effect.".

Amendment of Annexure B to the Regulations

14. Annexure B to the Regulations is hereby amended by—

(a) the addition in Part A after paragraph 5 of the following paragraphs:

"6. Hardware, components and supplies required by any qualified tradespersons solely for the purpose of emergency repairs at residential homes;

7 Hardware, components and supplies required by any entity engaged in the provision of essential services for any project related to the provision of water, electricity or other essential services;

8. Components for vehicles under-going emergency repairs where such vehicle is used by a person engaged in essential services work.";

(b) the substitution in Part B for paragraph 5 of the following paragraph:

"5. Grocery stores and wholesale produce markets, *spaza* shops, informal fruit and vegetable sellers and *langanas*, with written permission from a municipal authority to operate being required in respect of *spaza* shops and informal fruit and vegetable traders: Provided that all valid permits for *spaza* shops and informal fruit and vegetable traders issued before or during the declared national state of disaster and which fall due during the said period, will remain valid for a period of one month after the end of the national state of disaster; ";

(c) the substitution in Part B for paragraph 22 of the following paragraph:

"22. Gold, gold refinery, coal and mining;";

(d) the substitution in Part B for paragraph 27 of the following paragraph:

"27.1 Commissioners of the South African Human Rights Commission, Gender Commission, the Commission for the Promotion and Protection of the Rights of

Cultural, Religious and Linguistic Communities, the Public Protector and Deputy Public Protector and the Independent Electoral Commission; and

27.2 Services rendered by the institutions referred to in item 27.1;";

(e) the substitution in Part B for paragraph 30 of the following paragraph:

"30. Call centres necessary to provide health, safety, social support, government and financial services, debt restructuring for consumers of retailers, and access to short-term insurance policies as a result of reduced income or loss of income;"; and

(f) the addition in Part B of the following paragraphs after paragraph 33:

"34. Trades necessary for the rendering of emergency repair work, including plumbers, electricians, locksmiths, glaziers, roof repair work;

35. Trades necessary for emergency automobile repairs for persons rendering essential services;

36. Information and Communication Technology services rendered to entities and institutions engaged in delivering essential services in terms of these Regulations.".

Amendment of Form 3 of Annexure C to the Regulations

15. Form 3 of Annexure C to the Regulations is hereby amended by the substitution for the phrase "sheriff's(deponent's)" or "sheriff(deponent)" in the Certification wherever it appears of the word "deponent".

Amendment of Annexure C to the Regulations

16. Annexure C to the Regulations is hereby amended by the addition of the following forms after Form 3:

"FORM 4
DECLARATION BY BUYER OF HARDWARE PRODUCTS OR MOTOR-COMPONENTS
Regulation 11B(1)*(g)*

I,

Full names:						
Surname:						
Identity number						
Home address:						
Contact details:	Cell No		Tel No (h)		e-mail address	

Declare that the undermentioned goods are necessary for the rendering of emergency repair work:

Signed at_____this _____ day of _____ 2020.

_____

Signature of buyer".

Amendment of Annexure D to the Regulations

17. Annexure D to the Regulations is hereby amended for the substitution for subparagraph (vii) of paragraph *(c)* of the following subparagraph:

"(vii) hotels, lodges and guest houses, except to the extent that they are required for remaining tourists confined to hotels, lodges and guest houses;".

GOEWERMENTSKENNISGEWING
SAMEWERKENDE REGERING EN TRADISIONELE SAKE

No. R. 465 16 April 2020

WET OP RAMPBESTUUR, 2002: WYSIGING VAN REGULASIES INGEVOLGE ARTIKEL 27(2) UITGEREIK

Ek, Dr. Nkosazana Dlamini Zuma, Minister van Samewerkende Regering en Tradisionele Sake, kragtens artikel 3 van die Wet op Rampbestuur, 2002 (Wet No. 57 van 2002), aangewys, ná afkondiging van ’n nasionale ramptoestand in *Staatskoerant* No. 43096 op 15 Maart 2020, vaardig hierby, ná oorleg met die tersaaklike Kabinetslede, die Regulasies in die Bylae uit.

DR NKOSAZANA DLAMINI ZUMA, LP
MINISTER VAN SAMEWERKENDE REGERING EN TRADISIONELE SAKE
DATUM: 16 APRIL 2020

BYLAE

Woordomskrywing

1. In hierdie regulasies beteken “die Regulasies” die regulasies afgekondig in Goewermentskennisgewing No. 318 van 18 Maart 2020, soos gewysig deur Goewermentskennisgewings No. R. 398 van 25 Maart 2020, R.419 van 26 Maart 2020 en R. 446 van 2 April 2020.

Wysiging van regulasie 6 van die Regulasies

2. Regulasie 6 van die Regulasies word hierby deur die volgende regulasie vervang:

“Skole en gedeeltelikesorgfasiliteite moet van 18 Maart 2020 tot 30 April 2020 gesluit wees, welke tydperk by wyse van voorskrifte deur die verantwoordelike Kabinetslid verleng kan word.”.

Wysiging van regulasie 1A van die Regulasies

3. Regulasie 1A van die Regulasies word hierby gewysig deur die volgende regulasie te vervang:

“**Toepassing van Hoofstukke 1, 2, 3 en 4**

1A. (1) Hoofstuk 1 en enige voorskrif uitgereik ingevolge die Regulasies bly van krag, met uitsondering van enige teenstrydigheid tussen Hoofstuk 1 en Hoofstuk 2 tot 4, in welke geval Hoofstukke 2 tot 4 sal geld.

(2) Hoofstukke 2, 3 en 4 van hierdie Regulasies is van toepassing van 26 Maart 2020 om 23h59 tot 30 April 2020 om 23h59: Met dien verstande dat Hoofstuk 3 van krag sal bly vir die duur van die nasionale ramptoestand, of vir sodanige tydperke wat verleng mag word.".

Vervanging van regulasie 7 van die Regulasies

4. Regulasie 7 van die Regulasies word hierby deur die volgende regulasie vervang:

"**Opskorting van besoeke**

7. Alle besoeke deur lede van die publiek aan—

(*a*) korrektiewe sentrums;

(*b*) uitstel-aanhoudingsfasiliteite;

(*c*) aanhoudingselle;

(d) militêredetensiefasiliteite; en

(*e*) fasiliteite van die Departement van Maatskaplike Ontwikkeling, met inbegrip van kinder- en jeugsorgsentrums, skuilings, eenstopsentrums en behandelingsentrums,

word vir die inperkingstyd vanaf die datum van publikasie van hierdie Kennisgewing opgeskort, welke tydperk deur die verantwoordelike Kabinetslid vir enige tydperk, maar nie langer as die duur van die nasionale ramptoestand nie, verleng kan word."

Wysiging van regulasie 8 van die Regulasies

5. Regulasie 8 van die Regulasies word hierby gewysig deur subregulasie (6) na subregulasie (5) in te voeg:

"(6) Die vervoer van drank is verbode, behalwe waar alkohol vereis word vir nywerhede wat handreinigers, ontsmettingsmiddels, seep, alkohol vir industriële gebruik en huishoudelik skoonmaakprodukte vervaardig.".

Wysiging van Regulasie 10 van die Regulasies

6. Regulasie 10 van die Regulasies word hierby gewysig deur die volgende subregulasie by te voeg:

"(9) Alle voorskrifte ingevolge hierdie Regulasies uitgereik, bly van toepassing tensy dit verander, gewysig of ingetrek word deur die Kabinetslid verantwoordelik vir daardie voorskrifte.".

Wysiging van regulasie 11A van die Regulasies

7. Regulasie 11A van die Regulasies word hierby gewysig deur die omskrywing van "inperking" deur die volgende omskrywing te vervang:

" **'inperking'** die beperking van beweging van persone tydens die tydperk waarop Hoofstukke 2, 3 en 4 van hierdie Regulasies van toepassing is, naamlik van 23h59 op 26 Maart 2020, tot 23h59 op 30 April 2020;".

Wysiging van regulasie 11B van die Regulasies

8. Regulasie 11B van die Regulasies word hierby gewysig—

(a) deur item *(bb)* van subparagraaf (iii) van paragraaf *(a)* van subregulasie (1) deur die volgende item te vervang:

"*(bb)* vervoer van—

*(bb*A*)* noodsaaklike goedere;

*(bb*B*)* vrag van binnekomshawens na die beoogde bestemming daarvan; en

*(bb*C*)* vrag wat tans by binnekomshawens is, vir uitvoer van goedere om die binnekomshawens op te ruim;";

(b) deur die volgende paragraaf na paragraaf *(f)* van subregulasie (1) in te voeg:

"*(g)* Winkels wat hardewareprodukte en voertuigonderdele verkoop, moet 'n register hou van persone wat noodsaaklike goedere in Deel A van Aanhangsel B gelys, koop en moet 'n rekord hou van 'n ondertekende verklaring, wat wesenlik dieselfde as Vorm 4 van Aanhangsel C is, deur die koper van goedere waarin verklaar word dat die goedere noodsaaklike goedere is soos in die Regulasies omskryf.";

(c) deur paragraaf *(b)* van subregulasie (4A) deur die volgende paragraaf te vervang:

"*(b)* Die Kabinetslede verantwoordelik vir gesondheids- en maatskaplike dienste en handel, nywerheid en mededing kan, deur voorskrifte, dienste aanwys wat nodig is vir die voorsiening van noodsaaklike gesondheids- en maatskaplike dienste en internasionale handels- of nywerheidsbedrywighede in Aanhangsel B van die Regulasies gelys.";

(d) deur paragraaf *(h)* van subregulasie (8) te skrap; en

(e) deur die volgende subregulasies na subregulasie (8) in te voeg:

"(9) *(a)* Beweging van kinders tydens die inperkingstyd tussen persone wat ouerlike verantwoordelikhede en regte deel of ’n versorger, soos omskryf in artikel 1(1) van die “Children’s Act, 2005” (Wet No. 38 van 2005), omskryf, is verbode, behalwe waar reëlings in plek is vir ’n kind om van een ouer na ’n ander te gaan—

(i) ingevolge ’n hofbevel;

(ii) waar ’n ooreenkoms oor ouerlike verantwoordelikhede en regte of ’n ouerskapsplan, wat by die gesinsadvokaat geregistreer is, bestaan; of

(iii) die medehouer van ouerlike verantwoordelikhede en regte in besit is van ’n geboortesertifikaat of gesertifiseerde afskrif van ’n geboortesertifikaat van die kind of kinders om ’n wettige verwantskap tussen die medehouers van ouerlike verantwoordelikhede en regte te bewys :

Met dien verstande dat daar geen persoon is in die huishouding waarheen die kind moet gaan van wie dit bekend is of redelik vermoed word dat hy of sy in kontak was met enige ander persoon van wie dit bekend is of redelik vermoed word dat hy of sy COVID-19 onder lede het nie.

(b) Die ouer of versorger wat die betrokke kind vervoer, moet die hofbevel of ooreenkoms oor ouerlike verantwoordelikhede en regte of ouerskapsplan of die geboortesertifikaat van die kind of kinders, soos vereis, in sy of haar besit hê

(10) Alle vorms moet volledig ingevul word, met inbegrip van volle name, identiteits- of paspoortnommers en volle kontakbesonderhede soos in die vorm vereis en versuim om dit te doen sal tot gevolg hê dat die vorm as ongeldig verwerp word.”.

Invoeging van regulasie 11CA na regulasie 11C

9. Die volgende regulasie word hierby na regulasie 11C ingevoeg:

"**Verbod op uitsettings**

11CA. Niemand mag vir die duur van die inperking uit huil woonplek gesit word nie, ongeag of dit ’n formele of informele woonplek of ’n plaaswoning is.".

Vervanging van regulasie 11G van die Regulasies

10. Regulasie 11G van die Regulasies word hierby deur die volgende regulasie vervang:

" **Misdrywe en strawwe**

11G. By die toepassing van hierdie Hoofstuk, is enige persoon wat—

(a) regulasie 11B(1)*(a)*, *(b), (c), (d), (f)* of 11B(4); of

(b) regulasies 11C(1) en 11CA,

oortree, skuldig aan ’n misdryf en is, by skuldigbevinding, strafbaar met ’n boete of met gevangenisstraf vir ’n tydperk van hoogstens ses maande of met beide daardie boete en gevangenisstraf. ".

Wysiging van regulasie 11H van die Regulasies

11. Regulasie 11H van die Regulasies word hierby gewysig deur subregulasie (13) deur die volgende subregulasie te vervang:

"(13) Die Kabinetslid verantwoordelik vir justisie en korrektiewe dienste moet, ingevolge artikel 7(1)*(a)* gelees met paragraaf *(d)* van die omskrywing van ‘diens’ in artikel 1*(d)* van die Wet op Besoldiging en Diensvoorwaardes van Regters, 2001 (Wet No. 47 van 2001), regter of ’n Regter van die Konstitusionele Hof wat uit aktiewe diens ontslaan is, vra om diens te doen as ’n regter vir COVID-19 aangewys soos ingevolge die Regulasies voor voorsiening gemaak.".

Vervanging van regulasie 11I van die Regulasies

12. Regulasie 11I van die Regulasies word hierby deur die volgende regulasie vervang:

"**Misdrywe en strawwe**

11I. (1) Enige versuim om te voldoen aan—

(*a*) ’n verpligting ingevolge regulasie 11H(5), (9), (11), (17) opgelê; of

(*b*) ’n voorskrif ingevolge regulasie 11H(1) of (18) voorgeskryf,

is ’n misdryf

(2) ’n Persoon wat versuim om te voldoen aan ’n verpligting ingevolge regulasie 11H(5), (9), (11) of (17) of ’n voorskrif ingevolge regulasie 11H(10) of (18) opgelê, pleeg ’n misdryf en is by skuldigbevinding strafbaar met ’n boete of met gevangenisstraf vir ’n tydperk van hoogstens ses maande of met beide daardie boete en gevangenisstraf.”.

Invoeging van Hoofstuk 4 in die Regulasies

13. Die volgende Hoofstuk word hierby in die Regulasies ingevoeg:

"**HOOFSTUK 4**

Lewering van energie- en petroleumprodukte

11J. Ten einde die volgehoue lewering van energie- en petroleumprodukte aan die samelewing soos in paragraaf 6 van Deel B van Aanhangsel B bedoel te verseker—

(a) moet steenkoolmyne wat aan Eskom lewer teen volle kapasiteit voortgaan met bedrywighede; en

(b) raffinaderye moet teen volle kapasiteit bedryf om ’n tekort aan brandstof te voorkom en sodanige bedrywighede moet raffinaderye, smelters, aanlegte en smeltoonde insluit.

Mynbedrywighede

11K. (1) Mynbedrywighede, soos in paragraaf 22 van Deel B van Aanhangsel B bedoel, moet tydens inperking teen ’n verminderde kapasiteit van hoogstens 50% gedoen word en daarna teen ’n stygende kapasiteit soos deur die Kabinetslid verantwoordelik vir minerale hulpbronne en energie bepaal.

(2) Die volgende voorwaardes is van toepassing op die begin en verhoging van kapasiteit:

(a) ’n Streng siftings- en toetsprogram moet ingestel word namate werknemers terugkeer werk toe;

(b) die mynboubedryf moet kwarantynfasiliteite voorsien vir werknemers wat positief vir COVID-19 getoets het;

(c) data tydens die siftings- en toetsprogram ingesamel, moet by die tersaaklike owerheid ingedien word;

(d) mynmaatskappye moet reëlings tref om hulle Suid-Afrikaanse werknemers van hul huise na hulle onderskeie bedryfsgebiede te vervoer;

(e) werkers uit naburige lande in die Suider-Afrikaanse Ontwikkelingsgemeenskap, moet herroep word na hulle werkplekke aan die einde van inperking in hul onderskeie lande ooreenkomstig hierdie regulasies en ander regulasies van toepassing in daardie lande.

(3) Die monitering en impakassessering van seismisiteit deur die Raad vir Geowetenskap moet onmiddellik verskerp word.".

Wysiging van Aanhangsel B by die Regulasies

14. Aanhangsel B by die Regulasies word hierby gewysig—

(a) deur die volgende paragrawe na paragraaf 5 van Deel A in te voeg:

“6. Hardeware, onderdele en voorrade deur enige gekwalifiseerde ambagspersone benodig alleenlik vir noodherstelwerk by woonhuise.

7. Hardeware, onderdele en voorrade benodig deur enige entiteit betrokke by die voorsiening van noodsaaklike dienste vir enige projek wat verband hou met die voorsiening van water, elektrisiteit of ander noodsaaklike dienste.

8. Onderdele vir voertuie wat noodherstelwerk nodig het waar daardie voertuig besit of gebruik word deur ’n persoon wat noodsaaklike dienste lewer.”;

(b) deur paragraaf 5 in Deel B deur die volgende paragraaf te vervang:

"5. Kruidenierswinkels en groothandel-varsproduktemarkte, spazawinkels en informele vrugte- en groenteverkopers en *langanas*, met skriftelike toestemming van ’n munisipale owerheid om sake te doen as ’n vereiste vir spazawinkels en informele vrugte- en groenteverkopers: Met dien verstande dat alle geldige permitte vir spazawinkels en informele vrugte- en groenteverkopers wat voor of tydens die verklaarde nasionale ramptoestand uitgereik is en wat in die genoemde tydperk val, geldig sal bly vir ’n maand nadat die nasionale ramptoestand beëindig is;”;

(c) deur paragraaf 22 in Deel B deur die volgende paragraaf te vervang:
“22. Goud, goudaffinadery, steenkool en mynbou;”;

(d) deur paragraaf 27 in Deel B deur die volgende paragraaf te vervang:
"27.1 Kommissarisse van die Suid-Afrikaanse Menseregtekommissie, Genderkommissie en die Kommissie vir die Bevordering en Beskerming van die regte van Kultuur-, Godsdiens- en Taalgemeenskappe, die Openbare Beskermer en Adjunk Openbare Beskermer en die Onafhanklike Verkiesingskommissie; en
27.2 Dienste deur die instellings bedoel in item 27.1 gelewer;";

(e) deur paragraaf 30 in Deel B deur die volgende paragraaf te vervang:
"30. Inbelsentrums nodig om dienste te lewer vir gesondheid, veiligheid, maatskaplike ondersteuning, die staat en finansies, skuldherstrukturering vir verbruikers van kleinhandelaars, en toegang tot korttermynversekeringspolisse na aanleiding van verminderde of verlore inkomste;”; en

(f) deur die volgende paragrawe na paragraaf 33 in Deel B in te voeg:
“34. Ambagte nodig vir die lewering van noodherstelwerk, met inbegrip van loodgieters, elektrisiëns, slotmakers, ruitinsitters en dakherstelwerk.
35. Ambagte nodig vir noodherstelwerk aan motorvoertuie vir persone wat noodsaaklike dienste lewer;
36. Inligtings- en Kommunikasietegnologiedienste gelewer aan entiteite en instellings betrokke by die lewering van noodsaaklike dienste ingevolge hierdie Regulasies.".

Wysiging van Vorm 3 van Aanhangsel C by Regulasies

15. Vorm 3 van Aanhangsel C by die Regulasies word hierby gewysig deur die frase “balju’s (deponente)” of “balju (deponent)”in die Sertifisering, waar dit ook al voorkom te vervang deur die woord “deponent”.

Wysiging van Aanhangsel C by die Regulasies

16. Aanhangsel C by die Regulasies word hierby gewysig deur die volgende vorms na Vorm 3 in te voeg:

"**VORM 4**
VERKLARING DEUR KOPER VAN HARDEWAREPRODUKTE OF MOTORONDERDELE
Regulasie 11B(1)*(g)*

Ek,

Volle name:						
Van:						
Identiteitsnommer						
Huisadres:						
Kontakbesonderhede:	Selno.		Telno. (h)		e-posadres	

Verklaar dat die goedere hieronder vermeld nodig is vir die doen van noodherstelwerk:

Geteken te_____op hierdie _____ dag van _____ 2020.

_____
Handtekening van koper".

Wysiging van Aanhangsel D by die Regulasies

17. Aanhangsel D by die Regulasies word hierby gewysig deur subparagraaf (vii) van paragraaf *(c)* deur die volgende paragraaf te vervang:

"(vii) hotelle, lodges en gastehuise, behalwe tot die mate wat hulle benodig word vir oorblywende toeriste wat tot hotelle, lodges en gastehuise beperk is;".

TSEBISO YA MMUSO
PUSO YA KOPANELO LE MERERO YA SETSO

No. R. 465 16 Mmesa 2020

MOLAO WA TAOLO YA DIKODUWA WA 2002: SEHLOMATHISO SA MELAWANA E NTSHITSWENG HO IPAPISITSWE LE KAROLO YA 27(2)

Nna, Ngaka Nkosazana Dlamini Zuma, Letona la Puso ya Kopanelo le Merero ya Setso, setulong sena seo ke beilweng ho sona ho ya ka karolo ya 3 ya Molao wa Taolo ya Dikoduwa wa 2002 (Molao wa 57 wa 2002), kamora hore ke tsebahatse ka maemo a koduwa ya naha a phatlaladitsweng Koranteng ya Mmuso ya Nomoro ya 43096 ka la 15 Tlhakubele 2020, ke etsa melawana e Shejuleng ena ke ipapisitse le karolo ya 27(2) ya Molao wa Taolo ya Dikoduwa wa 2002, kamora hore ke bontshane le ditho tsa Kabinete tse tshwanelehileng.

NGAKA NKOSAZANA DLAMINI ZUMA, SETHO SA PALAMENTE
LETONA LA PUSO YA KOPANELO LE MERERO YA SETSO
LETSATSI:

SHEJULE

Ditlhaloso

1. Melawaneng ena, “Melawana” e hlalosa melawana e phatlaladitsweng Tsebisong ya Mmuso ya Nomoro ya 318 ya la 18 Tlhakubele 2020, jwaloka ha e hlomathisitswe ke Ditsebiso tsa Mmuso tsa Dinomoro tsa R.398 ya la 25 Tlhakubele 2020, R.419 ya la 26 Tlhakubele 2020 le R.446 ya la 2 Mmesa 2020.

Sehlomathiso sa molawana wa 6 wa Melawana ena

2. Molawana wa 6 wa Melawana ena jwale o hlomathiswa ka ho kenngwa ha molawana o latelang —

“Dikolo le ditsi tsa tlhokomelo ya bana ya ka dinako tse itseng, di tlameha ho kwalwa ka la 18 Tlhakubele 2020 ho fihlela ka la 30 Mmesa 2020, e leng nako e bang e ka nna ya eketswa ka mokgwa wa ditataiso tse tla etswa ke setho sa Kabinete se ikarabelang.”

Sehlomathiso sa molawana wa 1A wa Melawana ena

3. Molawana wa 1A wa Melawana ena jwale o hlomathiswa ka ho kenngwa ha molawana o latelang:

"Ho kenngwa tshebetsong ha Dikgaolo tsa 1, 2, 3 le 4

1A. (1) Kgaolo ya 1 le tataiso efe kapa efe e ntshitsweng ho ipapisitswe le Melawana ena e tla nne e tswelapele ho ba tshebetsong, empa haeba ho na le dikganano dife kapa dife tse teng dipakeng tsa Kgaolo ya 1 le Dikgaolo tsa ho tloha ho 2 ho ya ho 4, dikarolo tse Dikgaolong tsa ho tloha ho 2 ho ya ho 4 ke tsona tse tla dula di sebetsa.

(2) Dikgaolo tsa 2, 3 le 4 tsa Melawana ena, di tla qala ho sebetsa ho tloha ka la 26 Tlhakubele 2020 ka hora ya 23:59 ho fihlela ka la 30 Mmesa 2020 ka hora ya 23:59: Ha feela Kgaolo ya 3 e tla dula e sebetsa nakong yohle ya maemo ana a koduwa ya naha, kapa ka dinako tseo tse ka nnang tsa eketswa."

Ho nkelwa sebaka ha molawana wa 7 o Melawaneng ena

4. Molawana wa 7 wa Melawana ena jwale o nkelwa sebaka ke molawana o latelang:

"Ho emiswa nakwana ha diketelo

7. Diketelo tsohle tsa setjhaba tse yang—

(*a*) Ditsing tsa Tshokollo ya Batshwaruwa;

(*b*) Ditsing tsa Polokelo ya Batshwaruwa ba e so ahlolwe;

(*c*) Diseleng tsa sepoleseng;

(d) Ditsing tsa Polokelo ya Batshwaruwa Sesoleng; le

(*e*) Ditsing tsa Lefapha la Ntshetsopele ya Setjhaba, ho akga le Ditsi tsa Tlhokomelo ya Bana le Batjha, tsa bodulo ba batho ba itseng, Ditsi tse Fanang ka Ditshebeletso tse Ngata tse Fapaneng, le Ditsi tsa kokelo,

di emiswa nakwana ka nako ena ya ho kginwa ha metsamao ya batho le ditshebeletso tseo e seng tsa mantlha ho tloha ka letsatsi la phatlalatso ya Tsebiso ena, e leng nako e ka nnang ya eketswa ke setho sa Kabinete se ikarabelang ho sa natsehe hore na ke halelele hakae, empa e seng ho feta nako ya maemo a koduwa ya naha."

Sehlomathiso sa molawana wa 8 wa Melawana ena

5. Molawana wa 8 wa Melawana ena jwale o hlomathiswa ka keketso ya molawanana wa (6) kamorao ho molawanana wa (5)—

"(6) Ho tsamaiswa ha jwala ha ho a dumellwa, ntle le moo ho hlokehang alkhohole bakeng sa diindasteri tse hlahisang dihlwekisi tsa matsoho, dibolayadikokwanahloko, sesepa, alkhohole e reretsweng ho sebediswa diindastering le dihlahisweng tsa ho hlwekisa ka malapeng."

Sehlomathiso sa Molawana wa 10 wa Melawana ena

6. Molawana wa 10 wa Melawana ena jwale o hlomathiswa ka keketso ya molawanana o latelang:

"(9) Ditataiso tsohle tse ntshitsweng ho ipapisitswe le Melawana ena di tla tswelapele ho sebetsa ntle le haeba di fapafapana, di hlomathisitswe kapa di hutswe ke setho sa Kabinete se ikarabelang ditataisong tseo."

Ho hlomathiswa ha molawana wa 11A wa Melawana ena

7. Molawana wa 11A wa Melawana ena jwale o hlomathiswa ka ho nkelwa sebaka ha tlhaloso ya "*lockdown*" ya tlhaloso e latelang:

"*'lockdown'* e hlalosa ho kginwa ha metsamao ya batho nakong ena eo Melawana ya Dikgaolo tsa 2, 3 le 4 e sebetsang ka yona, e leng ho tloha ka hora ya 23:59 ka la 26 March 2020, ho fihlela ka hora ya 23:59 ka la 30 Mmesa 2020; le"

Sehlomathiso sa molawana wa 11B wa Melawana ena

8. Molawana wa 11B wa Melawana ena o hlomathiswa ka—

(a) ho nkelwa sebaka ha ntlha ya *(bb)* ya molawanana wa (iii) wa serapa sa *(a)* sa molawanana wa (1) wa ntlha e latelang:

"*(bb)* ho tsamaiswa ha—

(*bb*A) dithepa tsa mantlha tse hlokehang;

(*bb*B) ho tsamaiswa ha moqeqeko wa dithepa tse tswang madibohong a ho kena hore di ye moo di reretsweng ho ya teng; le

(*bb*C) moqeqeko wa dithepa tse madibohong a ho kena, e le hore dithepa tsa diyantle di fokotse tshubuhlellano e madibohong a ho kena;"

(b) ho kenngwa ha serapa se latelang kamorao ho serapa sa *(f)* sa molawanana wa (1):

"*(g)* Mabenkele a rekisang disebediswa tsa matsoho le dikarolo tsa dikoloi a tlameha ho boloka lenane la batho ba rekang dithepa tse hlokehang tse ngodisitsweng Karolong ya A ya Sehlomathisetso sa B, ebile a tlameha le ho boloka ditokomane tse tekennweng ke bareki ba dithepa tseo, tse pakang hore dithepa tsena ke tsona tse hlokehang jwaloka ha ho hlalositswe Melawaneng ena, mme di nyalana hantle le Foromo ya B ya Sehlomathisetso sa C.";

(c) ho nkelwa sebaka ha serapa sa *(b)* sa molawanana wa (4A) wa serapa sena se latelang:

"*(b)* Ditho tsa Kabinete tse ikarabelang ho tsa bophelo bo botle le ditshebeletso tsa setjhaba esita le kgwebisano le diindasteri le tlhodisano, di ka nna tsa tataisa, ka ho laela hore ho fanwe ka ditshebeletso tsa mantlha tse hlokehang haholo, hore ho fanwe kapa ho bolokwe ditshebeletso tse hlokehang tsa bophelo bo botle le tsa setjhaba, le tsa dikgwebisano tsa matjhaba, kapa diketsahalo tsa diindasteri tse ngodisitsweng Sehlomathisetsong sa B sa Melawana ena.";

(d) ho hlakolwa ha serapa sa *(h)* sa molawanana wa (8); le

(e) keketso ya melawanana e latelang kamorao ho molawanana wa (8):

"(9)*(a)* Ho ya kwana le kwana ha bana ha ho a dumellwa dipakeng tsa ba apesitsweng matla a maikarabelo a botswadi le ditokelo kapa a mohlokomedi, jwaloka ha ho hlalositswe karolong ya 1(1) ya Molao wa Bana wa 2005 (Molao wa 38 wa 2005), nakong ena ya ho kginwa ha metsamao le ditshebeletso tseo e seng tsa mantlha, ntle le moo ho seng ho na le ditlhophiso tsa hore ngwana a ka tloha motswading e mong ho ya ho e mong, ho ipapisitswe le—

(i) taelo ya lekgotla la dinyewe;

(ii) moo ho seng ho le teng tumellano ya maikarabelo a botswadi le ditokelo kapa morero wa ho ba motswadi wa ngwana eo, tse ngodisitsweng le mmuelli wa molao wa lelapa, kapa

(iii) motho ya apesitsweng matla a maikarabelo a botswadi le ditokelo mme a e na le lengolo la tswalo kapa khophi e tiiseditsweng ya lengolo la tswalo la ngwana kapa bana, e le ho pakahatsa dikamano tsa semolao dipakeng tsa ba apesitsweng matla a maikarabelo a botswadi le ditokelo:

Le teng ha feela e le hore lelapa leo ngwana a yang ho lona ha ho motho, katlasa mabaka a utlwahalang, ya belaellwang ka hore o kile a teana le motho e mong ofe kapa ofe ya tsejwang hore o ile a tshwaetseha, kapa ka mabaka a mang a utlwahalang, ya belaellwang hore o ile a tshwaetswa ke *COVID-19* lelapeng leo ngwana a yang ho lona.

(b) Motswadi kapa mohlokomedi ya tsamaisang ngwana eo, o tlameha hore ho yena a be le taelo ya lekgotla la dinyewe kapa tumello ya maikarabelo a botswadi le ditokelo kapa morero wa ho ba motswadi kapa lengolo la tswalo la ngwana, jwaloka ha ho hlokeha.

(10) Diforomo tsohle di tlameha ho tlatswa ka botlalo, ho akga le mabitso ka botlalo, dinomoro tsa boitsebiso kapa tsa diphasepoto esita le dintlha

tsohle tsa kgokahano jwaloka ha ho hlokeha foromong, athe ho hloleha ho etsa jwalo ho tla baka hore foromo e phekgenngwe ka hore ha e molaong."

Ho kenngwa ha molawana wa 11CA kamorao ho molawana wa 11C

9. Molawana o latelang jwale o a kenngwa kamorao ho molawana wa 11C:

"**Ho se dumellwe ha teleko dibakeng tsa bodulo**

11CA. Nakong ena yohle ya ho kginwa ha metsamao ya batho le ditshebeletso tseo e seng tsa mantlha, ha ho motho ya ka lelekwang moo a dulang teng, ho sa natsehe hore ke sebaka se molaong kapa se seng molaong kapa polasing."

Ho nkelwa sebaka ha molawana wa 11G wa Melawana ena

10. Molawana wa 11G wa Melawana ena jwale o nkelwa sebaka ke molawana o latelang:

" Ditlolo tsa molao le dikotlo

11G. Molemong wa Kgaolo ena, motho ofe kapa ofe ya tlolang—

(a) molawana wa 11B(1)*(a), (b), (c), (d), (f)* kapa 11B(4); kapa

(b) melawana ya 11C(1) le 11CA,

molao ebe nakong ya kahlolo o tlameha ho lefa kapa a kwallwe tjhankaneng ka nako e sa feteng dikgwedi tse tsheletseng, kapa e be tefo eo le ho kwallwa tjhankaneng ka bobedi ba tsona."

Sehlomathiso sa molawana wa 11H wa Melawana ena

11. Molawana wa 11H wa Melawana ena jwale o hlomathiswa ka ho nkelwa sebaka ke molawanana wa (13) wa molawanana o latelang:

"(13) Setho sa Kabinete se ikarabelang ho tsa toka le ditshebeletso tsa tshokollo ya batshwaruwa se tla kopa, se ipapisitse le karolo ya 7(1)(a) ha e balellwa le serapa sa (d) ka tlhaloso ya “tshebeletso” e karolong ya 1(1) ya Molao wa Meputso le Maemo a Kgiro a Baahlodi wa 2001 (Molao wa 47 wa 2001), hore moahlodi kapa Moahlodi wa Lekgotla la Dinyewe la Molaotheo ya seng a sa sebetse a etse tshebeletso ena e le Moahlodi ya apesitsweng matla ho tsa *COVID-19* ho ya kamoo ho hlalositsweng ka teng Melawaneng ena."

Ho nkelwa sebaka ha molawana wa 11I wa Melawana ena

12. Molawana wa 11I wa Melawana ena o nkelwa sebaka ke molawana o latelang:

"**Ditlolo tsa molao le dikotlo**

11I. (1) Ho hloleha ho ikamahanya le—

(*a*) tlameho e qobellwang ho ipapisitswe le molawana wa 11H(5), (9), (11), (17); kapa

(*b*) taelo e ntshitsweng ho ipapisitswe le molawana wa 11H(10) kapa wa (18), ke tlolo ya molao.

(2) Motho ya hlolehang ho ikamahanya le tlameho e qobellwang ho ipapisitswe le molawana wa 11H(5), (9), (11) kapa (17) kapa taelo e ntshitsweng ho ipapisitswe le molawana wa 11H(10) kapa (18), o tlola molao mme ha a ahlolwa, o tlameha ho lefa kapa a kwallwe tjhankaneng ka nako e sa feteng dikgwedi tse tsheletseng kapa yona tefo eo le ho kwallwa tjhankaneng ka bobedi ba tsona."

Ho kenngwa ha Kgaolo ya 4 Melawaneng

13. Kgaolo e latelang jwale e a kenngwa Melawaneng:

"KGAOLO YA 4

Phepelo ya dihlahiswa tsa eneji le tsa peterole

11J. Ho netefatsa ka boteng ba phepelo e tswelang pele ya dihlahiswa tsa eneji le peterole setjhabeng, ho ya kamoo ho boletsweng ka teng serapeng sa 6 sa Karolo ya B ya Sehlomathisetso sa B—

(a) merafo ya mashala e fepelang Eskom e tlameha ho tswelapele ka ho sebetsa ka botlalo; mme

(b) direfaenari di tlameha ho sebetsa ka botlalo e le ho qoba kgaello ya mafura, mme ditshebetso tse jwalo di tlameha ho akga diqhibidihisi, dipolante le difuthumetsi.

Ditshebetso tsa Merafo

11K. (1) Ditshebetso tsa merafo, ho ya kamoo ho boletsweng ka teng serapeng sa 22 sa Karolo ya B ya Sehlomathisetso sa B, di tlameha ho etswa ka sekgahla se fokoditsweng empa e le se sa feteng ho 50% nakong ena ya ho kginwa ha metsamao ya batho le ditshebeletso tseo e seng tsa mantlha, kamorao ho moo e ka ba ka sekgahla se eketsehileng jwaloka ha ho lekantswe ka taelo e ntshitsweng ke setho sa Kabinete se ikarabelang ho tsa dirafshwa le eneji.

(2) Maemo a latelang a sebetsa qalehong le keketsehong ya sekgahla:

(a) Lenaneo la tlhahlobisiso e matla le ho etsuwa ha diteko le tlameha ho kenngwa tshebetsong hang ha basebetsi ba kgutlela mesebetsing;

(b) indasteri ya merafo e tlameha ho fana ka ditsi tsa tshekeho bakeng sa basebetsi bao diteko di tla ba fumana ba e na le *COVID-19*;

(c) lesedi le bokelletsweng nakong ya lenaneo la tlhahlobisiso le ho etsuwa ha diteko, le tlameha ho fetisetswa ho ba tshwanelehileng ba apesitsweng matla;

(d) dikhamphane tsa merafo di tlameha ho etsa ditlhophiso tsa hore di palamise basebetsi ba tsona ba Maafrika Borwa ho tloha mahabo bona ho ya dibakeng tse fapaneng tseo ba sebetsang ho tsona;

(e) basebetsi ba tswang dinaheng tsa boahisane lebatoweng lena la Ntshetsopele ya Dinaha tsa Afrika e ka Borwa, ba tlameha ho bitswa moo ba sebetsang teng hang ha ho fela ho kginwa ha metsamao ya batho le ditshebeletso tseo e seng tsa mantlha dinaheng tsa bona, ho ipapisitswe le Melawana ena esita le melawana e meng e sebediswang dinaheng tseo tsa bona.

(3) Bodisa le tshekatsheko ya sekgahla sa ho reketla ha lefatshe tse etswang ke Lekgotla la *Geoscience* di tlameha ho matlafatswa hanghang."

Sehlomathiso sa Sehlomathisetso sa B Melawaneng ena

14. Sehlomathisetso sa B se Melawaneng ena jwale se hlomathiswa ka—

(a) keketso Karolong ya A kamorao ho serapa sa 5 sa dirapa tse latelang:

"6. Disebediswa tsa matsoho, metjhine le disebediswa tse ding tse hlokwang ke bahwebi bafe kapa bafe ba nang le mangolo, molemong wa ho etsa feela ditokiso tsa tshohanyetso matlong a bodulo;

7 Disebediswa tsa matsoho, metjhine le disebediswa tse ding tse hlokwang ke setheo sefe kapa sefe se sebetsanang le phano ya ditshebeletso tsa mantlha bakeng sa projeke efe kapa efe e amanang le phano ya metsi, ya motlakase kapa ya ditshebeletso tse ding tsa mantlha;

8. Dikarolo tsa ditshepe tsa dikoloi tse lokiswang ka mabaka a tshohanyetso, moo koloi eo e amehileng e sebediswang ke motho ya phethang mosebetsi o amang le ditshebeletso tsa mantlha."

(b) ho nkelwa sebaka ho Karolong ya B bakeng sa serapa sa 5 sa serapa se latelang:

"5. Mabenkele a grosare le mebaraka ya ditswamobung, di-*spaza*, baitshokodi ba rekisang ditholwana le meroho le bo-*langanas*, moo ho hlokehang tumello e ngotsweng ya ho sebetsa e tswang ha masepala mabapi le di-*spaza* le baitshokodi ba hwebang ka ditholwana le meroho: Le teng ha feela mangolo ohle a molaong a tumello a di-*spaza* le baitshokodi ba hwebang ka ditholwana le meroho a ntshitsweng pele kapa nakong ya ho phatlalatswa ha maemo a koduwa ya naha a bile a fellwa hona nakong eo ya koduwa, a tla dula a le molaong ka nako ya kgwedi e le nngwe kamora ho fela ha maemo a koduwa ya naha; "

(c) ho nkelwa sebaka ho Karolong ya B bakeng sa serapa sa 22 sa serapa se latelang:

"22. Gauta, moo ho phehwang gauta teng, mashala le merafo;"

(d) ho nkelwa sebaka ho Karolong ya B bakeng sa serapa sa 27 sa serapa se latelang:

"27.1 Bakhomishinara ba Khomishene ya Ditokelo tsa Botho ya Afrika Borwa, Khomishene ya tsa Bong, Khomishene ya Phahamiso le Tshireletso ya Ditokelo tsa Setjhaba tsa Botjhaba, Bodumedi le Dipuo; Mosireletsi wa Setjhaba le Motlatsi wa Mosireletsi wa Setjhaba esita le Khomishene e Ikemetseng ya Dikgetho; le

27.2 Ditshebeletso tse fanwang ke ditheo tse boletsweng ntlheng ya 27.1;"

(e) ho nkelwa sebaka ho Karolong ya B bakeng sa serapa sa 30 sa serapa se latelang:

"30. Ditsi tseo ho letsetswang setjhaba ho tloha ho tsona tse hlokehang hore di fane ka ditshebeletso tsa bophelo bo botle, tsa polokeho, tsa tshehetso ya setjhaba, tsa mmuso le tsa ditjhelete, tsa tlhophobotjha ya dikepele tsa ho lefa mekitlane bakeng sa bareki ba mabenkeleng a fapaneng, esita le phihlello diinshorenseng tsa nako e kgutshwane ka lebaka la meputso e pukutlilweng kapa tahlehelo ya kuno;" le

(f) keketso e Karolong ya B ya dirapa tse latelang kamorao ho serapa sa 33:

"34. Dikgwebisano tse hlokehang bakeng sa ho etswa ha mesebetsi ya tokiso ya tshohanyetso, ho akga le dipolambara, ba motlakase, banotlolli, basehi ba dikgalase, le mosebetsi wa ho lokisa marulelo;
35. Dikgwebisano tse hlokehang bakeng sa ditokiso tsa tshohanyetso tsa dikoloi tsa batho ba fanang ka ditshebeletso tse hlokehang tsa mantlha;
36. Ditshebeletso tsa Theknoloji ya Lesedi le Dikgokahanyo tse nanabetswang ditheong tse sebetsanang le phano ya ditshebeletso tsa mantlha ho ipapisitswe le Melawana ena."

Sehlomathiso sa Foromo ya 3 ya Sehlomathisetso sa C Melawaneng ena

15. Foromo ya 3 ya Sehlomathisetso sa C Melawaneng ena, jwale e hlomathiswa ka ho nkelwa sebaka ha lereo la "sherifo" (pakimotshwaedi) Tiisetsong eo neng kapa neng ho yona ho hlahellang lereo la "pakimotshwaedi".

Sehlomathiso sa Sehlomathisetso sa C Melawaneng ena

16. Sehlomathisetso sa C se Melawaneng ena se hlomathiswa ka keketso ya diforomo kamorao ho Foromo ya 3:

"FOROMO YA 4
TSEBAHATSO KA MOREKI WA DISEBEDISWA TSA MESEBETSI YA MATSOHO LE METJHINE YA DIKOLOI
Molawana wa 11B(1)*(g)*

Nna,

Mabitso ka botlalo:						
Fane:						
Nomoro ya boitsebiso						
Aterese ya lapeng:						
Dintlha tsa kgokahano:	Nomoro ya Selefoun u		Nomoro ya mohala (h)		Aterese ya imeile	

Ke a tsebahatsa hore dithepa tse hlalositsweng katlase mona di a hlokeha bakeng sa ho nanabetswa ha mesebetsi ya tshohanyetso ya tokiso:

E tekenetswe_____tsatsing lena la la _____ la kgwedi ya _____ 2020.

_____
Motekeno wa moreki"

Sehlomathiso sa Sehlomathisetso sa D Melawaneng ena

17. Sehlomathisetso sa D se Melawaneng ena jwale se hlomathiswa ka ho nkelwa sebaka ha serapana sa (vii) sa serapa sa (c) sa serapana se latelang:

"(vii) dihotele, dilotjhe le matlo a kamohelo ya baeti, ntle feela le moo e bang di a hlokeha bakeng sa ho amohela bahahlaudi ba ntseng ba le teng ba dumelletsweng feela ho dula dihoteleng, dilotjheng le matlong a kamohelo ya baeti;".

KITSISO YA PUSO

LEFAPHA LA TIRISANOMMOGO YA PUSO LE MERERO YA SETSO

Nmr. R. 465 18 Mopitlwe 2020

DISASTER MANAGEMENT ACT, 2002: TLHABOLOLO YA MELAWANATAOLO E E REBOTSWENG GO YA KA KAROLO 27(2)

Nna, Dr Nkosazana Dlamini-Zuma, Tona ya Tirisanommogo ya Puso le Merero ya Setso, ka taelo ka fa tlase ga karolo 3 ya *Disaster Management Act, 2002* (Molao 57 wa 2002), morago ga kgoeletso ya maemo a bosetšhaba a matlhotlhapelo, e e phasaladitsweng mo Lokwalodikgannyeng la Puso la Nomoro 43096 ka di 15 Mopitlwe 2020, go ya ka karolo 27(2) ya *Disaster Management Act, 2002*, morago ga go rerisana le maloko a Kabinete a a maleba, ke dira Melawanataolo mo Šejuleng.

DR NKOSAZANA DLAMINI ZUMA, MP

TONA YA TIRISANOMMOGO YA PUSO LE MERERO YA SETSO

LETLHA:

ŠEJULE

Dithaloso

1. Mo melawanataolong eno, "Melawanataolo" e kaya melawanataolo e e phasaladitsweng ka Kitsiso ya Puso Nmr. 318 ya di 18 Mopitlwe 2020, jaaka e tlhabolotswe ka Dikitsiso tsa Puso diNmr. R. 398 ya di 25 Mopitlwe 2020, R.419 ya di 26 Mopitlwe 2020 le R. 446 ya di 2 Moranang 2020.

Tlhabololo ya molawana 6 wa Melawanataolo

2. Molawanataolo 6 wa Melawanataolo o tlhabololwa ka go tseelwa legato ke molawanataolo o o latelang—

"Dikolo le mafelo a tlhokomelo e e sa felelang di tshwanetse go tswalwa ka di 18 Mopitlwe 2020 go fitlha ka di 30 Moranang 2020, mme paka eo e ka atoloswa ka taelo ya leloko la Kabinete le le rwalang maikarabelo."

Tlhabololo ya molawanataolo 1A wa Melawanataolo

3. Molawanataolo 1A wa Melawanataolo o tlhabololwa ka go tseelwa legato ke molawanataolo o o latelang:

"Tiriso ya Dikgaolo 1, 2, 3 le 4

1A. (1) Kgaolo 1 le taelo nngwe le nngwe e e rebotsweng go ya ka Melawanataolo e tla tswelela go disiwa gore e a obamelwa le go diriswa, ntle le fa go na le go sa tsamaelaneng magareng ga Kgaolo 1 le Kgaolo 2 go fitlha go 4, Dikgaolo 2 go fitlha go 4 di tla nna tsona di diriswang go ya ka bogolo jwa pharologano.

(2) Dikgaolo 2, 3 le 4 tsa Melawanataolo eno di tla diriswa go tloga ka di 26 Mopitlwe 2020 ka ura ya bo 23:59 go fitlha ka di 30 Moranang 2020 ka ura ya bo 23:59: Fela Kgaolo 3 e tla tswelela go disiwa gore e a obamelwa sebaka sa paka ya maemo a bosetšhaba a matlhotlhapelo, kgotsa sebaka sa dipaka jaaka di ka atoloswa."

Go tseelwa legato ga molawanataolo 7 wa Melawanataolo

4. Molawanataolo 7 wa Melawanataolo o tseelwa legato ke molawanataolo o o latelang:

"Tshekego ya maeto

7. Maeto otlhe a baagi go —

(a) Mafelo a Kgopololo;

(b) Mafelo a Tswalelo ya Balatofatswa;

(c) Mafelo a Tlhatlhelo;

(d) Mafelo a Tswalelo a Sesole; le

(e) Mafelo a Lefapha la Tlhabololo ya Loago, go akaretsa le Disenthara tsa Tlhokomelo ya Bana le Baswa, mafelo a tshireletso, Disenthara tsa Ditirelo Tsotlhe, Disenthara tsa Kalafi,

a sekegilwe sebaka sa paka ya tekanyetso ya metsamao ya baagi go simolola ka letlha la phasalatso ya Kitsiso eno, mme paka eo e ka atoloswetswa go paka e nngwe, mme ga e a tshwanela go feta paka ya maemo a bosetšhaba a matlhotlhapelo ke leloko la kabinete le le rwalang maikarabelo.".

Tlhabololo ya molawanataolo 8 wa Melawanataolo

5. Molawanataolo 8 wa Melawanataolo o tlhabololwa ka go tsenngwa ga molawanataolotlaleletso (6) morago ga molawanataolotlaleletso (5) —

"(6) Thwalo ya bojwala ga e a letlwa, ntle le fa tagi e tlhokega mabapi le madirelo a a tlhagisang diphepafatsadiatla, dibolatwatsi, sesepa le alekhoholo e e dirisetswang madirelo le ditlhagiso tsa go phepafatsa.".

Tlhabololo ya molawanataolo 10 wa Melawanataolo

6. Molawanataolo 10 wa Melawanataolo o tlhabololwa ka go tsenngwa ga molawanataolotlaleletso o o latelang:

"(9) Ditaelo tsotlhe tse di rebotsweng go ya ka Melawanataolo eno di tla tswelela go dira ntle le fa di fetotswe, di tlhabolotswe kgotsa di gogetswe morago ke leloko la Kabinete le le rwalang maikarabelo a ditaelo tseo."

Tlhabololo ya molawanataolo 11A wa Melawanataolo

7. Molawanataolo 11A wa Melawanataolo o tlhabololwa ka go tseelwa legato ga tlhaloso ya "tekanyetso ya metsamao ya baagi" ka tlhaloso e e latelang:

"'tekanyetso ya metsamao ya baagi' e kaya kganelo ya motsamao wa batho ka nako eo Dikgaolo 2, 3 le 4 tsa Melawanataolo eno di diriswang, e leng go simolola ka ura ya bo 23:59 ka di 26 Mopitlwe 2020, go fitlhela ka ura ya bo 23:59 ka di 30 Moranang 2020; le".

Tlhabololo ya molawanataolo 11B wa Melawanataolo

8. Molawanataolo 11B wa Melawanataolo o tlhabololwa ka—

(a) go tseelwa legato ga ntlha *(bb)* ya temanatlaleletso (ii) ya temana *(a)* ya molawanataolotlaleletso (1) ka ntlha e e latelang:

"(bb) thwalo ya—

(bbA) dithoto tsa botlhokwa;

(bbB) morwalo go tswa ka magorogelong go ya kwa mafelong a o tshwanetseng go goroswa teng; le

(bbC) morwalo o gajaana o leng kwa magorogelong, mabapi le thomelontle ya dithoto go fokotsa pitlagano kwa magorogelong;";

(b) go tsenngwa ga temana e e latelang morago ga temana *(f)* ya molawanataolotlaleletso (1):

"(g) Mabenkele a a rekisang ditlhagiso tsa didiriswa le dikarolo tsa dikoloi a tshwanetse go tshola rejisetara ya batho ba ba rekang dithoto tsa botlhokwa tse di tlhagisitsweng mo Karolong A ya Mametlelelo B, e bile a tshwanetse go tshola rekoto ya tlhomamiso e e saenilweng, e e tsamaelanang ka gotlhe le Foromo 4 ya Mametlelelo C e e dirilweng ke moreki wa dithoto a tlhomamisa gore dithoto ke dithoto tsa botlhokwa jaaka go tlhalositswe mo Melawanataolong.";

(c) go tseelwa legato ga temana *(b)* ya molawanataolotlaleletso (4A) ka temana e e latelang:

"(b) Leloko la Kabinete le le rwalang maikarabelo a tsa boitekanelo le ditirelo tsa loago le tsa kgwebisano, madirelo le kgaisano le ka, ka ditaelo, tlhagisa ditirelo tse di tlhokegang go tlamela kgotsa go tshegetsa ditirelo tsa botlhokwa tsa boitekanelo le loago le ditiro tsa kgwebisano kgotsa madirelo a boditšhabatšhaba tse di neetsweng mo Mametlelelong B ya Melawanataolo.";

(d) go phimolwa ga temana *(h)* ya molawanataolotlaleletso (8); le

(e) go tsenngwa ga melawanataolotlaleletso e e latelang morago ga molawanataolotlaleletso (8):

"(9)(a) Go tsamaiswa ga bana magareng ga batshwarimmogo ba maikarabelo a botsadi le ditshwanelo kgotsa motlhokomedi, jaaka go tlhalositswe mo karolong 1(1) ya *Children's Act, 2005* (Molao 38 wa 2005), ka nako ya tekanyetso ya metsamao ya baagi, ga go a letlwa, ntle le fa go dirilwe dithulaganyo tsa go tsamaisa ngwana go tswa go motsadi yo mongwe go ya go yo mongwe, go ya ka—

(i) taelo ya kgotlatshekelo;

(ii) fa go na le tumalano ya maikarabelo a botsadi le ditshwanelo kgotsa leano la botsadi, e e kwadisitsweng le mmueledi wa malapa, kgotsa

(iii) motshwarimmogo wa maikarabelo a botsadi le ditshwanelo a tshotse lokwalo la matsalo kgotsa kgatiso e e kanetsweng ya lokwalo la matsalo la ngwana kgotsa bana go netefatsa kamano e e mo molaong magareng ga batshwarimmogo ba maikarabelo a botsadi le ditshwanelo:

Fa fela kwa lelapeng le ngwana a tshwanetseng go ya go lona, go se motho ope yo go itsagaleng gore o amane le motho mongwe, kgotsa yo go belaelwang ka mabaka gore o amane le motho yo go itsagaleng gore o tshwaeditswe, kgotsa yo go belaelwang ka mabaka gore o tshwaeditswe ke *COVID-19* kwa lelapeng le ngwana a tshwanetseng go ya go lona.

(b) Motsadi kgotsa motlhokomedi yo o tsamaisang ngwana yo o amegang o tshwanetse go tshola mo go ena, taelo ya kgotlatshekelo kgotsa tumalano ya maikarabelo a botsadi le ditshwanelo kgotsa leano la botsadi kgotsa lokwalo la matsalo la ngwana kgotsa bana, jaaka go tlhokega.

(10) Diforomo tsotlhe di tshwanetse go tlatswa ka botlalo, go akaretsa le maina ka botlalo, dinomoro tsa lokwaloitshupo kgotsa lokwalo la mosepele le dintlha tsa kgolagano ka botlalo jaaka go tlhokega mo foromong mme fa go sa dirwa jalo foromo e tla tsewa jaaka e e sa amogelesegeng."

Go tsenngwa ga molawanataolo 11CA morago ga molawanataolo 11C

9. Molawanataolo o o latelang o tsenngwa morago ga molawanataolo 11C:

"Kganelo ya diphuduso

11CA. G go motho ope yo o tla fuduswang mo lefelong la gagwe la bonno, go sa kgathalesege gore ke bonno jwa semmuso kgotsa jo e seng jwa semmuso kgotsa bonno jwa kwa dipolaseng, ka nako ya tekanyetso ya metsamao ya baagi.".

Go tseelwa legato ga molawanataolo 11G wa Melawanataolo

10. Molawanataolo 11G wa Melawanataolo o tseelwa legato ke molawanataolo o o latelang:

"Ditlolomolao le dikotlhao

11G. Mabapi le maitlhomo a Kgaolo eno, motho mongwe le mongwe yo o tlolang —

(a) molawanataolo 11B(1)(a), *(b), (c), (d), (f)* kgotsa11B(4); kgotsa

(b) melawanataolo 11C(1) le 11CA,

o tlola molao e bile, fa a atlhotswe, o rwala maikarabelosemolao a tuediso kgotsa go romelwa kgolegelong dikgwedi tse di sa feteng tse thataro kgotsa ka bobedi tuediso le go golegwa.".

Tlhabololo ya molawanataolo 11H wa Melawanataolo

11. Molawanataolo 11H wa Melawanataolo o tlhabololwa ka go tseelwa legato ga molawanataolotlaleletso (13) ka molawanataolotlaleletso o o latelang:

"(13) Leloko la Kabinete le le rwalang maikarabelo a tsa bosiamisi le ditirelo tsa kgopololo le tla, go ya ka karolo 7(1)(a) e buisiwa mmogo le temana *(d)* ya tlhaloso ya "tirelo" mo karolong 1(1) ya *Judges' Remuneration and Conditions of Employment Act, 2001* (Molao 47 wa 2001) kopa moatlhodi kgotsa Moatlhodi wa Kgotlatshekelo ya Molaotheo yo o golotsweng mo tirelong go diragatsa tirelo jaaka Moatlhodi yo o Thapilweng wa *COVID-19* jaaka go laetswe mo Melawanataolong."

Go tseelwa legato ga molawanataolo 11I wa Melawanataolo

12. Molawanataolo 11I wa Melawanataolo o tseelwa legato ke molawanataolo o o latelang:

"Ditlolomolao le dikotlhao

11I. (1) Go se obamele—

(a) tlamego e e pateleditsweng go ya ka molawanataolo 11H(5), (9), (11), (17); kgotsa

(b) taelo e e rebotsweng go ya ka molawanataolo 11H(10)

kgotsa (18), ke tlolomolao.

(2) Motho mongwe le mongwe yo o retelelwang ke go obamela tlamego e e pateleditsweng go ya ka molawanataolo 11H(5), (9), (11) kgotsa (17) kgotsa taelo e e rebotsweng go ya ka molawanataolo 11H(10) kgotsa (18), o tlola molao e bile, fa a atlhotswe, o rwala maikarabelosemolao a tuediso kgotsa go romelwa kgolegelong dikgwedi tse di sa feteng tse thataro kgotsa ka bobedi tuediso le go golegwa."

Go tsenngwa ga Kgaolo 4 mo Melawanataolong

13. Kgaolo e e latelang e tsenngwa mo Melawanataolong:

"KGAOLO 4

Tlamelo ya ditlhagiso tsa motlakase le peteroleamo

11J. Go netefatsa tlamelo e e tswelelang ya ditlhagiso tsa motlakase le peteroleamo kwa baaging jaaka go kailwe mo temaneng 6 ya Karolo B ya Mametlelelo B—

(a) meepo ya malatlha e e tlamelang Eskom e tshwanetse go go tswelela go dira ka botlalo; le

(b) mafelo a oli e tlhotlhiwang mo go ona a tshwanetse go dira ka botlalo go efoga tlhaelo ya leokwane, e bile ditiro tseo di tshwanetse go akaretsa dikarolo tsa tlhapoloso, dipolante le maiso.

Ditiro tsa Meepo

11K. (1) Ditiro tsa meepo, jaaka di kailwe mo temaneng 22 ya Karolo B, di tshwanetse go dirwa ka bokgoni jo bo fokoditsweng jo bo sa feteng 50% ka nako ya tekanyetso ya metsamao ya baagi, mme morago ga moo ka bokgoni jo bo okeditsweng jaaka go tlhomamisitswe go ya ka taelo e e rebotsweng ke leloko la Kabinete le le rwalang maikarabelo a ditlamelo tsa dimenerale le motlakase.

(2) Dipeelomabaka tse di latelang di diriswa mo tshimololong le koketsong ya bokgoni:

(a) Lenaneo la tlhatlhobo le teko le le tseneletseng le tshwanetse go tsenngwa mo tirisong fa badiri ba boela kwa tirong;

(b) bodirelo jwa meepo bo tshwanetse go tlamela ka ditlamelo tsa kwarantini mabapi le badiri ba diteko di bontshang gore ba na le *COVID-19*;

(c) tshedimosetso e e kgobokantsweng ka nako ya lenaneo la tlhatlhobo le teko e tshwanetse go romelwa kwa bothating jo bo maleba;

(d) ditlamo tsa meepo di tshwanetse go dira dithulaganyo tsa go rwala badiri ba tsona ba maAforika Borwa go tswa kwa magaeng a bona a bonno go ya kwa mafelong a tiro;

(e) badiri go tswa kwa dinageng tsa boagisani tsa Setšhaba sa Tlhabololo sa Borwa jwa Aforika ba tshwanetse go biletswa kwa mafelong a bona a tiro kwa bokhutlong jwa tekanyetso ya metsamao ya baagi kwa dinageng tsa bona ka tsamaelano le Melawanataolo eno le melawanataolo e e diriswang kwa dinageng tseo.

(3) Tatediso le tshekatsheko ya kutlwalo ya thoromo ka Khansele ya Jeosaense e tshwanetse go oketswa ka bonako jo bo kgonegang."

Tlhabololo ya Mametlelelo B ya Melawanataolo

14. Mametlelelo B ya Melawanataolo e tlhabololwa ka —

(a) go e oketsa mo Karolong A morago ga temana 5 ka ditemana tse di latelang:

"6. Didiriswa, dikarolo le ditlhagiso tse di tlhokwang ke mogwebi mongwe le mongwe yo o siametseng mabapi fela le dipaakanyo tsa tshoganyetso kwa magaeng a bonno;

7. Didiriswa, dikarolo le ditlhagiso tse di tlhokwang ke setheo sengwe le sengwe se se tshwaraganeng le go tlamela ditirelo tsa botlhokwa tsa porojeke nngwe le nngwe e e amanang le metsi, motlakase kgotsa ditirelo tse dingwe tsa botlhokwa;

8. Dikarolwana tsa dikoloi tse di tlhokang go baakanngwa ka tshoganyetso fa koloi eo e diriswa ke motho yo o amegang mo tirong ya ditirelo tsa botlhokwa.";

(b) go tseelwa legato mo Karolong B ya temana 5 ka temana e e latelang:

"5. Mabenkele a kerosari le mebaraka ya tlhagisontsi, mabentlele a di-*spaza*, barekisi ba maungo le merogo ba mo mebileng le *langanas*, ka tlhokego ya tetla ya go rekisa e e kwetsweng go tswa go bothati jwa mmasepala mabapi le mabentlele a di-*spaza* le barekisi ba maungo le merego ba mo mebileng: Mme fela ditetla tsotlhe tse di amogelesegang tsa mabentlele a di-*spaza* le barekisi ba maungo le merego ba mo mebileng tse di rebotsweng pele ga kgotsa ka nako ya kgoeletso ya maemo a matlhotlhapelo a bosetšhaba le tse di dirang go fitlhela ka paka e e kailweng, di tla amogelesega sebaka sa kgwedi e le esi morago ga go ya bokhutlong ga maemo a matlhotlhapelo a bosetšhaba;";

(c) go tseelwa legato mo Karolong B ya temana 22 ka temana e e latelang:

"22. Gauta, tlhotlho ya gauta, malatlha le meepo;";

(d) go tseelwa legato mo Karolong B ya temana 27 ka temana e e latelang:
"27.1 Bakomišenara ba Khomišene ya Ditshwanelo tsa Botho ya Aforika Borwa, Khomišene ya Bong, Khomišene ya Tsweletso le Tshireletso ya Ditshwanelo tsa Mekgatlho ya Setso, Bodumedi, le Dipuo, Mosireletsi wa Setšhaba le Motlatsamosireletsi wa Setšhaba le Khomišene ya Ditlhopho e e Ikemetseng; le
27.2 Ditirelo tse di abiwang ke ditheo tse di kailweng mo ntlheng 27.1;";

(e) go tseelwa legato mo Karolong B ya temana 30 ka temana e e latelang:
"30. Mafelo a kamogelomegala a a tlhokegang go tlamela ditirelo tsa boitekanelo, pabalesego, tshegetsoloago, puso le ditšhelete, thulaganyoseŝwa ya dikoloto tsa badirisi ba mabenkele le phitlhelelo ya dipholisi tsa inšorense ya pakakhutshwane ka ntlha ya phokotso ya lotseno kgotsa tatlhegelo ya lotseno;"; le

(f) go oketsa mo Karolong B ga ditemana tse di latelang morago ga temana 33:
"34. Dikgwebo tse di tlhokegang mabapi le go dira tiro ya paakanyo ya tshoganyetso, go akaretsa dipolamara, badirakamotlakase, babaakanyi ba dinotlelo tsa mejako, batsenyadigalase tsa matlhabaphefo, babaakanyi ba marulelo;
35. Dikgwebo tse di tlhokegang mabapi le paakanyo ya tshoganyetso ya mebotorokara ya batho ba ba dirang ditirelo tsa botlhokwa;
36. Ditirelo tsa Tshedimosetso le Tlhaeletsano tse di abelwang ditheo tse di amegang mo kabong ya ditirelo tsa botlhokwa go ya ka Melawanataolo eno.".

Tlhabololo ya Foromo 3 ya Mametlelelo C ya Melawanataolo

15. Foromo 3 ya Mametlelelo C ya Melawanataolo e tlhabololwa ka go tseelwa legato ga lefoko "wa šerifi (wa moikani)" kgotsa " šerifi (moikani)" mo Kanelong gongwe le gongwe fa le tlhagelelang ka lefoko "moikani".

Tlhabololo ya Mametlelelo C ya Melawanataolo

16. Mametlelelo C ya Melawanataolo e tlhabololwa ka go tsenngwa ga diforomo tse di latelang morago ga Foromo 3:

"FOROMO 4
NETEFATSO YA MOREKI WA DITLHAGISO TSA DIDIRISWA KGOTSA DIKAROLWANA TSA KOLOI
Molawanataolo 11B(1 *)(g)*

Nna,

Maina ka botlalo:						
Sefane:						
Nomoroitshupo						
Aterese ya lefelo la bonno:						
Dintlha tsa kgolagano	Nmr. ya selefounu		Nmr. ya mogala		Aterese ya imeile	

Ke tlhomamisa gore dithoto tse di kailweng fa tlase di botlhokwa mabapi le tiro ya paakanyo ya tshoganyetso:

_____

_____

E saenilwe kwa _____ ka letsatsi la _____ la kgwedi ya _____ 2020.

_____

Mosaeno wa moreki'.

Tlhabololo ya Mametlelelo D ya Melawanataolo

17. Mametlelelo D ya Melawanataolo e tlhabololwa ka go tseela legato temanatlaleletso (vii) ya temana *(c)* ka temanatlaleletso e e latelang:

"(vii) dihotele, dilloje, le matlo a baeng, ntle le fa e le gore a tlhokega go dirisediwa go amogela bajanala ba ba setseng ba ba patelesegang go nna mo dihoteleng, dillojeng le kwa matlong a baeng;".

ISAZISO SIKARHULUMENTE

ISEBE LEZOLAWULO LWENTSEBENZISWANO NEMICIMBI YEMVELI

Nombl. 465 16 kuTshazimpuzi 2020

UMTHETHO WOWAMA-2002 WOLAWULO LWENTLEKELE: UHLENGA-HLENGISO LWEMIGAQO EYAYIKHUTSHWE NGOKWECANDELO 27(2)

Mna, Gq Nkosazana Dlamini Zuma, uMphathiswa wezoLawulo lweNtsebenziswano neMicimbi yeMveli, ochongwe phantsi kweCandelo 3 loMthetho wowama-2002, woLawulo lweNtlekele (uMthetho Nombl. 57 wowama-2002), ekubeni ndibhengeze imo yentlekele kazwelonke, epapashwe kwiphepha-ndaba loMbuso elinguNombl. 43096 ngomhla we-15 kweyoKwindla 2020, ndenza, ngokweCandelo lama-27 (2) loMthetho woLawulo lweNtlekele, lowama-2002, emva kokufakana umlomoa namalungu eKhabhinethi afanelekileyo, le Migaqo ibekiweyo kwiShedyuli.

GQ NKOSAZANA DLAMINI ZUMA, ILUNGU LEPALAMENTE

UMPHATHISWA WEZOLAWULO LWENTSEBENZISWANO NEMICIMBI YEMVELI

UMHLA:

ISHEDYULI

linkcazelo

1. Kule migaqo, “iMigaqo” ithetha imigaqo epapashwe kwiSaziso sikaRhulumente Nombl. 318 somhla we-18 kweyoKwindla 2020, njengoko siguquliweyo ziZaziso zikaRhulumente iiNombl. R. 398 ngomhla wama-25 kweyoKwindla 2020, R. 419 somhla wama-26 kweyoKwindla kunye ne-R. 446 somhla wesi-2 kuTshazimpuzi 2020.

Uhlenga-hlengiso lomgaqo wesi-6 weMigaqo

2. UMgaqo wesi-6 weMigaqo uyahlenga-hlengiswa ngokuthi kufakelwe endaweni yomgaqo olandelayo -

"Izikolo kunye namaziko okhathalelo okwethutyana kufuneka avalwe ungadlulanga umhla we-18 kweyoKwindla 2020 ukuya kuthi ga kumhla wama-30 kuTshazimpuzi 2020 thuba elo linokwandiswa ngendlela yemiyalelo lilungu leKhabhinethi elinoxanduva.".

Uhlenga-hlengiso lomgaqo we-1A weMigaqo

3. Umgaqo we-1A weMigaqo uyahlenga-hlengiswa ngokuthi kufakelwe endaweni yomgaqo olandelayo:

“Ukusetyenziswa kweZahluko 1, 2, 3 kunye nesesi-4

1A. (1) ISahluko soku-1 kunye nawuphi na ukhomba-ndlela okhutshwe ngokuhambelana neMigaqo uya kuqhubeka ukusebenza ngokukuko, ngaphandle kokuba kukho ukungangqinelani phakathi kweSahluko soku-1 neSahluko 2 ukuya kwesesi-4, iZahluko 2 ukuya ku-4 ziya kuphumelela ukuya kuthi ga kwinqanaba lokungangqinelani.

(2) IZahluko 2, 3 nesesi-4 sale Migaqo ziza kusebenza ukususela kumhla wama-26 kweyoKwindla ngo-23h59 ukuya kumhla wama-30 kuTshazimpuzi ngo-23h59: Ngaphandle kokuba iSahluko 3 siya kuhlala sisebenza ngexesha lemo yentlekele kwizwelonke, okanye ixesha elinjalo elinokuthi landiswe."

Uhlenga-hlengiso lomgaqo wesi-7 weMigaqo

4. UMgaqo wesi-7 weMigaqo uyahlenga-hlengiswa ngokuthi kufakelwe endaweni yomgaqo olandelayo:

" Ukunqunyanyiswa kokutyelela

7. Zonke iintlobo zotyelelo ngamalungu oluntu—

(*a*) KuMaziko oLuleko;
(*b*) KwiiJele;
(*c*) Kwizisele zokugcina amabanjwa angekagwetywa;
(d) KwiiJele zoMkhosi; kunye
(*e*) Namaziko eSebe lezoPhuhliso loLuntu, kuquka amaZiko okuGcina aBantwana noLutsha, iindawo zoogobi-tyholo, amaZiko angooNtozonke, kunye namaZiko oNyango, zinqunyanyiswe iintsuku ezingama-30 ukususela kumhla wokupapashwa kwesi Saziso, xesha elo elinokwandiswa nangaliphi na ixesha, kodwa kungabi ngaphaya kwexesha lemo yentlekele kazwelonke emiselwe lilungu lekhabhinethi elinoxanduva lokwenza oko.".

Uhlenga-hlengiso lomgaqo wesi-8 weMigaqo

5. UMgaqo wesi-8 weMigaqo uyahlenga-hlengiswa ngokuthi kongezwe kummiselo (6) emva kommiselo (5)—

"(6) Ukuthuthwa kotywala akuvumelekanga, ngaphandle kokuba utywala bufuneka kwimizi-mveliso evelisa amachiza okubulala iintsholongwane ezandleni, izibulala-ntsholongwane, isepha, utywala bokusetyenziswa kwimizi-mveliso kunye neemveliso zokucoca izindlu.".

Uhlenga-hlengiso lomgaqo we-10 weMigaqo

6. UMgaqo we-10 weMigaqo uyahlenga-hlengiswa ngokuthi kongezwe kummiselo olandelayo:

"(9) Yonke imiyalelo ekhutshwe ngokwale Migaqo iya kuqhubeka nokusebenza ngaphandle kokuba, ayifani, yenziwe izilungiso okanye irhoxiswe lilungu leKhabhinethi elinoxanduva lokunika loo miyalelo.".

Uhlenga-hlengiso lomgaqo we-11A weMigaqo

7. UMgaqo we-11A weMigaqo uyahlenga-hlengiswa ngokuthi kufakelwe endaweni yenkcazelo "yokuvaleleka phantsi kwemiqathango ethile" yale nkcazelo ilandelayo:

'ukuvaleleka phantsi kwemiqathango ethile' kuthetha ukuthintelwa kokuhamba-hamba kwabantu ngeli xesha kusetyenziswa ngalo iSahluko 2, 3 nesesi-4 sale Migaqo, ukususela ngo-23h59 ngomhla wama-26 kweyoKwindla 2020, kude kube ngu-23h59 ngomhla wama-30 kuTshazimpuzi 2020; kwaye".

Uhlenga-hlengiso lomgaqo we-11B weMigaqo

8. UMgaqo we-11B weMigaqo uyahlenga-hlengiswa—

(a) ngokuthi kufakelwe endaweni yomba (bb) womhlathana (iii) womthathi (a) wommiselo (1) wale miba ilandelayo:

"*(bb)* ukuthuthwa—

(*bb*A) kwezibonelelo ezingundoqo;

(*bb*B) kwempahla ukusuka kumazibuko okungena ukuya kwindawo yawo; kunye

(*bb*C) kwempahla okwangoku ekumazibuko okungena, eza kuthunyelwa kumazwe angaphandle ngeenjongo zokuphungula ingxinano kumazibuko okungena;";

(b) ukufakelwa komhlathi olandelayo emva komhlathi (*f*) wommiselo (1):

"*(g)* Iivenkile ezithengisa iimveliso zezixhobo zokusebenza kunye neentsimbi zeemoto kufuneka zigcine iinkcukacha zabantu abathenga iimpahla ezingundoqo ezidweliswe kwiCandelo A leSihlomelo B, kwaye kufuneka zigcine ikopi yesibhambathiso esityikitywe ngumthengi weempahla, efana kakhulu neFomu 4 yeSihlomelo C engqina ukuba iimpahla zizimpahla ezingundoqo. njengoko kuchaziwe kwiMigaqo.";

(c) ukufakela endaweni yomhlathi (b) wommiselo (4A) walo mhlathi ulandelayo:

"*(b)* Amalungu eKhabhinethi anoxanduva lwezempilo neenkonzo zoluntu kunye nezorhwebo, ezamashishini kunye nokhuphiswano, ngomyalelo, anokuthi akhethe iinkonzo eziyimfuneko ekunikezelweni okanye ukugcina iinkonzo zempilo ezingundoqo kunye nezibonelelo zoluntu kunye norhwebo lwamanye amazwe okanye imisebenzi yezorhwebo edweliswe kwiSihlomelo B kwiMigaqo.";

(d) ukucinywa komhlathi (h) wommiselo (8); kunye

(e) nokongezwa kwale mimiselo ilandelayo emva kommiselo (8):

"(9)*(a)* Ukuhanjiswa kwabantwana phakathi kwabazali ababambisene ngoxanduva lobuzali kunye namalungelo afanayo okanye umkhathaleli, njengoko kuchaziwe kwicandelo 1 (1) loMthetho waBantwana, wowama-2005 (uMthetho onguNombl. 38 wama-2005), ngexesha lokuvaleleka phantsi kwemiqathango ethile, kuyathintelwa, ngaphandle kokuba amalungiselelo akhona okuba umntwana asuke komnye umzali aye komnye—

(i) ngokomyalelo wenkundla;

(ii) apho uxanduva lobuzali kunye nemvumelwano yamalungelo okanye isicwangciso somzali, esibhaliswe kunye ligqwetha losapho, sikhona, okanye

(iii) omnye umzali onesivumelwano sokudlala indima yobuzali nesamalungelo obuzali unesiqiniseko sokuzalwa okanye ikopi eqinisekisiweyo yesiqinisekiso sokuzalwa somntwana okanye sabantwana ukungqina ulwalamano olusemthethweni phakathi kwabazali abanesivumelwano sokudlala indima yobuzali nesamalungelo obuzali:

Ngaphandle kokuba kwikhaya apho umntwana kufuneka afudukele khona, akukho mntu waziwayo ukuba ukhe wahlangana, okanye ukrokrelwa ukuba uye wahlangana nomnye umntu owaziwayo ukuba udibene nomnye umntu osulelekileyo, okanye okrokreleka ukuba wosulelekile yi-*COVID-19* kwikhaya apho umntwana ekufuneka efudukele khona.

(b) Umzali okanye umkhathaleli ohambisa umntwana kufuneka abe nemvume evela enkundleni okanye isivumelwano soxanduva lobuzali kunye namalungelo okanye isicwangciso sobuzali okanye isiqinisekiso sokuzalwa somntwana okanye sabantwana, njengoko kuyimfuneko

(10) Zonke iifomu kufuneka zigcwaliswe ngokupheleleyo, kuquka onke amagama, iinombolo zeziqinisekiso okanye zencwadana yokundwendwela kunye neenkcukacha zokuqhagamshelana njengoko zifuneka kwifomu kwaye ukusilela ukwenza oko kuya kukhokelela ukuba ifomu ingamkelwa njengengasebenziyo.".

Ukufakelwa komgaqo we-11CA emva komgaqo 11C

9. Lo mgaqo ulandelayo ufakelwa emva komgaqo 11C:

"**Ukuthintelwa kokugxothwa endlwini**

11CA. Akukho mntu uya kugxothwa kwindawo ahlala kuyo, nokuba ngaba yindawo yokuhlala yindlu eyakhiweyo okanye lityotyombe okanye yindawo yokuhlala efama, ngeli thuba sikwixesha lokuvaleleka phantsi kwemiqathango ethile.".

Ukufakwa endaweni yomgaqo we-11G weMigaqo

10. UMgaqo we-11C weMigaqo ufakwa endaweni yalo mgaqo ulandelayo:

"**Amatyala kunye nezohlwayo**

11G. Ngenjongo yesi Sahluko, nawuphi na umntu owaphula—

(a) umgaqo we-11B(1)*(a)*, *(b), (c), (d), (f)* or 11B(4); okanye

(b) imigaqo ye-11C(1) kunye neye-11CA,

wophula umthetho kwaye, ekugwetyweni, unoxanduva lokuhlawuliswa okanye ukuvalelwa entolongweni ixesha elingadlulanga kwiinyanga ezintandathu okanye zombini isohlwayo nokuvalelwa entolongweni.".

Uhlenga-hlengiso lomgaqo we-11H leMigaqo

11. UMgaqo we-11H weMigaqo uyahlenga-hlengiswa ngokuthi kufakelwe endaweni yommiselo (13) walo mmiselo ulandelayo:

"(13) Ilungu leKhabhinethi elinoxanduva lwezobulungisa kunye neenkonzo zoluleko liza, ngokwecandelo 7(1)(a) elifundwa nomhlathi (d) wenkcazelo “yenkonzo” kwicandelo 1(1) loMthetho weMivuzo yeeJaji kunye neeMeko zeNgqesho, wama-2001 (uMthetho onguNombl. 47 wama-2001), kucela ijaji okanye iJaji yeNkundla yoMgaqo-siseko eyekisiweyo ukusebenza ukuba iqhube njengeJaji eChongiweyo ye-*COVID-19* njengoko kuchaziwe kwiMigaqo.".

Ukufakwa endaweni yomgaqo we-11I weMigaqo

12. UMgaqo we-11I weMigaqo ufakwa endaweni yalo mgaqo ulandelayo:

"**Amatyala kunye nezohlwayo**

11I. (1) Ukungathobeli—

(*a*) umgaqo onyanzeliswa ngokwemigaqo 11H(5), (9), (11), (17); okanye

(*b*) umyalelo okhutshwe ngokomgaqo 11H(10) okanye (18), lityala.

(2) Umntu ongayithobeliyo imigaqo enyanzeliswa ngokwemigaqo 11H(5), (9), (11) or (17) okanye umyalelo okhutshiweyo ngokomgaqo 11H(10) okanye (18), wophula umthetho kwaye, ekugwetyweni kwakhe, unoxanduva lokuhlawuliswa okanye ukuvalelwa entolongweni ixesha elingadlulanga kwiinyanga ezintandathu okanye zombini isohlwayo nokuvalelwa entolongweni.".

Ukufakelwa kwiSahluko sesi-4 kwiMigaqo

13. Esi Sahluko silandelayo sifakelwe kwiMigaqo:

"ISAHLUKO SESI-4

Amandla nokuhanjiswa kweemveliso ze-*petroleum*

11J. Ukuqinisekisa ukuhanjiswa ngokuqhubekayo kwamandla kunye neemveliso ze-*petroleum* kuluntu njengoko kubhekisiwe kumhlathi 6 weCandelo B leSihlomelo B—

(a) abavelisi bamalahle abahambisela u-Eskom kufuneka baqhubeke besebenza ngokupheleleyo; kwaye

(b) amaziko okuvelisa iimveliso ze-petroleum kufuneka asebenze ngokupheleleyo ukunqanda ukunqongophala kwamafutha ezithuthi, kwaye imisebenzi enjalo kufuneka ibandakanye amaziko okwenza, ukuvelisa nokunyibilikisa isinyithi.

Ukusebenza kweeMigodi

11K. (1) Ukusebenza kwemigodi, njengoku kuchaziwe kumhlathi wama-22 weCandelo B leSihlomelo B, kufuneka kuqhubekwe nokuncitshiswa komthamo ongekho ngaphezulu kwe-50% ngexesha lokuvaleleka phantsi kwemiqathango ethile, kwaye emva koko kwandiswe umthamo njengoko kumiselwe lilungu leKhabhinethi elijongene nobutyebi bezimbiwa kunye namandla

(2) Le mibandela ilandelayo isebenza ekuqalisweni nasekunyusweni komthamo:

(a) Kufuneka kuqhutywe inkqubo engqongqo yovavanyo kunye nokuhlola abasebenzi xa bebuyela emsebenzini;

(b) icandelo lezezimbiwa kufuneka libonelele ngendawo yokugcina abasebenzi ekuthe kwafumaniseka ukuba bosulelekile yi-*COVID-19*;

(c) iinkcukacha eziqokelelwe ngexesha lenkqubo yovavanyo neyokuhlola kufuneka zidluliselwe kwabasemagunyeni abafanelekileyo;

(d) iinkampani zemigodi kufuneka zenze amalungiselelo okuhambisa abasebenzi baseMzantsi Afrika basuke kumakhaya abo baye kwiindawo abasebenza kuzo;

(e) abasebenzi abasuka kumazwe aphantsi koMbutho woPhuhliso lwaMazwe aseMazantsi e-Afrika (i-*SADC*) kufuneka bakhunjuzwe ukuba babuyele kwiindawo abasebenza kuzo ekupheleni kwexesha lokuvaleleka phantsi kwemiqathango ethile kumazwe abo ngokuhambelana nale Migaqo nemigaqo esetyenziswayo kuloo mazwe.

(3) Maziqaliswe ngoku ukwenziwa ngqingqwa iinkqubo zokuhlola nokubeka phantsi kweliso iziphumo nomahluko owenziwa kukunyikima kumhlaba ezantsi emgodini. Oku kufuneka kuqhutywe yi-*Council for Geoscience.*".

Uhlenga-hlengiso lweSihlomelo B kwiMigaqo

14. ISihlomelo B kwiMigaqo sihlenga-hlengisiweyo—

(a) ngokongeza iCandelo A emva komhlathi wesi-5 wale mihlathi ilandelayo:

"6. Izixhobo zokusebenza, izinto kunye nezinto ezifunwa ngamagcisa ngenjongo yokulungisa ngokungxamisekileyo izinto kwiindawo zokuhlala abantu;

7 Izixhobo zokusebenza, nezinto kunye nezinto ezifunwa liziko elibandakanyeka ekunikezelweni kweibonelelo ezingundoqo nakweyiphi na iprojekthi enxulumene nokubonelelwa kwamanzi, umbane okanye ezinye izibonelelo ezingundoqo;

8. Iintsimbi zezithuthi ezilungiswa ngokungxamisekileyo apho isithuthi eso sisetyenziswa ngumntu owenza umsebenzi wezibonelelo ezingundoqo.";

(b) Ukufakwa endaweni yeCandelo B kumhlathi 5 womhlathi olandelayo:

"5. Iivenkile ezithengisa ukutya kunye namaziko amakhulu athengisa iziqhamo nemifuno, iivenkile zasekuhlaleni (i-*spaza shop*), abathengisi basesitalatweni beziqhamo nemifuno kunye ne-*langanas*, ngemvume ebhaliweyo evela kugunyaziwe kamasipala yokuba basebenze iyimfuneko ngokubhekisele kwiivenkile zasekuhlaleni (i-*spaza*) kunye nakwabo bathengisa iziqhamo kunye nemifuno ezitalatweni:

Ngaphandle kokuba zonke iimvume ezisemthethweni zeevenkile zasekuhlaleni (i-*spaza*) kunye nezabathengisa basesitalatweni beziqhamo nemifuno ezikhutshwe ngaphambi okanye ngexesha lokuchazwa kwemo yentlekele kazwelonke futhi eziwela kwixesha elichaziweyo, ziya kuhlala zisemthethweni ithuba elingangenyanga enye emva kokuphela kwemo yentlekele kazwelonke; ";

(c) ukufakwa endaweni yeCandelo B kumhlathi 22 walo mhlathi ulandelayo:

"22. Igolide, ukucolwa kwegolide, amalahle nokumba imigodi;";

(d) ukufakwa endaweni yeCandelo B kumhlathi 27 walo mhlathi ulandelayo:

"27.1 AbaKhomishinara beKhomishoni yamaLungelo oLuntu yaseMzantsi Afrika, iKhomishoni yezeSini, iKhomishoni yokuKhuthaza nokuKhusela amaLungelo oLuntu, iNkolo yoLuntu kunye neeLwimi, uMkhuseli woLuntu kunye neSekela loMkhuseli woLuntu kunye neKhomishoni yoNyulo eZimeleyo; kunye

27.2 Neenkonzo ezenziwa ngamaziko ekubhekiswe kuwo ku-27.1;";

(e) ukufakwa ndaweni yeCandelo B kumhlathi 30 walo mhlathi ulandelayo:

"30. Amaziko eminxeba ayafuneka ukubonelela ngezempilo, ukhuseleko, inkxaso yoluntu, iinkonzo zikarhulumente nezemali, ukuhlenga-hlengiswa kwamatyala kubathengi bevenkile ezinkulu, kunye nokunxibelelana neenkampani ze-inshorensi yexesha elifutshane ngenxa yokuncitshiswa komvuzo okanye ukuphulukana nomvuzo;"; kunye

(f) ukongeza iCandelo B yale mihlathi ilandelayo emva komhlathi wama-33:

"34. Imisebenzi yobuchule eyimfuneko ekunikezelweni komsebenzi wokulungisa imeko kaxakeka, kuquka abakhandi, abezombane, abakhandi bezitshixo, abafakeli beglasi, abalungisi bophahla;

35. Imisebenzi yobuchule eyimfuneko ekulungisweni kweenqwelo zikaxakeka zabantu abanikezela ngezibonelelo ezingundoqo;
36. Iinkonzo zobuChwepheshwe boLwazi noNxibelelwano ezihanjiswa kumaqumrhu nakumaziko abandakanyeka ekuhanjisweni kweenkonzo ezingundoqo ngokwale Migaqo.".

Uhlenga-hlengiso lweFomu 3 yeSihlomelo C kule Migaqo

15. IFomu yesi-3 yeSihlomelo C kwiMigaqo iyahlenga-hlengiswa ngokuthi kufakelwe endaweni yebinzana elithi "unothimba' (ingqina)" okanye "unothimba (ingqina)" kwisiQinisekiso naphi na apho livela khona igama elithi "ingqina".

Uhlenga-hlengiso lweSihlomelo C kwiMigaqo

16. ISihlomelo C kwiMigaqo siyahlenga-hlengiswa ngokuthi kongezwe ezi fomu zilandelayo kwiFomu 3

"FOMU 4
ISIQINISEKISO NGUMTHENGI WEZIXHOBO ZOKUSEBENZA OKANYE IINTSIMBI ZEZITHUTHI
IiMigaqo 11B(1)*(g)*

I,

Amagama apheleyo:						
Ifani:						
Inombolo yesiqinisekiso						
Idilesi yasekhaya:						
Iinkcukacha zokuqhagamshelana:	Inombl. yeselula		Inombl yomnxeba		Idilesi ye-imeyile	

Chaza ukuba iimpahla ezikhankanywe apha ngezantsi ziyimfuneko ekunikezeleni ngomsebenzi wokulungisa imeko kaxakeka:

Ityikitywe e_____ngomhla _____ wenyanga _____ 2020.

_____

Utyikityo lomthengi".

Uhlenga-hlengiso lweSihlomelo D kwiMigaqo

17. ISihlomelo D kwiMigaqo siyahlenga-hlengiswa ukuba sifakwe endaweni yomhlathana (vii) womhlathi (c) kulo mhlathana ulandelayo:

"(vii) iihotele, ii-*lodge* kunye nee-*guest houses*, ngaphandle kokuba ziyafuneka kubakhenkethi abaseleyo abavaleleke kwiihotele, ii-*lodge* kunye ne-*guest houses*;".

ISAZISO SIKAHULUMENI

UMNYANGO WEZOKUPHATHA NGOKUBAMBISANA KANYE NEZINDABA ZENDABUKO

No. R. 465 16 Mbasa 2020

ISICHIBIYELO SEMITHETHONQUBO EKHISHWE NGOKWESIGABA 27(2) SOMTHETHO WOKULAWULWA KWENHLEKELELE, WEZI-2002

Mina, uDkt Nkosazana Dlamini-Zuma, onguNgqongqoshe Wezokuphatha Ngokubambisana kanye Nezindaba Zendabuko, oqokwe ngaphansi kwesigaba sesi-3 soMthetho Wokulawulwa Kwenhlekelele, wezi-2002 (uMthetho wama-57 wezi-2002), njengoba kwamenyenzelwa isimo senhlekelele sikazwelonke, esashicilelwa kuSomqulu Kahulumeni onguNombolo 43096 mhla ziyi-15 kuNdasa 2020, ngokweSigaba 27(2) soMthetho Wokulawulwa Kwenhlekelele, wezi-2002, emva kokufakana imilomo namalungu eKhabhinethi afanele, ngenza le Mithethonqubo ebekwe kwiSithasiselo-mthetho.

DKT NKOSAZANA DLAMINI-ZUMA, ILUNGU LEPHALAMENDE
UNGQONGQOSHE WEZOKUPHATHA NGOKUBAMBISANA KANYE NEZINDABA ZENDABUKO
USUKU:

ISITHASISELO-MTHETHO

Izincazelo zamagama

1. Kule mithethonqubo, igama elithi “iMithethonqubo” lisho imithethonqubo eyashicilelwa ngokweSaziso Sikahulumeni esingunombolo 318 mhla ziyi-18 kuNdasa 2020, njengoba sichitshiyeliwe ngokusebenzisa iSaziso Sikahulumeni esingunombolo R. 398 mhla zingama-25 kuNdasa 2020, nesaziso R.419 mhla zingama-26 kuNdasa 2020 kanye nesaziso R. 446 mhla zi-2 kuMbasa 2020.

Ukuchitshiyelwa komthethonqubo 6 weMithethonqubo

2. Ngalokhu, kuchitshiyelwa umthethonqubo 6 weMithethonqubo ngokuthi esikhundleni sawo kufakwe lo mthethonqubo olandelayo:

“Izikole kanye nezikhungo ezinakekela futhi zibhasobhe izingane okwesikhashana kumele zivalwe kusukela mhla ziyi-18 kuNdasa 2020 kuze kube ngumhla zingama-30 kuMbasa 2020, futhi kungenzeka ukuthi lesi sikhathi silulwe ngokwesiqondiso esivela kwilungu leKhabhinethi elengamele.

Ukuchitshiyelwa komthethonqubo 1A weMithethonqubo

3. Ngalokhu, kuchitshiyelwa umthethonqubo 1A weMithethonqubo ngokuthi esikhundleni sawo kufakwe lo mthethonqubo olandelayo:

"Ukusebenza kweSahluko soku-1, sesi-2, sesi-3 kanye nesesi-4

1A. (1) ISahluko 1 kanye nanoma isiphi isiqondiso esikhishwe ngokulandela iMithethonqubo kuzoqhubeka kusebenze ngokusemthethweni, kepha-ke uma kwenzeka kuba khona noma yikuphi ukungahambelani phakathi kweSahluko 1 neSahluko 2 kuya kwiSahluko 4, lokho okuqukethwe kwiSahluko 2 kuya kwiSahluko 4 yikona okuzothathwa njengokwamukelekile futhi okusebenza ngokusemthethweni.

(2) IZahluko 2, 3 no-4 zale Mithethonqubo zizosebenza kusukela mhla zingama-26 kuNdasa 2020 ngo-23h59 kuze kube ngumhla zingama-30 kuMbasa ngo-23h59: Ngaphansi kombandela wokuthi iSahluko 3 sizoqhubeka sisebenze ngokusemthethweni kuze kuphele isikhathi senhlekelele sikazwelonke, noma kuze kuphele leso sikhathi okwelulwe ngaso isikhathi senhlekelele sikazwelonke."

Ukuchitshiyelwa komthethonqubo 7 weMithethonqubo ngokuthi kufakwe omunye esikhundleni sawo

4. Ngalokhu, kuchitshiyelwa umthethonqubo 7 weMithethonqubo ngokuthi esikhundleni sawo kufakwe lo mthethonqubo olandelayo:

"Ukumiswa kokuvakasha

7. Konke ukuvakashela kwamalungu omphakathi—

(*a*) Ezikhungweni Zokuhlunyeleliswa Kwezimilo;

(*b*) Ezikhungweni Zokugcina Iziboshwa Ezingakagwetshwa;

(*c*) Emagunjini Okugcina Iziboshwa Ngenkathi Zisalinde Ukuqulwa Kwamacala Azo;

(d) Ezikhungweni Zokugcina Iziboshwa Zamasosha; kanye

(*e*) Nezikhungo zoMnyango Wezokuthuthukiswa Komphakathi, kubandakanya neziKhungo Zokunakekela Izingane Nentsha, izindawo zokufihla ikhanda ezenzelwe abantu abangenamakhaya, iziKhungo Ezihlinzeka Ngezinsiza Ezinhlobonhlobo Endaweni Eyodwa kanye NeziKhungo Zokwelapha,

kumisiwe kulesi sikhathi sokuvalwa kwezwe kusukela ngosuku okushicilelwe ngalo lesi Saziso, futhi kungenzeka ukuthi ilungu leKhabhinethi elengamele liselule lesi sikhathi siqhubeke kuze kube sekupheleni kwesikhathi senhlekelele sikazwelonke, kodwa-ke kungadluli lapho."

Ukuchitshiyelwa komthethonqubo 8 weMithethonqubo

5. Ngalokhu, kuchitshiyelwa umthethonqubo 8 weMithethonqubo ngokuthi kwengenzwe umthethonqubwana (6) emva komthethonqubwana (5) —

“(6) Akuvumelekile neze ukuthwalwa nokuthuthwa kotshwala, ngaphandle lapho ikhemikhali yoketshezi lukagologo (i-alkhoholi) idingwa yizimboni ezikhiqiza izibulalimagciwane zezandla, imithi yokubulala amagciwane, insipho, i-alkhoholi esetshenziswa yizimboni kanye nemikhiqizo yokuhlanza ikhaya.”

Ukuchitshiyelwa komthethonqubo 10 weMithethonqubo

6. Ngalokhu, kuchitshiyelwa umthethonqubo 10 weMithethonqubo ngokuthi kwengenzwe umthethonqubwana olandelayo:

"(9) Zonke iziqondiso ezikhishwe ngokwale Mithethonqubo zizoqhubeka zisebenze ngokusemthethweni, ngaphandle uma ziguqulwa, zichitshiyelwa noma zihoxiswa yilungu leKhabhinethi elengamele, futhi okungumsebenzi walo ukukhipha iziqondiso lezo."

Ukuchitshiyelwa komthethonqubo 11A weMithethonqubo

7. Ngalokhu, kuchitshiyelwa umthethonqubo 11A weMithethonqubo ngokuthi esikhundleni sencazelo yegama elithi **“ukuvalwa kwezwe” (“*lockdown*”)** kufakwe le ncazelo elandelayo:

igama elithi "**ukuvalwa kwezwe**" lisho ukubekwa kwemikhawulo evimbela ukuhamba kwabantu ngesikhathi okusebenza ngaso lokho okushiwo eSahlukweni sesi-2, sesi-3 kanye nesesi-4 sale Mithethonqubo, okuwumkhawulo ozosebenza kusukela ngo-23H59 mhla zingama-26 kuNdasa 2020, kuze kube ngu-23H59 mhla zingama-30 kuMbasa 2020; kanye

Nokuchitshiyelwa komthethonqubo 11B weMithethonqubo

8. Ngalokhu, kuchitshiyelwa umthethonqubo 11B weMithethonqubo ngokuthi—

(a) esikhundleni salokho okushiwo kumshwana *(bb)* wendinyana (iii) yendima *(a)* yomthethonqubwana (1) kufakwe lokhu okulandelayo:

"*(bb)* ukuthuthwa—

(*bb*A) kwezimpahla ezisemqoka;

(*bb*B) kwemithwalo yempahla isuka ezikhumulweni zemikhumbi isiwe ezindaweni ezihlosiwe okuthunyelwa kuzona impahla; kanye

(*bb*C) naleyo mpahla njengamanje esezikhumulweni zemikhumbi elindele ukuthunyelwa emazweni angaphandle ukuze kuncishiswe ukunqwabelana kwempahla ezikhumulweni zemikhumbi zakuleli";

(b) kufakwe le ndima elandelayo emva kwendima *(f)* yomthethonqubwana (1):

"*(g)* Izitolo ezidayisa impahla yokwakha kanye nezingxenye zezimoto kumele zigcine irejista labantu abathenga izimpahla ezisemqoka ezibhalwe ohlwini oluhlinzekwe kwiNgxenye A yeSithasiselo B, futhi kumele zigcine irekhodi lesiqinisekiso-sifungo esisayiniwe esihambelana ngokupheleleyo neFomu 4 leSithasiselo C esenziwa ngumthengi wempahla lapho eqinisekisa ukuthi izimpahla azithengile yizimpahla ezisemqoka njengalokhu zichaziwe kwiMithethonqubo."

(c) kufakwe indima *(b)* kumthethonqubwana (4A) wale ndima elandelayo:

"*(b)* Ilungu leKhabhinethi elengamele ezempilo, nelengamele izinsizakalo zomphakathi kanye nalelo elengamele ezohwebo, ezezimboni kanye nokuncintisana avumelekile ukuthi, ngokukhipha iziqondiso, aqoke izinsizakalo ezidingekayo ukuhlinzeka noma ukugcina izinsizakalo ezisemqoka zezempilo noma zomphakathi kanye nezokuhwebelana kwamazwe ngamazwe nemisebenzi ephathelene nezimboni ehlinzekwe ohlwini olukuSithasiselo B seMithethonqubo";

(d) kwesulwe indima *(h)* yomthethonqubwana (8); futhi

(e) ngokuthi kwengezwe le mithethonqubwana elandelayo ngaphansi komthethonqubwana (8):

"(9)*(a)* Ngesikhathi kuqhubeka ukuvalwa kwezwe akuvunyelwe neze ukuhanjiswa kwezingane phakathi kwabazali abahlala ngokwehlukana abakhulisa izingane ngokubambisana, noma abanikazi bamalungelo okukhulisa izingane ngokubambisana noma abanekekeli bezingane, njengoba lokhu kuchaziwe kwisigaba 1(1) soMthetho Wezingane, wezi-2005, (uMthetho No. 38 wezi-2005), ngaphandle uma kwenziwe amalungiselelo okususwa kwengane kumzali ihanjiswe komunye—

(i) ngokomyalelo wenkantolo;

(ii) lapho kunesivumelwano sezibopho namalungelo omzali noma uhlelo lokukhulisa ingane njengabazali, okubhaliswe kummeli oyisazi esengamele ezemibango ephathelene namalungelo obuzali nawokuthi izingane zizohlala futhi zikhuliswe yimuphi umzali phakathi kwabazali ababili, noma

(iii) uma umzali okhulisa izingane ngokubambisana nomunye, noma umnikazi welungelo lokukhulisa izingane ngokubambisana nomunye ephethe isitifiketi sokuzalwa sengane/izitifiketi zokuzalwa zezingane noma ikhophi

yesitifiketi sokuzalwa sengane/amakhophi ezitifiketi zokuzalwa zezingane njengobufakazi bobukhona bobudlelwano phakathi kwabazali abahlala ngokwehlukana abakhulisa izingane ngokubambisana noma abanamalungelo okukhulisa izingane ngokubambisana:

Ngaphansi kombandela wokuthi ekhaya okuzohanjiswa kulona ingane akekho umuntu owaziwayo ukuthi uke waxhumana noma okusolakala sengathi uke waxhumana nanoma imuphi umuntu ohaqwe yi-*COVID-19* ohlala kulelo khaya okuzohanjiswa kulona ingane.

(b) Umzali noma umnakekeli ohambisa leyo ngane kumele aphathe umyalelo wenkantolo noma isivumelwano sezibopho namalungelo omzali noma uhlelo lokukhulisa ingane njengabazali bayo noma isitifiketi sengane/izitifiketi zezingane, njengoba kudingekile.

(10) Wonke amafomu kumele kube ngamafomu agcwaliswe ngokuphelele, kubandakanya amagama aphelele, izinombolo zomazisi noma zamaphasiphothi kanye nemininingwane yokuxhumana ephelele njengoba lokhu kudingekile efomini lelo futhi uma umuntu engakwenzi lokho ifomu ngeke neze lamukelwe futhi liyochithwa lithathwe njengento engasebenzi futhi engamukelekile."

Ukufakwa komthethonqubo 11CA emva komthethonqubo 11C

9. Ngalokhu, kufakwa lo mthethonqubo olandelayo emva komthethonqubo 11C:

"**Ukunqatshelwa kokuxoshwa nokususwa kwabantu lapho behlala khona**

11CA. Akekho umuntu ongaxoshwa noma asuswe endaweni ahlala kuyona, kungakhathalekile ukuthi leyo ndawo iyisakhiwo esiyindlu ekahle noma iyisakhiwo esingumjondolo noma isakhiwo esiyindlu esepulazini, kuze kuphele isikhathi sokuvalwa kwezwe."

Ukususwa komthethonqubo 11G weMithethonqubo kufakwe omunye esikhundleni sawo

10. Ngalokhu, kuchitshiyelwa umthethonqubo 11G weMithethonqubo ngokuthi esikhundleni sawo kufakwe umthethonqubo olandelayo:

"**Amacala nezijeziso**

11G. Ngezinhloso zalesi Sahluko, noma imuphi umuntu ophula—

(a) umthethonqubo 11B(1)*(a)*, *(b), (c), (d), (f)* noma 11B(4); noma

(b) umthethonqubo 11C(1) kanye no-11CA,

wenze icala, futhi uma limlahla lelo cala, uzokhokhiswa inhlawulo noma agqunywe ejele isikhathi esingekho ngaphezu kwezinyanga eziyisithupha noma agixabezwe ngesigwebo esibandakanya kokubili, inhlawulo kanye nokugqunywa ejele."

Ukuchitshiyelwa komthethonqubo 11H weMithethonqubo

11. Ngalokhu, kuchitshiyelwa umthethonqubo 11H weMithethonqubo ngokuthi esikhundleni sawo kufakwe umthethonqubwana (13) walo mthethonqubwana olandelayo:

"(13) Ilungu leKhabhinethi elengamele ezobulungiswa nokuhlunyeleliswa kwezimilo, ngokwemigomo yesigaba 7(1)*(a)* uma sifundwa ngokuhlanganyela nendima

(d) yencazelo “yesevisi noma umsebenzi” equkethwe esigabeni 1(1) soMthetho Wamaholo kanye Nemibandela Yokuqashwa Nokusebenza kwamaJaji, wezi-2001 (uMthetho wama-47 wezi-2001) lizonxusa ijaji noma iJaji Lenkantolo yoMthethosisekelo eselathatha umhlalaphansi ukuthi lenze umsebenzi wokuba yiJaji eliqokelwe ukubhekana nezindaba eziphathelene ne-*COVID-19* njengoba lokhu kuhlinzekelwe kwiMithethonqubo."

Ukususwa komthethonqubo 11I weMithethonqubo kufakwe omunye esikhundleni sawo

12. Ngalokhu, kususwa umthethonqubo 11I weMithethonqubo esikhundleni sawo kufakwe lo Mthethonqubo olandelayo:

"**Amacala nezijeziso**

11I. (1) Ukwahluleka ukuthobela—

(*a*) isibopho esibekwe ngokomthethonqubo 11H(5), (9), (11), (17); noma

(*b*) isiqondiso esikhishwe ngokomthethonqubo 11H(10) noma (18),

kuyicala.

(2) Umuntu ohluleka ukuthobela isibopbo esibekwe ngokomthethonqubo 11H(5), (9), (11) noma (17) noma isiqondiso esikhishwe ngokomthethonqubo 11H(10) noma (18), wenza icala lokuphula umthetho futhi uma limlahla lelo cala, uzokhokhiswa inhlawulo noma agqunywe ejele isikhathi esingekho ngaphezu kwezinyanga eziyisithupha noma agixabezwe ngesigwebo esibandakanya kokubili, inhlawulo kanye nokugqunywa ejele."

Ukufakwa kweSahluko 4 kwiMithethonqubo

13. Ngalokhu, kufakwa iSahluko esilandelayo kwiMithethonqubo:

"**ISAHLUKO 4**

Ukuphakelwa nokuhlinzekwa kwemikhiqizo yamandla kagesi nekawoyela

11J. Ukuze kuqinisekiswe ukuqhubeka kokuphakelwa kwemikhiqizo yamandla kagesi nekawoyela kubantu njengoba kushiwo kwindima 6 yeNgxenye B yeSithasiselo B—

(a) izimayini zamalahle eziphakela u-Eskom ngamalahle kumele ziqhubeke nokusebenza ngokugcwele; futhi

(b) nezikhungo ezihluza uwoyela kumele nazo ziqhubeke nokusebenza ngokugcwele ukuze kugwenywe ukushoda kukaphethiloli, futhi imisebenzi enjalo kumele ibandakanye izikhungo zokuncibikilisa itshe-nsimbi, amafemu okukhiqiza lokhu kanye nobhayela.

Imisebenzi Yezimayini

11K. (1) Imisebenzi yokumba izimbiwa, eshiwo kwindima 22 yeNgxenye B yeSithasiselo B kumele yenziwe ngokwezinga elincishisiwe, elingekho ngaphezu kwama-50% ngesikhathi sokuvalwa kwezwe, futhi emva kwalokho likhushulwe izinga lokusebenza ngokwesiqondiso esikhishwe yilungu leKhabhinethi elengamele ezezimbiwa namandla.

(2) Kuzosebenza le mibandela elandelayo maqondana nokuqaliswa kanye nokukhuliswa komsebenzi:

(a) kumele kube nohlelo olunohlonze lokuxilonga nokuhlola abasebenzi ngenkathi bebuyela emsebenzini;

(b) imboni yezimayini kumele ibe nesikhungo lapho bezohlaliswa khona ngabodwana abasebenzi abahloliwe kwatholakala ukuthi sebehaqwe yi-*COVID-19*;

(c) imininingo eqoqwe ngenkathi kuqhutshwa uhlelo lokuxilonga nokuhlola abasebenzi kumele ithunyelwe kwiziphathimandla ezifanelekile;

(d) izinkampani zezimayini kumele zenze amalungiselelo okuthutha abasebenzi bazo baseNingizimu Afrika ngenkathi besuka emakhaya abo beya kulezo zindawo abasebenzela kuzona ngokwahlukahlukana kwazo;

(e) abasebenzi abavela emazweni angomakhelwane ngaphansi kweNhlangano Yokuthuthukiswa Kwamazwe aseNingizimu ne-Afrika kumele babizwe kuphela emva kokuphela kwesikhathi sokuvalwa kwezwe, batshelwe ukuthi sebengabuya emazweni abo ngokuhlukahlukana kwawo baphindele ezindaweni abasebenzela kuzona ngokuhambisana nale Mithethonqubo kanye nemithethonqubo esebenza kulawo mazwe abadabuka kuwona.

(3) Kumele uqiniswe ngokushesha okukhulu umsebenzi wokuqapha kanye nokuhlola umthelela wezigameko zokuzamazama komhlaba ezimayini ngokusebenzisa uMkhandlu Wezesayensi Yomumo Womhlaba."

Ukuchitshiyelwa kweSithasiselo B seMithethonqubo

14. Ngalokhu, kuchitshiyelwa iSithasiselo B seMithethonqubo ngokuthi—

(a) kwengezwe lezi zindima ezilandelayo kwiNgxenye A emva kwendima 5:

"6. Impahla nezingxenye zokwakha ezidingwa yinoma imuphi umakhi noma ingcweti yomsebenzi wezandla othile, kuphela ngenhloso yokwenza umsebenzi wokulungisa ophuthumayo okumele wenziwe ekhaya lomuntu;

7 Impahla kanye nezingxenye zokwakha ezidingwa yinoma iyiphi inkampani eyenza umsebenzi wokuhlinzekwa kwezinsizakalo ezisemqoka maqondana nanoma imuphi umklamo ophathelene nokuphakelwa nokuhlinzekwa kwamanzi, ugesi noma ezinye izinsizakalo ezisemqoka;

8. Izingxenye zezimoto ezisetshenziselwa umsebenzi wokulungiswa kwezimoto ophuthumayo, futhi okuyizimoto ezisetshenziswa ngabantu abenza umsebenzi wokuhlinzekwa kwezinsizakalo ezisemqoka."

(b) kuchitshiyelwe indima 5 yendima elandelayo kwiNgxenye B ngokuthi esikhundleni sayo kufakwe lokhu:

"5. Izitolo zegilosa kanye nezimakethe ezithengisa imikhiqizo yezolimo ngobuningi, izitolo eziyiziphaza, abathengisi bezithelo nemifino basemgwaqeni kanye nama-*langanas*, abanemvume yokuthengisa ebhalwe phansi ephuma kwisiphathimandla sikamasipala, okuyimvume edingekayo uma umuntu ezoqhuba umsebenzi wesitolo esiyisiphaza noma umsebenzi wokuba ngumhwebi wasemgwaqeni othengisa izithelo nemifino: Ngaphansi kombandela wokuthi zonke izimvume ezisemthethweni zezitolo eziyiziphaza kanye nezabahwebi basemgwaqeni abathengisa izithelo nemifino ezikhishwe ngaphambi noma ngesikhathi sokumenyenzelwa kwesimo senhlekelele sikazwelonke futhi okuyizimvume ezizophelelwa yisikhathi sokusebenza ngalesi sikhathi senhlekelele esishiwo lapha, zizoqhubeka zisebenze

ngokusemthethweni kuze kuphele isikhathi esiyinyanga eyodwa emva kokuphela kwesimo senhlekelele sikazwelonke."

(c) kuchitshiyelwe indima 22 yendima elandelayo kwiNgxenye B ngokuthi esikhundleni sayo kufakwe lokhu

"22. Igolide, ukulungiswa kwemikhiqizo yegolide, amalahle nokumbiwa kwamagugu ambiwayo."

(d) kuchitshiyelwe indima 27 yendima elandelayo kwiNgxenye B ngokuthi esikhundleni sayo kufakwe lokhu:

"27.1 OKhomishana BeKhomishani Yamalungelo Esintu yaseNingizimu Afrika, iKhomishani Yezobulili, iKhomishani Yokukhuthaza Nokuvikela Amasiko, Ezenkolo kanye Nezilimi Emiphakathini Ehlukahlukene, uMvikeli Womphakathi NePhini LoMvikeli Womphakathi kanye neKhomishani Yokhetho Ezimele; kanye

27.2 Nezinsizakalo ezihlinzekwa yizikhungo ezishiwo kwindinyana 27.1."

(e) kuchitshiyelwe indima 30 yendima elandelayo kwiNgxenye B, ngokuthi esikhundleni sayo kufakwe lokhu:

"30. Izikhungo ezihlinzeka usizo ngezincingo ezidingekayo ukuze zihlinzeke ngosizo lwezempilo, usizo lwezokuphepha, usizo lokweseka nokuxhasa umphakathi, izinsizakalo zikahulumeni nezezimali, usizo lokuhlelwa kabusha kwezikweletu zabathengi bezitolo ezithengisa impahla, kanye nokufinyelela kumapholisi omshwalense wesikhathi esifushane ngenxa yokuncipha kwemali engenayo noma ukulahlekelwa yimali engenayo"; futhi

(f) kwengezwe lokhu okulandelayo kwiNgxenye B yendima elandelayo emva kwendima 33:

"34. Imisebenzi yobungcweti bezandla edingekayo ekuhlinzekweni komsebenzi wokulungisa ophuthumayo, kubandakanya opulamba, abasebenzi bakagesi, abasiki nabalungisi bezikhiye, abafaki bezingilazi zamafasitela neminyango, umsebenzi wokulungiswa kophahla;

35. Imisebenzi yobungcweti bezandla edingekayo ekuhlinzekweni komsebenzi wokulungisa izimoto ophuthumayo, okuyizimoto ezisetshenziswa ngabantu abahlinzeka ngemisebenzi yezinsizakalo ezisemqoka;

36. Izinsizakalo Zobuchwepheshe Bolwazi Nokuxhumana ezihlinzekwa yizinkampani kanye nezikhungo ezenza umsebenzi wokuhlinzeka ngezinsizakalo ezisemqoka ngokwemigomo yale Mithethonqubo."

Ukuchitshiyelwa kweFomu 3 leSithasiselo C seMithethonqubo

15. Ngalokhu, kuchitshiyelwa iFomu 3 leSithasiselo C seMithethonqubo ngokuthi kufakwe amagama athi "okukasherifu(okomenzi-afidavithi)" noma "usherifu(umenzi-afidavithi)" eSiqinisekisweni noma kuphi lapho sibonakala khona esikhundleni segama elithi "umenzi-afidavithi".

Ukuchitshiyelwa kweSithasiselo C seMithethonqubo

16. Ngalokhu, kuchitshiyelwa iSithasiselo C seMithethonqubo ngokuthi kwengezwe amafomu alandelayo emva kweFomu 3:

"IFOMU 4

ISIQINISEKISO-SIFUNGO SOMTHENGI WEMPAHLA YOKWAKHA NOMA WEZINGXENYE ZEZIMOTO
Umthethonqubo 11B(1)*(g)*

I,

Amagama aphelele:						
Isibongo:						
Inombolo kamazisi						
Ikheli lasekhaya:						
Imininingwane yokuxhumana:	Inombolo yeselula		Inombolo yocingo (lwasekhaya)		ikheli le-imeyili	

Ngiyafunga futhi ngiyaqinisa ukuthi izimpahla ezibhalwe ngezansi yizimpahla ezidingekayo ekwenzeni umsebenzi wokulungisa ophuthumayo:

Sisayinwe e-_____mhlaka _____ ku- _____ 2020.

_____
Isiginesha yomthengi".

Ukuchitshiyelwa kweSithasiselo D seMithethonqubo

17. Ngalokhu, kuchitshiyelwa iSithasiselo D ngokuthi esikhundleni sendinyana (vii) yendima *(c)* yale ndinyana elandelayo kufakwe lokhu:

"(vii) amahhotela, izindawo zokuhlalisa nokulalisa izivakashi kanye nezindlu zezihambi, ngaphandle uma lezi zindawo kudingeka ukuthi zihlalise izivakashi zakwamanye amazwe ezivaleleke kuleli okumele zihlale kulawo mahhotela, izikhungo zokuhlalisa nokulalisa izivakashi, kanye nezindlu zezihambi futhi zingaphumeli ngaphandle kwamagceke alezi zindawo ezihleli kuzona".

TSEBIŠO YA MMUŠO
TIRIŠANO YA MAKALA A MMUŠO LE MERERO YA SETŠO

Nomoro ya. R. 465 16 Moranang 2020

MOLAO WA TAOLO YA MASETLAPELO, WA 2002: PHETOŠO YA MELAWANA YEO E NTŠHITŠWEGO GO YA KA KAROLO YA 27(2)

Nna, Ngaka Nkosazana Dlamini Zuma, Tona ya Tirišano ya Makala a Mmušo le Merero ya Setšo, ka taelo ya ka fase ga karolo ya 3 ya Molao wa Taolo ya Masetlapelo wa 2002 (Molao wa Nomoro ya 57 wa 2002) ("Molao"), ka ge go begilwe semmušo maemo a masetlapelo a bosetšhaba, ao a gatišitšwego go Kuranta ya Mmušo ya Nomoro ya 43096 ka la 15 Hlakola 2020, go ya ka karolo ya 27(2) ya Molao wa Taolo ya Masetlapelo, ka morago ga go rerišana le maloko a Kabinete ao a amegago, ke dira Melawana yeo e lego ka gare ga Šetule.

NGAKA NKOSAZANA DLAMINI ZUMA, LELOKO LA PALAMENTE (MP)
TONA YA PUŠO YA TIRIŠANO LE MERERO YA SETŠO
LETŠATŠIKGWEDI:

ŠETULE

Ditlhalošo

1. Ka mo go melawana ye, "Melawana" e ra melawana ye e phatlaladitšwego ke Tsebišo ya Mmušo ya nomoro ya 318 ya 18 Hlakola 2020, ka ge e fetošitšwe ke Ditsebišo tša Mmušo tša nomoro ya R. 398 ya la 25 Hlakola 2020, R.419 ya la 26 Hlakola 2020 le R. 446 ya 2 Moranang 2020.

Diphetošo tša molawana wa 6 wa Melawana

2. Molawana wa 6 wa Melawana o a fetošwa wa tšeelwa legato ke molawana wo o latelago —

"Dikolo le mafelo a tlhokomelo ya bana a sebakanyana a swanetše go tswalelwa ka la 18 Hlakola 2020 go fihla ka la 30 Moranang 2020, gomme nako yeo e ka oketšwa go ya ka taolo ya leloko la Kabinete leo le nago le maikarabelo ao".

Phetošo ya molawana wa 1A wa Melawana

3. Molawana wa 1A wa Melawana o a fetošwa wa tšeelwa legato ke molawana wo o latelago:

"Tirišo ya Dikgaolo tša 1, 2, 3 le 4

1A. (1) Kgaolo ya 1 le taelo efe goba efe ye e fiwago mabapi kle Melawana e tla tšwela pele go šoma le go phethagatšwa, ka ntle le ge fela go na le tšeo di sa swanego gareng ga Kgaolo ya 1 le Dikgaolo tša 2 go fihla go 4, Dikgaolo tša 2 go fihla ka 4 di tla tšwela pele go šoma go feta go se swane fao.

(2) Dikgaolo tša 2, 3 le 4 tša Melawana ye di tla šoma go thoma ka la 26 Hlakola 2020 ka 23h59 go fihla ka la 30 Moranang 2020 ka 23h59: Ge fela e le gore Kgaolo ya 3 e tla tšwela pele go šoma ka nakong ya seemo sa bosetšhaba sa tswalelo ya naga, goba go fihla ka dinako tšeo seemo se se katološitšwego."

Go tšeelwa legato ga molawana wa 7 wa Melawana

4. Molawana wa 7 wa Melawana o tšeelwa legato ke molawana wo o latelago:

"Go fegwa ga diketelo

7. Diketelo ka moka tša maloko a setšhaba go ya—

(*a*) Mafelong a Tshokollo ya bagolegwa;
(*b*) Mafelong a Kgolego ya Bagolegwa ye e Katološitšwego;
(*c*) Diseleng tša Kgolego ya Lebakanyana;
(d) Mafelong a Kgolego ya Mašole; le

(*e*) Mafelong a Kgoro ya Tlhabollo ya Leago, go akaretšwa Mafelong a Tlhokomelo ya Bana le Bafsa, madulong a lebakanyana, Mafelong a go Etelwa ke Setšhaba, le Mafelong a Kalafo,

di fegilwe mo nakong ya go tswalelwa ga naga go tloga ka letšatši la phatlalatšo ya Tsebišo ye, gomme nako ye e ka katološwa go fihla ka nako ye itšego, eupša e sego go feta mafelelo a seemo sa masetlapelo sa bosetšhaba, ke leloko la kabinete leo le nago le maikarabelo ao.".

Go fetošwa ga molawana wa 8 wa Melawana

5. Molawana wa 8 wa Melawana o a fetošwa ka go oketša ka molawana wa ka fasana wa (6) ka morago ga molawana wa ka fasana wa (5) —

"(6) Go sepetša bjala go ileditšwe, ka ntle le ge madila a nyakega ka diintastering tša go tšweletša disanithaesa tša diatla, ditlošaditwatši, disepa, madila a go šomišwa ka diintastering le ditšweletšwa tša go hlwekiša ka gae."

Go fetošwa ga molawana wa 10 wa Melawana

6. Molawana wa 10 wa Melawana o a fetošwa ka go oketša ka molawana wa ka fasana wo o latelago:

"(9) Ditaelo ka moka tše di filwego go latela Melawana ye di tla tšwela pele go šoma ka ntle le ge, di fapane, di fetošitšwe goba di tlošitšwe ke leloko la Kabinete leo le nago le maikarabelo a go fa ditaelo tšeo.".

Go fetošwa ga molawana wa 11A wa Melawana

7. Molawana wa 11A wa Melawana o a fetošwa ka go tloša tlhalošo ye e latelago ya "go tswalelwa naga" gwa tsenywa tlhalošo ye e latelago:

"**'go tswalelwa naga**' e ra kiletšo ya mesepelo ya batho ka nako yeo Dikgaolo tša 2, 3 le 4 tša Melawana ye di phethagatšwago, e lego go thoma ka 23H59 ka la 26 Hlakola 2020, go fihla ka 23H59 ka la 30 Moranang 2020; le".

Go fetošwa ga molawana wa 11B wa Melawana

8. Molawana wa 11B wa Melawana o fetošwa fa ke—

(a) go tšeelwa legato ga karolwana ya *(bb)* ya temana ya ka fasana ya (iii) ya temana ya *(a)* ya molawana wa ka fasana wa (1) gwa tsenywa karolwana ye e latelago:

"*(bb)* go sepetšwa ga—

(*bb*A) dithoto tše bohlokwa;

(*bb*B) go sepetšwa ga merwalo go tloga mellwaneng ya go tsena ka nageng go ya fao e swanetšego go ya gona; le

(*bb*C) merwalo yeo mo lebakeng le e lego mellwaneng ya go tsena ka nageng, go sepetšwa merwalo go ya dinageng tše dingwe ka nepo ya go dira gore mellwane ye tsenago ka nageng e se ke ya tlala;";

(b) go tsenywa ga temana ye e latelago ka morago ga temana ya *(f)* ya molawana wa ka fasana (1):

"*(g)* Mabenkele ao a rekišago ditšweletšwa tša hatewere le dikarolo tša difatanaga a swanetše go ngwala retšistara ya batho bao ba rekago dithoto tše bohlokwa tšeo di ngwadilwego ka go Karolo ya A ya Tlaleletšo ya B, gomme a swanetše go ba le pego ya boikano bjo bo saennwego, bjo bo sepelelanago kudu le Fomo ya 4 ya Tlaleletšo ya C ke moreki wa dithoto tšeo a tiišetša gore dithoto tšeo di bohlokwa ka ge go hlalošitšwe ka go Melawana.";

(c) go tšeelwa legato ga temana ya *(b)* ya molawana wa ka fasana wa (4A) gwa tsenywa temana ye e latelago:

"*(b)* Maloko a kabinete ao a rwelego maikarabelo a ditirelo tša maphelo le tša leago le kgwebišano, diintasteri le diphenkgišano a ka, ka ditaelo, a tšea sephetho mabapi le ditirelo tšeo di hlokagalago go aba goba go tšwetša pele ditirelo tše bohlokwa tša maphelo le tša leago le kgwebišano ya boditšhabatšhaba goba ditiro tša diintasteri tšeo di beilwego ka go Tlaleletšo ya B ya Melawana.";

(d) go phumolwa ga temana ya *(h)* ya temana ya ka fasana ya (8); le

(e) go tsenywa ga melawana ya ka fasana ye e latelago ka morago ga molawana wa ka fasana wa (8):

"(9)*(a)* Go sepetšwa ga bana gareng ga batho bao ba nago le maikarabelommogo a botswadi le ditokelo goba a tlhokomelo ya bana, ka ge go hlalošitšwe ka go karolo ya 1(1) ya Molao wa Bana, 2005 (Molao wa nomoro ya 38 ya 2005), ka nakong ya go tswalelwa ga naga, go ileditšwe, ka ntle le ge go na le dithulaganyo tša gore ngwana a tloge go motswadi o tee a ye go yo mongwe, go latela—

(i) taelo ya kgorotsheko;

(ii) fao tumelelano ya maikarabelo le ditokelo tša botswadi goba leano la tša botswadi, di ngwadišitšwego le moatbokheiti wa lapa, e le gona, goba

(iii) motho yo a rwelego maikarabelommogo a botswadi le ditokelo a swere setifikeiti sa matswalo sa ngwana goba setifikeiti sa matswalo seo se setifailwego sa ngwana goba tša bana go fa bohlatse bja kamano ye e lego molaong magareng ga batho bao ba nago le maikarabelommogo a botswadi le ditokelo:

Ge fela e le gore ka lapeng leo ngwana a swanetšego go ya go lona, go se na motho yo go tsebjago a kile a ba kgauswi, goba a belaelwa ka mabaka ao a kwagalago gore gore a ka be a bile kgauswi le motho yo mongwe yo a ka bego a fetetšwe, goba a belaelwa ka mabaka ao a kwagalago gore o fetetšwe ke COVID-19 ka lapeng leo ngwana a swanetšego go ya go lona.

(b) Motswadi goba mohlokomedi yo a sepetšago ngwana yo a amegago o swanetše go swara, taelo ya kgorotsheko goba tumelelano ya maikarabelo a botswadi le ya ditokelo goba leano la botswadi goba setifikeiti sa matswalo sa ngwana goba tša bana, ka ge go nyakega.

(10) Difomo ka moka di swanetše go tlatšwa ka botlalo, go akaretšwa maina, boitsebišo goba dinomoro tša phasephote le dintlha tša boitsebišo ka botlalo ka ge go nyakega ka fomong gomme go palelwa ke go dira seo go tla feletša ka gore fomo yeo e ganwe gore ga e molaong.".

Go tsenywa ga molawana wa 11CA ka morago ga molawana wa 11C

9. Molawana wo o latelago o tsenywa ka morago ga molawana wa 11C:

"**Kiletšo ya go raka batho madulong**

11CA. Ga go motho yo a swanetšego go rakwa madulong a bona, go sa kgathale ge eba ke madulong a semolao goba ao a sego a semolao goba madulong a dipolaseng, ka nakong ya go tswalelwa ga naga".

Go tlošwa ga molawana wa 11G wa Melawana

10. Molawana wa 11G wa Melawana o a tlošwa gwa tsenywa molawana wo o latelago:

" **Melato le dikotlo**

11G. Mabakeng a Kgaolo ye, motho mang goba mang yo a tshelago—

(a) molawana wa 11B(1)*(a)*, *(b), (c), (d), (f)* goba 11B(4); goba

(b) melawana ya 11C(1) le 11CA,

O dira molato ebile o, ge a ka bonwa molato, rwala maikarabelo a kotlo ya tšhelete goba a romelwa kgolegong nako ye e sa fetego dikgwedi tše tshela goba bobedi bja tšona kotlo ya tšhelete le go romelwa kgolegong.".

Phetošo ya molawana wa 11H wa Melawana

11. Molawana wa 11H wa Melawana o a tšeelwa legato ka go tloša molawana wa ka fasana wa (13) gwa tsenywa molawana wa ka fasana wo o latelago:

"(13) Leloko la Kabinete leo le rwelego maikarabelo a toka le ditirelo tša tshokollo ya bagolegwa le tla, go latela karolo ya 7(1)*(a)* ge e balwa le temana ya *(d)* ya tlhalošo ya "tirelo" ka go karolo ya 1(1) ya Molao wa Meputso ya Baahlodi le Dipeelano tša Mošomo wa 2001 (Molao wa nomoro ya 47 wa 2001) la kgopela moahlodi goba Moahlodi wa Kgorotsheko ya Molaotheo yo a rotšego modiro go šoma bjalo ka Moahlodi yo a Filwego Maikarabelo go merero ya COVID-19 ka ge go hlagišitšwe ka go Melawana.".

Go tšeelwa legato ga molawana wa 11I wa Melawana

12. Molawana wa 11I wa Melawana o a tšeelwa legato gwa tsenywa molawana wo o latelago:

"**Melato le dikotlo**

11I. (1) Go palelwa ke go obamela—

(*a*) tlamego ye e filwego go latela molawana wa 11H(5), (9), (11), (17); goba

(*b*) taelo ye e filwego go latela molawana wa 11H(10) goba wa (18),

ke go dira molato.

(2) Motho yo a palelwago ke go obamela tlamego ye e filwego go latela molawana wa 11H(5), (9), (11) goba wa (17) goba taelo ye e filwego go latela molawana

wa 11H(10) goba wa (18), o dira molato ebile o, ge a ka bonwa molato, rwala maikarabelo a kotlo ya tšhelete goba a romelwa kgolegong nako ye e sa fetego dikgwedi tše tshela goba bobedi bja tšona kotlo ya tšhelete le go romelwa kgolegong.".

Go tsenywa ga Kgaolo ya 4 ka go Melawana

13. Kgaolo ye e latelago e a tsenywa ka go Melawana:

"**KGAOLO YA 4**

Kabo ya enetši le ditšweletšwa tša phetroliamo

11J. Go netefatša gore go ba le kabo ye e tšwelago pele ya enetši le ya ditšweletšwa tša phetroliamo setšhabeng ka ge go laeditšwe ka go temana ya 6 ya Karolo ya B ya Tlaleletšo ya B—

(a) meepo ya malahla ye e abelago Eskom e swanetše go tšwela pele go šoma ka botlalo; le

(b) meepo ya tlwekišo ya diminerale e swanetše go tšwela pele go šoma ka botlalo go efoga tlhaelelo ya makhura a difatanaga, gomme mešomo yeo e swanetše go akaretšwa botološetšo, dipholante le meepo ya tlhwekišo ya diminerale ka phišo ya godimo.

Mešomo ya meepo

11K. (1) Mešomo ya meepo, ka ge go laeditšwe ka go temana ya 22 ya Karolo ya B ya Tlaleletšo ya B, e swanetše go phethagatšwa ka palo ye e fokoditšwego ya bašomi ye e sa fetego 50% ka nakong ya go tswalelwa ga naga, gomme ka morago ga fao ka palo ye e oketšegago ka ge go laetšwe ke taelo ye e filwego ke leloko la Kabinete leo le rwelego maikarabelo a methopo ya diminerale le enetši.

(2) Maemo ao a latelago a a šoma go thomeng ga palo ya bašomi le ge e oketšega:

(a) lenaneo leo le tseneletšego la tekolo le diteko tša bašomi le swanetše go tsenywa tirišong ge bašomi ba boela mošomong;

(b) intasteri ya meepo e swanetše go aba mafelo a go beela thoko bašomi bao diteko di bolelago gore ba fetetšwe ke COVID-19;

(c) tshedimošo ye e kgobokeditšwego ka nakong ya tekolo ya bašomi e swanetše go tliša go ba taolo ba maleba;

(d) dikhamphani tša meepo di swanetše go dira dithulaganyo tša go sepetša bašomi ba tšona ba Afrika Borwa go tloga dintlong tša bona go ya mafelong a mešomo ya tšona;

(e) bašomi go tšwa Dinageng tše di Hlabologago tša Borwa bja Afrika tša boagišane ba swanetše go bitšwa go boa mafelong a mešomo ya bona mafelelong a nako ya go tswalelwa ga naga go latela Melawana ye le melawana ye e šomago ka dinageng tša gabo bona.

(3) Tlhokomedišišo le tshekatsheko ya seabe sa tšhikinyego ya lefase ka meepong ka go diriša Lekgotla la Dithutamahlale tša Lefase e swanetše go dirwa ka fao go tseneletšego ka bjako.".

Phetošo ya Tlaleletšo ya B ya Melawana

14. Tlaleletšo ya B ya Melawana e a fetošwa ka—

(a) go tlaleletša go Karolo ya A ka morago ga temana ya 5 ka ditemana tše di latelago:

"6. Hatewere, dikarolo le dikabo tše di nyakwago ke molokiši yo a nago le mangwalo a dithuto fela mabakeng a go lokiša ditlabelo ka tšhoganetšo ka magaeng;

7 Hatewere, dikarolo le dikabo tše di nyakwago ke sehlongwa seo se šomago go aba ditirelo tše bohlokwa go protšeke efe goba efe ye e amanago le kabo ya meetse, ya mohlagase goba ya ditirelo tše dingwe tše bohlokwa;

8. Dikarolo tša difatanaga tšeo di lokišwago ka tšhoganetšo fao sefatanaga seo se šomišwago ke motho yo a šomago mošomo wa tšhoganetšo.";

(b) go tšeelwa legato go Karolo ya B temana ya 5 gwa tsenywa temana ye e latelago:

"5. Mabenkele a go rekiša korosari le mebaraka ya ditšweletšwa tša merogo le dikenywa, disephasa, barekiši ba mebileng ba dikenywa le merogo le *langanas*, ba swanetše go hwetša tumelelo ye e ngwadilwego go tšwa masepaleng go rekiša ka diphaseng le go barekiši ba mebileng ba dikenywa le merogo: Ge fela e le gore diphemiti ka moka tše di lego molaong tša disephasa le tša barekiši ba mebileng ba dikenywa le merogo di abilwe pele ga goba ka nakong ya go kgoeletšo ya seemo sa bosetšhaba sa masetlapelo gomme di wela ka yona nakong yeo, di tla tšwela pele go šoma mo nakong ya kgwedi e tee ka morago ga mafelelo a seemo sa bosetšhaba sa masetlapelo; ";

(c) go tšeelwa legato ga Karolo ya B temana ya 22 gwa tsenywa temana ye e latelago:

"22. Gauta, tlhwekišo ya gauta, malahla le meepo;";

(d) go tšeelwa legato go Karolo ya B temana ya 27 gwa tsenywa temana ye e latelago:

"27.1 Bakhomišenare ba Khomišene ya Ditokelo tša Botho ya Afrika Borwa, Khomišene ya tša Bong, Khomišene ya Tšwetšopele le Tšhireletšo ya Ditokelo tša Ditšhaba tša Setšo, Sedumedi le Dipolelo, Mošireletši wa Setšhaba le Motlatšamošireletši wa Setšhaba le Khomišene ya Dikgetho ye e Ikemego; le

27.2 Ditirelo tše di phethagatšwago ke dihlongwa tše go boletšwego ka ga tšona ka go temana ya 27.1;";

(e) go tšeelwa legato ga Karolo ya B temana ya 30 gwa tsenywa temana ye e latelago:

"30. Mafelo a megala ao a hlokagalago go aba thekgo ya maphelo, ya polokego, ya thekgo ya leago, ya ditirelo tša mmušo le ditšhelete, go beakanya leswa sekoloto ka badiriši ba mabenkele, le phihlelelo go dipholisi tša inšorentshe ya lebaka le lekopana ka lebaka la phokotšego ya letseno goba go lahlegelwa ke letseno;"; le

(f) go tsenya go Karolo ya B ditemana tše di latelago ka morago ga temana ya 33:

"34. Dikgwebišano tše di hlokagalago go phethagatša mošomo wa go lokiša wa tšhoganetšo, go akaretšwa dipholampara, bašomi ba tša mohlagase, ba dikhii, ba go tsenya digalase tša mafasetere, mošomo wa go lokiša marulelo;

35. Dikgwebišano tše di hlokagalago go lokiša difatanaga ka tšhoganetšo tša batho ba go šoma ditirelo tše bohlokwa;

36. Ditirelo tša Theknolotši ya Tshedimošo le Kgokagano tšeo di abelwago dikgwebo le dihlongwa tšeo di šomago ditirelo tše bohlokwa go latela Melawana ye.".

Phetošo ya Fomo ya 3 ya Tlaleletšo ya C ya Melawana

15. Fomo ya 3 ya Tlaleletšo ya C ya Melawana e a fetošwa ka go tšeelwa legato ga lefokwana le "šerife(wa hlatse ya semolao)" goba "šerife(hlatse ya semolao)" ka Tiišetšo kae goba kae fao go tšwelelago gwa tsenywa lentšu le "hlatse ya semolao".

Phetošo ya Tlaleletšo ya C ya Melawana

16. Tlaleletšo ya C ya Melawana e a fetošwa ka go tsenya difomo tše di latelago ka morago ga Fomo ya 3:

"FOMO YA 4
BOIKANO KA MOREKI WA DITŠWELETŠWA TŠA HATEWERE GOBA DIKAROLO TŠA DIFATANAGA
Molawana wa 11B(1)*(g)*

Nna,

Maina ka botlalo:						
Sefane:						
Nomoro ya boitsebišo						
Aterese ya Madulo:						
Dintlha tša boikgokaganyo:	Nomoro ya Selefoune		Nomoro ya Mogala (ya gae)		Aterese ya imeile	

Ke ikana gore diphahlo tše di ngwadilwego ka mo godimo di a hlokagala go dira mošomo wa go lokiša wa tšhoganetšo:

E saennwe ka_____letšatši la bo _____ la kgwedi ya _____ 2020.

_____
Mosaeno wa moreki".

Phetošo ya Tlaleletšo ya D ya Melawana

17. Tlaleletšo ya D ya Melawana e a fetošwa gwa tlošwa temana ya ka fase ya (vii) ya temana ya *(c)* gwa tsenywa temana ya ka fase ye e latelago:

"(vii) dihotele, dilotše le mafelo a go dula baeti, ka ntle le ge a nyakega gore go dule baeti bao ba sa šetšego ka nageng ka dihoteleng, dilotšeng le ka mafelong a go dula baeti;".

SATISO SAHULUMENDE

LITIKO LETEKUBUSA NGEKUBAMBISANA NETENDZABUKO

No. R. 465 16 Mabasa 2020

UMTSETFO WETEKULAWULA TINHLEKELELE, 2002: KUCHITJELWA KWEMITSETFOMGOMO LEKHISHWE NGEKWEMIBANDZELA YESIGABA SE-27(2)

Mine, DKT. Nkosazana Dlamini Zuma, Indvuna yeTekubusa Ngekubambisana Netendzabuko, ngaphasi kwesigaba se-3 seMtsetfo weteKulawula Tinhlekelele, 2002 (Umtsetfo. we-57 wanga-2002), njengobe sengimemetele simo senhlekelele savelonkhe, kwashicilelwa nakuGazethi yaHulumende No. 43096 mhla ti-15 Mabasa 2020, ngekwemibandzela yesigaba se-27(2) seMtsetfo weteKulawulwa kweTinhlekelele, 2002, ngemuva kwekubonisana nemalunga eKhabhinethi lafanele, ngente loMtsetfomgomo kuleShejuli.

DKT. NKOSAZANA DLAMINI ZUMA, LILUNGA LEPHALAMENDE
INDVUNA YELITIKO LETEKUBUSA NGEKUBAMBISANA NETENDZABUKO
LUSUKU:

ISHEJULI

Tinchazelo

1. Lemitsetfomgomo, "Imitsetfomgomo" isho imitsetfomgomo leshicilelwe Satiso saHulumende No. 318 wamhla ti-18 Indlovulenkhulu 2020, njengobe ichitjelwe Tatiso taHulumende No. R. 398 wamhla tinge-25 Indlovulenkhulu 2020, R.419 wamhla tinge-26 Indlovulenkhulu 2020 kanye na-R. 446 wamhla ti-2 Mabasa 2020.

Kuchitjelwa kwemtsetfomgomo we-6 weMitsetfomgomo

2. Umtsetfomgomo we-6 waleMitsetfomgomo uchitjelwa ngekutsi kufakwe lomtsetfomgomo lolandzelako —

"Tikolwa netikhungo tekunakekela ngalokuyincenye tifanele kutsi tivalwe mhla ti-18 Indlovulenkhulu 2020 kute kube ngumhla tinge-30 Mabasa 2020, lekusikhatsi lekungenteka kutsi selulwe ngekuya kweticondziso temalunga ekhabhinethi labukene naloko."

Kuchitjelwa kwemtsetfomgomo 1A weMitsetfomgomo

3. Umtsetfomgomo 1A weMitsetfomgomo uchitjelwa ngekutsi kufakwe lomtsetfomgomo lolandzelako:

"Kusetjentiswa kweTahluko se-1, 2, 3 nese-4

1A. (1) Sahluko se-1 nanoma ngusiphi sicondziso lesikhishwako ngekuya kweMitsetfomgomo itawuchubeka isebente futsi ibe nemphumela, ngaphandle uma ngabe kukhona kwehluka lokutsite emkhatsini weSahluko se-1 neSahluko se-2 kuya kuse-4, Sahluko se-2 kuya kuse-4 kutawuba ngiso lesisebentako uma kunekwehluka.

(2) Tahluko se-2, 3 nese-4 taleMitsetfomgomo titawucala kusebenta kusukela mhla tinge-26 Indlovulenkhulu 2020 ngensimbi ye-23h59 ebusuku kute kube ngumhla tinge-30 Mabasa 2020 ngensimbi ye-23h59: Ngekubekwa kutsi Sahluko se-3 sitawuchubeka sisebente sonkhe sikhatsi senhlekelele yavelonkhe, noma leto tikhatsi lekungenteka kutsi telulwe."

Kufaka lokunye kumtsetfomgomo we-7 waleMitsetfomgomo

4. Umtsetfomgomo we-7 waleMitsetfomgomo kufakwa esikhundleni sawo lomtsetfomgomo lolandzelako:

"Kumiswa kwekuvakasha

7. Konkhe kuvakasha kwemalunga emmango kwekuya—

(*a*) kuTikhungo Tekucondziswa Similo;

(*b*) kuTikhungo tebeMacala Lahlehlisiwe Lababoshiwe;

(*c*) kuMaseli Ekugcina Tiboshwa Kwesikhashana;

(d) Tikhungo Tekugcina Tiboshwa teteMbutfo Wetekuvikela; kanye ne

(*e*) Tikhungo teLitiko Lekutfutfukiswa Kwetenhlalakahle, kufaka ekhatsi Tikhungo Tekunakekela Bantfwana neLusha, tindzawo tekukhosela, Tikhungo Lekutfolakala Konkhe Kuto, neTikhungo Tetekwelashwa,

kumisiwe kulesikhatsi sekuhlala emakhaya kungatsiwa khushu kusukela ngelusuku lekushicilelwe ngalo leSatiso, lekusikhatsi lekungenteka kutsi selulwe sikhatsi lesitsite, kepha hhayi kwendlula lesikhatsi senhlekelele yavelonkhe, lilunga lekhabhinethi lelibukene naloko.

Kuchitjelwa kwemtsetfomgomo we-8 waleMitsetfomgomo

5. Umtsetfomgomo we-6 waleMitsetfomgomo uchitjelwa ngekutsi kufakwe lomtsetfomgomo lomncane (6) lolandzelako ngemuva kwemtsetfomgomo lomncane (5) —

“(6) Kuhanjiswa kwetjwala akukavumeleki, ngaphandle kwalapho tjwala budzingeka etimbonini letikhicita tibulalamagciwane tetandla, tibulalimagciwane, insipho, tjwala bekusetjentiswa etimbonini nakumikhicito yekuhlanta etindlini.”.

Kuchitjelwa kweMtsetfomgomo we-10 waleMitsetfomgomo

6. Umtsetfomgomo we-10 waleMitsetfomgomo uchitjelwa ngekutsi kwengetwe lomtsetfomgomo lomncane lolandzelako:

"(9) Tonkhe ticondziso letikhishwa ngekwemibandzela yaleMitsetfomgomo itawuchubeka nekusebenta ngaphandle uma ngabe, yehlukile, ichitjelwe noma ilengisiwe lilunga leKhabhinethi lelibukene naleto ticondziso.".

Kuchitjelwa kwemtsetfomgomo 11A waleMitsetfomgomo

7. Umtsetfomgomo we-11A waleMitsetfomgomo uchitjelwa ngekutsi kufakwe esikhundleni senchazelo "yekuhlala ekhaya ungatsi khushu " lenchazelo lelandzelako:

"**'kuhlala ekhaya ungatsi khushu**' kusho kubekwa kwemkhawulo wekuhamba kwebantfu ngalesikhatsi lapho kusebenta khona Tahluko se-2, 3 nese-4 saleMitsetfomgomo, kusuka ngensimbi ye-23H59 ebusuku mhla tinge-26 Indlovulenkhulu 2020, kute kube yinsimbi ye-23H59 mhla tinge-30 Mabasa 2020; kanye ne".

Kuchitjelwa kwemtsetfomgomo 11B waleMitsetfomgomo

8. Umtsetfomgomo we-11B waleMitsetfomgomo uchitjelwa ngekutsi—

(a) kufakwe lokunye esikhundleni sentfo lengu-*(bb)* wesigatjana (iii) sendzima *(a)* semtsetfomgomo lomncane (1) walentfo lelandzelako:

"*(bb)* kutfutfwa kwe—

(*bb*A) mikhicito lebalulekile;

(*bb*B) kutfutfwa kwemphahla isuka ematubukweni ekungena kuleli iyiswe lapho ifanele kuyiswa khona; futsi

(*bb*C) mphahla kwamanje lesematubukweni ekungena kuleli, kutsi imikhicito leyotsengiswa ngaphandle kwaleli kute kutsi kucedvwe siminyaminya semikhicito ematubukweni ekungena kuleli;";

(b) kufakwa kwalendzima lelandzelako ngemuva kwendzima *(f)* yemtsetfomgomo lomncane (1):

"*(g)* Titolo letitsengisa imikhicito lemishini netintfo tekwakha nemaphatsi etinomoto tifanele kutsi tibe nerejista yekubhalisa bantfu labatsenga imikhicito lebalulekile lebhalwe kuSigaba A seSeleko B, tifanele futsi kutsi tigcine emarekhodi esicinisekiso lesisayiniwe, lesihambisana kakhulu neLifomu-4 leSeleko C ngumtsengi walowo mkhicito lapho acinisekisa khona kutsi lemikhicito layitsengako ibalulekile njengobe kuchaziwe kuleMitsetfomgomo.";

(c) lokufakwe esikhundleni sendzima *(b)* yemtsetfomgomo lomncane (4A) walendzima lelandzelako:

"*(b)* Emalunga eKhabhinethi lafanele etinsita tetemphilo netenhlalo netekuhwebelana, tetimboni nemncintiswane tingabeka, ngekweticondziso, tinsita letidzingekako kuniketa noma kugcina tetemphilo netenhlalo letibalulekile netekuhwebelana temave emhlaba noma imisebenti yetimboni lebhalwe kuSeleko B kuleMitsetfomgomo.";

(d) kususwa kwesigaba *(h)* semtsetfomgomo lomncane (8); kanye

(e) nekwengetwa kwalemitsetfomgomo lemincane ngemuva kwemtsetfomgomo lomncane (8):

"(9)*(a)* Kuhanjiswa kwebantfwana emkhatsini walekubanjiswene nabo kutibopho nemalungelo ekuba ngumtali noma umnakekeli, njengobe kuchaziwe kusigaba se-1(1) seMtsetfo weBantfwana, 2005 (Umtsetfo No. 38 wanga-2005), ngesikhatsi sekuhlala ekhaya ungatsi khushu, akukavumeleki, ngaphandle kwalapho kunemalungiselelo lahleliwe ekuhambisa umntfwana asuke kumunye umtali aye kulomunye, ngekwemibandzela—

(i) umyalo wenkantolo;

(ii) lapho khona tibopho tekuba ngumtali netivumelwano temalungelo noma lisu lekuba ngumtali, kubhaliswe kummeli wemndeni, kukhona, noma

(iii) lona lekubanjiswene naye kutibopho tekuba ngumtali nemalungelo ekuba nesitifiketi sekutalwa noma ikhophi yesitifiketi sekutalwa lecinisekisiwe yalomntfwana noma bantfwana kufakazela bungibo bebuhlobo lobusemkhatsini kwalekubanjiswene naye kutibopho nemalungelo ekuba ngumtali:

Kuphela nje uma ngabe kulelikhaya lomntfwana lafanele kutsi aye kulo, kute umuntfu lowatiwako kutsi uhlangene, noma kunetinsolo leticinile tekutsi uhlangane nemuntfu lowatiwako kutsi ungenwe, yi-*COVID-19* kulelikhaya lomntfwana lafanele kutsi aye kulo.

(b) Lomtali noma umnakekeli lohambisa lomntfwana lokukhulunywa ngaye ufanele kutsi aphatse umyalelo wenkantolo noma sivumelwane setibopho tekuba ngumtali noma sivumelwane semalungelo noma lisu lekuba ngumtali noma sitifiketi sekutalwa salomntfwana noma bantfwana, njengobe kudzingeka.

(10) Onkhe emafomu afanele kutsi agcwaliswe, kufaka ekhatsi emagama laphelele, tinombolo tekutatisa noma tepasipoti nemininingwane yekutsintsana lephelele njengobe kudzingeka kulelifomu futsi kwehluleka kwenta njalo kutawuholela ekutsi lelifomu laliwe njengalelingasebenti.".

Kufakwa kwemtsetfomgomo we-11CA ngemuva kwemtsetfomgomo we-11C

9. Lomtsetfomgomo lolandzelako ufakwa ngemuva kwemtsetfomgomo we-11C:

"**Kungavunyelwa kwekususwa bantfu endzaweni ngendluzula**

11CA. Kute bantfu labatawususwa ngendluzula etindzaweni tabo labahlala kuto, akunandzaba kutsi yindzawo lehlelekile noma lemikhukhu noma lipulazi, ngesikhatsi sekuhlala ekhaya ungatsi khushu.

Kufaka kwalokunye esikhundleni semtsetfomgomo we-11G waleMitsetfomgomo

10. Umtsetfomgomo we-11G waleMitsetfomgomo uyasuswa esikhundleni kufakwa esikhundleni sawo lomtsetfomgomo lolandzelako:

" **Kwephulwa kwemitsetfomgomo netijeziso**

11G. ngekwenhloso yaleSahluko, nanoma ngumuphi umuntfu lowephula—

(a) umtsetfomgomo we-1B(1)*(a)*, *(b), (c), (d), (f)* noma 11B(4); noma

(b) imitsetfomgomo we-11C(1) newe-11CA,

wenta licala futsi, ngemuva kwekulahlwa licala, angahlawuliswa noma aboshwe sikhatsi lesingendluli tinyanga letisitfupha noma entiwe kokubili kuhlawuliswa nekuboshwa".

Kuchitjelwa kwemtsetfomgomo we-11H weMitsetfomgomo

11. Umtsetfomgomo 11H weMitsetfomgomo uchitjelwa ngekutsi kufakwe lomtsetfomgomo lomncane (13) walomtsetfomgomo lomncane lolandzelako:

"(13) Lilunga leKhabhinethi lelibukene netebulungiswa nekucondziswa kwesimilo, ngekwemibandzela yesigaba se-7(1)*(a)* sifundvwa kanye nendzima *(d)* yenchazelo “yetinsita” kusigaba se-1(1) seKuholelwa kwemajaji neMtsetfo weTimo teKusebenta, 2001 (Umtsetfo No. 47 wanga-2001) litawucela lijaji noma Lijaji leNkantolo yeMtsetfosisekelo leselitsatse umhlalaphasi kute linikete tinsita njengeLijaji leLikhetselwe te-*COVID-19* njengobe kubekiwe kuMitsetfomgomo.".

Kufaka kwalokunye esikhundleni semtsetfomgomo we-11I waleMitsetfomgomo

12. Umtsetfomgomo we-11I waleMitsetfomgomo uyasuswa esikhundleni kufakwa esikhundleni sawo lomtsetfomgomo lolandzelako:

" **Kwephulwa kwemitsetfomgomo netijeziso**

11I. (1) Kwehluleka kuhambisana—

(*a*) nemtsetfomgomo lobekwe ngemibandzela yemtsetfomgomo we-11H(5), (9), (11), (17); noma

(*b*) sicondziso lesikhishwe ngekwemibandzela yemtsetfomgomo we-11H(10) noma (18),

kwenta licala

(2) Umuntfu lowehluleka kuhambisana nalesibopho lesibekwe ngekwemibandzela yemtsetfomgomo we-11H(5), (9), (11) noma (17) noma sicondziso lesikhishwe ngekwemibandzela we-11H(10) noma (18), wenta licala futsi, ngemuva kwekulahlwa ticala, angahlawuliswa noma aboshwe sikhatsi lesingendluli tinyanga letisitfupha noma entiwe kokubili kuhlawuliswa nekuboshwa.".

Kufakwa kweSahluko se-4 kuMitsetfomgomo

13. LeSahluko lesilandzelako sifakwa kuMitsetfomgomo:

"**SAHLUKO 4**

Kwetfulwa kwemikhicito yetemandla agezi ne-oyili

11J. Kucinisekisa kuchubeka nekwetfulwa kwemikhicito yetemandla agezi ne-oyili emmangweni njengobe kushiwo kusigaba se-6 seNcenye B yeSeleko B—

(a) tinkampani temalahle lenika i-Eskom emalahle tiyachubeka nekusebenta ngalokuphelele; kanye

(b) netinkampani letihlutako tifanele kutsi tisebente ngalokuphelele kute kugwenywe kweswelakala kwemafutsa, futsi lemisebenti lenjena ifanele kutsi ifake ekhatsi bahlungi bensimbi etjeni, takhiwonchanti tekukhicita tetimboni netitsandvo temlilo.

Kusebenta Emayini

11K. (1) Imisebenti yasemayini, njengobe kushiwo endzimeni ye-22 yeNcenye B yeSeleko B, ifanele yentiwe ngekunciphisa tisebenti ngalokunge-50% ngalesikhatsi sekuhlala ekhaya ungatsi khushu, bese kutsi ngemuva kwaloko seliyakhushulwa linani letisebenti njengesincumo sesicondziso lesikhishwe lilunga leKhabhinethi lelibukene nemicebo lembiwa phasi nemandla.

(2) Letimo letilandzelako tisebenta ekucaleni nasekukhuliseni linani letisebenti:

(a) Kufanele kutsi kwentiwe luhlelo lolunemandla lwekucilonga nekuhlola masinyane-nje tisebenti natibuyela emsebentini;

(b) imboni yetimbiwa ifanele kutsi yente kutsi kube netindzawo tekuhlala bodvwana yetisebenti letihlolwe tatfolakala tine-*COVID-19*;

(c) imininingwane legcogcwe ngesikhatsi seluhlelo lwekucilongwa nekuhlolwa ifanele kutsi iyiswe kusiphatsimandla lesifanele;

(d) tinkampani tetimbiwa tifanele kutsi tente emalungiselelo ekuhambisa tisebenti tato taseNingizimu Afrika kusuka emakhaya ato tiye etindzaweni tato temisebenti ngekufanana;

(e) tisebenti letivela emaveni labomakhelwane languMmango weteKutfutfukisa wangaseNingizimu Afrika tifanele kutsi tibitwe tibuyele etindzaweni tato temsebenti ekupheleni kwesikhatsi sekuhlala ekhaya ungatsi khushu ngekuya kwaleMitsetfomgomo nemitsetfomgomo lesebenta kulawo mave.

(3) Kulandzelelwa nekuhlolwa kwetehlakalo tekutamatama kwemhlaba ngekusebentisa Umkhandlu weSayensi yeKuma kweMhlaba kufanele kutsi kwentiwe ngemandla masinyane.".

Kuchitjelwa kweSeleko B kuleMitsetfomgomo

14. Seleko B kuleMitsetfomgomo uchitjelwa nge—

(a) kwengeta kuNcenye A ngemuva kwendzima ye-5 yaletindzima letilandzelako:

"6. Imishini, netincenye tekwakha letidzingwa ngumakhi noma umuntfu lowenta umsebenti wetandla lotsite lakudzingela kuphela inhloso yekulungisa lokuphutfumako emakhaya ekuhlala;

7 Imishini netincenye tekwakha, nekuniketwa lokudzingwa sikhungo lesiniketa tinsita letibalulekile kwanoma ngumuphi umklamo lophatselene nekuphakelwa kwemanti, gezi noma tinsita letibalulekile;

8. Emaphatsi etimoto letilungiswa ngekwesimo lesiphutfumako lapho khona leyo moto isetjentiswa ngumuntfu lowenta umsebenti wekuniketa tinsita letiphutfumako.

(a) kufakwa kwalokunye esikhundleni salokunye kuNcenye B kundzima ye-5 yalendzima lelandzelako:

"5. Titolo tegrosa netimakethe temikhicito yemahholiseyi, titolo letiti*phaza*, batsengisi betitselo netibhidvo labangakahleleki kanye ne*ma-langanas*, labanetimvume letibhaliwe letibuya kusiphatsimandla samasipala tekusebenta tiyadzingeka mayelana netitolo letiti*phaza* kanye nebahwebi betitselo netibhidvo labangakahleleki: Kuphela-nje uma ngabe tonkhe timvume tetitolo letiti*phaza* nebahwebi betitselo netibhidvo labangakahleleki letikhishwe ngembi nangemuva kwekumenyetelwa kwesimo savelonkhe lesiyinhlekelele naletiniketwa ngalesikhatsi lesishiwo, titawuchubeka nekusebenta sikhatsi lesiyinyanga ngemuva kwekuphela kwesimo savelonkhe senhlekelele; ";

(c) lokufakwa kwalokunye esikhundleni salokunye kuNcenye B kwendzima ye-22 yalendzima lelandzelako:

"22. Ligolide, kuhlutwa kweligolide, emalahle nekumbiwa;";

(d) kufakwa kwalokunye esikhundleni salokunye kuNcenye B kwendzima ye-27 yalendzima lelandzelako:

"27.1 Bokhomishina beKhomishini yaseNingizimu Afrika yeMalungelo eLuntfu, Ikhomishini yeteBulili, Ikhomishini yeKukhutsatwa neKuvikela Emalungelo etemasiko, teNkholo neMimango yeLulwimi, Umvikeli weSive kanye neKhomishini yeLukhetfo leTimele; kanye

27.2 neTinsita letiniketwa tikhungo letishiwo ku-27.1;";

(e) lokufakwa kwalokunye esikhundleni salokunye kuNcenye B kwendzima ye-30 yalendzima lelandzelako:

"30. Tikhungo tetincingo letenta letiniketa tinsita tetemphilo, tekuphepha, tekwesekela tenhlalo, tahulumende netetimali, kuhlela kabusha tikweleti tebatsengi tetitolo letinkhulu, kanye nekufinyelela tinchubomgomo temshwalensi wesikhashana njengemphumela wekuncishiswa kwemali lengenako noma kulahlekelwa yimali lengenako;"; kanye

(f) nekwengetwa kuNcenye B yaletindzima letilandzelako ngemuva kwendzima ye-33:

"34. Emahwebo ladzingeka kwenta umsebenti wekulungisa ngalokuphutfumako, kufaka ekhatsi boplamba, bosomagezi, bomakhi nebalungisi betikhiya, bafakitingilazi teminyango netemafasitelo, umsebenti wekulungisa luphahla;

35. Emahwebo ladzingeka kulungisa timoto ngekwesimo lesiphutfumako tebantfu labaniketa tinsita letibalulekile;

36. Tinsita teTetheknoloji yeLwatiso neteKuchumana letiniketwa tikhungo letiniketa tinsita letibalulekile ngekwemibandzela yaleMitsetfomgomo."

Kuchitjelwa kweLifomu 3 leSeleko C kuleMitsetfomgomo

15. Lifomu 3 leSeleko C kuMitsetfomgomo liyachitjelwa ngekufakwa kwalokunye esikhundleni salelibintana lelitsi "kwasherifu (kwafakazi)" noma "isherifu (fakazi)" eSitifiketini nanoma ngukuphi lapho livela khona leligama lelitsi "fakazi".

Kuchitjelwa kweSeleko C kuleMitsetfomgomo

16. Seleko C kuMitsetfomgomo siyachitjelwa ngekutsi kwengetwe lamafomu lalandzelako ngemuva kweLifomu 3:

"LIFOMU 4
SICINISEKISO SEMTSENGI WEMIKHICITO YEMSHINI/EMATHULUSI NOME EMAPHATSI ETIMOTO
Umtsetfomgomo we-11B(1)*(g)*

Mine,

Emagama laphelele:						
Sibongo:						
Inombolo yamatisi						
Likheli lasekhaya:						
Imininingwane yekutsintsana:	Inombolo yamakhalekhikhini:		Inombolo yeLucingo (lwasekhaya)		likheli lencwadzigezi	

Ngiyacinisekisa kutsi lemikhicito leshiwo lapha ngentasi iyadzingeka ekwenteni umsebenti wekulungisa kwesimo lesiphutfumako:

Sisaninwe e/ka_____ mhla ti _____ enyangeni ya _____ 2020.

_____
Isayini yemtsengi".

Kuchitjelwa kweSeleko D kuleMitsetfomgomo

17. Seleko D kuleMitsetfomgomo siyachitjelwa kute kufakwe lokunye kulomtsetfomgomo lomncane (vii) wendzima *(c)* yalendzima lelandzelako:

"(vii) emahhotela, emaloji netindlu tekuhlalisa tivakashi, ngaphandle uma ngabe tidzingelwa kuhlalisa tivakashi letisele letivaleleke kulawo mahhotela, kumaloji nakutindlu tekuhlalisa tivakashi;".

NḐIVHADZO YA MUVHUSO

MUHASHO WA TSHUMISANO YA MAVHUSELE NA MAFHUNGO A ZWA SIALALA

No. R. 465 **16 Lambamai 2020**

MULAYO WA NDANGULO YA ZWIWO, 2002: KHWINISO YA NDANGULO DZE DZA BVISWA U YA NGA TSHITEŃWA 27(2)

Nṋe, Dr Vho Nkosazana Dlamini Zuma, Minisiṭa wa Tshumisano ya Mavhusele na Mafhungo a zwa Sialala, ndo nangwa fhasi ha tshiteńwa tsha 3 tsha Mulayo wa Ndangulo ya Zwiwo, 2002 (Mulayo No. 57 wa 2002), ho vhigwa uri ndi tshiimo tsha tshiwo tsha lushaka, zwe zwa anḓadzwa kha *Gazethe* ya Muvhuso No. 43096 nga ḽa 15 Ṭhafamuhwe 2020, u ya nga tshiteńwa 27(2) tsha Mulayo wa Ndangulo ya Zwiwo, 2002, nga murahu ha vhukwamani na miraḓo ya Khabinethe yo teaho, nga zwenezwo, ndi khou ita Ndangulo kha Sheduḽu.

DR VHO NKOSAZANA DLAMINI ZUMA, MP

MINISIṬA WA TSHUMISANO YA MAVHUSELE NA MAFHUNGO A ZWA SIALALA

DATUMU:

SHEDUḼU

Ṱhaluso

1. Kha hedzi ndangulo “Ndangulo” zwi amba ndangulo dzo anḓadzwaho kha Nḓivhadzo No.318 ya ḽa 18 Ṱhafamuhwe 2020, sa zwe ya khwinisiswa zwone nga Nḓivhadzo dza Muvhuso dza No. R. 398 ya ḽa 25 Ṱhafamuhwe 2020, R. 419 ya ḽa 26 Ṱhafamuhwe 2020 na R. 446 ya ḽa 2 Lambamai 2020.

Khwiniso ya ndangulo ya vhu6 kha Ndangulo

2. Ndangulo ya vhu6 ya Ndangulo sa zwenezwo i khou khwiniswa nga tshiimela tsha ndangulo i tevhelaho —

“Zwikolo na zwiimiswa zwine zwa ṋea ndondolo zwi tea u valwa nga ḽa 18 Ṱhafamuhwe 2020, hune tshifhinga tsha nga ḓi engedzwa nga nḓila dza vhueletshedzi nga muraḓo wa Khabinethe o hwalaho vhuḓifhinduleli.”

Khwiniso ya ndangulo ya 1A ya Ndangulo

3. Ndangulo ya 1A ya Ndangulo sa zwenezwo i khou khwiniswa nga tshiimela tsha ndangulo i tevhelaho — :

"Kushumele kwa Ndima 1, 2, 3 na 4

1A. (1) Ndima ya 1 na vhulaeli vhuṅwe na vhuṅwe ho ṋetshedzwaho vhu tshimbilelanaho na Ndangulo zwi ḓo bvela phanḓa na u shumiswa nahone vhu tshi khou shuma, u tsireledza arali hu na huṅwe u sa tendelana vhukati ha Ndima ya 1, ya 2 u swika kha 4, Ndima ya 2 u swika kha 4 dzi ḓo vhonala u swika nga hanefho ha u sa tendelana hadzo.

(2) Ndima ya 2, ya 3 na ya 4 dza Ndangulo idzi dzi ḓo shuma u bva nga ḽa 26 Ṱhafamuhwe 2020 nga 23h59 u swika nga ḽa 30 Lambamai 2020 nga 23h59. Nga nnḓani ha musi Ndima ya 3 i ḓo dzula i tshi

khou shuma kha tshifhinga tsha tshiimo tsha tshiwo tsha lushaka, kana lwa zwifhinga zwenezwo sa zwine zwa nga engedzwa."

Tshiimela tsha ndangulo ya vhu7 ya Ndangulo

4. Ndangulo ya vhu7 ya Ndangulo sa zwenezwo i khou imelwa nga ndangulo i tevhelaho —

"U imiswa lwa tshifhinganyana ha madalo

7. Madalo oṱhe nga miraḓo ya tshitshavha kha —

(*a*) Senthara dza Ndulamiso;

(*b*) Zwiimiswa zwine Vhafariwa vho lindelaho tsengo vha valelwa khazwo;

(*c*) Zwiṱokisini;

(d) Zwiimiswa zwa Vhafariwa zwa Mmbi; na

(*e*) Zwiimiswa zwa Muhasho wa Mveledziso ya Matshilisano, ho katelwa Senthara dza Ndondolo ya Vhaswa na Vhana, vhukhudoni, Senthara dza Tshumelo Dzoṱhe na Senthara dza Dzilafho, o imiswa lwa tshifhinga tsha nyiledza u bva hayani u bva nga datumu ya nyanḓadzo ya iyi Nḓivhadzo, hune tshifhinga itshi tshi nga kha ḓi engedzedzwa u ya kha tshifhinga tshiṅwe na tshiṅwe, fhedzi tshi sa fhiri tshifhinga tsho vhewaho tsha tshiimo tsha tshiwo tsha lushaka nga muraḓo wa Khabinethe o hwalaho vhuḓifhinduleli."

Khwiniso ya ndangulo ya vhu8 ya Ndangulo

5. Ndangulo ya vhu8 ya Ndangulo sa zwenezwo i khou khwiniswa nga u ḓadziswa ha ndangulo ṱhukhu ya vhu(6) i tevhelaho ndangulo ṱhukhu ya vhu(5) —

"(6) U endedzwa ha mahalwa zwo iledzwa, nga nnḓani ha musi iyo aḽikhoholo i tshi khou ṱoḓea kha nḓowetshumo dzine dza bveledza sanithaiza dza zwanḓa, zwifafadzeli zwa u kunisa, zwisibe, aḽikhoholo ya u shumisa kha nḓowetshumo kana zwibveledzwa zwa u kunakisa miḓini."

Khwiniso ya ndangulo ya vhu10 ya Ndangulo

6. Ndangulo ya vhu10 wa Ndangulo sa zwenezwo i khou khwiniswa nga u ḓadziswa ha ndangulo ṱhukhu i tevhelaho:

"(9) Vhulaeli hoṱhe he ha ṋetshedzwa nga fhasi ha hedzi Ndangulo vhu ḓo bvela phanḓa na u tevhedzwa nga u ralo, ho fhambana, u khwiniswa kana u humiselwa murahu nga muraḓo wa Khabinethe o hwalaho vhuḓifhinduleli ha vhulaeli honoho.".

Khwiniso ya ndangulo ya 11A ya Ndangulo

7. Ndangulo ya 11A ya Ndangulo sa zwenezwo i khou khwiniswa nga tshiimela tsha ṱhaluso ya "nyiledza u bva hayani" ya ṱhaluso i tevhelaho:

"nyiledza u bva hayani ' i amba nyiledzo ya thavhithavhi ya vhathu nga tshifhinga tshine Milayo ya Ndima ya 2, 3, na 4 ya khou shuma, zwi tshi amba u bva nga 23H59 nga ḽa 26 Ṱhafamuhwe 2020, u swika nga 23H59 nga ḽa 30 Lambamai 2020; na".

Khwiniso ya ndangulo ya 11B ya Ndangulo

lo

8. Ndangulo ya 11B ya Ndangulo sa zwenezwo i khou khwiniswa –

(a) tshiimela tsha tshiteṅwa (*bb*) tsha phara ṱhukhu (iii) ya phara (*a*) ya ndangulo ṱhuku (1) ya tshiteṅwa tshi tevhelaho:

"*(bb)* u endedzwa ha—

(*bb*A) thundu ya ndeme;

(*bb*B) u endedzwa ha mihwalo mihulwane u bva vhuimangalavha hune ya dzhena ngaho u ya he ya livhiswa hone; na

(*bb*C) mihwalo mihulwane zwazwino u bva vhuimangalavha hune ya dzhena ngaho, u itela vhurumelwazwivhambadzwa nnḓa u itela u fhungudza u ḓala ha thundu hune thundu dza dzhena ngaho;";

(b) u ṱoredzwa ha phara i tevhelaho i ḓaho murahu ha phara *(f)* ya phara ṱhukhu ya (1):

"*(g)* Mavhengele ane a khou rengisa zwibveledzwa zwa hadiwee na zwipiḓa zwa dzigoloi a tea u vhulunga ridzhisiṱara dza vhathu vhane vha khou renga zwithu izwo zwa ndeme sa zwe zwa vhekanyiswa zwone kha Tshipiḓa A tsha Ṱhumetshedzo B, na uri vha tea u vhulunga rekhodo ya mulevho wo sainwaho, ine i tshimbilelana tshoṱhe na Fomo 4 ya Ṱhumetshedzo C nga murengi wa thundu ane a khou khwaṱhisedza uri thundu ndi thundu dza ndeme sa zwe zwa ṱalusiswa zwone kha Ndangulo.";

(c) u imelwa ha phara *(b*) ya phara ṱhukhu (4A) ya phara i tevhelaho:

"*(b)* Miraḓo ya Khabinethe yo hwalaho vhuḓifhinduleli kha mutakalo na tshumelo dza mutakalo khathihi na mbambadzo, nḓowetshumo na muṱaṱisano, vha nga kha ḓi, nga vhulaeli, tendela tshumelo dzo teaho u itela uri dzi ṋetshedzwe kana u londolwa ha tshumelo dza ndeme dza mutakalo na matshilisano khathihi na mbambadzo dza dzitshaka kana mishumo ya zwa nḓowetshumo yo tevhekanywaho kha Ṱhumetshedzo B ya Ndangulo.";

(d) u phumulwa ha phara *(h)* ya phara ṱhukhu (8); na

(e) u ḓadziswa ha ndangulo ṱhuku nga murahu ha ndangulo ṱhuku ya vhu(8):

"(9)*(a)* U tshimbidzwa ha vhana vhukati ha vhafara-vhoṱhe vhuḓifhinduleli na pfanelo dza vhabebi, kana vhaunḓi sa zwe zwa ṱalusiswa zwone kha tshiteṅwa 1(1) tsha Mulayo wa Vhana wa 2005 (Mulayo No. 38 wa 2005), nga tshifhinga tsha nyiledza u bva hayani, zwo iledzwa, nga nnḓani ha he nzudzanyo dza itelwa uri ṅwana a kone u tshimbidzwa a tshi bva kha muṅwe mubebi a tshi ya kha muṅwe, zwi tshi ya nga maitele a—

(i) ndaela ya khothe;

(ii) hune thendelano dza pfanelo na vhuḓifhinduleli ha mubebi kana pulane ya u vha na vhana ya vhabebi, yo ṅwaliswaho kha adivokheithi ya miṱa, i hone, kana

(iii) mufara pfanelo na vhuḓifhinduleli a na ṱhanziela ya mabebo kana khophi yo khwaṱhisedzwaho ya ṅwana kana vhana u khwaṱhisedza vhushaka ha vhukuma vhukati ha vhafara-vhoṱhe pfanelo na vhuḓifhinduleli ha vhabebi:

Zwihulwane ndi uri kha muṱa une ṅwana a khou tea u ya khawo, a huna muthu ane a ḓivhea uri o vha na vhukwamani, kana ane zwa khou humbulelwa hu si na u kanakana uri a nga vha o vha na vhukwamani na muthu muṅwe ane a ḓivhea uri o kavhiwa, kana u khou humbulelwa hu si na u kanakana uri o kavhiwa nga COVID-19 muṱani une ṅwana a khou tea u ya khawo.

(b) Mubebi kana muundi ane a khou endedza ṅwana a kwameaho u tea u vha o fara ndaela ya khothe, kana thendelano ya pfanelo na vhuḓifhinduleli ha mubebi kana pulane ya u vha u na vhana ya mubebi, kana ṱhanziela ya mabebo ya ṅwana kana vhana, sa zwine zwa ṱoḓeisa zwone.

(10) Fomo dzoṱhe dzi tea u ḓadzwa dzo fhelela, ho katelwa madzina nga vhuḓalo, nomboro dza bugundaula kana phasipoto na zwidodombedzwa zwa vhukwamani nga vhuḓalo sa zwine zwa ṱoḓeisa zwone kha fomo, na uri u kundelwa u ita nga u ralo zwi ḓo itisa uri fomo i haniwe sa ine i sa shume.".

U ṱoredzwa ha ndangulo ya 11CA nga murahu ha ndangulo ya 11C

9. Ndangulo i tevhelaho sa zwenezwo i khou ṱoredzwa nga murahu ha ndangulo ya 11C:

"Nyiledzo dza u pfuluswa

11CA. A huna muthu ane a nga pfuluswa hune a dzula hone, zwi si na ndavha uri ndi vhudzulo zwaho kana ha vhukuma kana vhudzulo ha mabulasini, kha tshifhinga tsha nyiledza u bva hayani.".

Tshiimela ndangulo ya 11G ya Ndangulo

10. Ndangulo ya 11G ya Ndangulo sa zwenezwo i khou imelwa kha ndangulo i tevhelaho:

" Vhukhakhi na ndaṱiso

11G. U itela ndivho dza hei Ndima, muthu muṅwe na muṅwe ane a pfuka —

(a) ndangulo dza kha 11B(1)*(a), (b), (c), (d), (f)* kana 11B(4); kana

(b) ndangulo ya 11C(1) na 11CA,

u vha o ita vhukhakhi na uri, a nga gwevhiwa, a tea u badela faini kana u dzula dzhele lwa tshifhinga tshi sa fhiriho miṅwedzi ya rathi kana zwoṱhe u badela faini na u dzula dzhele.".

Khwiniso ya ndangulo ya 11H ya Ndangulo

11. Ndangulo ya 11H ya Ndangulo sa zwenezwo i khou khwiniswa nga u imelwa ha ndangulo ṱhuku ya vhu(13) ya ndangulo ṱhuku i tevhelaho:

"(13) Muraḓo wa Khabinethe o hwalaho vhuḓifhinduleli ha tshumelo dza ndulamiso na vhulamukanyi vha ḓo, u ya nga tshiteńwa tsha 7(1)*(a)* tshi tshi khou vhalwa khathihi na phara (*d*) tsha ṱhaluso ya "tshumelo" kha tshiteńwa 1(1) tsha Miholo ya Vhahaṱuli na Mulayo wa zwa Mishumo, 2001 (Mulayo wa No. 47 wa 2001) u humbela muhaṱuli kana Muhaṱuli wa Khothe ya Ndayotewa o no nothaho kha u tou shuma tshoṱhe u ita tshumelo sa Muhaṱuli o Tholwaho wa COVID- 19 sa zwe zwa ṋetshedziswa zwone kha Ndangulo."

Tshiimela tsha ndangulo ya vhu11I ya Ndangulo

12. Ndangulo ya vhu11I ya Ndangulo sa zwenezwo i khou imelwa nga ndangulo i tevhelaho:

"Vhukhakhi na ndaṱiso

11I. (1) U kundelwa u tevhedzela —

(*a*) khombetshedzo yo vhewaho u ya nga ndangulo ya 11H(5), (9), (11), (17); kana

(*b*) vhulaeli ho vhewaho u ya nga ndangulo ya 11H(10) kana (18),

zwi dzhiiwa hu u ita vhukhakhi.

(2) Muthu ane a kundelwa u tevhedza khombetshedzo yo vhewaho u ya nga ndangulo ya 11H(5), (9), (11) kana (17) kana vhulaeli ho ṋetshedzwaho u ya nga mulayo11H(10) kana (18), u vha o ita vhukhakhi na uri, a nga gwevhiwa, a tea u badela faini kana u dzula dzhele lwa tshifhinga tshi sa fhiriho miṅwedzi ya rathi kana zwoṱhe u badela faini na u dzula dzhele."

U ṱoredzwa ha Ndima ya 4 kha Ndangulo

13. Ndima i tevhelaho i khou ṱoredzwa kha ndangulo:

"NDIMA YA 4

Ṋetshedzo ya zwibveledzwa zwa fulufulu na zwa pheṱhiroḽiamu.

11J. U vha na vhuṱanzi ha u vhona uri fulufulu na zwibveledzwa pheṱhiroḽiamu zwi khou ṋetshedzwa kha lushaka zwi sa imi sa zwe zwa vheiswa zwone kha phara 6 ya Tshipiḓa B tsha Ṭhumetshedzo B—

(a) vhabveledzi vha malasha vhane vha isa Eskom vha tea u bvela phanḓa na u shuma nga kushumele kwo fhelelaho; na

(b) vhabveledzi vha zwivhaswa vha tea u shuma nga kushumele kwo fhelelaho u itela uri ri tinye ṱhahelelo ya zwivhaswa, na uri u shuma hoho hu tea u katela vhaṋokisi nga u fhisedzela, dzipuḽanthi na vha dzihonndo.

U shuma ha migodi

11K. (1) U shuma ha migodi, sa zwe zwa vheiswa zwone kha phara 22 ya Tshipiḓa B tsha Ṭhumetshedzo B, zwi tea u itwa zwo fhungudzwa lune zwa si fhire 50% nga tshifhinga hetshi tsha nyiledza u bva hayani, ha ḓo konaha u engedzwa kushumele nga murahu sa zwine zwa tiswa zwone nga vhulaeli ha Muraḓo wa Khabinethe o hwalaho vhuḓifhinduleli ha zwiko zwa mineraḽa na fulufulu.

(2) Maitele haya a ḓo shuma kha u thoma u engedzwa ha kushumele:

(a) Mbekanyamushumo dzo kalulaho dza u ṱhaṱhuvha na dza u ita ndingo dzi tea u thoma u shuma musi vhashumi vha tshi khou humela mushumoni;

(b) nḓowetshumo ya zwa migodi i tea u ṋetshedza zwiimiswa zwa u valela vhathu thungo u itela vhashumi vhavho vhane vha nga lingiwa vha wanala vho kavhiwa nga COVID-19;

(c) datha ye ya kuvhanganywa nga hetshi tshifhinga tsha mbekanyamushumo dza u ṱhaṱhuvha na dza u ita ndingo i tea u iswa kha vhathu vho teaho;

(d) khamphani dza zwa migodi dzi tea u ita nzudzanyo dza u endedza vhashumi vhadzo vha MaAfrika Tshipembe u bva mahayani avho u ya fhethu ho fhambanaho hune vha shumela hone;

(e) Vhashumi vhane vha bva kha mashango a vhahura a Tshitshavha tsha Mveledziso ya Tshipembe ha Afrika vha tea u vhidzwa murahu mishumoni yavho mafheloni a nyiledza u bva hayani u bva kha mashango avho o fhambanaho u ya nga heyi Milayo na miṅwe milayo ine ya khou shumiswa kha aneo mashango.

(3) Vhuvhea iṱo na ṱholo ya masiandaitwa a mudzinginyo a tea u khwaṱhiseswa nga u ṱavhanya nga Khoro ya *Geoscience.*".

Khwiniso ya Ṭhumetshedzo B kha ndangulo

14. Ṱhumetshedzo B kha Ndangulo sa zwenezwo i ḓo khwiniswa nga —

(a) u ḓadzisa kha Tshipiḓa tsha A nga murahu ha phara 5 ya phara dzi tevhelaho:

“6. Hadiwee, zwipiḓa na zwishumiswa zwine zwi ṱoḓiwaho nga vhathu vho gudelaho zwa mishumogudwa u itela fhedzi ndivho ya u lugisa ha shishi miḓini ya vhathu;

7 Hadiwee, zwipiḓa na zwishumiswa zwine zwa ṱoḓiwa nga mabindu ane a khou shuma kha u ṋetshedza tshumelo dza ndeme dza thandela iṅwe na iṅwe ine ya tshimbilelana na nḓisedzo ya maḓi, muḓagasi na dziṅwe tshumelo dza ndeme;

8. Zwipiḓa zwa dzigoloi dzine dza khou fanelwa u lugiswa lwa shishi hune iyo goloi i shumiswa nga muthu ane a khou shuma u ṋetshedza tshumelo dza shishi.”;

(b) tshiimela kha Tshipiḓa tsha B tsha phara ya 5 ya phara i tevhelaho:

"5. Mavhengele a zwiḽiwa na mimakete ya zwibveledzwa zwa dziholosele , mavhengele a *zwiphaza*, vharengisi vha sokou ḓirengiselaho miroho na mitshelo na *dzilangana*, vha na thendelo yo tou ṅwalwaho u bva kha vha muvhuso wa masipala uri vha shume sa zwine zwa khou tendeliswa zwone u ya nga maitele a mavhengele a *zwiphaza* na vharengisi vha sokou ḓirengiselaho miroho na mitshelo: Tshihulwane ndi uri phemithi dza vhukuma dzoṱhe dzo ṋetshedzwaho vha mavhengele a *zwiphaza* na vharengisi vha sokou ḓirengiselaho miroho na mitshelo phanḓa ha kana nga tshifhinga tsha u itwa ha mulevho wa tshiimo tsha tshiwo tsha lushaka na uri dza fhelelwa u shuma nga tshifhinga tshenetsho, dzi ḓo dzula dzi tshi khou shuma lwa ṅwedzi muthihi nga murahu ha tshiimo tsha tshiwo tsha lushaka ;”;

(c) tshiimela kha Tshipiḓa tsha B tsha Phara ya 22 ya phara i tevhelaho:

“22. Musuku, u kunakiswa ha musuku, malasha na zwa u eba migodini;”;

(d) tshiimela kha Tshipiḓa tsha B tsha Phara ya 27 ya phara i tevhelaho:

"27.1 Khomishinari dza Khomishini ya Pfanelo dza Vhathu Afrika Tshipembe, Khomishini ya Mbeu, Khomishini ya Nyaluso na Tsireledzo ya Pfanelo dza zwa Mvelele, Vhureleli na Nyambo dza Zwitshavha, Mutsireledzi wa Tshitshavha na Tshanḓa tsha Mutsireledzi wa Tshitshavha khathihi na Khomishini ya Dzikhetho yo Ḓiimisaho; na

27.2 Tshumelo dzine dza ṋetshedzwa nga zwiimiswa zwe zwa ambiwa nga hazwo kha tshiteṅwa 27.1;";

(e) tshiimela kha Tshipiḓa B tsha Phara ya 30 ya phara i tevhelaho:

"30. Senthara dzine ha livhiswa zwivhudziswa khadzo dzine ndi dza ndeme kha u ṋetshedza tshumelo dza mutakalo, tsireledzo, thikhedzo ya matshilisano, tshumelo dza muvhuso na tshumelo dza zwa masheleni, u dzudzanyululwa ha zwikolodo zwa vharengi vha mavhengeleni na tswikelo dza ndindakhombo dza tshifhinga nyana zwine zwo vhangwa nga u fhungudzea ha miholo kana u sa tsha vha na muholo tshoṱhe,"; na

(f) tshiimela kha Tshipiḓa tsha B tsha Phara ya 33 ya phara i tevhelaho:

"34. Mishumogudwa ya ndeme ine ya ṋetshedzwa ya u lugisa ha shishi, ho katelwa dzipuḽambara, vhoramiḓagasi, vhakhiululi, vha shumaho na dzingilasi, vha shumaho u lugisa ṯhanga;

35. Mishumogudwa ya ndeme ya shishi ya zwa u lugisa zwiendedzi zwa vhathu vhane vha khou ṋetshedza tshumelo dza ndeme;

36. Tshumelo dza Thekhinoḽodzhi ya Vhudavhidzani na Mafhungo ine ya ṋetshedzwa kha mabindu na zwiimiswa zwine zwi khou ḓisa tshumelo dza ndeme u ya nga ha maitele a hedzi ndangulo." .

Khwiniso ya Fomo 3 ya Ṯhumetshedzo C kha Ndangulo

15. Fomo 3 ya Ṯhumetshedzo C ya Ndangulo sa zwenezwo i khou khwiniswa nga tshiimela tsha mutala wa "(ṯhanzi) ya sherifi " kana "sherifi (ṯhanzi)" kha Khwaṯhisedzo huṅwe na huṅwe hune ḽa bvelela kha ipfi "ṯhanzi".

Khwiniso ya Ṯhumetshedzo C kha Milayo

16. Ṯhumetshedzo C ya Milayo sa zwenezwo i khou khwiniswa nga u ḓadziswa ha fomo dzi tevhelaho dzi ḓaho murahu ha Fomo 3:

"FOMO YA VHU4

MULEVHO NGA MURENGI WA ZWIBVELEDZWA HADIWEE KANA ZWIPIḒA ZWA GOLOI

Nandngulo ya 11B(1)*(g)*

Nṋe,

Madzina nga vhuḓalo:						
Tshifani:						
Nomborondaula:						
Ḓiresi ya hayani:						
Zwidodombedzwa zwa vhukwamani:	No ya Cell		No ya Luṱ (h)		ḓiresi ya imeiḽi	

Kha vha ite mulevho wa uri thundu iyo yo buliwaho afho fhasi ndi ya ndeme kha u ita mushumo wa u lugisa wa shishi:

Yo sainwa _____nga ḓuvha ḽa vhu _____ ḽa _____ 2020.

_____

“Tsaino ya murengi”.

Khwiniso ya Ṱhumetshedzo D kha Ndangulo

17. Ṱhumetshedzo D ya Ndangulo sa zwenezwo i khou khwiniswa i itela tshiimela tsha phara ṯhukhu (vii) phara *(c)* ya phara ṯhukhu i tevhelaho:

"(vii) dzihodela, dziḽodzho na dzinnḓu dza vhaeni, nga nnḓani ha hanefha hune dza khou ṱoḓea ngaho kha tshifhinga tshine vhaendelamashango vha kha ḓi vha vha hanefho dzihodelani, dziḽodzho na dzinnḓu dza vhaeni;".

XITIVISO XA MFUMO

NDZAWULO YA MFUMONTIRHISANO NA TIMHAKA TA NDHAVUKO

No. R. 465 16 Dzivamisoko 2020

NAWU WA MALAWULELO YA TIMHANGU, 2002: HUNDZULUXO WA SWINAWANA LESWI SWI NYIKIWAKA HI KU LANDZA XIYENGE XA 27(2)

Mina, Dkd Nkosazana Dlamini Zuma, Holobye wa Mfumontirhisano na Timhaka ta Ndhavuko, loyi a hlawuriweke ehansi ka Xiyenge xa 3 xa Nawu wa Malawulelo ya Timhangu, 2002 (Nawu wa No. ya 57 wa 2002), loyi a tiviseke xiyimo xa rixaka xa mhangu, lexi kandziyisiweke eka Gazete ya Mfumo ya No. 43096 hi siku ra 15 Nyenyankulu 2020, hi ku landza xiyenge xa 27(2) xa Nawu wa Malawulelo ya Timhangu, 2002, endzhaku ka ku vulavurisana na swirho swa Khabinete leswi faneleke, ndzi endla Swinawana leswi hlamuseriweke eka Xedulu leyi.

DKD NKOSAZANA DLAMINI ZUMA, MP
HOLOBYE WA MFUMONTIRHISANO NA TIMHAKA TA NDHAVUKO
SIKU:

XEDULU

Tinhlamuselo

1. Eka swinawana leswi, "Swinawana leswi" swi vula swinawana leswi kandziyisiweke hi Xitiviso xa Mfumo xa No. 318 xa 18 Nyenyankulu 2020, tanihilaha xi hundzuluxiweke hakona hi Switiviso swa Mfumo swa tiNo. R. 398 ya 25 Nyenyankulu 2020, R.419 ya 26 Nyenyankulu 2020 na R. 446 ya 2 Dzivamisoko 2020.

Hundzuluxo wa xinawana xa 6 xa Swinawana leswi

2. Xinawana xa 6 xa Swinawana leswi hi tsalwa leri swa hundzuluxiwa hi ku siviwa ka xinawana lexi landzelaka —

"Swikolo na miako ya nhlayiso wa xiphemu swi fanele ku pfariwa hi kwalomu ka 18 Nyenyankulu 2020 kufikela 30 Dzivamisoko 2020, lowu nga nkarhi lowu nga ha engeteriwaka hi ndlela ya swileriso hi xirho xa Khabinete lexi nga na vutihlamuleri.".

Hundzuluxo wa xinawana xa 1A xa Swinawana leswi

3. Xinawana xa 1A xa Swinawana leswi xa hundzuluxiwa hi ku siviwa ka xinawana lexi landzelaka:

"Matirhiselo ya Mikavanyisa ya 1, 2, 3 na 4

1A. (1) Kavanyisa ka 1 na xileriso xihi kumbe xihi lexi nyikiweke hi ku landza Swinawana leswi swi ta ya emahlweni swi ri na matimba no tirha, handlekaloko ku ri na mikaendlelomfanana yihi kumbe yihi exikarhi ka Kavanyisa ka 1 na Mikavanyisa ya 2 kufika eka 4, Mikavanyisa ya 2 kufika eka 4 yi ta va ehenhla kufika eka mpimo wa nkaendlelomfanana.

(2) Mikavanyisa ya 2, 3 na 4 ya Swinawana leswi yi ta tirha kusuka 26 Nyenyankulu 2020 hi 23h59 kufikela 30 Dzivamisoko 2020 hi 23h59: Ntsenaloko Kavanyisa ka 3 ku ta tshama ku ri na matimba ku ringana nkarhi wa xiyimo xa rixaka xa mhangu, kumbe ku ringana mikarhi yaleyo tanihilaha yi nga ha engeteriwaka hakona.".

Ku siviwa ka xinawana xa 7 xa Swinawana leswi

4. Xinawana xa 7 xa Swinawana leswi hi tsalwa leri xa siviwa hi xinawana lexi landzelaka:

"Ku yimisiwa nkarhinyana ka ku endzela

7. Ku endzela hinkwako hi vaaki eka—

(*a*) Tisenthara ta Makhotso;

(*b*) Miako yo Pfalela Vabohiwa lava Milandzu ya vona yi nga si Tengiwaka;

(*c*) Switokosi;
(d) Miako yo Pfalela Vabohiwa va swa Nyimpi; na
(*e*) Miako ya Ndzawulo ya Nhluvukiso wa Vanhu, ku katsa na Tisenthara ta Nhlayiso wa Vana na Vantshwa, vutumbelo, Tisenthara leti Xavisaka Switirhisiwa Hinkwaswo, na Tisenthara ta swa Vutshunguri,

swi yimisiwile nkarhinyana ku ringana nkarhi wa ku pfaleriwa kusuka eka siku ra nkandziyiso wa Xitiviso lexi, lowu nga nkarhi lowu nga engeteriwaka eka nkarhi wihi kumbe wihi, kambe ku nga ri ku hundza eka nkarhi wa xiyimo xa rixaka xa mhangu hi xirho xa Khabinete lexi nga na vutihlamuleri.".

Hundzuluxo wa xinawana xa 8 xa Swinawana leswi

5. Xinawana xa 8 xa swinawana leswi hi tsalwa leri xa hundzuluxiwa hi ku engeteriwa ka xinawanatsongo xa (6) endzhaku ka xinawanatsongo xa (5) —

“(6) Vutleketli bya byalwa byi tshimbisiwile, handle ka laha xihoko xi lavekaka eka tiindasitiri leti endlaka xibasisaswandla, swidlayaswitsongwatsongwana, xisibi, xihoko xa ntirhiso wa tiindasitiri na swimakiwa swo basisa emutini.”.

Hundzuluxo wa xinawana xa 10 xa Swinawana leswi

6. Xinawana xa 10 xa swinawana leswi hi tsalwa leri xa hundzuluxiwa hi ku engeteriwa ka xinawanatsongo lexi landzelaka:

"(9) Swileriso hinkwaswo leswi nyikiweke hi ku landza Swinawana leswi swi ta ya emahlweni swi tirha handlekaloko, swi hambanisiwa, swi hundzuluxiwa kumbe ku suriwa hi xirho xa Khabinete lexi nga na vutihlamuleri bya swileriso swoleswo.".

Hundzuluxo wa xinawana xa 11A xa Swinawana leswi

7. Xinawana xa 11A xa swinawana leswi hi tsalwa leri xa hundzuluxiwa hi ku siviwa ka nhlamuselo ya "ku pfaleriwa" ka hlamuselo leyi landzelaka:

"**'ku pfaleriwa**' swi vula ku pimeriwa ka mfambafambo wa vanhu hi nkarhi lowu Mikavanyisa ya 2, 3 na 4 ya Swinawana leswi yi tirhaka, ku nga kusuka hi 23H59 hi siku ra 26 Nyenyankulu 2020, kufikela 23H59 hi siku ra 30 Dzivamisoko 2020; na".

Hundzuluxo wa xinawana xa 11B xa Swinawana leswi

8. Xinawana xa 11B xa swinawana leswi hi tsalwa leri xa hundzuluxiwa hi—

(a) ku siviwa ka xiphemu xa *(bb)* xa ndzimanatsongo (iii) ya ndzimana *(a)* ya xinawanatsongo (1) ya xiphemu lexi landzelaka:

"*(bb)* Vutleketli bya—

(*bb*A) tinhundzu leti lavekaka swonghasi;

(*bb*B) vutleketli bya tinhundzu kusuka etindhawini to nghena etikweni kufika eka tindhawu leti ti kongomisiweke eka tona; na

(*bb*C) Tinhundzu leti eka nkarhi wa sweswi ti nga etindhawini to nghena etikweni, eka ku rhumeriwa ematikweni mambe ka tinhundzu ku hunguta ntlimbano etindhawini to nghena etikweni;";

(b) ku nghenisiwa ka ndzimana leyi landzelaka endzhaku ka ndzimana ya *(f)* ya xinawanatsongo xa (1):

"*(g)* Mavhengele lama xavisaka swimakiwa swo maka na swiphemutsongo swa swipandzamananga ma fanele ku hlayisa rhijisitara ra vanhu lava xavaka tinhundzu leti xaxametiweke eka Xiphemu xa A xa Xengetelwa xa B, naswona ma boheka ku hlayisa rhekodo ya xihlambanyo lexi sayiniweke, lexi xi fambelanaka hindlela yo tivikana na Fomo ya 4 ya Xengetelwa xa C hi muxavi wa tinhundzu leti seketelaka leswaku tinhundzu leti i tinhundzu leti lavekaka swonghasi tanihilaha swi hlamuseriwaka hakona eka swinawana leswi.";

(c) ku siviwa ka ndzimana ya *(b)* ya xinawanatsongo xa (4A) xa ndzimana leyi landzelaka:

"*(b)* Swirho swa Khabinete leswi nga na vutihlamuleri bya vukorhokeri bya rihanyo na vaaki na mabindzu, tiindasitiri na miphikizano, hi swileriso, swi nga ha hlawula vukorhokeri lebyi byi lavekaka swonghasi ku nyika kumbe ku hlayisa vukorhokeri bya rihanyo na vaaki na mabindzu ya matiko ya misava kumbe migingiriko ya tiindasitiri leyi xaxametiweke eka Xengetelwa xa B eka Swinawana leswi.";

(d) ku suriwa ka ndzimana ya *(h)* ya xinawanatsongo xa (8); na

(e) ku engeteriwa ka swinawanatsongo leswi landzelaka endzhaku ka xinawanatsongo xa (8):

"(9)*(a)* Mfambafambo wa vana exikarhi vakhomikulobye va vutihlamuleri na timfanelo ta mutswari kumbe muhlayisi, tanihilaha swi hlamuseriweke hakona eka xiyenge xa 1(1) xa Nawu wa Vana, 2005 (Nawu wa No. ya 38 wa 2005), hi nkarhi wa ku pfaleriwa, wu tshimbisiwile, handle ka laha milulamiselo yi endliweke leswaku vana va famba kusuka eka mutswari un'we kuya eka un'wana, hi ku landza—

(i) xileriso xa khoto;

(ii) laha ntwanano wa vutihlamuleri na timfanelo ta mutswari kumbe kungu ra vutswari, leri tsariweke eka gqwetha ra ndyangu, wu nga kona, kumbe

(iii) vakhomikulobye bya vutihlamuleri na timfanelo ta vutswari va nga na xitifikheti xa ku velekiwa kumbe khopi leyi tiyisisiweke ya xitifikheti xa ku velekiwa xa n'wana kumbe vana lava ku humesa vumbhoni bya vuxaka lebyi nga enawini exikarhi ka vakhomikulobye va vutihlamuleri na timfanelo ta mutswari:

Ntsenaloko emutini lowu n'wana loyi a bohekaka ku ya eka wona, ku ri hava munhu loyi a tivekaka ku va a khumbanile, kumbe a ehleketeleriwaka hindlela yo tivikana ku va a khumbanile na munhu un'wana wihi kumbe wihi loyi a tivekaka ku va a khomiwile, kumbe a ehleketeleriwaka ku va a khomiwile hi COVID-19 emutini lowu n'wana loyi a bohekaka ku ya eka wona.

(b) Mutswari kumbe muhlayisi loyi a tleketlaka n'wana loyi a khumbekaka u boheka ku va na xileriso xa khoto kumbe ntwanano wa vutihlamuleri na timfanelo ta mutswari kumbe kungu ra vutswari kumbe xitifiketi xa ku velekiwa xa n'wana kumbe vana lava, tanihilaha swi lavekaka hakona.

(10) Tifomo hinkwato to fanele ku tatisiwa hi vutalo, ku katsa na mavito hi vutalo, tinomboro ta pasi kumbe ta phasipoto na vuxokoxoko bya vutihlanganisi

hi vutalo tanihilaha swi lavekaka hakona eka fomo leyi naswona ku hluleka ku endla tano swi ta vanga leswaku fomo leyi yi ariwa tanihi leyi nga amukelekiki.".

Ku nghenisiwa ka xinawana xa 11CA ka xinawana xa 11C

9. Xinawana lexi landzelaka hi tsalwa leri xa nghenisiwa endzhaku ka xinawana xa 11C:

"**Ku tshimbisiwa ka mirhurhiso**

11CA. A ku na munhu loyi a nga ha rhurhisiwaka kusuka eka ndhawu ya yena ya vutshamo, swi nga ri na mhaka loko byi ri vutshamo bya ximfumo kumbe lebyi nga riki bya ximfumo".

Ku siviwa ka xinawana xa 11G xa swinawana leswi

10. Xinawana xa 11G xa Swinawana leswi hi tsalwa leri xa siviwa hi xinawana lexi landzelaka:

"**Milandzu na mixupulo**

11G. Eka swikongomelo swa Kavanyisa loku, munhu wihi kumbe wihi loyi a tlulaka—

(a) xinawana xa 11B(1)*(a)*, *(b), (c), (d), (f)* kumbe 11B(4); kumbe

(b) swinawana swa 11C(1) na 11CA,

u endla nandzu naswona, loko a voniwa nandzu, u ta byarha ndziho kumbe ku pfaleriwa ekhotsweni ku ringana nkarhi lowu nga hundziki tsevu wa tin'hweti kumbe a byarha havumbirhi bya ndziho wolowo na ku pfaleriwa ekhotsweni.".

Hundzuluxo wa xinawana xa 11H xa Swinawana leswi

11. Xinawana xa 11H xa Swinawana leswi hi tsalwa leri xa hundzuluxiwa hi ku siviwa ka xinawanatsongo xa (13) xa xinawanatsongo lexi landzelaka:

"(13) Xirho xa Khabinete lexi nga na vutihlamuleri bya vululami na vukorhokeri bya makhotso, hi ku landza xiyenge xa 7(1)*(a)* lexi hlayiwaka na ndzimana ya *(d)* ya nhlamuselo ya "vukorhokeri" eka xiyenge xa 1(1) xa Nawu wa Miholo ya Vaavanyisi na Swipimelo swa le Ntirhweni, 2001 (Nawu wa No. ya 47 wa 2001) xi ta kombela muavanyisi kumbe Muavanyisi wa Khoto ya Vumbiwa loyi a tshunxiweke eka vukorhokeri bya siku na siku ku endla vukorhokeri tanihi Muavanyisi loyi a Hlawuriweke wa COVID-19 tanihilaha swi lulamiseriweke hakona eka Swinawana leswi.".

Ku siviwa ka xinawana xa 11I xa Swinawana leswi

12. Xinawana xa 11I xa Swinawana leswi hi tsalwa leri xa siviwa eka xinawana lexi landzelaka:

"**Milandzu na mixupulo**

11I. (1) Ku hluleka ku landzelela—

(*a*) mbhoheko lowu rhwexiwaka hi ku landza xinawana xa 11H(5), (9), (11), (17); kumbe

(*b*) xileriso lexi nyikiwaka hi ku landza xinawana xa 11H(10) kumbe (18),

swi vumba nandzu.

(2) Munhu loyi a hlulekaka ku landzelela mbhoheko lowu rhwexiwaka hi ku landza xinawana xa 11H(5), (9), (11) kumbe (17) kumbe xileriso lexi nyikiwaka hi ku landza xinawana xa 11H(10) kumbe (18), u endla nandzu naswona, loko a voniwa nandzu, u ta byarha ndziho kumbe ku pfaleriwa ekhotsweni ku ringana nkarhi lowu nga hundziki tsevu wa tin'hweti kumbe a byarha havumbirhi bya ndziho wolowo na ku pfaleriwa ekhotsweni.".

Ku nghenisiwa ka Kavanyisa ka 4 eka swinawana leswi

13. Kavanyisa loku landzelaka hi tsalwa leri ka nghenisiwa eka swinawana leswi:

"**KAVANYISA KA 4**

Mphakelo wa eneji na swimakiwa swa oyilimbisi

11J. Ku tiyisisa leswaku ku na mphakelo lowu yaka emahlweni wa eneji na swimakiwa swa oyilimbisi erixakeni tanihilaha swi vuriweke hakona eka ndzimana ya 6 ya Xiphemu xa B xa Xengetelwa xa B—

(a) migodi ya malahla leyi yi phakelaka Eskom yi fanele ku ya emahlweni yi tirha hi vundzeni bya vutalo; na

(b) vubasiselo byi fanele ku tirha hi vundzeni bya vutalo ku papalata nkayivelo wa mafurha, naswona mitirho yaleyo yi fanele ku katsa swin'okiselo, tipulanti na swivavulelo.

Mitirho ya vucelamigodi

11K. (1) Mitirho ya vucelamigodi, tanihilaha swi vuriweke hakona eka ndzimana ya 22 ya Xiphemu xa B xa Xengetelwa xa B, yi fanele ku endliwa hi vundzeni lebyi hungutiweke bya ku nga tluli 50% hi nkarhi wa ku pfaleriwa, naswona endzhaku ka swona hi vundzeni lebyi engetelaka tanihilaha swi nga ta bohiwa hakona hi xileriso lexi nyikiwaka hi xirho xa Khabinete lexi nga na vutihlamuleri bya swipfuno swa swicelwa na eneji.

(2) swipimelo leswi landzelaka swi ta tirha eka sunguriweni na le ku engeteriweni ka vundzeni:

(a) Nongonoko vuhleri na nkambelo wa vuenti wu ta simekiwa tanihiloko vatirhi va ri karhi va vuyela entirhweni;

(b) indasitiri ya vucelamigodi yi fanele ku nyika miako ya nhlambulo eka vatirhi lava kamberiweke va kumeka va ri na COVID-19;

(c) data leyi hlengeletiweke hi nkarhi wa nongonoko wa vuhleri na nkambelo yi fanele ku rhumeriwa eka vulawuri lebyi faneleke;

(d) tikhamphani ta vucelamigodi ti fanele ku endla milulamiselo yo tleketla vatirhi va Afrika-Dzonga kusuka emakaya ya vona ku ya etindhawini ta vona to hambanahambana ta mitirho;

(e) vatirhi kusuka eka matikoakelana ya Miganga ya Nhluvukiso ya le Dzongeni wa Afrika va fanele ku vitaniwa va vuyela endhawini ya vona ya ntirho emakumu ka ku pfaleriwa ematikweni ya vona yo hambanahambana hi ku fambisana na Swinawana leswi na swinawana leswi swi tirhaka ematikweni walawo.

(3) Vulanguteri na nhlahluvo wa nkhumbeko wa ninginiko wa misava hi ku tirhisa Huvo ya Sayense ya Ntivomisava swi fanele ku tiyisiwa hi ku hatlisa.".

Hundzuluxo wa Xengetelwa xa B xa Swinawana leswi

14. Xengetelwa xa B eka Swinawana leswi hi tsalwa leri swa hundzuluxiwa hi—

(a) ku engeteriwa eka Xiphemu xa A endzhaku ka ndzimana ya 5 ya tindzimana leti landzelaka:

"6. Swo maka, swiphemutsongo na swiphakeriwa leswi laviwaka hi vanhu lava endlaka bindzu rolero lava ri thwaseleke ntsena eka swikongomelo swa vulunghisi bya xilamulelamhangu emakaya ya vutshamo;

7 Swo maka, swiphemutsongo na swiphakeriwa leswi laviwaka hi vandla leri endlaka vunyiki bya vukorhokerikulu bya phurojeke yihi kumbe yihi leyi fambelanaka na ku nyikiwa ka mati, gezi kumbe vukorhokerikulu byin'wana;

8. Swiphemutsongo swa swipandzamananga leswi nga eku endliweni ka vulunghisi bya xilamulelamhangu laha xipandzamananga xolexo xi tirhisiwaka hi munhu loyi a endlaka vukorhokerikulu.";

(b) ku siviwa eka Xiphemu xa B ka ndzimana ya 5 ya ndzimana leyi landzelaka:

"5. Mavhengele ya girosa na timakete ta matsavu ta tiholiseli, mavhengelexiphaza, vaxavisi va mihandzu na miroho lava nga riki va ximfumo na *malangana*, lava nga na mpfumelelo wo tsariwa kusuka eka vulawuri bya masipala ku tirha lowu lavekaka hi mayelana na mavhengelexiphaza, na vabindzurisi va mihandzu na miroho lava nga riki va ximfumo: Ntsenaloko mipfumelelo leyi amukelekaka hinkwayo ya mavhengelexiphaza, vabindzurisi va mihandzu na miroho lava nga riki va ximfumo leyi nyikiweke ku nga si va na kumbe hi nkarhi wa xiyimo xa rixaka lexi tivisiweke xa mhangu naswona leyi yi lavekaka hi nkarhi wo fana, yi ta tshama ya ha amukeleka eka nkarhi wa n'hweti yin'we endzhaku ka kufika emakumu ka xiyimo xa rixaka xa mhangu; ";

(c) ku siviwa eka Xiphemu xa B ka ndzimana ya 22 ya ndzimana leyi landzelaka

"22. Nsuku, vubasiselo bya nsuku, malahla na vucelamigodi;";

(d) ku siviwa eka Xiphemu xa B ka ndzimana ya 27 ya ndzimana leyi landzelaka:

"27.1 Vakhomixinara va Khomixini ya Timfanelo ta Ximunhu ya Afrika-Dzonga, Khomixini ya Rimbewu, Khomixini ya Nkondletelo na Nsirhelelo wa Timfanelo ta Miganga ya Mfuwo, Vukhongeri na Tindzimi, Musirhelelavaaki na Xandla xa Musirhelelavaaki na Khomixini ya Nhlawulo wa leyi Tiyimelaka; na

27.2 Vukorhokeri lebyi nyikiwaka hi mihlangano leyi vuriwaka eka xiphemu xa 27.1;";

(e) ku siviwa eka Xiphemu xa B ka ndzimana ya 30 ya ndzimana leyi landzelaka:

"30. Tisenthara ta tiqingho leti lavekaka swonghasi ku nyika vukorhokeri bya rihanyo, bya vuhlayiseki, bya nseketelo wa vaaki, bya mfumo na bya timali, ku vumbiwa hi vuntshwa ka swikweleti swa vatirhisi va vaxavisi, na mfikelelo wa tipholisi ta ndzindzakhombo wa nkarhi wo koma hikwalaho ka malinghena leyi hungutekeke kumbe ndzahlekelo wa malinghena;"; na

(f) ku engeteriwa eka Xiphemu xa B ka tindzimana leti landzelaka endzhaku ka ndzimana ya 33:

"34. Mabindzu lama lavekaka swonghasi eka ku nyikiwa ka ntirho wa vulunghisi bya xilamulelamhangu, ku katsa vatirhi va tiphayiphi, vativagezi, vativansimbhi, vavekelanghilazi, ntirho wo lunghisa lwangu;

35. Mabindzu lama lavekaka swonghasi eka vulunghisi bya mimovha bya xilamulelamhangu eka vanhu lava nyikaka vukorhokerikulu;

36. Vukorhokeri bya Thekinoloji ya Vuxokoxoko na Vuhlanganisi lebyi nyikiwaka mavandla na mihlangano leyi endlaka mphakelo wa vukorhokerikulu hi ku landza Swinawana leswi.".

Hundzuluxo wa Fomo ya 3 ya Xengetelwa xa C eka Swinawana leswi

15. Fomo ya 3 ya Xengetelwa xa C eka Swinawana leswi hi tsalwa leri ya hundzuluxiwa hi ku siviwa ka xivulwahava xa "xa xerifi(xa muhlambanyi)" kumbe "xerifi(muhlambanyi)" eka ku nyikiwa ka Xitifikheti kwihi kumbe kwihi laha xi vonakaka kona ka rito "muhlambanyi".

Hundzuluxo wa Xengetelwa xa C eka Swinawana leswi

16. Xengetelwa xa C eka Swinawana leswi hi tsalwa leri xa hundzuluxiwa hi ku engeteriwa ka tifomo leti landzelaka endzhaku ka Fomo ya 3:

"FORM 4
XIHLAMBANYO HI MUXAVI WA SWIMAKIWA SWO MAKA KUMBE SWIPHEMUTSONGO SWA MOVHA
Xinawana xa 11B(1)*(g)*

Mina,

Mavito hi vutalo:						
Xivongo:						
Nomboro ya pasi:						
Adirese ya le kaya:						
Vuxokoxoko bya vutihlanganisi:	No. ya selifoni		No. ya riqingho (h)		Adirese ya imeyili	

Ndza hlambanya leswaku tinhundzu leti vuriweke laha hansi ta laveka swonghasi eka ku nyika ntirho wo lunghisa wa xilamulelamhangu:

Xi sayiniwile e_____hi _____ siku ra _____ 2020.

_____

Nsayino wa muxavi".

Hundzuluxo wa Xengetelwa xa D eka Swinawana leswi

17. Xengetelwa xa D eka Swinawana leswi hi tsalwa leri xa nyikiwa eka ku siviwa ka ndzimanatsongo ya (vii) ya ndzimana ya *(c)* ya ndzimanatsongo leyi landzelaka:

"(vii) tihodela, vurhurhelo na tindlu ta vayeni, handle ka mpimo laha swi laveriwaka vapfhumba lava nga sala lava pfaleriweke etihodela, eka vurhurhelo na le ka tindlu ta vayeni;".

ISAZISO SOMBUSO

UMNYANGO WEZOKUBUSA NGOKUBAMBISANA NEZENDABUKO

No. R. 465 16 kuSihlabantangana 2020

UMTHETHO OLAWULA IHLEKELELE WEE-2002: ISIKHIBELELO SEMITHETHOLAWULO EKHUTJHWE NGAPHASI KWESIGABA 27(2)

Mina, uDorh. Nkosazana Dlamini-Zuma, uNgqongqotjhe wezokuBusa ngokuBambisana nezeNdabuko, obekwe esikhundleni ngaphasi kwesiGaba 3 somthetho oLawula iHlekelele wee-2002 (UmThetho Nomboro. 57 wee-2002), njengombana sekumenyezelwe ubujamo behlekelele yelizweloke, ogadangiswe kuGazede yoMbuso yeNomboro 43096 yamhlana ali-15 kuNtaka wee-2020, ngokwesiGaba 27(2) somThetho oLawula iHlekelele wee-2002, ngemva kokubonisana namalunga afaneleko weKhabinethi, ngenza imiThetholawulo ngaphakathi kweHlelomthetho.

UDORH. NKOSAZANA DLAMINI-ZUMA, ILUNGA LEPALAMENDE
UNGQONGQOTJHE WEZOKUBUSA NGOKUBAMBISANA NEZENDABUKO
ILANGA:

IHLELOMTHETHO

Iinhlathululo

1. Ngaphakathi kwemithetholawulo le, "imiThetholawulo" ihlathulula imithetholawulo ekhutjhwe ngeSaziso soMbuso seNomboro. 318 samhlana ali-18 kuNtaka wee-2020, njengokukhitjelelwa siSaziso soMbuso seNomboro. R. 398 zamhlana ama-25 kuNtaka wee-2020, seNomboro R.419 samhlana ama-26 kuNtaka wee-2020 neseNomboro R.446 samhlazana ama-2 kuSihlabantangana wee-2020.

Isikhibelelo somthetholawulo 6 wemiThetholawulo

2. Umthetholawulo 6 wemiThetholawulo ukhitjelelwa ngenzasi ngokujanyiselelwa mthetholawulo olandelako —

“Iinkolo neendawo zetjhejo labentwana nanyana iinkulisa kufanele kube sezivaliwe ukusukela mhlana ali-18 kuNtaka wee-2020 ukufikela mhlana nakama-30 kuSihlabantangana wee-2020, ekusikhathi esingangezelelwa ngokwemilayelo yelunga leKhabinethi elifaneleko.”.

Ukukhitjelelwa komthetholawulo 1A wemiThetholawulo

3. Umthetholawulo 1A wemiThetholawulo ukhitjelelwa ngokujanyiselelwa ngomthetholawulo olandelako:

"Ukusetjenziswa kweZahluko 1, 2, 3 nesesi-4

1A. (1) Isahluko 1 kunye nanyana ngiwuphi umlayo okhutjhiweko mayelana nemiThetholawulo sizokuraga ngokusebenza nokusetjenziswa, ngaphandle nakunokutjhayisana hlangana neSahluko 1 neZahluko 2 ukuya kesesi-4, iZahluko 2 ukuya kesesi-4 zizokusebenza nakunokutjhayisana.

(2) Izahluko 2, 3 nesesi-4 zemiThetholawulo le zizokusebenza ukusukela mhlana ama-26 kuNtaka wee-2020 nge-awara le-23h59 ukufikela mhlana ama-30 kuSihlabantangaana wee-2020 nge-awara le-23h59: Kwaphela nange iSahluko 3 sizokuhlala sisebenza ngesikhathi sobujamo behlekelele yelizweloke, nofana ngesikhathi ekungenzeka selulwe."

Ukujanyiselelwa komthetholawulo 7 wemiThetholawulo

4. Umthetholawulo 7 wemiThetholawulo ujanyiselelwa ngomthetholawulo olandelako:

"Ukujanyiswa kwamavakatjho

7. Woke amavakatjho wamalunga womphakathi wokuya —

(*a*) emaZikweni wezokuHlengwa kwesimilo;

(*b*) eeNdaweni zemaJele nokuValelwa ngaphambi kokulalelwa kwemilandu;

(*c*) emaSelini wokuLindisa iimBotjhwa;

(d) eeNdaweni zokuValelwa iimBotjhwa ezimaSotja; begodu

(*e*) nemaZikweni womNyango wezokuThuthukiswa komPhakathi, ekufaka hlangana amaZiko weTjhejo labeNtwana neLutjha, iindawo zokuhlalisa abanganabuyo, emaZikweni wokuSekelwa ngeSizo neZenzelwa eziHlukahlukeneko Ndawonye nemaZikweni wezokweLapha,

Kujanyiswe ngokwesikhathi sokuqinteliswa kweminye imisebenzi namakhambo ukusukela ngelanga lokukhutjhwa kweSaziswesi, ubude besikhatheso bungahle bungezelelwe, isikhathi saso ekungenzeka selulelwe esikhathini esithile, kodwana kungadluli isikhathi sobujamo behlekelele yelizwe okuzakumenyezelwa lilunga lekhabinethi elifaneleko.".

Isikhibelelo somthetholawulo 8 wemiThetholawulo

5. Umthetholawulo 8 wemiThetholawulo ukhitjelelwa ngokungezelela umthetjhwana (6) ngemva komthetjhwana (5) —

"(6) Ukuthuthwa kotjwala akukavunyelwa, ngaphandle kwalapho i-alikhoholi itlhogeka emabubulweni akhiqiza iinhlanzekisi zezandla, iimbulaliingogwana, isibha, i-alikhoholi esetjenziswa mabubulo nemikhiqizweni yokuhlwengisa ngekhaya".

Ukukhitjelelwa komThetholawulo 10 wemiThetholawulo

6. Umthetholawulo 10 wemiThetholawulo ukhitjelelwa ngokungezelela umthetjhwana olandelako:

"(9) Yoke imiyalo ekhutjhwe ngokwemiThetholawulo le izakuraga nokusebenza ngaphandle kwalapho, nayitjhugululwako, ikhitjelelwe nofana irhoqiswe lilunga leKhabinethi elifaneleko neliqalene nemiyalo leyo".

Ukukhitjelelwa komthetholawulo 11A wemiThetholawulo

Umthetholawulo 11A wemiThetholawulo ukhitjelelwa ngokujanyiselelwa kwehlathululo "yokuqinteliswa kweminye imisebenzi namakhambo" ngehlathululo elandelako:

7. **"'Ukuqinteliswa kweminye imisebenzi namakhambo'** kuhlathulula ukukhandelwa kokukhamba kwabantu ngesikhathi lapho izahluko 2, 3 nesesi-4 zemiThetholawulo le zisebenza ngaso, okutjho ukusukela nge-awa le-23H59 ukusukela mhlana ama-26 kuSihlabantangana wee-2020, ukufikela nge-awa le-23H59 mhlana ama-30 kuSihlabantangana wee-2020; begodu".

Ukukhitjelelwa komthetholawulo 11B wemiThetholawulo

8. Umthetholawulo 11B wemiThetholawulo ukhitjelelwa ngoku—

(a) janyiselelwa kwesihlokwana *(bb)* sendinyana (iii) yendima *(a)* yomthetjhwanalawulo (1) wesihlokwana esilandelako:

"*(bb)* ukuthuthwa —

(*bb*A) kwepahla eqakathekileko;

(*bb*B) komthwalo ukusuka emadoyelweni wobungeno usiwa eendaweni oya kizo; begodu

(*bb*C) komthwalo osele usemazibukweni abungeno belizwe, ukukhambisa ipahla kobana kwehliswe isiminyaminya esisemazibukweni abungeno belizwe";

(b) ukuhlonyelelwa kwesigaba esilandelako ngemva kwesigaba *(f)* somthetjhwanalawulo (1):

"*(g)* Iintolo ezithengisa imikhiqizo emathulusi neengcenye zeenkoloyi kufanele zibe nerejista yabantu abathenga ipahla erhabekileko etlolwe kuNgcenye A yesiKhibelelo B, godu zibe nerekhodi lesivumelwano esitlikitliweko, esikhambisana ngokwamambala neForomo 4 lesiKhibelelo C mthengi wepahla esifakazela bonyana yipahla ethengiweko ngerhabekileko njengokuhlathululwa ngaphakathi kwemiThetholawulo.";

(c) ukujanyiselelwa kwendima *(b)* yomthetjhwanalawulo (4A) wendima elandelako:

"*(b)* Amalunga weKhabinethi aqalene nezepilo neendaba zehlalakuhle nezerhwebo, amabubulo nephaliswano angakhetha, ngemilayo imisebenzi efaneleko ukunikela nokutjheja iinsiza zezamaphilo nezehlalakuhle eziqakathekileko nokurhwebelana kwamazwe ngamazwe nanyana imisebenzi yamabubulo erhenyiswe ngaphakathi kwesiKhibelelo B emiThethwenilawulo.";

(d) ukukhutjhwa kwendima *(h)* yomthetjhwana (8); begodu

(e) nokungezelelwa kwemithetjhwana elandelako ngemva komthetjhwanalawulo (8):

"(9)*(a)* Ukukhanjiswa kwabantwana hlangana nababambisani bokutlhogonyelwa kwabentwana namalungelo womtlhogomeli, njengokuhlathululwe esigabeni 1(1) se-*Children's Act, 2005* (UmThetho Nomboro. 38 wee-2005), ngesikhathi sokuqinteliswa kweminye imisebenzi namakhambo, akukavunyelwa, ngaphandle kwalapho kwenziwe amalungiselelo bonyana umntwana asuke kumbelethi abegade akuye aye komunye, ngokuya—

(i) ngomlayelo wekhotho;

(ii) ngokuthi kunesivumelwano seembopho kanye namalungelo wokukhuliswa komntwana nofana ihlelo lokukhuliswa komntwana, elitloliswe negcwetha lomndeni, nofana

(iii) ngokuthi umbelethi okhulisa umntwana ngokubambisana nomunye ngokwesibopho nanyana onamalungelo wokukhulisa umntwana/abentwana aphethe isitifikeyidi sokubelethwa/iintifikeyidi zokubelethwa nofana ikhophi eqinisekisiweko yesitifikeyidi/yeentifikeyidi sokubelethwa/zokubelethwa somntwana/zabantwana ukufakazela ubudlelwano bangokomthetho phakathi kwababelethi abangahlali boke kodwana babambisene ngokweembopho namalungelo ekukukhuliseni umntwana namkha abentwana:

Ngombandela othi kwaphela nange ekhaya lapho kufuze umntwana aye khona, akunamuntu otheleleke, nofana osolelwa bonyana khewathintana nomunye umuntu owaziwa bonyana utheleleke, nofana osolelwa bonyana utheleleke ngengogwana i-*COVID-19* ohlala ekhaya ekufuze umntwana asiwe kilo.

(b) Umbelethi nofana umtlhogomeli okhambisa umntwana kufuze aphathe kuye, umlayo wekhotho nofana isivumelwano seembopho namalungelo wokukhuliswa komntwana nofana ihlelo lokukhuliswa komntwana nofana isitifikedi sokubelethwa somntwana nofana abantwana, njengombana kudingeka ngokomthetho.

(10) Woke amaforomo kufuze azaliswe ngokuzeleko, ekufaka hlangana amagama apheleleleko, iinomboro zikamazisi nofana zephasiphoti nemininingwana yokuthintana epheleleko ngendlela ekudingeka ngayo ngaphakathi kweforomo begodu nakungasinjalo iforomo alizukwamukelwa, lizakuphayelwa ngeqadi njengelingasi semthethweni".

Ukukhitjelelwa komthetholawulo 11CA ngemva komthetholawulo 11C

9. Umthetholawulo olandelako uhlonyelelwa ngemva komthetholawulo 11C:

"**Ukukhandelwa kokukhutjhwa ngekani kwabantu eendaweni abahlala kizo**

11CA. Akunamuntu ekufuze asuswe ngekani endaweni abahlala kiyo, nangaphandle kokuthi uhlezi ngokomthetho nofana ngokungekho emthethweni nofana uhlala emaplasini, ngesikhathi sokuqinteliswa kweminye imisebenzi namakhambo".

Ukujanyiselelwa komthetholawulo 11G wemiThetholawulo

10. Umthetholawulo 11G wemiThetholawulo ujanyiselelwa ngomthetholawulo olandelako:

" **Imilandu nehlawulo**

11G. Ngokweminqopho yeSahlukwesi, nanyana ngubani owephula—

(a) umthetholawulo 11B(1)*(a)*, *(b), (c), (d), (f)* nofana 11B(4); nofana

(b) imithetholawulo 11C(1) no 11CA,

wenza umlandu begodu, nakafunyanwa amlandu, uthweswa ihlawulo nofana isigwebo sokuvalelwe isikhathi esingadluli iinyanga ezisithandathu nofana kokubili ihlawulo nesigwebo sokuvalelwa".

Ukukhitjelelwa komthetholawulo 11H wemiThetholawulo

11. Umthetholawulo 11H wemiThetholawulo ukhitjelelwa ngokujanyiselelwa komthetjhwanalawulo (13) womthetjhwanalawulo olandelako:

"(13) Ilunga leKhabinethi eliqalene nezobulungiswa nokuhlengwa kweemilo, ngokwesigaba 7(1)*(a)* esifundwa nendima *(d)* yehlathululo "yomsebenzi" esigabeni 1(1) seHlelo lemiRholo neMibandela yokuQatjhwa nokuSebenza kwamaJaji (i-*Judges' Remuneration and Conditions of Employment Act, 2001)* (UmThetho Nomboro. 47 wee-2001) lingakhombela ijaji nofana iJaji leKhotho yomThethosisekelo elitjhatjhululiweko

emsebenzini walo wangamalanga ukusebenza njengeJaji eliKhethiweko le-*COVID-19* njengokuqalelelwe ngaphakathi kwemiThetholawulo".

Ukujanyiselelwa komthetholawulo 11I wemiThetholawulo

12. Umthetholawulo 11I wemiThetholawulo ujanyiselelwa ngomthetholawulo olandelako:

"**Imilandu nehlawulo**

11I. (1) Ukwehluleka ukuthobela—

(*a*) isibopho esithweswe ngokuya ngomthetholawulo 11H(5), (9), (11), (17); nofana

(*b*) umlayo okhutjhwe ngokomthetholawulo 11H(10) nofana (18),

kukwephula umthetho.

(2) Umuntu obhalelwa kuthobela isibopho esithweswe ngokomthetholawulo 11H(5), (9), (11) nofana (17) nofana umlayo okhutjhwe ngokomthetholawulo 11H(10) nofana (18), uphula umthetho begodu, nakafunyenwe amlandu, uthweswa ihlawulo nofana isigwebo sokuvalelwa esingadluli iinyanga ezisithandathu nofana kokubili ihlawulo nesigwebo sokuvalelwa".

Ukukhitjelelwa kweSahluko 4 emiThethwenilawulo

13. ISahluko esilandelako sikhitjelelwa emiThethwenilawulo le:

"**ISAHLUKO 4**
Ukunikelwa kweembaseli zamandla nezephethroliyamu

11J. Ukuqinisekisa ukunikelwa kwemikhiqizo yezamandla neyephethroliyamu emphakathini njengokukhonjwe endimeni 6 yeNgcenye B yesiKhibelelo B—

(a) iimayini zamalahle ezifakela i-*Eskom* kufuze zirage nokusebenza ngokuzeleko; begodu

(b) namaZiko we-oli kufuze asebenze ngokuzeleko ukukhandela ukutlhayelelwa ziimbaseli, godu imisebenzi le kufuze ifakeiinkampani ezincithikisi isimbi, amafemu akhiqiza koke okuziimbaseli neemvuthisi.

ImiSebenzi yeeMayini

11K. (1) Imisebenzi yeemayini, njengokukhonjwe endimeni 22 yeNgcenye yesiKhibelelo B, kufuze kwenziwe ngokwezinga eliphunguliweko elingasi ngaphezulu kwamaphesenti ama-50% ngesikhathi sokuqinteliswa kwamakhambo, ngemva kwalokho izinga lizakukhutjhulwa ukuya ngokomyalo welunga leKhabhinethi eliqalene neendaba zezenjiwa namandla.

(2) Imibandela elandelako isebenza ekuthomeni ekukhulisweni kwezinga lokusebenza:

(a) Umsebenzi ongeneleleko wehlelo lokuhlola nokuphengula kufuze lenziwe lokha abasebenzi nababuyela emsebenzini;

(b) ibubulo leemayini kufuze linikele ngeendawo zokuvalelwa kwabasebenzi abafunyenwe batheleleke ngengogwana i-*COVID-19*;

(c) imininingwana ebuthelelweni nakuphengulwako nalokha nakuhlolwako kufuze ithunyelwe kumphathimandla ezifaneleko;

(d) amakhamphani weemayini kufuze alungise ngokuthutha abasebenzi bazo abamaSewula Afrika ukusuka emizinabo ukuya lapho basebenzela khona;

(e) abasebenzi bamazwe abomakhelwana ngaphasi kweHlangano eThuthukisa aMazwe we-Afrika engeSewula (i-SADC) bazakubizwa ngemva kokuphela kwesikhathi sokuqinteliswa kweminye imisebenzi namakhambo emazweni wemakhabo ukuya ngokwemiThetholawulo le nemithetholawulo esebenza emazweni abadabuka kiwo.

(3) Ukuhlolwa nokutjhejisiswa komthelela wokusikinyeka kwephasi okwenziwa mKhandlu wezeSayensi yobuJamo bePhasi (i-*Council for Geoscience)* kufuze kuqiniswe njenganje".

Ukukhitjelelwa kwesiKhibelelo B emiThethwenilawulo

14. IsiKhibelelo B emiThethwenilawulo ikhitjelelwa ngoku—

(a) ngezelela ngaphakathi kweNgcenye A ngemva kwendima 5 yeendima ezilandelako:

"6. Imikhiqizo yokwakha namathulusi, anesidingo atlhogwa babantu bemisebenzi yezandla, abakhi nabakhandi abanamaphepha we-ambarha kwaphela ngehloso yokwenza umsebenzi orhabekileko emakhaya;

7 Iinsetjenziswa eziqinileko nezimathulusi, iingcenye neendingo ezitlhogwa nginanyana ngiliphi iziko elinikela ngeensetjenziswa ezirhabekileko kuphrojekthi ekhambisana nokunikelwa kwamanzi, igezi nofana ngiwuphi omunye umsebenzi orhabekileko;

8. Iingcenye zeenkoloyi ezilungiswa ngokurhabekileko lapho umnikazayo asebenza umsebenzi orhabekileko.";

(b) ukujanyiselelwa ngaphakathi kweNgcenye B endimeni 5 yendima elandelako:

"5. Iintolo zokudla namamakethe wemikhiqizo etjalwako, iintolodlwana nanyana iimphaza, abathengisi beenthelo nemirorho abangakatloliswa nama-*langanas*, ngemvumo etlolwe phasi ekhutjhwe siphathimandla sikamasipala yokusebenza mayelana neentodlwana namkha iimphaza nabathengisi beenthelo nemirorho abathengisele endleleni ekhutjhwe ngaphambi nofana ngesikhathi sesimemezelo sehlekelele yezweloke ephelelwa sikhathi esibekiweko, izakuhlala isebenza isikhathi esingaba yinyanga ngemva kwesikhathi sehlekelele yelizweloke";

(c) ukujanyiselelwa ngaphakathi kweNgcenye B endimeni 22 yendima elandelako:

"22. Irhawuda, isikhungo sokusila irhawuda, amalahle neemayini;";

(d) ukujanyiselelwa kweNgcenye B endimeni 27 yendima elandelako:

"27.1 Abokomitjhinara beKomitjhini yamaLungelo woBuntu, iKomitjhini yoBulili, iKomitjhini yokuThuthukiswa nokuVikelwa kwamaLungelo, amaSiko, iinKolelo namaLimi wemiPhakathi, umVikeli womPhakathi neSekela lomVikeli womPhakathi neKomitjhini eziJameleko yamaKhetho; begodu

27.2 Nemisebenzi enikelwa maziko akhonjwe ku-ayithemu 27.1;";

(e) ukujanyiselelwa ngaphakathi kweNgcenye B endimeni 30 yendima elandelako:

"30. Iinkhungo zemitato eqalene nokunikela iinsiza zezamaphilo, zokuphepha, isekelo lezehlalakuhle, iinsiza zikarhulumende nezeemali, ukulungiswa kweenkolodo

zabathengi beentolo ezikulu, nokufikelela amatjhorensi wesikhatjhana ngonobangela wokwehla kwengeniso nofana ukulahlekelwa yingeniso;"; begodu

(f) ukungezelelwa ngaphakathi kweNgcenye B yeendima eziilandelako ngemva kwendima 33:

"34. Ukurhweba okutlhogekako kokulungisa okurhabekileko, kufaka hlangana aboplamara, abasebenza ngegezi, beenlodlhelo, abasebenza ngamarhalasi, abalungisa umfulelo;

35. Imisebenzi yokulungiswa ngokurhabako iinkoloyi zabantu abenza imisebenzi erhabako;

36. Imisebenzi eqakathekileko yeLwazi leThekonoloji yezokuThintana enikelwa amabubulo namaziko aqalene nokuletha iinsetjenziswa eziqakathekileko mayelana nemiThetholawulo le.".

Ukukhitjelelwa kweForomo 3 lesiKhibelelo C emiThethwenilawulo

15. IForomo 3 lesiKhibelelo C semiThetholawulo likhitjelelwa ngokujamiselela umutjhwana "isithunywa sekhotho (umfungi)" "isithunywa sekhotho (umfungisi)" nakuQinisekiswa koke lapho kuvela khona igama elithi "umfungi".

Ukukhitjelelwa kwesiKhibelelo C emiThethwenilawulo

16. IsiKhibelelo C emiThethwenilawulo ikhitjelelwa ngokungezelela amaforomo alandelako ngemva kweForomo 3:

"IFOROMO 4

ISIQINISEKISO SOMTHENGI WEMIKHIQIZO YOKWAKHA NAMATHULUSI NANYANA IINGCENYE ZEKOLOYI
Umthetholawulo 11B(1)*(g)*

Mina,

Amabizo apheleleko:						
Isibongo:						
Inomboro kamazisi:						
Isiphande sekhaya:						
Imininingwana yokuthintana:	INomboro kafunjathwako		INomboro yomtato (wekhaya)		Isiphande seposommoya	

Ngiqinisekisa bonyana ipahla etlolwe ngenzasi iyatlhogeka ukwenza umsebenzi wokulungisa orhabekileko:

Itlikitlelwe e_____mhlana ama-_____ ku_____ 2020.

_____
Umtlikitlo womthengi".

Ukukhitjelelwa kwesiHlomelelo D emiThethwenilawulo

17. IsiHlomelelo D emiThethwenilawulo siyakhitjelelwa ukujamiselela indinyana (vii) yesigaba *(c)* sendima elandelako:

"(vii) amahotela, amaloji neenkumba zeemvakatjhi, ngaphandle kokufikela lapho zifunelwa iimvakatjhi eziseleko ezivaleleke emahotela, emaloji neenkumbeni zabavakatjhi;".

GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

DEPARTMENT OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS

NO. R. 480 **29 APRIL 2020**

DISASTER MANAGEMENT ACT, 2002
REGULATIONS ISSUED IN TERMS OF SECTION 27(2) OF THE DISASTER MANAGEMENT ACT, 2002

I, Dr Nkosazana Dlamini Zuma, Minister of Cooperative Governance and Traditional Affairs, designated under section 3 of the Disaster Management Act, 2002 (Act No. 57 of 2002), having declared a national state of disaster, published in Government *Gazette* No. 43096 on 15 March 2020, hereby in terms of section 27(2) of the Disaster Management Act, 2002, after consultation with the relevant Cabinet members, make the Regulations in the Schedule.

NC Zuma

DR NKOSAZANA DLAMINI ZUMA, MP
MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS
DATE: 29.04.2020.

SCHEDULE
CLASSIFICATION OF REGULATIONS

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CHAPTER 3
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TABLE 1

Alert Level 4

ANNEXURE A

Form No.

1. Order for a person to go to a site of isolation, quarantine facility, or for a person to go for medical examination
2. Permit to perform an essential or permitted service
3. Permit for the movement of children to travel to another province, metropolitan area or district
4. Permit to travel to another province, metropolitan area or district for a funeral
5. Sworn affidavit by person who wishes to attend a funeral in another province metropolitan area or district

ANNEXURE B

Essential goods for import

ANNEXURE C

Permitted goods for export

ANNEXURE D

Essential services

ANNEXURE E

Workplace plans

CHAPTER I

DEFINITIONS AND APPLICATION

Definitions

1. In these Regulations, unless the context otherwise indicates—

'adequate space' means not more than one person per one and a half metres of floor space;
'Alert Level' means the determination made under subregulation 3(2);
'clinical case' means a patient that presents with clinical signs and symptoms of COVID-19;
'Constitution' means the Constitution of the Republic of South Africa, 1996;
'COVID-19' means the Novel Coronavirus (2019-nCov2) which is an infectious disease caused by a virus that has previously not been scientifically identified in humans, which emerged during 2019 and was declared a global pandemic by the **WHO** in 2020;
'Criminal Procedure Act' means the Criminal Procedure Act, 1977 (Act No. 51 of 1977);
'directions' means the directions contemplated in section 27(2) of the Act, issued by a Cabinet member relating to his or her line functions, after consultation with the Cabinet members responsible for cooperative governance and traditional affairs and justice and correctional services;
'donor' means an individual, corporation or organisation that is a contributor of cash, kind and/or other assets;
'enforcement officer' includes a member of the South African Police Service, the South African National Defence Force, metro police, traffic officers, immigration inspectors; and a peace officer as defined in section 1 of the Criminal Procedure Act;
'essential goods for import' means the goods listed in Annexure B;
'essential services' means the services listed in Annexure D;
'gathering' means any assembly, concourse or procession in or on—
(a) any public road, as defined in the National Road Traffic Act, 1996 (Act No. 93 of 1996); or
(b) any other building, place or premises, including wholly or partly in the open air, and including, but not limited to, any premises or place used for any sporting, entertainment, funeral, recreational, religious, or cultural purposes; but excludes a workplace and a place of residence for those persons ordinarily residing at the residence;
'health protocols' means the COVID-19 health protocols determined by the Director General of Health;
'head of an institution' means the accounting officer of a public institution and the chief executive officer or the equivalent of a chief executive officer of a private institution;
'institution' means any public or private institution, including a sole practitioner and any other business owned and operated by a single person, that is engaged in the supply or distribution of a good or service as set out in the Table 1, or which regulates such supply or distribution, including professional regulatory bodies designated in directions made in terms of regulation 4 of the Regulations;
'institutions of higher learning' means 'higher education college' and 'higher education institution' as defined in section 1 of the Higher Education Act, 1997 (Act No. 101 of 1997);
'isolation' means separating a sick individual with a contagious disease from healthy individuals

that are not infected with such disease in a manner that aims to prevent the spreading of infection or contamination;

'laboratory confirmed case' means a patient who has been diagnosed with COVID-19 by means of a laboratory diagnostic method approved by the Department of Health;

'liquor' means—

(a) any liquor product, as defined in section 1 of the Liquor Products Act, 1989 (Act No. 60 of 1989);

(b) beer or traditional African beer; or

(c) any other substance or drink declared to be liquor under the Liquor Act, 2003 (Act No. 59 of 2003), but does not include methylated spirits;

'lockdown' means the period between 23H59 on 26 March 2020, until 23H59 on 30 April 2020,

'movement' means entering or leaving a place of residence or, in the case of people not ordinarily resident in the Republic, their place of temporary residence while in the Republic.

'national state of disaster' means the national state of disaster declared by Government Notice No. R. 313 of 15 March 2020;

'permitted goods' means Part E in the Table 1;

'permitted goods for export' means the goods listed in Annexure C;

'**permitted services**' means the services permitted in Table1;

'quarantine' means the restriction of activities or separation of a person, who was or may potentially have been exposed, to COVID-19 and who could potentially spread the disease to other non-exposed persons, to prevent the possible spread of infection or contamination to healthy individuals;

'school' means a school as defined in section 1 of the South African Schools Act, 1984 (Act No. 84 of 1996);

'the Act' means the Disaster Management Act, 2002 (Act No. 57 of 2002); and

'WHO' means the World Health Organisation.

Repeal and transitional provisions

2. (1) The regulations published by Government Notice No. 318 of 18 March 2020, as amended by Government Notice Nos. R. 398 of 25 March 2020, R.419 of 26 March 2020, R. 446 of 2 April 2020, R. 465 of 16 April 2020 and R. 471 of 20 April 2020, are hereby repealed.

(2) Despite the repeal of the regulations referred to in subregulation (1), any regulation, for purposes of the disposal of any investigation, prosecution or any criminal or legal proceedings or the appointment made in regulation 8(13), remains in force as if such regulation had not been repealed.

(3) Despite the repeal of the regulations referred to in subregulation (1), all directions issued in terms of those Regulations shall continue to apply unless, varied, amended or withdrawn by the Cabinet member responsible for such directions.

Application of Regulations

3. (1) Chapters 1 and 2 of these Regulations will apply for the duration of the national state of disaster.

(2) The Cabinet member responsible for cooperative governance and traditional affairs shall, upon the recommendation of the Cabinet member responsible for health and in consultation with Cabinet, declare which of the following alert levels apply, and the extent to which they apply at a national, provincial, metropolitan or district level:

(a) 'Alert Level 1' as determined by Cabinet;

(b) 'Alert Level 2' as determined by Cabinet;

(c) 'Alert Level 3' as determined by Cabinet;

(d) 'Alert Level 4' as determined by Cabinet; and

(e) 'Alert Level 5' as determined by Cabinet.

(3) The Cabinet member responsible for health shall issue directions on the criteria that will guide the determination of alert levels;

(4) The detail of permissions and prohibitions for each Alert Level will be set out in the different Alert levels.

CHAPTER 2
GENERAL PROVISIONS APPLICABLE DURING NATIONAL STATE OF DISASTER

Authority to issue directions

4. (1) The Cabinet member responsible for health may—

(a) issue directions to address, prevent and combat the spread of COVID-19 in any area of the Republic of South Africa, which directions may include the—

(i) recruitment and training of human resources from the Department of Health, and other entities responsible for the handling of COVID-19 mortal remains;

(ii) deployment of human resources from the Department of Health to identified sites to render services;

(iii) sourcing of human resources from the Expanded Public Works Programme, retired health professionals and Non-Governmental Organisations to render services in identified sites;

(iv) provision of health equipment, sanitation materials and medical supplies;

(v) identification and establishment of mortuaries that will accommodate all COVID-19 mortal remains;

(vi) disposal of COVID-19 mortal remains; and

(b) vary the directions referred to in paragraph *(a)* as the circumstances require.

(2) The Cabinet member responsible for justice and correctional Services may—

(a) issue directions to address, prevent and combat the spread of COVID-19 in all Correctional Centres and Remand Detention Facilities in the Republic of South Africa;

(b) where appropriate, issue directions to address, prevent and combat the spread of COVID-19 in all courts and court precincts in the Republic of South Africa;

(c) issue directions for voluntary alternative dispute resolution mechanisms, pursuant to regulationn13, to resolve COVID-19 disputes and related matters; and

(d) vary the directions referred to in paragraphs (*a*) to (*c*) as the circumstances require.

(3) The Cabinet members responsible for basic and higher education may—

(a) issue directions to address, prevent and combat the spread of COVID-19 in all schools and institutions of higher learning; and

(b) vary the directions referred to in (a) as the circumstances require.

(4) The Cabinet member responsible for police may—

(a) issue directions to address, prevent and combat the spread of COVID-19 in all police stations, police precincts, and holding cells; and

(b) vary the directions referred to in paragraph (a) as the circumstances require.

(5) The Cabinet member responsible for social development may—

(a) issue directions to address, prevent and combat the spread of COVID-19 in all Department of Social Development facilities; and

(b) vary the directions referred to in paragraph (a) as the circumstances require.

(6) The Cabinet member responsible for trade, industry and competition may —

(a) issue directions to—

(i) protect consumers from excessive, unfair, unreasonable or unjust pricing of goods and services during the national state of disaster; and

(ii) maintain security and availability of the supply of goods and services during the national state of disaster;

(b) issue directions to address, prevent and combat the spread of COVID-19; and

(c) vary the directions referred to in paragraphs (a) and (b) as the circumstances require.

(7) The Cabinet member responsible for transport may—

(a) issue directions to address, prevent and combat the spread of COVID-19 in matters falling within his or her mandate; and

(b) vary the directions referred to in paragraph (a) as the circumstances require.

(8) The Cabinet member responsible for home affairs may issue directions to allow a person to enter or exit the Republic for emergency medical attention for a life-threatening condition, or for a South African, or foreign national to be repatriated to their country of nationality or permanent residence.

(9) The Cabinet member responsible for small business may—

(a) issue directions to address, prevent and combat the spread of COVID-19 in matters falling within his or her mandate; and

(b) vary the directions referred to in paragraph (a) as the circumstances require.

(10) Any Cabinet member may issue and vary directions, as required, within his or her mandate, to address, prevent and combat the spread of COVID-19, and its impact on matters relevant to their portfolio, from time to time, as may be required, including—

(a) disseminating information required for dealing with the national state of disaster;

(b) implementing emergency procurement procedures;

(c) taking any other steps that may be necessary to prevent an escalation of the national state of disaster, or to alleviate, contain and minimise the effects of the national state of disaster; or

(d) taking steps to facilitate international assistance.

(11) All directions issued in terms of these Regulations shall continue to apply unless, varied, amended or withdrawn by the Cabinet member responsible for such directions.

(12) Directions with regard to health and social services and trade, industry and competition may be issued to designate services which are necessary to provide or maintain essential health and social services and international trade or industrial activities.

(13) Directions may be issued and varied, as required, to address, prevent and combat the spread of COVID-19, from time to time, including—

(a) disseminating information required for dealing with the national state of disaster;

(b) implementing emergency procurement procedures;

(c) taking any other steps that may be necessary to prevent an escalation of the national state of disaster, or to alleviate, contain and minimise the effects of the national state of disaster; or

(d) taking steps to facilitate international assistance.

(14) All directions issued in terms of these Regulations shall continue to apply unless, varied, amended or withdrawn by the Cabinet member responsible for such directions.

General measures to contain the spread of COVID-19

5. (1) A person must wear a cloth face mask or a homemade item that covers the nose and mouth when in a public place, or another appropriate item to cover the nose and mouth

(2) No person will be allowed to use any form of public transport, or enter a building, place or premises, if they do not wear a cloth face mask or a homemade item that covers the nose and mouth when in a public place, or another appropriate item to cover the nose and mouth.

(3) An employer must provide every employee who may come into direct contact with members of the public as part of their duties with a cloth face mask to cover his or her nose and mouth or a homemade item that covers the nose and mouth when in a public place, or another appropriate item to cover the nose and mouth.

(4) Every business premises, including, but not limited to, a supermarket, shop, grocery store, retail store, wholesale produce market or pharmacy shall–

(a) determine their area of floor space in square metres;

(b) based on the information contemplated in paragraph *(a)*, determine the number of customers and employees that may be inside the premises at any time with adequate space available;

(c) take steps to ensure that persons queuing inside or outside the premises are able to maintain a distance of one and a half metres from each other;

(d) provide hand sanitisers for use by the public and employees at the entrance to the premises; and

(e) assign, in writing, an employee or any other suitable person, as the compliance employee, who must ensure—

(i) compliance with the measures provided for in paragraphs *(a)* to *(d)*; and

(ii) that all directions in respect of hygienic conditions and limitation of exposure to persons with COVID-19 are adhered to.

(5) All employers must, adopt measures to promote physical distancing of employees, including—

(a) enabling employees to work from home or minimising the need for employees to be physically present at the workplace;

(b) the provision for adequate space;

(c) restrictions on face to face meetings;

(d) special measures for employees with known or disclosed health issues or comorbidities, or with any condition which may place such employees at a higher risk of complications or death if they are infected with COVID-19;

(e) special measures for employees above the age of 60 who are at a higher risk of complications or death if they are infected with COVID-19.

(6) The requirements as set out in subregulation (4) applies with the necessary changes, to any other building that is not provided for by subregulation (4).

(7) All courier and delivery services shall provide for minimized personal contact during delivery.

Refusal of medical examination, prophylaxis, treatment, isolation and quarantine

6. (1) No person who has been confirmed as a clinical or a laboratory confirmed case as having contracted COVID-19, or who is suspected of having contracted COVID-19, or who has been in contact with a person who is a carrier of COVID–19, may refuse to—

(a) submit to a medical examination, including, but not limited to, the taking of any bodily sample which is authorised in law;

(b) be admitted to a health establishment or a quarantine or isolation site; or

(c) submit to mandatory prophylaxis, treatment, isolation or quarantine, in order to prevent transmission:

Provided that if a person does not comply with the instruction or order of the enforcement officer, that person must be placed in quarantine for a period not exceeding 48 hours, pending a warrant being issued by a competent Court, on application by an enforcement officer for the medical examination contemplated in paragraph *(a)*.

(2) A warrant contemplated in subregulation (1) may be issued by a magistrate, if it appears from information on oath or affirmation by an enforcement officer—

(a) that a person is confirmed as having been infected with COVID-19;

(b) who is on reasonable grounds suspected of having contracted COVID-19, or who has been in contact with, or who is on reasonable grounds suspected as having been in contact with a person who is a carrier of, or infected with COVID–19.

(3) The warrant may impose restrictions on the powers of the enforcement officer as the magistrate may deem fit.

(4) A warrant issued in terms of this regulation remains in force until—

(a) it is executed;

(b) it is cancelled by the person who issued it or, if such person is not available, by any other magistrate;

(c) the expiry of ninety days from the date of its issue; or

(d) the purpose for the issuing of the warrant has lapsed,

whichever occurs first.

Isolation or quarantine of persons

7. (1) Any person who is a clinical case, or who is on reasonable grounds suspected to be infected or contaminated with COVID-19, or who has been in contact with a person who is infected or contaminated with COVID–19, must comply with—

(a) an oral instruction of, or a written direction, issued by a medical practitioner, a person authorised by the medical practitioner, a nurse or an enforcement officer to subject himself or herself to screening to determine his or her COVID-19 status; or

(b) a written direction, issued by a medical practitioner, a person authorised by the medical practitioner, a nurse or an enforcement officer to—

(i) voluntarily travel to or be taken to a health establishment or any other place for purposes of isolation or quarantine; or

(ii) quarantine himself or herself in accordance with the instructions of such medical practitioner or person authorised by him or her, or a nurse,

pending the determination of his or her COVID-19 status, as a precautionary measure to contain the transmission of COVID-19.

(2) If a person refuses to quarantine himself or herself, or travel to a site of isolation or quarantined facility as directed, a magistrate in whose jurisdiction such a person is, must make an order as contemplated in Form 1 of Annexure A, to compel such a person to quarantine himself or herself, travel to such site of isolation, quarantined facility, or medical screening.

(3) The—

(a) Cabinet member responsible for public works and infrastructure;

(b) member of the provincial Executive Council responsible for public works; or

(c) accounting officers of municipalities,

must identify and make available sites to be used as isolation and quarantine facilities as the need arises and provide a list thereof to the Department of Health for resourcing.

Contact tracing

8. (1) In this regulation—

(a) "COVID-19 Tracing Database" means the database established by the National Department of Health in terms of subregulation (2); and

(b) "COVID-19 Designated Judge" means a judge designated in terms of subregulation (13).

(2) The National Department of Health shall develop and maintain a national database to enable the tracing of persons who are known or reasonably suspected to have come into contact with any person known or reasonably suspected to have contracted COVID-19.

(3) The COVID-19 Tracing Database shall include all information considered necessary for the contact tracing process to be effective, including but not limited to:

(a) the first name and surname, identity or passport numbers, residential address and other address where such person could be located, and cellular phone numbers of all persons who have been tested for COVID-19;

(b) the COVID-19 test results of all such persons; and

(c) the details of the known or suspected contacts of any person who tested positive for COVID-19.

(4) The information contained in the COVID-19 Tracing Database and any information obtained through this regulation is confidential.

(5) No person may disclose any information contained in the COVID-19 Tracing Database or any information obtained through this regulation unless authorized to do so and unless the disclosure is necessary for the purpose of addressing, preventing or combatting the spread of COVID-19.

(6) Where any person is to be tested for COVID-19, the person taking the sample for purposes of testing must obtain as much of the following information as is available at the time of taking the sample—

(a) the first name and surname, identity or passport number, residential address, and cellular phone numbers of the person tested; and

(b) a copy or photograph of the passport, driver's licence, identity card, identity book of the person tested;

and promptly submit this information, along with any information it has regarding likely contacts of the person tested, to the Director-General: Health for inclusion in the COVID-19 Tracing Database.

(7) Where any laboratory has tested a sample for COVID-19, the laboratory must promptly transmit to the Director-General: Health, for inclusion in the COVID-19 Tracing Database—

(a) all details the laboratory has, including the first name and surname, identity or passport numbers, residential address and cellular phone numbers, regarding the person tested;

(b) the COVID-19 test result concerned.

(8) The National Institute for Communicable Diseases (NICD) must transmit to the Director-General: Health, for inclusion in the COVID-19 Tracing Database—

(a) all details the NICD has, including the first name and surname, identity or passport numbers, residential address and cellular phone numbers of any person tested for COVID-19;

(b) the results of the COVID-19 test concerned; and

(c) any information the NICD has regarding likely contacts of the person tested.

(9) Every accommodation establishment must, promptly after the coming into force of this regulation, transmit to the Director-General: Health, for inclusion in the COVID-19 Tracing Database, the following information regarding every person staying at the accommodation establishment during the period of lockdown—

(a) the first name and surname, identity or passport number, residential address and cellular phone numbers of the person concerned; and

(b) a copy or photograph of the passport, driver's licence, identity card or identity book of the person concerned.

(10) The Director-General: Health may, in writing and without prior notice to the person concerned, direct an electronic communications service provider licensed under the Electronic Communications Act, 2005 (Act No. 36 of 2005) to provide him or her, for inclusion in the COVID-19 Tracing Database, with such information as that electronic communications service provider has available to it regarding—

(a) the location or movements of any person known or reasonably suspected to have contracted COVID-19; and

(b) the location or movements of any person known or reasonably suspected to have come into contact, during the period 5 March 2020 to the date on which the national state of disaster has lapsed or has been terminated, with a person contemplated in subparagraph *(a)*,

and the electronic communications service provider must promptly comply with the directive concerned.

(11) The information referred to in subregulation (10)—

(a) may only be obtained in relation to the location or movements of persons during the period 5 March 2020 to the date on which the national state of disaster has lapsed or has been terminated;

(b) may only be obtained, used or disclosed by authorised persons and may only be obtained, used and disclosed when necessary for the purposes of addressing, preventing or combatting the spread of COVID-19 through the contact tracing process;

(c) where relevant to the contact tracing process, must be included in the COVID-19 Tracing Database; and

(d) apart from what is included in the COVID-19 Tracing Database, may only be retained by the Director-General: Health for a period of six weeks after being obtained and shall thereafter be destroyed.

(12) Nothing in this regulation entitles the Director-General: Health or any other person to intercept the contents of any electronic communication.

(13) The Cabinet member responsible for justice and correctional services has, in terms of section 7(1)*(a)* read with paragraph *(d)* of the definition of 'service' in section 1(1) of Judges' Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001), appointed a Constitutional Court Judge who has been discharged from active service to perform service as a COVID-19 Designated Judge as provided for in the Regulations.

(14) The Director-General: Health must file a weekly report with the COVID-19 Designated Judge setting out the names and details of all persons whose location or movements were obtained in terms of subregulation (10)*(a)* and 10*(b)* respectively.

(15) The COVID-19 Designated Judge may make such recommendations to the Cabinet members responsible for cooperative governance and traditional affairs, health and justice and correctional services as he or she deems fit regarding the amendment or enforcement of this regulation in order to safeguard the right to privacy while ensuring the ability of the Department of Health to engage in urgent and effective contact tracing to address, prevent and combat the spread of COVID-19.

(16) The Director-General: Health shall, within six weeks after the national state of disaster has lapsed, or has been terminated, notify every person whose information has been obtained in terms of subregulation (10) that information regarding their location or movements was obtained in terms of subregulation (10).

(17) Within six weeks after the national state of disaster has lapsed or has been terminated—

(a) the information on the COVID-19 Tracing Database shall be de-identified;

(b) the de-identified information on the COVID-19 Tracing Database shall be retained and used only for research, study and teaching purposes;

(c) all information on the COVID-19 Tracing Database which has not been de-identified shall be destroyed; and

(d) the Director-General: Health shall file a report with the COVID-19 Designated Judge recording the steps taken in this regard, and the steps taken pursuant to subregulation (16).

(18) Upon receipt of the report in subregulation (17)*(d)*, the COVID-19 Designated Judge shall be entitled to give directions as to any further steps to be taken to protect the right to privacy of those persons whose data has been collected, which directions must be complied with.

(19) The report required by subregulation (17)*(d)* and any directions given in terms of subregulation (18) shall be tabled in Parliament.

Release of resources

9. (1) The Department of Defence must, for the duration of the declared national state of disaster, within its available resources—

(a) release and mobilise available resources, including human resources, stores, equipment, ships, aircraft platforms, vehicles and facilities; and

(b) ensure the delivery of essential services,

as may be required, to prevent, limit, contain, combat and manage the spreading of COVID-19.

(2) National organs of state must, within their available resources, release their personnel for the rendering of emergency services, as contemplated in section 27(2)*(b)* of the Act.

(3) Institutions within national, provincial and local government must make resources, other than funding, available to implement these Regulations or directions issued in terms of section 27(2) of the Act regarding the national state of disaster.

(4) Institutions within national, provincial and local government must—

(a) make funding available; and

(b) as far as possible, without affecting service delivery in relation to the realisation of the rights contemplated in sections 26 to 29 of the Constitution, shift funding, within its budget to implement these Regulations or directions issued in terms of section 27(2) of the Act, regarding the national state of disaster.

(5) The National Treasury and provincial treasuries must take the necessary steps in terms of applicable legislation to implement these Regulations and directions issued in terms of section 27(2) of the Act, in relation to the national state of disaster.

(6) Donor funding received by institutions, subject to the Public Finance Management Act, 1999 (Act No. 1 of 1999) or the Local Government: Municipal Finance Management Act, 2003 (Act Np. 56 of 2003), to assist with the national state of disaster must be—

(a) paid into the Reconstruction and Development Fund, established by the Reconstruction and Development Fund Act, 1994 (Act No. 7 of 1994); and

(b) used strictly for purposes of implementing these Regulations and directions issued in terms of section 27(2) of the Act in relation to the national state of disaster.

Shelters and sites identified by the State during national state of disaster

10. (1) The State shall identify—

(a) temporary shelters for homeless people that comply with the necessary health protocols and adequate spacing standards as provided for in guidelines published by the Director General of Health; and

(b) temporary sites for quarantine and self-isolation that comply with the necessary health protocols and adequate spacing standards, as provided for in guidelines published by the Director General of Health, for persons who cannot isolate or quarantine in their homes.

(2) The provision of the State's resources contemplated in subregulation (1) shall be for the duration of the national state of disaster, and the use thereof will be subject to conditions determined by the Cabinet member responsible for such resources.

Emergency Procurement Procedures

11. Emergency procurement for institutions is subject to—

(a) the Public Finance Management Act, 1999 (Act No. 1 of 1999), and the applicable emergency provisions in the Regulations or Instructions made under section 76 of that Act; and

(b) the Municipal Finance Management Act, 2003 (Act No. 56 of 2003), and the applicable emergency provisions in the Regulations made under that Act.

Powers and indemnity

12. These Regulations do not limit any powers or indemnities of security services provided for in any law.

Resolution of disputes

13. (1) The parties to a civil dispute against the State or any organ of State, which may potentially result in litigation, may—

(a) either before or after the commencement of litigation but before the granting of judgment by the court, agree to refer the dispute to mediation; or

(b) before the commencement of litigation, agree to refer the dispute to arbitration.

(2) Where the parties agree to mediation or arbitration:

(a) the Office of the Solicitor General shall assist the parties in coordinating and overseeing the process; and

(b) the parties may agree that a judge who has retired from active service shall act as the mediator or arbitrator as the case may be, in which event no fees shall be payable to such mediator or arbitrator.

(3) The Office of the State Attorney in whose area of jurisdiction a dispute arises shall immediately upon knowledge of such dispute engage the party raising the dispute, or such party's legal representative, in considering mediation or arbitration.

Offences and penalties

14. (1) Any person who intentionally misrepresents that he, she or any other person is infected with COVID-19 is guilty of an offence and on conviction liable to a fine or to imprisonment for a period not exceeding six months or to both such fine and imprisonment.

(2) Any person who publishes any statement, through any medium, including social media, with the intention to deceive any other person about—

(*a*) COVID-19;

(*b*) COVID-19 infection status of any person; or

(*c*) any measure taken by the Government to address COVID-19,

commits an offence and is liable on conviction to a fine or imprisonment for a period not exceeding six months, or both such fine and imprisonment.

(3) Any person who intentionally exposes another person to COVID-19 may be prosecuted for an offence, including assault, attempted murder or murder.

(4) A person who fails to comply with—

(*a*) an obligation imposed in terms of regulation 8(5),8 (9), 8(11), 8(17); or

(*b*) a direction issued in terms of regulation 8(10) or 8(18);

of these Regulations commits an offence and is, on conviction, liable to a fine or to imprisonment for a period not exceeding six months or to both such fine and imprisonment.

CHAPTER 3
ALERT LEVEL 4

Determination of Alert Level

15. (1) The Cabinet member responsible for cooperative governance and traditional affairs, in terms of regulation 3(2), declares, upon the recommendation of the Cabinet member responsible for health, and in consultation with Cabinet, that Alert Level 4 will be applicable from 1 May 2020 in the Republic of South Africa and will remain in force up to the declaration of different Alert Levels for the duration of the national state of disaster.

(2) The regulations set out in this Chapter apply during Alert Level 4.

Movement of persons

16. (1) Every person is confined to his or her place of residence.

(2) A person may only leave their place of residence to—

(a) perform an essential or permitted service, as allowed in Alert Level 4;

(b) go to work where a permit which corresponds with Form 2 of Annexure A, has been issued;

(c) buy permitted goods;

(d) obtain services that are allowed to operate as set out in Table 1 to the Regulations;

(e) move children, as allowed;

(f) walk, run or cycle between the hours of 06H00 to 09H00, within a five kilometre radius of their place of residence: Provided that this is not done in organised groups.

(3) Every person is confined to his or her place of residence from 20H00 until 05H00 daily, except where a person has been granted a permit to perform an essential or permitted service as listed in Annexure D, or is attending to a security or medical emergency.

(4) Movement between provinces, metropolitan areas and districts are prohibited except—

(a) for workers who have a permit to perform an essential or permitted service who have to commute to and from work on a daily basis;

(b) the attendance of a funeral, as allowed;

(c) the transportation of mortal remains; and

(d) for learners who have to commute to and from school or higher education institutions on a daily basis during periods when those institutions are permitted to operate.

(5) Any person who was not at their place of residence, or work before the lockdown period and who could not travel between provinces, metropolitan and district areas during the lockdown, will be permitted, on a once-off basis, to return to their places of residence or work and will be required to stay in such place until the end of Alert Level 4.

(6) All industries, businesses, entities, both private and in the public sector, which are permitted to operate during Alert Level 4, must—

(a) designate a COVID-19 compliance officer who will oversee the:

(i) implementation of the plan referred to in subregulation (*b*); and

(ii) adherence to the standards of hygiene and health protocols relating to COVID-19 at the workplace;

(b) develop a plan for the phased in return of their employees to the workplace, prior to reopening the workplace for business, which plan must correspond with Annexure E and be retained for inspection and contain the following information:

(i) which employees are permitted to work;

(ii) what the plans for the phased-in return of their employees to the workplace are;

(iii) what health protocols are in place to protect employees from COVID-19; and

(iv) the details of the COVID-19 compliance officer;

(c) phase in the return of their employees to work to manage the return of employees from other provinces, metropolitan and district areas; and

(d) develop measures to ensure that the workplace meets the standards of health protocols, adequate space for employees and social distancing measures for the public and service providers, as required.

(5) The Cabinet member responsible for home affairs, or a person designated by him or her, may allow a person to enter or exit the Republic for emergency medical attention for a life-threatening condition, or for a South African, or foreign national to be repatriated to their country of nationality or permanent residence.

(6) All foreign tourists who arrived in the Republic prior to the lockdown period, which ended on 30 April 2020, and who remained in the Republic, must remain in their place of temporary residence in the Republic for the duration of Alert Level 4, as the case may be, and may be subject to screening for COVID-19 and be quarantined or isolated as required: Provided that the evacuation of foreign tourists where arrangements, including an arrangement for the evacuation by air charter, has been made by the relevant embassy, may be allowed: Provided further that a tourist is escorted to the point of exit where he or she may be screened again.

Movement of children

17. (1) The movement of children between co-holders of parental responsibilities and rights or a caregiver, as defined in section 1(1) of the Children's Act, 2005 (Act No. 38 of 2005), in the same metropolitan area or district municipality is allowed subject to the following if the co-holders of parental responsibilities and rights or a caregiver is in possession of—

(a) a court order; or

(b) a parental responsibilities and rights agreement or parenting plan, registered with the family advocate

(c) a permit issued by a magistrate where which corresponds with Form 3 of Annexure A if the documentation in paragraphs (a) and (b) is not available.

(2) The movement of children between co-holders of parental responsibilities and rights or a caregiver, as defined in section 1(1) of the Children's Act, 2005 (Act No. 38 of 2005), between different metropolitan areas, district municipalities or provinces is allowed if the co-holders of parental responsibilities and rights or a caregiver is in possession of a permit, issued by a magistrate which corresponds with Form 3 of Annexure A.

(3) Any child who was not at the residence of their primary caregiver before the lockdown period and who could not travel between provinces, metropolitan and district areas during the lockdown will be permitted, on a once-off basis, to return to the residence of their primary caregiver if the co-holders of parental responsibilities and rights or a caregiver is in possession of a permit issued by a magistrate which corresponds with Form 3 of annexure A.

(4) The household to which the child has to move, must be free of COVID-19.

(5) *(a)* Before a magistrate issues a permit referred to in regulation 17(1)*(c)*, he or she must be provided with—

(i) a birth certificate or certified copy of a birth certificate of the child or children to prove a legitimate relationship between the co-holders of parental responsibilities and rights; and

(ii) written reasons why the movement of the child is necessary.

(b) Before a magistrate issues a permit referred to in 17(2) or (3), he or she must be provided with—

(i) A court order

(ii) a parental responsibilities and rights agreement or parenting plan registered with the family advocate or

(iii) a birth certificate or certified copy of a birth certificate of the child or children to prove a legitimate relationship between the co-holders of parental responsibilities and rights; and

(iv) written reasons why the movement of the child is necessary.

Attendance of funerals

18. (1) Movement between a province, metropolitan area or district by a person wishing to attend a funeral shall only be permitted if that person so wishing to attend the funeral is a—

(a) spouse or partner of the deceased;

(b) child of the deceased, whether biological, adopted or stepchild;

(c) child-in-law of the deceased;

(d) parent of the deceased whether biological, adopted or stepparent;

(e) sibling, whether biological, adopted or stepbrother or sister of the deceased; or

(f) grandparent of the deceased;

(2) Attendance at a funeral is limited to 50 people and will not be regarded as a prohibited gathering.

(3) Night vigils at a funeral is banned.

(4) During a funeral, all hygienic conditions and distancing measures must be adhered to for the limitation of exposure of persons at the funeral to COVID-19.

(5) Each person, whether traveling alone or not, wishing to attend a funeral and who has to travel between districts, or between provinces to attend a funeral must obtain a permit which corresponds substantially with Form 4 of Annexure A, from his or her nearest magistrate's office or police station to travel to the funeral and back.

(6) The head of court, or a person designated by him or her, or a station commander of a police station or a person designated by him or her, may issue the permit to travel to a funeral.

(7) Upon a request for a permit to attend a funeral, a person requesting a permit must produce a death certificate or a certified copy of the death certificate to the head of court, or a person designated by him or her, or a station commander of a police station or a person designated by him or her: Provided that where a death certificate is not yet available, and the funeral must be held within 24 hours in keeping with cultural and religious practices, the person requesting the permit must make a sworn affidavit which corresponds with Form 5 of Annexure A, together with a letter from a cultural or religious leader confirming the need for the funeral within 24 hours.

(8) Only two family members or a person with a close affiliation to the deceased may, with the required permits, be present in the vehicle transporting the mortal remains to the metropolitan or district area, or province where the funeral will take place: provided that the cause of death of the deceased being transported is non-COVID-19 related.

(9) The Regulations for the use of public transport must be strictly adhered to when travelling.

(10) A copy of the permit issued and the death certificate or sworn affidavit made, must be kept safely by the head of court, or station commander of a police station for record keeping for a period of three months after the national state of disaster has ended, where after it may be destroyed.

(11) All forms must be completed in full, including full names, identification or passport numbers and full contact details as required in the form and failure to do so will result in the form being rejected as invalid.

Prohibition on evictions

19. A competent court may grant an order for the eviction of any person from land or a home in terms of the provisions of the Extension of Security of Tenure Act 62 of 1997 and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998: Provided that any order of eviction shall be stayed and suspended until the last day Alert Level 4, unless a court decides that it is not just and equitable to stay and suspend the order until the last day of the Alert Level 4 period.

Public transport

20. (1) The Minister of Transport must, after consultation with the Cabinet members responsible for cooperative governance and traditional affairs, health, police and justice and correctional services, issue directions for the resumption of different modes of public transport to cater for the gradual return to work of people, in respect of —

(a) rail, bus services, taxi services;

(b) e-hailing services; and

(c) private vehicles.

(2) The directions to be issued by the cabinet member responsible for Transport must set out the hygienic conditions that must be adhered to and steps to be followed for the limitation of exposure of members of the public using public transport to COVID-19.

Closure of borders

21. All borders of the Republic remain closed during the period of Alert Level 4, except for ports of entry designated by the Cabinet member responsible for home affairs and for the transportation of fuel, cargo and goods during the period of Alert Level 4.

Transportation of cargo

22. (1) Rail, ocean, air and road transport is permitted for the movement of cargo to other countries and within the Republic of South Africa, subject to national legislation, for the transportation of the following goods—

(a) essential goods for import as set out in Annexure B to the Regulations;

(b) the import of materials and components required for manufacturing activities allowed under Alert Level 4;

(c) cargo at ports of entry;

(d) goods cleared at ports of entry for removal in transit through the Republic destined for neighboring countries;

(e) permitted goods for export as set out in Annexure C to the Regulations;

(f) transport of goods within the Republic of South Africa; and

(g) any other goods as set out in Directions by the relevant Cabinet member; taking into account health risks, constrained capacity at ports of entry and other factors relevant to the health, public order and economic effects of Covid-19.

(2) The Cabinet member responsible for transport, may, after consultation with the Cabinet members responsible cooperative governance and traditional affairs, trade, industry and competition, health, justice and correctional services and public enterprises, issue directions relating to sea cargo operations and air freight operations.

Gatherings

23. (1) All gatherings are banned, except—

(a) for funerals;

(b) when at a workplace; or

(c) when buying or obtaining goods and services, as allowed in Table 1.

(2) An enforcement officer must, where a gathering takes place—

(a) order the persons at the gathering to disperse immediately; and

(b) if the persons refuse to disperse, take appropriate action, which may, subject to the Criminal Procedure Act, include arrest and detention.

Places and premises closed to the public

24. (1) Any place or premises normally open to the public where religious, cultural, sporting, entertainment, recreational, exhibitional, organisational or similar activities may take place, is closed.

(2) Any place or premises normally open to the public or where people may gather, are prohibited. These include—

(a) public parks, sports grounds and fields, beaches and swimming pools;

(b) flea markets;

(c) fêtes and bazaars;

(d) night clubs;

(e) casinos;

(f) hotels, lodges, bed and breakfasts, *airbnbs*', timeshare facilities and resorts, and guest houses, except to the extent that they are required for remaining tourists confined to hotels, lodges and guest houses;

(g) private and public game reserves except to the extent that they are required for remaining tourists confined to private and public game reserves;

(h) holiday resorts except to the extent that they are required for remaining tourists confined to such holiday resort;

(i) taverns and *shebeens*, or similar establishments;

(j) theatres and cinemas; and

(k) museums.

(3) Persons rendering security and maintenance services may continue to perform these services at the places or premises listed in this regulation.

(4) The Cabinet member responsible for cooperative governance and traditional affairs may, by direction in the Gazette, determine any other place or premises that must be closed, if there is a risk to any person or members of the public being exposed to COVID-19.

Controlled visits by members of the public

25. All visits by members of the public to—

(a) Correctional Centres;

(b) Remand Detention Facilities;

(c) Police Holding Cells;

(d) Military Detention Facilities;

(e) Health establishments and facilities, except to receive treatment or medication in accordance with health protocols; and

(f) Facilities controlled or managed by the Department of Social Development, including Child and Youth Care Centres, shelters, One Stop Centres, and Treatment Centres,

will be allowed to the extent and in the manner as directed by the Cabinet member responsible for cooperative governance and traditional affairs after consultation with the Cabinet members responsible for health, police and justice and correctional services.

Sale, dispensing or transportation of liquor

26. (1) The sale, dispensing and distribution of liquor is prohibited.

(2) The transportation of liquor is prohibited, except where alcohol is required for industries producing hand sanitizers, disinfectants, soap, alcohol for industrial use and household cleaning products.

(3) The transportation of liquor for export purposes is permitted.

(4) No special or events liquor licenses may be considered for approval during the duration of the national state of disaster.

Tobacco products, e-cigarettes and related products

27. The sale of tobacco, tobacco products, e-cigarettes and related products is prohibited.

Operation of economic sectors

28. (1) Businesses and other entities as set out in Table 1 may commence operations.

(2) Every person in control of a retail store or institution must—

(a) take steps to ensure that customers keep a distance of at least one and a half metres from each other, and that all directions in respect of health protocols and social distancing measures COVID-19, are adhered to; and

(b) designate a compliance official to ensure that the safety controls are strictly adhered to, and display the name of the official prominently in the store or in a visible area.

(3) Retail stores selling goods as provided for the Table 1 are prohibited from selling other goods that are not permitted in terms of the Table 1.

(4) Persons performing essential services or permitted services, must be duly designated in writing by the head of an institution, or a person designated by him or her, on a form that corresponds with Form 2 in Annexure A: Provided that Cabinet member responsible for small enterprises may issue directions in respect of small and micro enterprises, co-operatives, informal traders and *spaza* shops in respect of those entities.

Energy and petroleum products supply

29. To ensure the continuous supply of energy and petroleum products to society as referred to in Table 1—

(a) collieries that supply Eskom may continue to operate at full capacity; and

(b) refineries and other facilities providing energy and fuel may operate at full capacity to avoid shortage of fuel and energy, and such operations may include fuel storage, smelters, plants and furnaces.

Mining Operations

30. (1) Open-cast mining scaling up to a baseline of 50% and thereafter scaling up to full employment.

(2) All other mining starting in batches scaling up towards 50% employment.

(3) Mining operations, must be conducted at a reduced capacity of not more than 50%, and thereafter at increasing capacity as determined by direction issued by the Cabinet member responsible for mineral resources and energy.

(4) The following conditions apply to the starting and increasing of capacity:

(a) Appropriate measures to protect the health and safety of workers must be implemented by mining companies in accordance with the directions issued from time to time by the Cabinet member responsible for mineral resources and energy, in consultation with the Cabinet member responsible for health.

(b) a rigorous screening and testing programme must be implemented as employees return to work;

(c) the mining industry must provide quarantine facilities for employees who have tested positive for the COVID-19;

(d) data collected during the screening and testing programme must be submitted to the authority referred to in regulation 8;

(e) mining companies must make arrangements to transport their South African employees from their homes to their respective areas of operations;

(5) The monitoring and impact assessment of seismicity through the Council for Geoscience must be intensified with immediate effect.

Offences and penalties

31. (1) For the duration of the national state of disaster, any person who—

(a) convenes a gathering; or

(b) hinders, interferes with, or obstructs an enforcement officer in the exercise of his or her powers, or the performance of his or her duties in terms of these Regulations,

is guilty of an offence and, on conviction, liable to a fine or to imprisonment for a period not exceeding six months or to both such fine and imprisonment.

(2) For the purposes of this Chapter, any person who fails to comply with or contravenes the provisions of regulations 16(1), 16(2),16(3) and 16(4), 19, 24(1) and 24(2), 26(1) and 26(2), 27 and 28(3) of these Regulations commits an offence and is, on conviction, liable to a fine or to imprisonment for a period not exceeding six months or to both such fine and imprisonment.

TABLE 1
ALERT LEVEL 4

All persons who are able to work from home should do so.

Persons in the following list of industries and activities will be permitted to perform work outside the home, and to travel to and from work, under Alert Level 4, subject to—

(a) strict health protocols, and social distancing rules;

(b) return to work to be phased in to enable measures to make the workplace COVID-ready; and

(c) return to work to be done in a manner that avoids and reduces risks of infection.

PERMISSIONS AND PROHIBITIONS	
PART A	**AGRICULTURE, HUNTING, FORESTRY AND FISHING**
1	All agriculture, hunting, forestry and fishing, bee-keeping, including preparation, cultivation, harvesting, storage, transport of live animals and auctions (subject to health directions) and related agricultural infrastructure and services (including research, inspection, certification and quality control). All fishing, operation of fish hatcheries and fish farms, on such conditions as may be issued in directions by the cabinet members responsible for the environment, forestry and fisheries. Harvesting and storage activities essential to prevent the wastage of primary agricultural, fishing and forestry goods. Export of all agricultural, agro-processed, fishing and forestry products.
PART B	**ELECTRICITY, GAS AND WATER SUPPLY**
1.	All electricity, gas and water supply is permitted.
PART C	**MANUFACTURING**
1	Manufacture of wholesale and retail products permitted to be sold under Alert Level 4, and all input products, permitted scaling up to full employment, except where otherwise indicated, and subject to strict health protocols.
2	Manufacture of paper and paper products, excluding stationery, permitted scaling up to full employment and subject to strict health protocols.
3	Manufacture of plastics and packaging, including glass, plastic bottles and containers, permitted scaling up to full employment and subject to strict health protocols.
4	Petroleum refineries, smelters, and furnaces, permitted scaling up to full employment and subject to strict health protocols.
5	Manufacture of winter clothing, footwear, bedding and heaters (and all inputs required, including textiles) permitted, commencing at 25% and scaling up to 50% employment and subject to strict health protocols.
6	Manufacturing of automotives, steel and other metals, rail and ship-building (including components), scaling up in phases to 50% employment and subject to strict health protocols.
7	Stationery production, scaling up in phases to 50% employment and subject to strict health protocols.
8	Cement, other construction material, and hardware, scaling up in phases to 50% employment and subject to strict health protocols.
9	All other manufacturing, scaling up to 30% employment and subject to strict health protocols.

PART D	CONSTRUCTION AND RELATED SERVICES (INC. TRADES PERSONS)
1	Civil engineering for public works projects (including water, energy, sanitation).
2	Public works civil engineering and construction works.
3	Road and bridge projects, including local road repairs
4	Critical maintenance and repairs.
PART E	**WHOLESALE AND RETAIL TRADE, COVERING STORES, *SPAZA* SHOPS, E-COMMERCE AND INFORMAL TRADERS**
1	Food products, including non-alcoholic beverages and animal food.
2	The sale of hot cooked food, only for home delivery.
3	Toilet Paper, sanitary pads, sanitary tampons, and condoms.
4	Hand sanitiser, disinfectants, soap, alcohol for industrial use, household cleaning products, and personal protective equipment.
5	Products for the care of babies and toddlers.
6	Personal toiletries, including haircare, body, face, hand and foot care products, roll-ons, deodorants, dental care products.
7	Medical and Hospital Supplies, medicine, equipment and personal protective equipment.
8	Fuel and lighting, including coal, wood, paraffin and gas.
9	Airtime and electricity.
10	Hardware, components and supplies.
12	Components for vehicles undergoing emergency repairs
13	Chemicals, packaging and ancillary products used in the production of any these products listed in Part E.
14	Textiles required to produce face masks and other personal protective equipment and winter clothing.
15	Winter clothing, footwear, bedding and heaters and the components and fabrics required to manufacture these.
16	Children's clothing and fabrics and components required to manufacture these.
17	Stationery and educational books.
18	Personal ICT equipment including computers, mobile telephones and other home office equipment.
19	No sale of liquor permitted.
20	Directions may permit the incremental expansion of e-Commerce, taking into account the need to limit the extent of movement on the road, contact between people, law-enforcement challenges and the impact on other businesses.
PART F	**INFORMATION AND COMMUNICATION SERVICES**
1	All telecommunication services and infrastructure.
2	Information and Communication Technology services for all private and business customers.
3	Postal services and courier services for all permitted Alert Level 4 services.
PART G	**MEDIA AND ENTERTAINMENT SERVICES**
1	Online services.
2	Productions for local broadcast and live streaming of creative sector services in support of COVID-19 subject to directions.
3	Newspapers and broadcasting.
PART H	**FINANCIAL AND BUSINESS SERVICES**
1	Employees should work from home where possible.
2	Essential financial services may operate, subject to directions issues by the relevant Cabinet member, including the following services necessary to maintain the functioning of a financial system as defined in section 1(1) of the Financial

	Sector Regulation Act, only when the operation of a place of business or entity is necessary to continue to perform those services: i. the banking environment (including the operations of mutual banks, co-operative banks, co-operative financial institutions and the Postbank); ii. the payments environment; iii. the financial markets (including market infrastructures licensed under the Financial Markets Act, 2012 (Act No. 19 of 2012); iv. the insurance environment; v. the savings and investment environment; vi. pension fund administration; vii. outsourced administration; viii. medical schemes administration; and ix. additional services designated in terms of regulation 11B (4A) (c) (i). The services listed above may not include debt collection services.
3	Services necessary for the provision of social grants.
4	Private security services may operate.
5	Implementation of payroll systems.
6	Car sales under specific directions
7	Chauffeur services, rental of motor vehicles, driven vehicles, machinery and equipment, and of goods to support other Alert Level 4 services.
8	Call centres, for local and all international markets, may operate subject to directions issues by the relevant cabinet members.
9	Other professional services may operate only where work-from-home is not possible, and only to support other Alert Level 4 services.
PART I	**ACCOMMODATION AND FOOD SERVICE ACTIVITIES PERMITTED**
1	Accommodation not permitted, except for quarantine and essential services
2	Restaurants only for food delivery services (9H00-19H00) and subject to restriction on movement (no sit down or pick-up allowed).
PART J	**TRANSPORT, STORAGE AND COMMUNICATION SERVICES PERMITTED**
1	Ocean, rail, road and air transport of goods permitted only for activities set out in Regulation 22(1).
2	Public rail, minibus taxi and bus services will resume at Alert Levels and on terms as will be set out in Directions, based on the progressive increase in commuter numbers during the various phases.
3	E-hailing services subject to restrictions on capacity and times, and for permitted activities only.
4	Transport and logistics in respect of specified cargo specified in J1, and permitted retail goods to neighbouring countries, which shall include all goods imported via SA ports of entry, for re-export to neighbouring countries.
PART K	**MINING AND QUARRYING**
1	Coal production for Eskom scaling up to full employment.
2	Open-cast mining scaling up to a baseline of 50% and thereafter scaling up to full employment.
3	All other mining starting in batches scaling up towards 50% employment.
PART L	**REPAIR AND RELATED EMERGENCY SERVICES PERMITTED**
1	Tow trucks and vehicle recovery services.
2	Emergency repair work, including plumbers, electricians, locksmiths, glaziers, roof repair work.
3	Emergency automobile repairs for all persons.
PART M	**SUPPLY CHAINS**

1	Production, manufacturing, supply, logistics, transport, delivery and critical maintenance and repair of goods and services (including components and equipment) required for the production or rendering of permitted goods and services
2	All workplaces or premises must have care and maintenance that is essential to the prevention of the destruction or significant impairment of working areas, plant, machinery or inventory, or to permit orderly wind down arrangements, on such conditions as may be issued by means of directions by the relevant cabinet members.
PART N	**PRIVATE HOUSEHOLDS' EMPLOYMENT**
1	Live-in staff, and staff providing care to the sick, mentally ill, elderly, people with disabilities and children.
PART O	**PUBLIC ADMINISTRATION, GOVERNMENT SERVICES AND OTHER ARMS OF THE STATE** Only essential government and administration services may operate, including:
1	Disaster management services.
2	Licensing, permitting, deeds, masters offices, birth and death certificates, replacement identification documents
3	Any other service designated by the Executive Authority, HODs, Heads of Courts, and Heads of other Chapter 9 Institutions.
4	Essential municipal services.
5	Services related to the functioning of courts; the State Capture Commission.
6	Essential SARS services defined by the Commissioner of SARS.
7	Police, peace officers, traffic officers, military medical personnel and soldiers, correctional services officials and traffic management services.
8	Services rendered by the Executive, members of Parliament, Members of the Provincial Legislature, Members of Local Councils, the Judiciary, traditional leaders and National Office Bearers of Political Parties represented in Parliament.
9	Commissioners of the South African Human Rights Commission, Gender Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Public Protector and Deputy Public Protector and the Independent Electoral Commission.
PART P	**HEALTH, SOCIAL AND PERSONAL SERVICES**
1	Medical and veterinary services permitted.
2	Cleaning, sanitation, pest control, sewerage, waste and refuse removal services.
3	Recycling of glass, paper, plastic, metal, tyres and such others as determined by directions, are permitted at 50% capacity. Informal recyclers will be permitted to resume operations.
4	All Social work, counselling, services supporting gender based violence, care and relief activities permitted.
5	Wildlife Management, Anti-poaching, Animal Care and Veterinary services.
6	Funeral services, including mortuaries services and the transportation of mortal remains.
7	Trade union essential staff for workers covered by Alert Level 4, subject to Directions.
PART Q	**EDUCATION SERVICES**
1	Permitted on dates and schedule set out separately.

ANNEXURE A

FORM 1

ORDER FOR A PERSON TO GO TO A SITE OF ISOLATION, QUARANTINE FACILITY, OR FOR A PERSON TO GO FOR MEDICAL EXAMINATION

Regulation 7(2)

IN THE MAGISTRATES COURT FOR THE DISTRICT OF _____ HELD AT _____ ON THIS _____ DAY OF _____ 2020.

BEFORE ME _____ MAGISTRATE FOR THE AFOREMENTIONED DISTRICT IN CHAMBERS

WHEREAS it appears that _____ (name of person)
Being a person:

☐ who has been clinically, or by a laboratory, confirmed as having COVID-19

☐ who is suspected of having contracted COVID-19

☐ who has been in contact with a person who is a carrier of COVID-19

and who has refused to —

☐ submit to a medical examination, including but not limited to the taking of any bodily sample by a person authorised in law to do so;

☐ be admitted to a site to be used as isolation or a quarantine facility; or

☐ submit to mandatory prophylaxis, treatment, isolation or quarantine or isolation in order to prevent transmission.

I hereby issue an order for the submission of the said person to a medical examination, including the taking of any bodily sample by a person authorised in law.

..... **DATE** .....
MAGISTRATE

NOTE: *This order remains in force until —*
(a) it is executed;
(b) it is cancelled by the person who issued it or, if such person is not available, by any person with like authority;
(c) a period of ninety days has lapsed from the date of its issue; or
(d) the purpose for the issuing of the order has lapsed.

Signed at _____, on this the _____ day of _____ 2020.

Official stamp of Institution

FORM 2
PERMIT TO PERFORM AN ESSENTIAL OR PERMITTED SERVICE
Regulations 16(2)(*b*) and 28(4)

- *Please note that the person to whom the permit is issued must at all times present a form of identification together with this permit. If no identification is presented, the person to whom the permit is issued will have to return to his or her place of residence during Alert Level 4.*

I, being the head of institution, with the below mentioned details,

Surname				
Full names				
Identity number				
Contact details	**Cell nr.**	**Tel Nr(W)**	**Tel Nr(H)**	**e-mail address**
Physical Address of Institution				

Hereby certify that the below mentioned official/employee is performing services in my institution

Surname	
Full names	
Identity number	
Place of residence of employee	

Signed at _____, on this the _____ day of _____ 2020.

_____
Signature of Head of Institution

Official stamp of Institution

FORM 3

PERMIT FOR THE MOVEMENT OF CHILDREN TO TRAVEL TO ANOTHER PROVINCE/METROPOLITAN AREA/DISTRICT

Regulation 17(1)*(c)*

Note: This permit and any form of identification must be in the possession of the person to whom this permit is issued

IN THE MAGISTRATES COURT FOR THE DISTRICT OF _____ HELD AT _____ ON THIS _____ DAY OF _____ 2020.

BEFORE ME _____ MAGISTRATE FOR THE AFOREMENTIONED DISTRICT IN CHAMBERS

I, hereby issue this permit for travel to the following person:

Full names:						
Surname:						
Identity number:						
Address of place of residence:						
Province of residence:						
Contact details:	Cell nr		Tel No (h)		e-mail address	
Metropolitan area/district travelling to:						
Province travelling to:						
Date of travel to:						
Date of return travel:						
Name of child concerned (*must correspond with the birth certificate)*:						
Reason for movement of child(ren):						

I also declare that the above-mentioned person presented the documentation as required by *regulation 17(5).

Signed at _____ this _____ day of _____ 2020.

_____

Magistrate issuing

Official stamp

FORM 4

PERMIT TO TRAVEL TO ANOTHER PROVINCE/METROPOLITAN AREA/DISTRICT FOR A FUNERAL

Regulations 18(5)

(To be completed by the head of court or a station commander or a person designated by him or her respectively.)

I,_____*(full names of *head of court, or a person designated by him or her / station commander of a police station or a person designated by him or her)* for—

(a) the Magistrate's court for the district of _____;

(b) the police station at _____,

hereby issue this permit for travel to another district/province, to the following person:

Full names:					
Surname:					
Identity number					
Address of place of residence:					
Province of residence:					
Contact details:	Cell nr		Tel No (h)	e-mail address	
Metropolitan area/district travelling to:					
Province travelling to:					
Date of funeral:					

I also declare that the above-mentioned person presented the *death certificate/certified copy of the death certificate/affidavit to me.

Signed at_____this _____ day of _____ 2020.

_____

**Person issuing permit*

Official stamp

FORM 5
SWORN AFFIDAVIT BY PERSON WHO WISHES TO ATTEND A FUNERAL IN ANOTHER PROVINCE/METROPOLITAN AREA/DISTRICT

Regulations 18(7)

Note: 1. *A person giving false information on this affidavit shall be guilty of an offence and, on conviction, liable to a fine or to imprisonment for a period not exceeding six months or to both such fine and imprisonment.*

2. This affidavit may only be sworn to or affirmed at a magistrate's court or police station.

I,

Full names:						
Surname:						
Identity number						
Address of place of residence:						
Province of residence:						
Contact details:	Cell nr		Tel No (h)		e-mail address	
District of funeral:						
Province in which funeral will take place:						

Hereby declare under oath with regards to the deceased:

Names of deceased:				
Surname of deceased:				
Relationship/Affiliation to the deceased*(eg spouse/parent)*				
I am not in possession of the death certificate for the reasons set out, and a copy of the letter from a cultural or religious leader is attached:	**Yes**		**No**	
Date of funeral:				
Province in which funeral will take place:				
*City/town/village of funeral:				

***OATH/AFFIRMATION**

I,_____(full names), identity number _____, hereby declare under *oath/affirmation that the above-mentioned information is true and correct.

Signed at_____on this _____day of _____2020.

_____

Signature of person making affidavit

CERTIFICATION

I hereby certify that before administering the *oath/taking the affirmation, I asked the deponent the following questions and noted *his/her answers in *his/her presence as indicated below:

(a) Do you know and understand the contents of the above declaration?

Answer: _____

(b) Do you have any objection to taking the *oath/affirmation?

Answer: _____

I Do you consider the *oath/affirmation to be binding on your conscience?

Answer: _____

I hereby certify that the deponent has acknowledged that *he/she knows and understands the content of this declaration which was *sworn to/affirmed before me, and the deponent's signature was placed thereon in my presence.

Signed at_____this_____day of_____2020__

*Justice of the Peace/Commissioner of Oaths

Full names: _____

Designation: _____

Business address: _____

_____

_____

*Delete which is not applicable".

ANNEXURE B
ESSENTIAL GOODS FOR IMPORT
Regulation 22(1)

	ESSENTIAL GOODS FOR IMPORT
1.	Food products, including non-alcoholic beverages and animal feed .
2.	Sanitary pads, sanitary tampons, condoms.
3.	Hand sanitiser, disinfectants, soap, alcohol for industrial use, household cleaning products, and personal protective equipment, excluding cloth face masks.
4.	Products for the care of babies and toddlers.
5.	Personal toiletries, including haircare, body and face care products, roll-ons, deodorants, and dental care products.
6.	Medical and hospital supplies, medicine, equipment and personal protective equipment (excluding cloth face masks).
7.	Fuel, including coal, wood, paraffin and gas.
8.	Hardware, components and supplies.
9.	Components for aftersales vehicles services.
10.	Chemicals, packaging and ancillary products used in the production of any these products.
11.	Textiles required to produce face masks, and other personal protective equipment.
12.	ICT equipment to facilitate work-from-home arrangements including computers, mobile telephones and other home office equipment.

ANNEXURE C
PERMITTED GOODS FOR EXPORT
Regulation 22(1)(*e*)

	PERMITTED GOODS FOR EXPORT
1.	Agricultural, agro-processing, forestry and fishing products
2.	Manufacturing products and mining products permitted for production under the Alert Level 4 table subject to directions issued by the relevant Minister

ANNEXURE D
ESSENTIAL SERVICES

A: Essential and permitted services referred to in section 16(3) of the Regulation shall refer to:

(a) the list of essential services as set out in B below; and

(b) such other service as are set out in Alert Level 4 and where the technological, industrial, structural or similar requirement of the service necessitates a continuous or shift operation, as set out in directions, as set out below.

B Essential services means the services as defined in section 213 of the Labour Relations Act, 1995 (Act No. 66 of 1995), and designated in terms of section 71(8) of the Labour Relations Act, 1995 (and which designation remains valid as at the date of publication of this regulation), and as listed below:

1. Medical, Health (including Mental Health), Laboratory and Medical services and the National Institute for Communicable Diseases;
2. Disaster Management, Fire Prevention, Fire Fighting and Emergency services;
3.1 *(a)* The following services necessary to maintain the functioning of a financial system as defined in section 1(1) of the Financial Sector Regulation Act, only when the operation of a place of business or entity is necessary to continue to perform those services:
   (i) the banking environment (including the operations of mutual banks, co-operative banks, co-operative financial institutions and the Postbank);
   (ii) the payments environment;
   (iii) the financial markets (including market infrastructures licensed under the Financial Markets Act, 2012 (Act No. 19 of 2012);
   (iv) the insurance environment;
   (v) the savings and investment environment;
   (vi) pension fund administration;
   (vii) outsourced administration;
   (viii) medical schemes administration; and
   (ix) additional services set out in directions.
   (b) The services listed in paragraph *(a)* may not be construed to include debt collection services.
3.2 Services necessary for the provision of social grants.
4. Production and sale of the goods listed in Annexure B;
5. Whole sale and retail stores for re-stocking;
6. Electricity (including vital demand management services), water, gas and fuel production, supply and maintenance;
7. Critical jobs for essential government services as determined by Head of National or Provincial Departments in accordance with the guidance of the Department of Public Service and Administration, including Social Grant Payments and pension payments;
8. Essential municipal services;

9. Care services and social relief of distress provided to older persons, mentally ill, persons with disabilities, the sick, and children;
10. Funeral and cremation services, including mortuaries services and the transportation of mortal remains;
11. Wildlife Management, Anti-poaching, Animal Care and Veterinary services;
12. Newspaper, broadcasting and telecommunication infrastructure and services, including call centres critical for the support of such services;
13. Production and sale of any chemicals, hygiene products, pharmaceuticals for the medical or retail sector;
14. Cleaning, sanitation, pest control, sewerage, waste and refuse removal services;
15. Services related to the essential functioning of courts, judicial officers, the Master of the High Court, Sheriffs and legal practitioners required for those services;
16. Essential SARS services defined by the Commissioner of SARS;
17. Police, peace officers, traffic officers, military medical personnel and soldiers, correctional services officials and traffic management services;
18. Postal services and courier services related to transport of medical products;
19. Private security services;
20. Air-traffic Navigation, Civil Aviation Authority, air charters, Cargo Shipping and dockyard services;
21. Gold, gold refinery, coal and mining;
22. Accommodation used for persons rendering essential services, quarantine, isolation and the lockdown;
23. Production, manufacturing, supply, logistics, transport, delivery, critical maintenance and repair in relation to the rendering of essential services including components and equipment;
24. Transport services for persons rendering essential services and goods, and transportation of patients;
25. Services rendered by the Executive, members of Parliament, Members of the Provincial Legislature, Members of Local Councils, the Judiciary, traditional leaders and National Office Bearers of Political Parties represented in Parliament;

26.1 Commissioners of the South African Human Rights Commission, Gender Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Public Protector and Deputy Public Protector and the Independent Electoral Commission; and

26.2 Services rendered by the institutions referred to in item 26.1

27. Transport and logistics in respect of cargo and goods as set out in Part A to neighbouring countries;
28. Tow trucks and vehicle recovery services;
29. Call centres necessary to provide health, safety, social support, government and financial services, debt restructuring for consumers of retailers, and access to short-term insurance policies as a result of reduced income or loss of income;
30. Harvesting and storage activities essential to prevent the wastage of primary agricultural goods;
31. Implementation of payroll systems to the extent that such arrangement has not been made, to ensure timeous payments to workers; and

32. Critical maintenance services which cannot be delayed for more than 21 days and are essential to resume operations;
33. Trades necessary for the rendering of emergency repair work, including plumbers, electricians, locksmiths, glaziers, roof repair work;
34. Trades necessary for emergency automobile repairs for persons rendering essential services;
35. Information and Communication Technology services rendered to entities and institutions engaged in delivering essential services in terms of these Regulations.

ANNEXURE E
WORKPLACE PLANS
Regulation 16(6)(*b*)

A COVID-ready Workplace Plan must be developed prior to the reopening of an enterprise employing persons or serving the public.

For small businesses, the plan can be basic reflecting the size of the business, while for medium and larger businesses, a more detailed written plan should be developed given the larger numbers of persons at the workplace.

The Plan for medium and large businesses must include the following:

1. The date the business will open and the hours of opening;
2. The timetable setting out the phased return-to-work of employees, to enable appropriate measures to be taken to avoid and reduce the spread of the virus in the workplace;
3. The steps taken to get the workplace COVID-19 ready;
4. A list of staff who can work from home; staff who are 60 years or older; and staff with comorbidities who will be required to stay at home or work from home;
5. Arrangements for staff in the establishment:
   (a) sanitary and social distancing measures and facilities at the entrance and exit to the workplace;
   (b) screening facilities and systems;
   (c) the attendance-record system and infrastructure;
   (d) the work-area of employees;
   (e) any designated area where the public is served;
   (f) canteen and bathroom facilities;
   (g) testing facilities (for establishments with more than 500 employees);
   (h) staff rotational arrangements (for establishments where fewer than 100% of employees will be permitted to work).
6. Arrangements for customers or members of the public, including sanitation and social distancing measures.

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DEPARTMENT OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS

NO. 471 **20 APRIL 2020**

DISASTER MANAGEMENT ACT, 2002: AMENDMENT OF REGULATIONS ISSUED IN TERMS OF SECTION 27(2)

I, Dr Nkosazana Dlamini Zuma, Minister of Cooperative Governance and Traditional Affairs, designated under section 3 of the Disaster Management Act, 2002 (Act No. 57 of 2002), having declared a national state of disaster, published in Government *Gazette* No. 43096 on 15 March 2020, hereby in terms of section 27(2) of the Disaster Management Act, 2002, after consultation with the relevant Cabinet members, make the Regulations in the Schedule.

NC Zuma

DR NKOSAZANA DLAMINI ZUMA, MP
MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS
DATE: 19 04 2020

SCHEDULE

Definitions

1. In these regulations, "the Regulations" means the regulations published by Government Notice No. 318 of 18 March 2020, as amended by Government Notices Nos. R. 398 of 25 March 2020, R.419 of 26 March 2020, R. 446 of 2 April 2020 and R. 465 of 16 April 2020.

Amendment of Annexure B to the Regulations

2. Annexure B to the Regulations is hereby amended by the substitution in Part A for item (i) of subparagraph (1) of the following item:

"(i) Any food product, including non-alcoholic beverages, but excluding cooked hot food;";

DEPARTMENT OF EMPLOYMENT AND LABOUR

NO. R. 639 **04 JUNE 2020**

DIRECTION BY THE MINISTER OF EMPLOYMENT AND LABOUR IN TERMS OF REGULATION 4(10) OF THE REGULATIONS R480 OF 29 APRIL 2020 ISSUED BY THE MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS IN TERMS OF SECTION 27 (2) OF THE DISASTER MANAGEMENT ACT, 2002 (ACT NO. 57 OF 2002)

I, Thembelani Waltermade Nxesi, the Minister of Employment and Labour, acting in terms of Regulation 4(10) of the Regulations made by the Minister of Cooperative Governance and Traditional Affairs in terms of section 27 (2) of the Disaster Management Act, 2002 (Act No. 57 of 2002) on 29 April 2020 and to prevent the escalation of COVID-19 infections in the workplace, issues a Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces as set out in the Schedule to replace the Direction on Occupational Health and Safety Measures in Certain Workplaces issued on 29 April 2020.

MR TW NXESI, MP
MINISTER OF EMPLOYMENT AND LABOUR
DATE: 03/06/2020

SCHEDULE

Consolidated COVID-19 Direction on Health and Safety in the Workplace

Issued by the Minister in terms of Regulation 4(10) of the National Disaster Regulations

Preamble

1. On 17 March 2020, the Department of Employment and Labour issued guidelines for employers to deal with COVID-19 at workplaces.[1] The Department of Employment and Labour appealed to employers to use the prescriptions of the OHSA in particular the Hazardous Biological Agents Regulations governing workplaces in relation to Coronavirus Disease 2019 caused by the SARS-CoV-2 virus.

2. In the period since the issuing of the guidelines, a clearer picture has emerged about COVID-19 and the nature of the hazard and risk in the workplace and the precautions that should be taken to minimise the risk. The purpose of these directions is to stipulate measures that must be taken by employers in order to protect the health and safety of workers and members of the public who enter their workplaces or are exposed to their working activities.

3. On 29 April 2020 the Minister of Cooperative Government and Traditional Affairs published Regulations in terms of section 27(2) of the Disaster Management Act, 2002 (Act No. 57 of 2002) as amended by the Regulations published on 28 May 2020 in terms of which every employer permitted to commence operations must adopt the measures contained in the Regulations.

4. These directions give effect to those Regulations and seek to ensure that the measures taken by employers under OHSA are consistent with the overall national strategies and policies to minimise the spread of COVID-19.

5. The OHSA, read with its regulations and incorporated standards, requires the employer to provide and maintain as far as is reasonably practicable a working environment that is safe and without risks to the health of workers and to take such steps as may be reasonably practicable to eliminate or mitigate the hazard or potential hazard.

6. The OHSA further requires employers, to ensure, as far as is reasonably practicable, that all persons who may be directly affected by their activities (such as customers, clients or contractors and their workers who enter their workplace or come into contact with their employees) are not exposed to hazards to their health

[1] http://www.labour.gov.za/DocumentCenter/Publications/Occupational%20Health%20and%20Safety/COVID-19%20Guideline%20Mar2020.pdf

or safety. This obligation also applies to self-employed persons (for example, plumbers or electricians) whose working activities bring them into contact with members of the public.

7. For the purposes of OHSA in the workplaces to which this Direction applies, the identifiable hazard relating to COVID-19 is that workers face is the virus transmission by an infected person to workers in the workplace. In workplaces to which the public has access, the hazard includes transmission of the virus by members of the public. Each situation requires special measures to be implemented by employers in order to prevent the transmission of the virus.

8. Although OHSA requires employers to review and update risk assessments on a regular basis, the new hazard posed by COVID-19 is clearly identifiable and the basic measures to eliminate or minimise the risk are now well known[2]. The object of conducting or updating a risk assessment in respect of COVID-19 is to provide specific focus on COVID-19 and adapt the measures required by this Direction to specific working environments taking into account the Risk Assessment Guides published online by the National Department of Health.

9. This Direction is based on infection transmission prevention and specific occupational hygiene practices that focus on the need for employers to implement measures to mitigate or eliminate the transmission of the virus in the workplace.

10. This Direction recognises that there are sector specific measures that need to be taken into account and accordingly provides for sector guidelines to supplement this Direction.

11. This Direction does not reduce the existing obligations of the employer in terms of OHSA nor prevent an employer from implementing measures that are more stringent in order to prevent the spread of the virus.

Definitions

12. In this Direction, unless the context indicates otherwise –

"BCEA" means the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997);

"COVID-19" means Coronavirus Disease 2019;

"Disaster Management Act" means the Disaster Management Act, 2002 (Act No. 57 of 2002);

"inspector" means a person designated as an inspector in terms of section 28 of OHSA;

"OHSA" means the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993);

[2] These basic measures may be further refined in the sector guidelines or in amendments to the direction as the science on the transmission of the disease progresses.

"PPE" means personal protective equipment;

"Regulations" means the Regulations published by in terms of section 27(2) of the Disaster Management Act by the Minister of Cooperative Governance and Traditional Affairs;

"virus" means the SARS-CoV-2 virus;

"vulnerable employee" means any employee, as contemplated in the Department of Health Guidelines[3] -

(a) with known or disclosed health issues or comorbidities or any other condition that may place the employee at a higher risk of complications or death than other employees if infected with COVID-19; or

(b) above the age of 60 years who is at a higher risk of complications or death if infected;

"worker" means any person who works in an employer's workplace including an employee of the employer or contractor, a self-employed person or volunteer[4];

"workplace" means any premises or place where a person performs work.

Application

13. Subject to clause 14, this Direction applies to employers and workers in workplaces permitted to continue or commence operations under the Regulations.

14. This Direction does not apply to a workplace-

14.1 excluded from the OHSA in terms of section 1(3) of the OHSA[5];

14.2 in respect of which another Minister has issued a direction under those Regulations dealing with health and safety.

15. Subject to the employer's obligations under OHSA to conduct a risk assessment, employers with less than 10 employees need only apply the measures set out in clause 46 of this Direction.

Period of application

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[3] *Guidance on vulnerable employees and workplace accommodation in relation to COVID-19* – see the link in Annexure A.

[4] The distinction between 'worker' and 'employee' in the Direction is used to ensure that all persons who in work in a workplace are protected and to locate the responsibility in respect of certain obligations imposed on the employer in respect of its employees such as an application for illness benefits or worker's compensation.

[5] Section 1(3) of OHSA excludes mines, mining areas or works in terms the Minerals Act, 1991 (Act No. 50 of 1991) and ships, boats or cranes in terms of the Merchant Shipping Act, 1951 (Act No. 57 of 1951.

16. This Direction remains in force for as long as the declaration of a national disaster published in *Government Gazette* 43096 on 15 March 2020 remains in force.

Plan for re-opening workplaces

17. As and when any regulations made in terms of section 27(2) of the Disaster Management Act permit industries, businesses, entities both private and in the public sector to commence operating, every employer commencing operations must-

17.1 undertake a risk assessment in terms of clause 20.1 to 20.3;

17.2 on the basis of that risk assessment, develop a plan outlining the protective measures in place for the phased return of its employees before opening;

17.3 consult on the risk assessment and plan with-

17.3.1 any representative trade union as contemplated by section 14(1) of the Labour Relations Act, 1995 (Act No. 66 of 1995); and

17.3.2 any health and safety committee established in terms of section 19 of OHSA; or

17.3.3 in the absence of such a committee, a health and safety representative designated in terms of section 17(1) of OHSA or employee representative; and

17.4 make that plan available for inspection by an inspector and a person contemplated in clause 17.3.

18. The plan referred to in clause 17 must include-

18.1 the date that the workplace will open and the hours of opening;

18.2 a list of employees permitted to return to work and those who are required to work from home;

18.3 the plan and timetable for the phased-in return of employees to the workplace;

18.4 identify vulnerable employees for the purposes of clause 20.3;

18.5 ways of minimizing the number of workers at the workplace at any one time contemplated in clause 20.8;

18.6 the workplace protective measures required to be taken in terms of this Direction and any sectoral guideline to get the workplace COVID-19 ready;

18.7 the measures for the daily screening of employees and the screening of clients, contractors and visitors to the workplace; and

18.8 the details of the COVID-19 compliance officer appointed in terms of clause 20.6 of this Direction.

19. The employer contemplated in clause 17 must phase the return of their employees to work in accordance with the plan.

Administrative measures

20. Every employer must establish the following administrative measures:

20.1 It must undertake a risk assessment to give effect to the minimum measures required by this Direction taking into account the specific circumstances of the workplace;

20.2 if the employer employs more than 500 employees[6], that employer must submit a record of its risk assessment together with a written policy concerning the protection of the health and safety of its employees from COVID-19 as contemplated in section 7(1) of OHSA to-

20.2.1 its health and safety committee established in terms of section 19 of OHSA; and

20.2.2 the Department of Employment and Labour within 21 days of the commencement of this Direction;[7]

20.3 it must take special measures to mitigate the risk of COVID-19 for vulnerable employees in accordance with the Department of Health's Guidelines[8] to facilitate their safe return to work or their working from home;

20.4 it must notify all workers of the contents of this Direction and the manner in which it intends to implement it;

20.5 it must notify its employees that if they are sick or have symptoms associated with COVID–19 that they must not come to work and to take paid sick leave in terms of section 22 of the BCEA;

20.6 it must appoint a manager as a COVID-19 compliance officer to-

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[6] For employers with more than 500 employees in the construction, manufacturing, business or financial sectors regulation 46(6) of the Regulations requires appropriate sector or workplace arrangements or compacts to address an additional number of matters.

[7] Submission must be made to the Provincial Chief Inspector at http://www.labour.gov.za/About-Us/Ministry/Pages/IES0320-7398.aspx

[8] *Guidance on vulnerable employees and workplace accommodation in relation to COVID-19* – see the link in Annexure A.

20.6.1 oversee the implementation of the plan contemplated in clause 17.2;

20.6.2 oversee the adherence to the health and safety measures established in the workplace to give effect to requirements of this Direction including appointing employees to perform this function if the employer has more than one workplace;

20.6.3 address employee or workplace representative concerns and to keep them informed and, in any workplace in which an health and safety committee has been elected, consult with that committee on the nature of the hazard in that workplace and the measures that need to be taken;

20.7 it must ensure that the measures required by this Direction and its risk assessment plan are strictly complied with through monitoring and supervision;

20.8 it must, as far as practicable, minimize the number of workers at the workplace at any given time through rotation, staggered working hours, shift systems, remote working arrangements or similar measures in order to achieve social distancing as contemplated in clause 21 and to limit congestion in public transport and at the workplace;

20.9 it must take measures to minimize contact between workers as well as between workers and members of the public;

20.10 it must provide workers with information that raises awareness in any form or manner, including where reasonably practicable leaflets and notices placed in conspicuous places in the workplace informing workers of the dangers of the virus, the manner of its transmission, the measures to prevent transmission such as personal hygiene, social distancing, use of masks, cough etiquette and where to go for screening or testing if presenting with COVID-19 related symptoms;

20.11 if a worker has been diagnosed with COVID-19, an employer must-

20.11.1 inform the Department of Health[9] and the Department of Employment and Labour; and

20.11.2 investigate the mode of exposure including any control failure and review its risk assessment to ensure that the necessary controls and PPE requirements are in place;

20.11.3 determine the need to temporarily close the affected work area for decontamination using an incident-based risk assessment with due regard to the Department of Health's Guidelines[10]; and

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[9] Report must be made to the COVID-19 hotline: 0800 02 9999.

[10] *Guidance note for workplaces in the event of identification of a COVID-19 positive employee* – see link in Annexure A.

20.11.4 it must give administrative support to any contact-tracing measures implemented by the Department of Health.

Social distancing measures

21. Every employer must arrange the workplace to ensure minimal contact between workers and as far as practicable ensure that there is a minimum of one and a half metres between workers while they are working, for example, at their workstations. Depending on the circumstances of the workplace or the nature of the sector, the minimum distance may need to be greater. Reducing the number of workers present in the workplace at any time in terms of clause 20.8 may assist in achieving the required social distancing.

22. If it is not practicable to arrange work stations to be spaced at least one and a half metres apart, the employer must-

22.1 arrange physical barriers to be placed between work stations or erected on work stations to form a solid physical barrier between workers while they are working; or

22.2 when required, supply the employee free of charge with appropriate PPE based on a risk assessment of the working place.

23. Every employer must ensure that social distancing measures are implemented through supervision both in the workplace and in the common areas outside the immediate workplace through queue control or within the workplace such as canteens and lavatories. These measures may include dividing the workforce into groups or staggering break-times to avoid the concentration of workers in common areas.

Health and safety measures

24. Every employer must implement the following health and safety measures.

Symptom screening

25. Every employer must take measures to-

25.1 screen any worker when they report for work in order to-

25.1.1 ascertain whether they have any of the symptoms associated with COVID-19 as per the current NICD definition[11], namely a cough, sore throat, shortness of breath (or difficulty in breathing), or loss of smell or taste;

25.1.2 determine whether they suffer from any of the following additional symptoms: fever, body aches, redness of eyes, nausea, vomiting, diarrhea, fatigue, weakness or tiredness; and

25.2 require workers to immediately inform the employer if they experience any of the symptoms in sub-clause 25.1 while at work.

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[11] *Clinical management of suspected or confirmed COVID-19 disease* – see the link in Annexure A

26. Employers must comply with any guidelines issued by the National Department of Health in consultation with the Department in respect of –

26.1 symptom screening; [12] and

26.2 if required to do so, medical surveillance and testing.

27. If a worker presents with COVID-19-related symptoms, or advises the employer of these symptoms, the employer must –

27.1 not permit the worker to enter the workplace or report for work; or

27.2 if the worker is already at work immediately-

27.2.1 isolate the worker, provide the worker with a surgical mask and arrange for the worker to be transported in a manner that does not place other workers or members of the public at risk either to be self-isolated or to be referred for a medical examination or testing; and

27.2.2 assess the risk of transmission, disinfect the area and the worker's workstation, undertake contact tracing and refer those workers who may be at risk for screening and take any other appropriate measure to prevent possible transmission;

27.3 place its employee on paid sick leave in terms of section 22 of the BCEA or if the employee's sick leave entitlement under the section is exhausted, make application for an illness benefit in terms of clause 4 of the Directive issued on 25 March 2020 on the COVID-19 Temporary Employer Relief Scheme under regulation 10(8) of the Regulations promulgated in terms of section 27(2) of the Disaster Management Act;

27.4 ensure that the employee is not discriminated against on grounds of having tested positive for COVID-19 in terms of section 6 of the Employment Equity Act, 1998 (Act No. 55 of 1998);

27.5 if there is evidence that the worker contracted COVID-19 arising out of and in the course of employment, lodge a claim for compensation in terms of the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993) in accordance with Notice 193 published on 3 March 2020.[13]

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[12] For more specific guidelines see *Guidelines for symptom monitoring and management of essential workers for COVID-19 related infection* – see the link in Annexure A.

[13] GG 43126 GN193 of 23 March 2020.

28. If a worker has been diagnosed with COVID-19 and isolated in accordance with the Department of Health Guidelines,[14] an employer may only allow a worker to return to work on the following conditions:

    28.1 The worker has completed the mandatory 14 days of self-isolation;

    28.2 the worker has undergone a medical evaluation confirming fitness to work if the worker had moderate or severe illness;

    28.3 the employer ensures that personal hygiene, wearing of masks, social distancing, and cough etiquette is strictly adhered to by the worker;

    28.4 the employer closely monitors the worker for symptoms on return to work; and

    28.5 the worker wears a surgical mask for 21 days from the date of diagnosis.

29. If a worker has been in contact in the workplace with another worker who has been diagnosed with COVID-19, the employer must assess that worker's exposure in accordance with the Department of Health's Guidelines[15] to ascertain whether the exposure carries a high or low risk of transmission between the workers.

30. If there is a low risk of exposure, the employer –

    30.1 may permit the worker to continue working using a cloth mask complying with standard precautions; and

    30.2 must monitor the worker's symptoms for 14 days from the first contact.

31. If there is a high risk of exposure-

    31.1 the worker must remain in quarantine for 14 days; and

    31.2 the employer of that worker must place the worker on sick leave in accordance with clause 27.3 for that period.

Sanitizers, disinfectants and other measures

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[14] *Clinical management of suspected or confirmed COVID-19 disease* – see the link in Annexure A

[15] The *Guidelines for symptom monitoring and management of essential workers for COVID-19 related infection* and the guideline: *Clinical management of suspected or confirmed COVID-19 disease* – see the links in Annexure A.

32. For the purposes of these clauses, a hand sanitizer must be one that has at least 70% alcohol content and is in accordance with the recommendations of the Department of Health.

33. Every employer must, free of charge, ensure that –

33.1 there are sufficient quantities of hand sanitizer based on the number of workers or other persons who access the workplace at the entrance of, and in, the workplace which the workers or other persons are required to use; and

33.2 every employee who works away from the workplace, other than at home, must be provided with an adequate supply of hand sanitizer.

34. If a worker interacts with the public, the employer must provide the worker with sufficient supplies of hand-sanitizer at that worker's workstation for both the worker and the person with whom the worker is interacting.

35. Every employer must take measures to ensure that-

35.1 all work surfaces and equipment are disinfected before work begins, regularly during the working period and after work ends;

35.2 all areas such as toilets, common areas, door handles, shared electronic equipment are regularly cleaned and disinfected; and

35.3 disable biometric systems or make them COVID-19-proof.

36. The employer must ensure that-

36.1 there are adequate facilities for the washing of hands with soap and clean water;

36.2 only paper towels are provided to dry hands after washing – the use of fabric toweling is prohibited;

36.3 the workers are required to wash their hands and sanitize their hands regularly while at work;

36.4 the workers interacting with the public are instructed to sanitize their hands between each interaction with a member of the public; and

36.5 surfaces that workers and members of the public come into contact with are routinely cleaned and disinfected.

Cloth masks

37. The main benefit of everyone wearing a cloth mask is to reduce the amount of virus containing droplets being coughed up by those with the infection and transmitted to others and to surfaces that others may touch. Since some infected persons may not have symptoms or may not know they are infected, the Department of Health requires that all persons wear cloth masks when in a public place.

38. For the reasons underlying the Department of Health's requirement, every employer must –

38.1 provide each of its employees, free of charge, with a minimum of two cloth masks, which comply with the requirements set out in the Department of Health's recommendations[16], for the employee to wear while at work and while commuting to and from work; and

38.2 require any other worker to wear masks in the workplace.

39. The number and replaceability of cloth masks that must be provided to an employee or required of other workers must be determined in accordance with any sectoral guideline and in the light of the employee or worker's conditions of work, in particular, where these may result in the mask becoming wet or soiled.

40. Every employer must ensure that workers are informed, trained, instructed and supervise as to the correct use of cloth masks.

41. The general requirement for workers to wear masks does not derogate from the fact that, where a risk assessment indicates that specific personal protective equipment is required, those categories of workers must be provided with the accredited personal protective equipment in accordance with Department of Health guidelines.

Measures in respect of workplaces to which public have access

42. The principal purpose of the measures contained in the following clause is to protect workers from being exposed to the virus through their interaction with the public and to protect members of the public from being exposed to virus through their interaction with workers or other persons present in such a workplace.

43. Depending on what is reasonably practicable given the nature of the workplace contemplated in clause 42, every employer must-

43.1 determine the floor area of the workplace in square metres in order to determine the number of customers and workers that may be inside the workplace at any one time with adequate space available;

43.2 arrange the workplace to ensure that there is a distance at least one and a half metres between workers and members of the public or between members of the public; or

43.3 put in place physical barriers at counters or provide workers with face shields or visors;

43.4 if appropriate, undertake symptom screening measures of persons other than its employees entering the workplace with due regard to available technology and any guidelines issued by the Department of Health;

[16] Department of Health: *How to use mask cloth* – see the link in Annexure A.

43.5 if appropriate, display notices advising persons other than employees entering the workplace of the precautions they are required to observe while in the workplace;

43.6 require members of the public, including suppliers, to wear masks when inside their premises;

43.7 take steps to ensure that customers queuing inside or outside the workplace are able to maintain a distance of one and half metres from each other;

43.8 provide hand sanitizer for use by the public at the entrance to the workplace;

43.9 assign an employee as a compliance officer to ensure that these measures are complied with and that all directions in respect of hygienic conditions and limitation of exposure to persons with COVID-19 are adhered to.

Ventilation

44. Every employer must –

44.1 keep the workplace well ventilated by natural or mechanical means to reduce the SARS-CoV-2 viral load;

44.2 where reasonably practicable, have an effective local extraction ventilation system with high-efficiency particulate air HEPA filters, which is regularly cleaned and maintained, and its vents do not feed back in through open windows;

44.3 ensure that filters are cleaned and replaced in accordance with the manufacturer's instructions by a competent person.

Specific Personal Protective Equipment

45. Every employer must check regularly on the websites of the National Department of Health[17], National Institute of Communicable Diseases[18] and the National Institute for Occupational Health[19] whether any specialised personal protective equipment for COVID-19 is required or recommended in any guidelines given the nature of the workplace or the nature of a worker's duties and the associated level of risk.

Small businesses

[17] http://www.health.gov.za/

[18] https://www.nicd.ac.za/

[19] http://www.nioh.ac.za/

46. Employers with 10 employees or less must take the following measures:

46.1 if the employer is permitted to recommence operations under the Regulations, it must develop a basic plan for the phasing in the return of its employees taking into account those that are able to work remotely and those over the age of 60 years or who have comorbidities;

46.2 arrange the workplace to ensure that employees are at least one and half metres apart or, if not practicable, place physical barriers between them to prevent the possible transmission of the virus;

46.3 ensure that employees that present with the symptoms set out in clause 25.1 are not permitted to work;

46.4 immediately contact the COVID-19 hotline: 0800 02 9999 for instruction and direct the employee to act in accordance with those instructions;

46.5 provide cloth masks or require an employee to wear some form of cloth covering over their mouth and nose while at work;

46.6 provide each employee with hand sanitizers, soap and clean water to wash their hands and disinfectants to sanitize their workstations;

46.7 ensure that each employee while at work washes with soap and sanitizes their hands; and

46.8 ensure that their workstations are disinfected regularly; and

46.9 take any other measures indicated by a risk assessment of the workplace including the such measures as are appropriate in clause 43 if the public have access to the workplace.

Worker obligations

47. In addition to the obligations of employees under the OHSA, every worker is obliged to comply with measures introduced by their employer as required by this Direction.

Refusal to work due to exposure to COVID-19

48. An employee may refuse to perform any work if circumstances arise which with reasonable justification appear to that employee or to a health and safety representative to pose an imminent and serious risk of their exposure to COVID-19.

49. An employee who has refused to perform work in terms of clause 48 must as soon as is reasonably practicable notify the employer either personally or through a health and safety representative of the refusal and the the reason for the refusal. Every employer must, after consultation with the compliance officer and

any health and safety committee, endeavour to resolve any issue that may arise from the exercise of the right in terms of clause 48.

50. Clause 48 applies whether or not the person refusing to work has used or exhausted any other applicable external or internal procedure.

51. No person may advantage or promise to advantage any person for not exercising his or her right in terms of clause 48.

52. No employer may make any deduction from an employee's remuneration, or require or permit an employee to make any payment to the employer or any other person, in respect of anything which the employer is obliged to provide or to do in terms of this Direction.

53. No person may threaten to take any action against a person because that person has exercised or intends to exercise the right in terms of clause 48.

54. No employee may be dismissed, disciplined, prejudiced or harassed for refusing to perform any work as contemplated in clause 48.

55. If there is a dispute as to whether clause 49 has been contravened, the employee may refer the dispute to the Commission for Conciliation, Mediation and Arbitration or an accredited bargaining council for conciliation and arbitration in accordance with the procedures contained in section 191 of the Labour Relations Act, 1995 (Act No. 66 of 1995).

56. If the arbitrator appointed in terms of section 191 of that Act to determine a dispute referred in terms of clause 56 finds that the employer has contravened clause 55, the arbitrator may make any appropriate order contemplated in section 193 read with 194(3) or (4) of that Act.

Monitoring and enforcing the Direction

57. If a person fails to comply with this direction, an inspector may perform any of the functions in section 29 of OHSA and exercise any of the powers listed in section 30 of OHSA in order to monitor compliance with this Direction.

58. In so far as any contravention of this Direction constitutes a contravention of an obligation or prohibition under OHSA, the offences and penalties provided for in section 38 of OHSA apply.

59. An inspector may for the purpose of promoting, monitoring and enforcing compliance with the OHSA, advise employees and employers of their rights and obligations in terms of this Direction in accordance with section 64 of the BCEA.

Sectoral protocols and guidelines

60. Sectoral or industry associations must, in the event of high health risks, develop sector-specific health protocols in consultation with the Department of Health to limit the spread of COVID-19 in the sector including providing for those circumstances where a firm within the sector cannot stagger working hours or provide transport for its employees.

61. The Chief Inspector appointed in terms of section 27 the OHSA must facilitate the development of sector specific guidelines to supplement this Direction by engaging with the social partners through the offices of the National Economic Development and Labour Council.

62. The sector specific guidelines should include the matters referred to in Annexure B.

Changes to Annexure A

63. The Minister may from time to time amend Annexure A and publish it online without issuing an amended direction in order to update the links to any new applicable guideline or recommendation.

Commencement of this Direction

64. This Direction comes into effect on the date of its publication on the Department's website or the *Gazette*, whichever is the earlier.

Annexure A

DEPARTMENT OF HEALTH LINKS

***Guidance on vulnerable employees and workplace accommodation in relation to COVID-19* (V4: 25 May 2020)**

http://www.nioh.ac.za/wp-content/uploads/2020/05/20_2020-V4.-Guidance-on-vulnerable-employees-and-workplace-accommodation....pdf

Guidance note for workplaces in the event of identification of a COVID-19 positive employee

http://www.nioh.ac.za/wp-content/uploads/2020/05/guidelines_positive_worker_19_May_20.pdf

***Clinical management of suspected or confirmed COVID-19 disease* Version 4 (18th May 2020)**

https://www.nicd.ac.za/wp-content/uploads/2020/05/Clinical-management-of-suspected-or-confirmed-COVID-19-Version-4.pdf

Guidelines for symptom monitoring and management of essential workers for COVID-19 related infection

http://www.nioh.ac.za/wp-content/uploads/2020/05/guidelines_positive_worker_19_May_20.pdf

How to use mask cloth

http://www.health.gov.za/index.php/component/phocadownload/category/631#

Annexure B

SECTORAL GUIDELINES

1. **Workplace Risk assessment**

   1.1 Identify high-risk exposure work processes
   1.2 Identify high-risk work practices

2. **Engineering controls**

   2.1. Ventilation
   2.2. Physical barriers
   2.3. Adaptation of workstations to increase social distance

3. **Administrative controls**

   3.1. Screening/ reporting of symptoms/ sick leave
   3.2. Minimizing contact
   3.3. Rotation and shift work
   3.4. Work-at-home strategies
   3.5. Communication and information strategies
   3.6. Role of health and safety committees and representatives
   3.7. Education and training
   3.8. Reporting of incidents for regulatory purposes
   3.9. Reporting for purposes of public health, contact tracing, screening, testing and surveillance
   3.10 Management of COVID-19 positive employees and workplace contacts (symptomatic and asymptomatic)
   3.11 Management of vulnerable employees and special measures for their protection, including protection against unfair discrimination or victimization

4. **Healthy and safe work practices**

   4.1. Disinfectants, sanitisers and personal hygiene
   4.2. Other

5. **PPE**

   5.1. Masks
   5.2. Gloves
   5.3. Facial shields
   5.4. Other

6. **Provision of safe transport for employees**

   6.1. Personal hygiene
   6.2. Social distancing
   6.3. Arrangements to minimise exposure associated with commuting

6.4. Cloth masks (if commuter)
6.5. Employer provided transport
6.6. PPE (driver/conductor of employer-provided transport)

DEPARTMENT OF CO-OPERATIVE GOVERNANCE

NO. R. 152 **28 February 20212**

DISASTER MANAGEMENT ACT, 2002: AMENDMENT OF REGULATIONS ISSUED IN TERMS OF SECTION 27(2)

I, Dr Nkosazana Dlamini Zuma, Minister of Cooperative Governance and Traditional Affairs, designated under section 3 of the Disaster Management Act, 2002 (Act No. 57 of 2002), having declared a national state of disaster published by Government Notice No. 313 of 15 March 2020, and extended by Government Notices Nos. 646 of 5 June 2020, 765 of 13 July 2020, 889 of 15 August 2020, 995 of 14 September 2020, 1090 of 14 October 2020,1225 of 14 November 2020, No.1341 of 11 December 2020, No. R. 15 of 13 January 2021 and No. R. 86 of 11 February 2021 hereby in terms of section 27(2) of the Disaster Management Act, 2002, after consultation with the relevant Cabinet members, make the Regulations in the Schedule.

NC Zuma

DR NKOSAZANA DLAMINI ZUMA, MP
MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS
DATE: 28.02.2021

SCHEDULE

Definitions

1. In these Regulations, "the Regulations" means the regulations published by Government Notice No. R. 480 of 29 April 2020 as amended by Government Notices Nos. R. 608 of 28 May 2020, R. 714 of 25 June 2020, R.763 of 12 July 2020, R. 846 of 31 July 2020 R. 891 of 17 August 2020, No. 999 of 18 September 2020, No. 1011 of 20 September 2020, No. 1053 of 1 October 2020, No. 1104 of 21 October 2020, No. 1199 of 11 November 2020, No. 1290 of 3 December 2020, No. 1346 of 15 December 2020, No.1370 of 17 December 2020, No. 1421 of 24 December 2020, No. 1423 of 29 December 2020, No 1435 of 29 December 2020, No. R. 11 of 11 January 2021, No. R. 69 of 1 February 2021, No. R. 92 of 13 February 2021 and No. R. 93 of 13 February 2021.

Amendment of the Classification of the Regulations

2. The Classification of the Regulations is hereby amended by the substitution for Chapter 6 of the following Chapter:

CHAPTER 6
ALERT LEVEL 1

65. Application of Alert Level
66. Notification by district municipalities

67. Compliance officers
68. Movement of persons
69. Opening and closure of schools
70. Mandatory protocols when in a public place
71. Attendance of funerals
72. Gatherings
73. Eviction and demolition of places of residence
74. Rental housing
75. Places and premises closed to the public
76. Initiation practices
77. Controlled visits by members of the public
78. Partial re-opening of borders
79. Transportation of cargo
80. Public transport
81. Sale, dispensing and transportation of liquor
82. Operation of economic sector
83. Offences and penalties".

Substitution of Chapter 6 of the Regulations

3. Chapter 6 of the Regulations is hereby substituted for the following Chapter:

"CHAPTER 6
ALERT LEVEL 1

Application of Alert Level

65. The regulations set out in this Chapter apply during Alert Level 1.

Notification by district municipalities

66. All district municipalities must, after consultation with its local municipalities in its area—

(a) alert communities within that district of the increasing number of infections that could lead to that district being declared a hotspot;

(b) publish on their websites and in the local media, areas with high infection rates within the district; and

(c) update the information as and when it becomes available.

Compliance officers

67. (1) Industries, businesses and entities, both private and in the public sector, must—

(a) designate a COVID-19 compliance officer who must oversee—

(i) the implementation of the plan referred to in paragraph *(b)*; and

(ii) strict adherence to the standards of hygiene and health protocols relating to COVID-19 at the workplace;

(b) develop a plan containing measures to ensure that the workplace meets the standards of health protocols, adequate space for employees and social distancing measures for the public and service providers, as required; and

(c) retain a copy of the plan for inspection, which plan must also contain the details of the COVID-19 compliance officer.

(2) A person in control of a retail store or institution must—

(a) take steps to ensure that customers keep a distance of at least one and a half metres from each other and that all directions in respect of health protocols and social distancing measures are strictly adhered to; and

(b) designate a compliance officer to ensure that safety controls are strictly adhered to and display the name of the compliance officer prominently in the store or institution in a visible area.

Movement of persons

68. (1) Every person is confined to his or her place of residence from 00H00 until 04H00 daily, unless a person—

(a) has been granted permission through directions issued by the relevant Cabinet member or a permit, which corresponds with Form 7 of Annexure A, to perform a service other than a service related to an activity listed under Table 4;

(b) is attending to a security or medical emergency; or

(c) arrives on a flight or is travelling to or from an airport which necessitates travelling during restricted hours of movement: Provided that the person traveling is in possession of a valid boarding pass as proof of flight or a copy of the airline ticket.

(2) Any person who fails to abide by the curfew referred to in subregulation (1) commits an offence and is, on conviction, liable to a fine or a period of imprisonment not exceeding six months, or to both such fine and imprisonment.

(3) Closing time for the following establishments, whether indoors or outdoors, is 23H00:

(a) cinemas;

(b) theatres;

(c) casinos;

(d) museums, galleries and archives;

(e) public swimming pools;

(f) beaches and public parks;

(g) game parks, botanical gardens, aquariums and zoos;

(h) gyms and fitness centres;

(i) restaurants;

(j) venues hosting auctions;

(k) venues hosting professional sport; and

(l) venues hosting faith-based, religious, social, political and cultural gatherings.

Opening and closure of schools

69. The Cabinet member responsible for basic education may by direction contemplated in regulation 4(3), determine the dates on which schools may be opened or closed, as defined in the South African Schools Act, 1996 (Act No.84 of 1996) and any matter related to the management of schools in the basic education sector, to address, prevent and combat the spread of COVID-19 in all schools.

Mandatory protocols when in a public place

70. (1) For the purposes of these Regulations, a **'face mask'** means a cloth face mask or a homemade item that covers the nose and mouth, or another appropriate item to cover the nose and mouth.

(2) The wearing of a face mask is mandatory for every person when in a public place, excluding a child under the age of six years, and any person who fails to comply with a verbal instruction by an enforcement officer to wear a face mask, commits an offence and is, on conviction, liable to a fine or a period of imprisonment not exceeding six months, or to both such fine and imprisonment.

(3) No person will be allowed to—

(a) use, operate, perform any service on any form of public transport;

(b) enter or be in a building, place or premises, including government buildings, places or premises, used by the public to obtain goods or services; or

(c) be in any public open space,

if he or she is not wearing a face mask.

(4) The prohibition in subregulation (3)*(c)* shall not apply to a person who undertakes vigorous exercise in a public place, provided that the person maintains a distance of at least one and a half metres from any other person.

(5) An employer may not allow any employee to perform any duties or enter the employment premises if the employee is not wearing a face mask while performing his or her duties.

(6) Every business premises, including, but not limited to, a supermarket, shop, grocery store, retail store, wholesale produce market or pharmacy shall—

(a) determine their area of floor space in square metres;

(b) based on the information contemplated in paragraph *(a)*, determine the number of customers and employees that may be inside the premises in order to comply with the limitation as provided for in regulation 72(5)*(c)* of the Regulations and subject to strict adherence to all health protocols and social distancing measures;

(c) take steps to ensure that persons queuing inside or outside the premises are able to maintain a distance of one and a half metres from each other;

(d) provide hand sanitisers for use by the public and employees at the entrance to the premises; and

(e) assign, in writing, an employee or any other suitable person, as the compliance employee, who must ensure—

(i) compliance with the measures provided for in paragraphs *(a)* to *(d)*; and

(ii) that all directions in respect of hygienic conditions and limitation of exposure to persons with COVID-19 are adhered to.

(7) Any business whose premises exceeds the maximum number of customers and employees determined in subregulation (6) commits an offence and is, on conviction, liable to a fine or to imprisonment for a period not exceeding six months or to both such fine and imprisonment.

(8) All employers must, adopt measures to promote physical distancing of employees, including—

(a) enabling employees to work from home or minimising the need for employees to be physically present at the workplace;

(b) the provision for adequate space;

(c) restrictions on face to face meetings;

(d) special measures for employees with known or disclosed health issues or comorbidities, or with any condition which may place such employees at a higher risk of complications or death if they are infected with COVID-19; and

(e) special measures for employees above the age of 60 who are at a higher risk of complications or death if they are infected with COVID-19.

(9) The requirements as set out in subregulation (6) applies with the necessary changes, to any other building that is not provided for by subregulation (6).

(10) All courier and delivery services shall provide for minimal personal contact during delivery.

(11) All banks as defined in the Banks Act, 1990 (Act No. 94 of 1990) and financial institutions as defined in the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017), must—

(a) ensure that all automated teller machines of that bank or financial institution, if any in the case of a financial institution, that is not a bank, have hand sanitisers for use by the public at each automated teller machine; and

(b) take steps to ensure that persons queuing at the automated teller machine maintain a distance of one and a half metres from each other.

Attendance of funerals

71. (1) Attendance of a funeral is limited to 100 persons or less and if the venue is too small to hold the prescribed number of persons observing a distance of at least one and a half metres from each other, then not more than 50 percent of the capacity of the venue may be used, subject to strict adherence to all health protocols and all persons maintaining a distance of one and a half metres from each other.

(2) Night vigils are not allowed.

(3) After-funeral gatherings, including "after-tears" gatherings, are not allowed.

(4) During a funeral, a person must wear a face mask and adhere to all health protocols and social distancing measures.

(5) The duration of a funeral is restricted to a maximum of two hours.

Gatherings

72. (1) Every person, when attending a gathering and in order to limit exposure to COVID-19, must—

(a) wear a face mask;

(b) adhere to all health protocols;

(c) maintain a distance of at least one and a half metres from each other;

(d) adhere to the curfew hours as provided for in regulation 68; and

(e) adhere to any other health protocols and social distancing measures as provided for in directions issued by the relevant Cabinet member after consultation with the Cabinet member responsible for health.

(2) An owner or operator of any indoor or outdoor facility where gatherings are held must display the certificate of occupancy which sets out the maximum number of persons the facility may hold.

(3) All faith-based, religious, social, political and cultural gatherings are permitted but limited to 100 persons or less for indoor venues and 250 persons or less for outdoor venues and if the venue is too small to hold the prescribed number of persons observing a distance of at least one and a half metres from each other, then not more than 50 percent of the capacity of the venue may be used, subject to strict adherence to all health protocols and social distancing measures.

(4) Gatherings at a workplace for work purposes are allowed, subject to strict adherence to all health protocols and social distancing measures.

(5) *(a)* Hotels, lodges, bed and breakfasts, timeshare facilities, resorts and guest houses are allowed full capacity of the available rooms for accommodation, with patrons observing a distance of at least one and a half metres from each other when in common spaces.

(b) Conferencing, dining and entertainment facilities are subject to a limitation of a maximum of 100 persons or less for indoor venues and 250 persons or less for outdoor venues and if the venue is too small to hold 100 persons indoors or 250 persons outdoors observing a distance of at least one and a half metres from each other, then not more than 50 percent of the capacity of the venue may be used.

(c) Every business premises, including but not limited to supermarkets, shops, grocery stores, produce markets and pharmacies, are subject to a limitation of 50 percent of the floor space, which includes customers and employees, and subject to strict adherence to all health protocols, social distancing measures.

(6) Sporting activities, including both professional and non-professional matches, by recognised sporting bodies are allowed, subject to strict adherence to the times of operation as provided for in regulation 33(3) and the following:

(a) Directions for sports matches issued by the Cabinet member responsible for sport after consultation with the Cabinet member responsible for health;
(b) only journalists, radio, television crew, security personnel, emergency medical services, and the necessary employees employed by the owners of the venue of the sport match, are allowed at the venue of the sport match;
(c) only the required number of players, match officials, support staff and medical crew required for the sport match, are allowed at the venue of the sport match;
(d) no spectators are allowed at the venue of the sports match; and
(e) international sport events involving countries with a low or medium COVID-19 infection and transmission rate are allowed.

(7) An enforcement officer must, where a gathering in contravention of the regulations takes place—
(a) order the persons at the gathering to disperse immediately; and
(b) if the persons refuse to disperse, take appropriate action, which may, subject to the Criminal Procedure Act, 1977 (Act No. 51 of 1977), include the arrest and detention of any person at the gathering.

Eviction and demolition of places of residence

73. (1) A person may not be evicted from his or her land or home or have his or her place of residence demolished for the duration of the national state of disaster unless a competent court has granted an order authorising the eviction or demolition.

(2) A competent court may suspend or stay an order for eviction or demolition contemplated in subregulation (1) until after the lapse or termination of the national state of disaster unless the court is of the opinion that it is not just or equitable to suspend or stay the order having regard, in addition to any other relevant consideration, to—
(a) the need, in the public interest for all persons to have access to a place of residence and basic services to protect their health and the health of others and to avoid unnecessary movement and gathering with other persons;
(b) any restrictions on movement or other relevant restrictions in place at the relevant time in terms of these Regulations;
(c) the impact of the disaster on the parties;
(d) the prejudice to any party of a delay in executing the order and whether such prejudice outweighs the prejudice of the persons who will be subject to the order;
(e) whether any affected person has been prejudiced in their ability to access legal services as a result of the disaster;
(f) whether affected persons will have immediate access to an alternative place of residence and basic services;
(g) whether adequate measures are in place to protect the health of any person in the process of a relocation;
(h) whether any occupier is causing harm to others or there is a threat to life; and

(i) whether the party applying for such an order has taken reasonable steps in good faith, to make alternative arrangements with all affected persons, including but not limited to payment arrangements that would preclude the need for any relocation during the national state of disaster.

(3) A court hearing an application to authorise an eviction or demolition may, where appropriate and in addition to any other report that is required by law, request a report from the responsible member of the executive regarding the availability of emergency accommodation or quarantine or isolation facilities pursuant to these Regulations.

Rental housing

74. (1) During the national state of disaster, the Rental Housing Tribunals established under the Rental Housing Act, 1999 (Act No. 50 of 1999)—

(a) must determine fair procedures for the urgent hearing of disputes; or

(b) may grant an urgent *ex parte* spoliation order including to restore the occupation of a dwelling or access to services provided that an affected party may, on 24 hours' notice, require that a hearing be promptly convened.

(2) During the national state of disaster and without derogating from the protections afforded by the Rental Housing Act, 1999 or any provincial unfair practice regulation in place or the duty to consider the interests of both the landlord and tenant on a just and equitable basis, the following conduct is presumed to be an unfair practice for purposes of the Act:

(a) The termination of services in circumstances where—

(i) the landlord has failed to provide reasonable notice and an opportunity to make representations;

(ii) the landlord has failed, reasonably and in good faith, to make the necessary arrangements including to reach an agreement regarding alternative payment arrangements, where applicable; or

(iii) no provision has been made for the ongoing provision of basic services during the national state of disaster.

(b) The imposition of any penalty for the late payment of rental where the default is caused by the disaster, whether or not the penalty takes the form of an administrative charge or any other form other than interest.

(c) The failure of a landlord or tenant to engage reasonably and in good faith to make arrangements to cater for the exigencies of the disaster.

(d) Any other conduct prejudicing the ongoing occupancy of a place of residence, prejudicing the health of any person or prejudicing the ability of any person to comply with the applicable restrictions on movement that is unreasonable or oppressive having regard to the prevailing circumstances.

(3) Where the protections afforded by any Unfair Practice Regulations in force in any province are greater than those provided in this regulation, the provisions of the provincial Unfair Practice Regulations shall apply.

(4) The Cabinet member responsible for human settlements must, after consulting with the Rental Housing Tribunals, issue directions disseminating information about the manner in which the Tribunals will conduct

their proceedings during the national state of disaster including, but not limited to—

(a) the manner in which Tribunals will facilitate expeditious access to any aggrieved person; and

(b) the convening of remote hearings or the convening of hearings at any suitable place.

Places and premises closed to the public

75. (1) Night clubs are closed to the public.

(2) The Cabinet member responsible for cooperative governance and traditional affairs may, by directions, determine a place or premises that must be closed, if there is a risk of any members of the public being exposed to COVID-19 at such a place or premises.

Initiation practices

76. (1) Initiation practices are permitted, subject to the submission of a risk adjusted plan for the conducting of initiation practices to the relevant Cabinet members by the provincial executive responsible for traditional affairs and strict adherence to all health protocols and social distancing measures as provided for in directions issued by the relevant Cabinet member after consultation with the Cabinet member responsible for health.

(2) Post-initiation celebrations ("*imigidi*") are permitted, subject to a limitation of 100 persons or less for indoor venues and 250 persons or less for outdoor venues and if the venue is too small to hold the prescribed number of persons observing a distance of at least one and a half metres from each other, then not more than 50 percent of the capacity of the venue may be used.

Controlled visits by members of the public

77. (1) All visits by members of the public to—

(a) correctional centres;

(b) remand detention facilities;

(c) police holding cells;

(d) military detention facilities;

(e) health establishments and facilities, except to receive treatment or medication, subject to strict adherence to health protocols; and

(f) older persons' residential facilities,

are permitted to the extent and in the manner directed by the relevant Cabinet member.

(2) The Independent Electoral Commission will be allowed to visit the institutions referred to in subregulation (1), where required for the purposes of voter registration, or special voting, to the extent and in the manner set out in Directions by the relevant Cabinet member.

Partial re-opening of borders

78. (1) The 20 land borders which are fully operational, will remain as such and the 33 land borders which were closed, will remain closed.

(2) Traveling to and from the Republic is allowed, subject to subregulation (3).

(3) Daily commuters from neighbouring countries who attend or teach at a school in the Republic, and who are allowed entry into and exit from the Republic, are subject to compliance with protocols relating to—

(a) screening for COVID-19 and quarantine or isolation, where necessary;

(b) the wearing of a face mask;

(c) transportation; and

(d) sanitisation and social distancing measures as per the relevant health protocols on safety and prevention of the spread of COVID-19.

(4) *(a)* International air travel is restricted to the following airports—

(i) OR Tambo International Airport;

(ii) King Shaka International Airport;

(iii) Cape Town International Airport;

(iv) Lanseria International Airport; and

(v) Kruger Mpumalanga International Airport.

(b) Long-haul flight departures and landings at the airports listed in paragraph *(a)* are permitted during the hours of curfew as provided for in regulation 68(1).

(c) All international travellers arriving at the airports listed in paragraph *(a)* must provide a valid certificate of a negative COVID-19 test, recognised by the World Health Organisation, which was obtained not more than 72 hours before the date of travel.

(d) In the event of the traveller's failure to submit a certificate as proof of a negative COVID-19 test, the traveller will be required to do an antigen test on arrival at his or her own cost and in the event of a traveller testing positive for COVID-19, he or she will be required to isolate him or herself at his or her own cost, for a period of 10 days.

(5) All commercial seaports will remain open and small crafts will be allowed entry into seaports, in-line with all health and border law enforcement protocols.

Transportation of cargo

79. (1) Rail, ocean, air and road transport is permitted for the movement of cargo to and from other countries and within the Republic, subject to national legislation and any directions issued in terms of subregulation (2), for the transportation of goods for export and for import.

(2) The Cabinet member responsible for trade, industry and competition may, after consultation with the Cabinet members responsible for transport and finance, issue directions that provide for the management, administration and prioritisation of exports or imports, taking into account the

need to prevent and limit the spread of COVID-19 and to deal with the destructive and other effects of the COVID-19 pandemic.

(3) The Cabinet member responsible for transport may, after consultation with the Cabinet members responsible for cooperative governance and traditional affairs, trade, industry and competition, health, justice and correctional services, finance and public enterprises, issue directions relating to health protocols applicable to sea cargo operations and air freight operation.

Public transport

80. (1) For purposes of this regulation "long distance travel" is a trip of 200 km or more.

(2) The Cabinet member responsible for transport must, after consultation with the Cabinet members responsible for cooperative governance and traditional affairs, health, police, trade, industry and competition, and justice and correctional services, issue directions for the resumption of different modes of public transport to cater for the gradual return to work of people, in respect of—

(a) domestic air travel;
(b) rail, bus services, taxi services;
(c) e-hailing services; and
(d) private vehicles.

(3) Bus and taxi services—

(a) may not carry more than 70 percent of the licensed capacity for long distance travel; and
(b) may carry 100 percent of the licensed capacity for any trip not regarded as long distance travel in terms of subregulation (1).

(4) A driver, owner or operator of public transport may not allow any member of the public who is not wearing a face mask, to board or be conveyed in a public transport owned or operated by him or her.

(5) The directions to be issued by the Cabinet member responsible for transport must set out the health protocols that must be adhered to and the steps to be followed for the limitation of the exposure of members of the public using public transport to COVID-19.

Sale, dispensing and transportation of liquor

81. (1) The sale of liquor—

(a) by a licensed premises for off-site consumption, is permitted during licenced trading hours, subject to the laws governing such licences; and
(b) by a licensed premises for on-site consumption is permitted, subject to strict adherence to the curfew contemplated in regulation 68(3).

(2) The transportation of liquor is permitted.

(3) The consumption of liquor in public places, except in licensed on-site consumption premises, is not permitted.

(4) The sale and consumption of liquor in contravention of subregulation (1)*(b)* and (3), is an offence.

Operation of economic sector

82. (1) Businesses may operate except for those set out in Table 4.

(2) Relevant health protocols and social distancing measures for persons employed in private residences must be adhered to.

(3) Relevant health protocols and social distancing measures set out in directions must be adhered to, in addition to the occupational health and safety directions issued by the Cabinet member responsible for employment and labour, and applicable labour legislation.

(4) *(a)* Firms must adhere to any sector-specific health protocols intended to limit the spread of COVID-19 in the sector concerned.

(b) Sector-specific health protocols may address matters such as work rotation, staggered working hours, shift systems, remote working arrangements, special measures affecting persons with greater vulnerabilities or similar measures, in order to achieve social distancing, protect employees or limit congestion in public transport and at the workplace.

(c) Sector-specific health protocols where these are still to be developed, must be developed and issued by Cabinet members responsible for a sector in consultation with the Cabinet member responsible for health.

Offences and penalties

83. (1) For the duration of the national state of disaster, any person who hinders, interferes with, or obstructs an enforcement officer in the exercise of his or her powers, or the performance of his or her duties in terms of these Regulations, is guilty of an offence and, on conviction, liable to a fine or to imprisonment for a period not exceeding six months or to both such fine and imprisonment.

(2) For the purposes of this Chapter, any person who fails to comply with or contravenes a provision of regulations 68(1) and (3), 70(2), (3) and (7); 80(3)*(a)*, 81(1)*(b)* and 81(3) of these Regulations commits an offence and is, on conviction, liable to a fine or to imprisonment for a period not exceeding six months or to both such fine and imprisonment.".

Substitution of Table 4 of the Regulations

4. Table 4 of the Regulations is hereby substituted for the following Table:

"TABLE 4
ALERT LEVEL 1

All persons who are able to work from home must do so. However, persons will be permitted to perform any type of work outside the home, and to travel to and from work and for work purposes under Alert Level 1, subject to—

(a) strict compliance with health protocols and social distancing measures;

(b) the return to work being phased-in in order to put in place measures to make the workplace COVID-19 ready;

(c) the return to work being done in a manner that avoids and reduces risks of infection; and

(d) the work not being listed under the specific economic exclusions in this Table.

SPECIFIC EXCLUSIONS	
1.	Night vigils.
2.	After-funeral gatherings including "after-tears" gatherings.
3.	Night clubs.
4.	The land borders that remain closed, excluding the land borders contemplated in regulation 78(1).
5.	Passenger ships for international leisure purposes, excluding small crafts, in line with health and border law enforcement.
6.	Attendance of any sporting event by spectators.
7.	Exclusions relating to public transport services as set out in the directions issued by the Cabinet member responsible for transport.
8.	Exclusions relating to education services as set out in the directions issued by the Cabinet members responsible for education.".

Commencement

5. This amendment to the Regulations will come into operation on publication in the *Gazette*.

ANNEXURE A: Substitution of Form 7 of the Regulations

6. Form 7 of the Regulations is hereby substituted for the following Form:

"FORM 7

PERMIT TO TRAVEL TO PERFORM A SERVICE

Regulation 68

- *Please note that the person to whom the permit is issued must at all times present a form of identification together with this permit. If no identification is presented, the person to whom the permit is issued will have to return to his or her place of residence.*

I, being the head of institution, with the below mentioned details,

Surname				
Full names				
Identity number				
Contact details	**cell nr.**	**tel nr(w)**	**tel nr(h)**	**e-mail address**
Physical Address of Institution				

hereby certify that the below mentioned official/employee is performing services in my institution

Surname	
Full names	
Identity number	
Place of residence of employee	

Signed at _____, on this the _____ day of _____ 2021.

_____

Signature of Head of Institution

Official stamp of Institution

GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

DEPARTMENT OF CO-OPERATIVE GOVERNANCE

NO. R. 151 **28 February 2021**

DISASTER MANAGEMENT ACT, 2002: (ACT NO. 57 OF 2002): DETERMINATION OF ALERT LEVEL

I, Dr Nkosazana Dlamini Zuma, Minister of Cooperative Governance and Traditional Affairs, designated under section 3 of the Disaster Management Act, 2002 (Act No. 57 of 2002), having declared a national state of disaster published by Government Notice No. 313 of 15 March 2020, and extended by Government Notices Nos. 646 of 5 June 2020, 765 of 13 July 2020, 889 of 15 August 2020, 995 of 14 September 2020, 1090 of 14 October 2020,1225 of 14 November 2020, No.1341 of 11 December 2020, No. R. 15 of 13 January 2021 and No. R. 86 of 11 February 2021 hereby in terms of section 27(2) of the Disaster Management Act, 2002, upon recommendation of the Cabinet member responsible for health and in consultation with Cabinet, determine as follows:

(a) Government Notice No. 1424 of 29 December 2020, is hereby withdrawn.

(b) Alert Level 1 as adjusted will apply nationally.

NC Zuma

DR NKOSAZANA DLAMINI ZUMA, MP
MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS
DATE: 28.02.2021

GOVERNMENT NOTICE

DEPARTMENT OF LABOUR

No. R. 7 **15 January 2010**

BASIC CONDITIONS OF EMPLOYMENT ACT, NO 75 OF 1997

REGULATIONS ON HAZARDOUS WORK BY CHILDREN IN SOUTH AFRICA

I, Membathisi Mphumzi Shepherd Mdladlana, Minister of Labour, in terms of Section 44(1) of the Basic Conditions of Employment Act, No 75 of 1997 and Section 43(1) of the Occupational Health and Safety Act, No 85 of 1993, hereby publish Regulations on Hazardous Work by Children in South Africa.

MM S MDLADLANA, MP
MINISTER OF LABOUR

Regulations on Hazardous work by children in South Africa

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Health and Safety of Children at Work Regulations

OCCUPATIONAL HEALTH AND SAFETY ACT, 1993

The Minister of Labour, on the recommendation of the Occupational Health and Safety Advisory Council, has in terms of section 43(1) made the following regulations.

1. Definitions

In these Regulations any word or expression to which a meaning has been assigned in the Act shall have the meaning so assigned but, unless the context otherwise indicates—

(a) **"the Act"** means the Occupational Health and Safety Act, 1993;

(b) **"child"** means a person under eighteen years of age;

(c) **"child worker"** means any child who

(i) is employed by or works for an employer and who receives or is entitled to receive any remuneration; or

(ii) who works under the direction or supervision of an employer or any other person;

(d) **"employer"** means an employer as defined in the Act who employs or provides work for a child.

2. Purpose and interpretation

(1) The purpose of these regulations is to prohibit or place conditions upon the work that may be required, expected or permitted to be performed by child workers, and which is not prohibited in terms of any law.

(2) No provision in these regulations may be interpreted as permitting the employment of–

(a) a child who is under 15 years of age or is subject to compulsory schooling in terms of any law;

(b) a child who is 15 years of age or older and is not subject to compulsory schooling in any work which is prohibited in terms of any law.

(3) Any person who requires or permits a child worker to work must comply with these regulations in addition to any other provisions of this Act, its regulations or any other law applicable to such work.

(4) These regulations must be interpreted in accordance with International Labour Organisation's Worst Forms of Child Labour Convention, 1999.[1]

[1] The text of the Convention is available at www.ilo.org

3. Risk assessment

(1) Every employer who employs, or provides work to, a child worker or permits any child worker to work at any place under their control or with any machinery under their control must in respect of such work undertake a risk assessment process which must include at least the following —

(a) identifying the risks and hazards to which any child worker may be exposed;

(b) analysing and evaluating the risks and hazards that are identified;

(c) preparing and implementing –

(i) a documented plan of safe work procedures to remove, mitigate, reduce or control the risks and hazards that have been identified; and

(ii) a monitoring plan.

(2) Without limitation to the obligations in terms of sub-regulation (1), an employer must for the purposes of complying with sub-regulation (1) take into account, to the extent that they are relevant to any work, the following factors –

(a) the increased biological sensitivity of children to chemicals, biological agents, carcinogens and hormone disruptors;

(b) the increased vulnerability of children to sleep disruption;

(c) the vulnerability of children to direct and indirect coercion or abuse from any person, particularly when working alone;

(d) the relative lack of experience and maturity of children in making safety judgments;

(e) the reduced ability of children to adapt to inflexible work routines;

(f) the reduced ability of children to perceive dangers correctly;

(g) the reduced capacity of children to understand safety messages;

(h) whether the design of any machinery, tools, equipment and protective equipment is appropriate for children's stature;

(i) the implications of children working at the period when their skeletal structures and bones are still developing;

(j) children's physical development in relation to ergonomics, in order to ensure a healthy and safe working environment;

(k) the physiological, hormonal and other vulnerabilities of children at puberty.

(3) In the risk assessment process referred to in sub-regulations (1) and (2), the employer take into account the guidelines provided in Schedule 1 to these regulations.

4. Respiratory hazards

No employer may require or permit any child worker to undertake any work in respect of which a person over the age of 18 performing the same work would be required in terms of the Act to wear respiratory protection equipment.

5. Work in elevated position[2]

(1) No person may require or permit a child worker –

(a) to work in an elevated position unless –

(i) the work is performed under the supervision of a competent adult employee or by the employer; and

(ii) those fall protection measures which are reasonably practicable, and which comply with or exceed the requirements of the Construction Regulations are provided;

(b) to work at a height of more than 5 metres above the floor or ground.

(2) For the purposes of this regulation, work in an elevated position, means work at a height of more than 2 metres from the floor or ground.

6. Lifting of heavy weights

(1) No person may require or permit a child worker to perform any work that involves lifting an object that weighs more than the lesser of

(a) 15 kgs; or

(b) 20 % of the child's body weight.

(2) Subject to sub-regulation (1), a child worker who lifts objects weighing more than 7,5 kgs as part of their work may not be required or permitted to lift such an object more than once per minute.

(3) Subject to sub-regulations (1) and (2), a child worker who lifts objects weighing more than 5.kgs may not be required or permitted to do so continuously for longer than 2 hours.

(4) For the purposes of sub-regulation (3), a child worker shall be regarded as lifting a weight continuously unless they do not lift such a weight for a period of at least 30 minutes.

7. Work in a cold environment[3]

(1) No person may require or permit a child worker to work in an environment below an actual dry-bulb temperature specified in this regulation, unless the child is supplied with suitable protective warm clothing –

(a) 0°C where the work involves repeated entry into, or presence for more than two minutes in such environment;

[2] Regulation 8 of the Construction Regulations (published in Government Gazette 25207, Government Notice R 1010 of 18 July 2003) requires any contractor undertaking construction work to prepare and implement a fall protection plan in respect of all employees, regarding all risks relating to working from an elevated position, which considers the nature of work undertaken, and sets out the procedures and methods to be applied in order to eliminate the risk. That regulation applies in addition to this regulation.

[3] Regulation 2(1) to (3) of the Environmental Regulations for Workplaces published in Government Gazette 10988, Government Notice R 2281 of 16 October 1987 further regulates work in a cold environment. That regulation applies in addition to this regulation.

(b) 6°C where the work involves repeated entry into, or presence for more than one hour in such environment.

(2) For the purposes of sub-regulation (1), suitable protective warm clothing means the items of protective clothing specified in Regulation 2(2)(b)(i) to (vi) of the Environmental Regulations for Workplaces published in Government Gazette 10988, Government Notice R 2281 of 16 October 1987.

8. Work in a hot environment[4]

No person may require or permit a child worker to work perform hard manual labour where the time-weighted average WBGT index as defined in the Environmental Regulations for Workplaces, made in terms of the Occupational Health and Safety Act, 1993, determined over a period of one hour, exceeds 30 unless the child –

(a) is acclimatised to such working environment before he is required or permitted to work in such environment;

(b) has water breaks every 15 minutes; and

(c) is cognisant of the need to drink at least 150ml of liquid every break and the employer provides the child with the necessary liquids.

9. Work in noisy environment[5]

No person may require or permit a child worker to perform any work involving an exposure to a noise level in excess of 80 dB(A) unless the child is supplied with hearing protective equipment that complies with regulation 12 of the Noise-Induced Hearing Loss Regulations, made in terms of the Occupational Health and Safety Act, 1993.

10. Power tools and cutting or grinding equipment

(1) No person may require or permit a child worker to use any power tool, or any cutting or grinding equipment unless-

(a) they have conducted a risk assessment in terms of regulation 3 and have determined that it is safe and without significant risks for the child to use;

(b) if the risk assessment indicated that it is safe and without significant risks for the child to use if used with safety equipment or facilities, they

(i) provide the child with the necessary safety equipment and facilities in term of regulation 2 of the General Safety Regulations, made in terms of the Occupational Health and Safety Act, 1993; and

(ii) instruct the child in the use, maintenance and limitations of such equipment;

[4] Regulation 2(4) of the Environmental Regulations for Workplaces published in Government Gazette 10988, Government Notice R 2281 of 16 October 1987, further regulates work in a hot environment and applies in addition to this regulation.

[5] The Noise Induced Hearing Loss Regulations apply to all employers or self-employed persons whose activities may expose persons to noise at or above the noise-rating limit set in the those regulations, and apply in addition to this regulation.

(c) the child has received adequate training from a competent person in the safe and appropriate use of the power tool or other such equipment before starting such work; and

(d) the child is supervised by a competent person when using power tool or other equipment.

(2) Despite sub-regulation (1), no person may require or permit a child worker to use any power tool or other machinery if an inspector has issued a notice in terms of section 30(1) of the Act prohibiting the use by child workers of such tool or other machinery.

11. Report to department of social development

A labour inspector who finds a child worker being employed or used in contravention of the Act or in contravention of these regulations shall refer the child for investigation to a child protection organisation designated in terms of the Children's Act No 38 of 2005 or to the provincial department of social development in the province where the child works or lives, unless the labour inspector is satisfied that the child will not suffer any detriment due to steps being taken by the inspector to ensure compliance with the law.

12. Offences and penalties

(1) Any person who contravenes or fails to comply with any provision of these regulations shall be guilty of an offence and on conviction shall be liable to a fine or to imprisonment for a period of 12 months and, in the case of an continuing offence, to an additional fine of R200 or to additional imprisonment for each day on which the offence continues: Provided that the period of such additional imprisonment shall not exceed 90 days.

(2) If a person is convicted of a offence under these regulations, and the action or omissions that constitutes the offence is also a worst form of child labour as defined in regulation 9 of the Regulations on Hazardous Work by Children, made in terms of the Basic Conditions of Employment Act, 1997, the court on convicting that person and determining a sentence must take into account that –

(a) that South Africa has ratified Worst Forms of Child Labour Convention, 1999;

(b) that the offence constitutes a worst form of child labour in terms of that Convention.

13. Summary

(1) Any person who employs a child worker must display the prescribed summary of these regulations in the work-place where it can be read by employees including child workers who are at the workplace, which may include a summary of other relevant regulations and laws, in their workplace. This summary is provided in Schedule 2 to these regulations.

(2) The existence of this displayed summary and its contents must be brought to the attention of all employees, including child workers.

14. Short title and commencement

These regulations shall be known as the Health and Safety of Children at Work Regulations and will come into effect 21 days after the date of publication in the *Government Gazette*

Schedule 1: Guidelines on risk assessments and plans of safe work procedures regarding permitted work by child workers

These are the guidelines issued in terms of regulation 3(3), which an employer of a child worker under the age of 18 years old must take into account when conducting a risk assessment in terms of regulation 3(1).

1. Definitions

In these Guidelines these terms means the following, unless the context indicates otherwise—

(1) **"child"** means a person under 18 years old;

(2) **"child worker"** means a child referred to in the definition of "employer" and who works in terms of paragraph 3 of these guidelines;

(3) **"employer"** means a person who employs, or provides work to a child or permits a child to work at any place under their control or with any machinery under their control, or allows a child to assist in any other manner in carrying on their business.

2. Risk assessment required

(1) Regulation 3 provides that every employer who employs, or provides work to, a child worker or permits any child worker to work at any place under their control or with any machinery under their control must in respect of such work undertake a risk assessment process which must include at least the following –

(a) identifying the risks and hazards to which any child worker may be exposed;

(b) analysing and evaluating the risks and hazards that are identified;

(c) preparing and implementing –

(i) a documented plan of safe work procedures to remove, mitigate, reduce or control the risks and hazards that have been identified; and

(ii) a monitoring plan; and

(iii) a review plan.

(2) A risk assessment is a way for an employer to

(a) evaluate the worksite in a systematic way to identify potential hazards and safety issues so the employer is able to take steps to prevent the hazard causing or contributing an exposure, injury, or illness;

(b) identify how many child workers might be affected by the hazard and under what circumstances this may occur; and

(c) assess the likelihood and severity of any health consequences that may arise from the exposure to the hazard.

(3) A risk assessment must be appropriate to the employer's workplace and the hazards and risks associated with the processes and activities that take place in the workplace. A risk assessment must cover the full range of work that child

workers may be engaged in at the workplace, and work where child workers may be present.

(4) A risk assessment enables the employer to plan and implement measures to control or remove the hazard and thereby reduce the risk.

3. Application regarding child workers

(1) The provisions on risk assessment apply to children who are allowed to work in terms of the law.

(2) A child who is under 15 years of age or is subject to compulsory schooling may not be employed as an employee and may not assist any person to carry on their business.

(3) In terms of the South African Schools Act a child is subject to compulsory schooling until the last school day of the calendar year in which such learner reaches the age of fifteen years or the ninth grade, whichever occurs first.

(4) An exception to the prohibition on work by younger child workers, referred to in sub-paragraph (2), is that younger children are permitted to work in the performance of advertising, artistic or cultural activities in terms of a permit granted in terms of *Sectoral Determination 10: Children in the Performance of Advertising, Artistic and Cultural Activities* issued by the Minister of Labour in terms of the BCEA. Employers in these sectors should study the sectoral determination, which can be accessed on www.labour.gov.za.

4. Children's characteristics and recommendations for safety

(1) Children are in a special time in their development and are not yet ready to take on the duties and responsibilities of adults. Below are characteristics to keep in mind when supervising them in any setting.

(a) physical, cognitive, and emotional development differ from adults:

(i) physical size, development, maturity, & judgment vary for any given age;

(ii) bone plates, ligaments and tendons are still growing;

(iii) chemicals metabolize faster and smaller doses may have bigger impacts;

(b) more sleep is needed by children than adults at a time when sleep habits and patterns may not be good;

(c) children typically explore, experiment, and take risks, but lack a sense of vulnerability; sometimes they try to do "a little more" to prove themselves;

(d) children desire acceptance from adults and peers, and are susceptible to peer pressure, yet want to assert their independence;

(e) children may be inexperienced in work practices or lack role models for responsibilities associated with the world of work;

(f) children often lack assertiveness and may be afraid to ask questions or speak up because they are concerned about looking stupid or losing their job;

(g) children may have limited skills in communicating with supervisors.

5. Increased risks of children at work

(1) Regulation 3(2) provides that the risk assessment should take into account, to the extent that they are relevant to any work by child workers, a range of factors.

(2) These factors, together with examples of how they could become relevant at work, are:

(a) the increased biological sensitivity of children to chemicals, biological agents, carcinogens and hormone disruptors For example chemicals may metabolize faster and have greater impact at smaller doses.

(b) the increased vulnerability of children to sleep disruption, for example children require more sleep than adults and children's body clock is more vulnerable under conditions of shift work;

(c) the vulnerability of children to direct and indirect coercion or abuse from any person, particularly when working alone, for example –

- children working alone in retail outlets are easier targets for criminals
- children in domestic service are isolated in private homes and may be subjected to sexual abuse by others in the homes;

(d) the relative lack of experience and maturity of children in making safety judgments, for example children may not have sufficient insight to know that a mechanical tool is faulty, or that a ladder is not sufficiently stable, so may continue using the device in a situation where an adult would know to stop;

(e) the reduced ability of children to adapt to inflexible work routines, for example children may not be able to maintain concentration when working for long periods without a break, increasing the likelihood of injury due to fatigue or stress related to prolonged work without rest;

(f) the reduced ability of children to perceive dangers correctly, for example –

- children, especially teenagers, typically explore, experiment, and take risks, but lack a sense of vulnerability;
- sometimes they try to do "a little more" to prove themselves;
- they desire acceptance from adults and peers, and are susceptible to peer pressure, yet want to assert their independence;
- children may be inexperienced in work practices or lack role models for responsibilities associated with the world of work;

(g) the reduced capacity of children to understand safety messages, for example some safety messages require cognitive processes that children may not have acquired;

(h) whether the design of any machinery, tools, equipment and protective equipment is appropriate for children's stature, for example whether the handle of a power tool is too big for the size of that child's hands, thereby reducing the child's ability to control the power tool;

(i) the implications of children working at the period when their skeletal structures and bones are still developing, for example children's growth and development may be adversely affected by having to carry heavy loads or do repetitive work;

(j) from an ergonomic perspective, children's physical development is not typically suited to the design of machinery, tools, equipment and protective equipment that is appropriate for children's stature; these must be assessed whether the mismatch jeopardizes a healthy and safe working environment. For example most equipment, including safety equipment, is designed for adults, so will not fit most children's body build; as a result, children may be forced into awkward postures to use a device, or may not be able to benefit from the use of gloves to protect themselves from hazards to the skin, because of poor fit of a glove;

(k) the physiological, hormonal and other vulnerabilities of children at puberty, for example –

- working children may be more susceptible to sexual exploitation by adults who take advantage of children;
- chemicals that cause endocrine disruption may have serious effects on children's hormonal function.

6. Preparation for employment of child workers, and for risk assessment

The employer should prepare carefully for the employment of child workers, and for the risk assessment, including the following steps:

(a) understand the relevant child labour and health and safety regulations;

(b) walk through the workplace to identify job activities that are prohibited;

(c) increase knowledge about special needs of child workers;

(d) train supervisors and co-workers about working with child workers;

(e) involve workplace health and safety personnel, if any;

(f) training of child workers on health and safety should be age-appropriate, ie it should be conducted in a manner that child workers of the employed age-group can understand;

(g) identify age-appropriate health and safety education materials;

(h) incorporate special considerations for child workers in the employers' *plan of safe work procedures*;

(i) discuss work issues with parents of child workers and/or school(s) attended by child workers, as needed;

(j) educate child workers about potential harassment and abuse by other employees or customers, or potential for threats of violence at the workplace.

7. Plan of safe work procedures

(1) Regulation 3(1)(c)) requires the preparation of a plan of safe work procedures.

(2) The employer should consider at least the following strategies when drawing up such a plan:

(a) follow all child labour and relevant other safety and health regulations;

(b) conduct thorough orientation when a new child workers starts working, or when work practices change, such as set out in the orientation checklist in paragraph 8;

(c) utilize safety training checklists, such as the checklist in paragraph 9, in order to ensure all topics are covered;

(d) in orientation and training, consider the list of health and safety topics in paragraph 10;

(e) provide for child-sensitive supervision to child workers taking into consideration the guidelines in paragraph 11;

(f) consider a child workers's physical capacity to perform the job safely, the child's maturity to exercise good judgment, and the child's ability to read and understand written instructions and safety signs;

(g) involve co-workers: create a mentoring program among experienced workers, including experienced child workers;

(h) encourage child workers to ask questions and ask for assistance regularly.

8. Checklist on safety orientation of child workers

The employer should keep a written record on whether each of the following safety orientation steps have been taken regarding each child worker: whether the child worker has been –

(a) informed about the elements of the written safety program that outlines the employer's safety efforts;

(b) informed about any staff health and safety meetings;

(c) told to report all injuries and shown how to do this;

(d) told to report all hazards to her/his supervisor and shown how to do this;

(e) informed about all machinery hazards;

(f) informed about what tasks child workers are prohibited from performing;

(g) informed about all other hazards and ways to protect themselves (i.e., chemicals, use of ladders, slippery floors, etc.);

(h) shown where the first aid supplies are located and who to call for first aid;

(i) told what to do during any emergencies that could occur;

(j) shown how to operate a fire extinguisher and other emergency equipment;

(k) informed of and trained on any chemical hazards according to the relevant hazardous chemical regulations, including how to read a label and precautions to take when using them;

(l) trained on the safe methods to perform the specific job the child workers was assigned including any hazards associated with that job;

(m) provided any formal training required to do his/her job, such as proper lifting, use of knives, grill and fryer operation, spill clean-up etc.

9. Checklist on basic training principles

(1) What to train child worker on:

(a) job safety requirements, including safety regarding the specific tasks the worker would perform, and health and safety requirements for such work under the law;

(b) how to recognize hazards;

(c) what precautions to take;

(d) what to do if a problem or emergency arises;

(e) how to report an injury;

(f) where they can go to for further advice.

(2) How to train:

(a) give clear instructions;

(b) ask worker to repeat instructions;

(c) show worker how to perform the task;

(d) watch worker perform the task, and correct errors;

(e) make the training age-appropriate and make it fun and easy to understand;

(f) encourage them to ask questions.

(3) When to train:

(a) when worker is first hired;

(b) when worker is given new task or tool;

(c) when a new hazard is introduced into workplace;

(d) after an incident (an injury or close call);

(e) when the child worker returns to the work environment after a significant period of absence;

(f) regularly, such as through on-site safety training.

(4) On-site safety training

(a) "On-site Safety Training" means a short, concise safety training session held out in a work area. It has been widely used in some industries and has proven effective in preventing injuries. Monthly or weekly on-site safety training is recommended to help keep safety on the minds of the workers, make it part of the normal routine, and demonstrate the importance you place on safety.

(b) The on-site training session should keep the following in mind:

(i) keep the training sessions short, for instance, 10-15 minutes maximum, to keep worker attention;

(ii) focus on a single topic and keep it simple;

(iii) hold on-site training regularly; a common practice is monthly or weekly on the same day;

(iv) select days and times when workers are fully attentive; first thing Monday morning or last thing Friday are not good times;

(v) pick a location that is relatively free from distractions, either out in the workplace or where employees normally are found - a quiet break room is acceptable. Sometimes the best place is near where the hazards are;

(vi) keep your presentation informal. Use language workers will understand. Be upbeat and enthusiastic.

(vii) choose topics that apply directly to your operation, and be specific in telling workers how it applies to them personally. Keep it relevant;

(viii) injury incidents or near misses are good subjects. Let the workers suggest topics and highlight issues;

(ix) use visual aids such as safety signs, flip charts, diagrams, illustrations, or actual objects. Demonstrate a procedure if appropriate. Use handouts if needed, but keep them simple;

(x) encourage questions and discussion. Be sure workers are paying attention and actively learning;

(xi) have workers sign a sheet documenting their presence at the training, and keep on file.

10. Health an safety topics to cover in orientation and training

When taking steps regarding orientation referred to in paragraph 8 or regarding training referred to in paragraph 9, the following topics should be considered relative to the possible risks which could arise in the working environment:

Basic safety and training principles
Tractor safety
Cold environment: working where it is below 6 degrees C
Crime and abusive customers
Electrical safety
Eye protection
Fire safety
Hearing protection
Height: working more than 2m above the floor or ground
Hot environment: Heat stress & sun exposure
Incident and injury reporting
Irrigation safety
Kitchen safety: avoiding burns, safe handling of knives, using electrical appliances
Lifting of heavy objects
Ladder safety
Lighting and safety
Machine safety
Noisy environment: ear protection
Personal protective equipment, use, maintenance, inspection and limitations
Safety signs and signage
Slips, trips, and falls

Shop safety
Tools: Hand tool safety
Tools: Outdoor power tool safety
Tools: Power tools, generally
Transportation and travelling safety
Tree fruit harvest safety
Water safety
Working at night
Working away from home
Working near embankments or excavations
Working with or near chemical substances

This list is not exclusive, so add other relevant work related topics as deemed necessary or appropriate

11. Supervision of child workers

The following factors should be taken into consideration in a plan on safe work procedures, regarding the supervision of child workers, to reduce risks regarding their work:

(a) keep adolescent characteristics in mind as described in paragraph 4 in mind and assign age-appropriate tasks;

(b) consider a young worker's physical capacity to perform the job safely; maturity to exercise good judgment; and ability to read and understand written instructions and safety signs;

(c) provide a clear assignment of duties with specific information about those tasks;

(d) provide appropriate safety training on assigned equipment and tasks, including the need to report all safety hazards and injuries;

(e) teach them how to recognize risks, and encourage them to make good decisions about taking appropriate precautions or action;

(f) provide information on how to cope with emergencies, who to contact, and how to reach them. Phone numbers, the address of the workplace, and directions to the workplace should be put on notice boards or walls where easy to find;

(g) provide increased supervision by co-workers or supervisors who work well with youth, are consistent, and who set a good example by following the safety rules, and designate appropriate adult employee(s) as *child worker safety officers, with the responsibility of specifically monitoring the safety of child workers in the workplace and to intervene if they feel the work is too risky;

(h) create an atmosphere where child workers feel free to ask questions or express concerns;

(i) be sure child workers have an understanding of their rights and responsibilities;

(j) provide positive feedback when child workers follow through with these responsibilities.

12. Examples of steps that may be included in a plan of safe work procedures
The following are examples of guidelines and tips to be taken into account when drafting a plan of safe work procedures, or when implementing a plan, in specific situations.

(1) **Guidelines on the risk of crime and abusive customers:**

(a) Handling cash:

(i) Leave a clear, unobstructed view of the cash register from the street;

(ii) Post signs saying cash register contains minimal cash;

(iii) Store cash in a drop safe, limited-access safe or comparable safe container;

(iv) Don't count cash or close the till in front of customers;

(v) Practice the "buddy system" during cash drops.

(b) Creating a safer retail environment:

(i) Develop a workplace violence prevention plan, and use it to train employees;

(ii) Train employees on what to do in case of a robbery;

(iii) Train employees on how to de-escalate a potentially violent situation. Establish a policy that employees not resist or pursue shoplifters;

(iv) Establish a reporting process for violent incidents and threats;

(v) Consider displaying a "no safe keys held on the premises" notice.

(c) Notices:

(i) Post emergency telephone numbers in an accessible place;

(ii) Places notices on laws against assault, stalking or violent acts.

(d) Staffing:

(i) Schedule at least two people per shift. child workers may not work without adult (age 18 or older) supervision after 8 pm;

(ii) Don't require child workers who serve customers to wear revealing uniforms or clothing;

(iii) Keep background noise to a minimum.

(e) Entering and leaving:

(i) Have more than one exit employees can reach in case of emergency;

(ii) Practice the "buddy system" to walk to public transportation and parking areas.

(iii) Although back doors should be locked at night, employees should still be able to exit easily, especially during an emergency situation.

(f) Security and lighting:

(i) Use alarms and locks. Make sure they work properly;

(ii) Use security surveillance cameras or mirrors, if possible;

(iii) Provide a "panic" button, silent alarm or other means for employees to communicate with police or security;

(iv) Provide adequate lighting and security in parking lots and other areas where employees go alone at night;

(v) Work with your local police and security to identify any special arrangements which might be useful in a particular location.

(2) **Proper lifting of weights / loads**

(a) Assess the load:

(i) Check if the shape or mass of the load presents a risk to safe manual lifting;

(ii) Use a lifting aid or hand truck/ trolley if possible. Get help if you need it;

(iii) Check for slivers, nails, exposed staples;

(iv) Use gloves if necessary;

(v) Make sure you have a clear path to where you are moving it to.

(b) Lifting the load:

(i) Place you feet to ensure a stable base to do the lift;

(ii) Bring the load as close to you as possible before lifting;

(iii) Establish a good hand grip to lift the load

(iv) Lift with your legs, not your back;

(v) Keep your head up, your back straight and don't bend at your hips.

(c) Moving the load:

(i) Keep the load close to your body;

(ii) Look where you are going;

(iii) Shift your feet to turn, don't twist your body.

(d) Putting it down:

(i) When putting a load down, let your leg muscles carry it down;

(ii) Make certain your fingers and toes are clear before putting the load down;

(iii) Place the load first then, move it into the required position. Do not twist your body while placing a load as it can cause back strain.

Schedule 2: Summary of regulations on the health and safety of children at work and on hazardous work by children

The Minister of Labour has made regulations to protect the health and safety of child workers at work under –

(a) section 44 and 45 of the Basic Conditions of Employment Act, 1997 (called the BCEA regulations);

(b) section 43 of the Occupational Health and Safety Act, 1993 (called the OHSA regulations).

This is a summary of the most important provisions of these two sets of regulations.

Any person who employs or uses the services of a child worker must display this summary in the workplace where it can be read by employees including child workers who are at the workplace.

1. Definitions

In this summary these terms means the following, unless the context indicates otherwise—

(1) **"child"** means a person under 18 years old;

(2) **"child worker"** means a child referred to in the definition of "employer";

(3) **"employer"** means a person who employs, or provides work to a child, subject to paragraph 3 below.

2. Purpose of regulations and notice

(1) The purpose of the regulations is to –

(a) protect the health and safety at work of child workers who are lawfully entitled to work;

(b) prohibit categories of work which child workers may not perform;

(c) place conditions on the work that may be performed by child workers

(d) identify which categories of work constitute worst forms of child labour, and to make appropriate enforcement provisions in this regard;

3. Coverage and interpretation of regulations

(1) The BCEA regulations cover child workers as defined in those regulations, namely children who are employed, including children who assist any person to carry on their business.

(2) The OHSA regulations cover all work performed by child workers as defined in those regulations.

(3) For the purposes of the BCEA regulations, any person who allows a child worker to assist them in carrying on their business is the employer of that child.

(4) The regulations do not -

(a) permit the employment of any child worker who is under 15 years of age or is subject to compulsory schooling in terms of any law;

(b) reduce any other condition of employment or prohibition applicable to the employment of any person in the Act or any other law, insofar as it applies to the employment of a child.

(5) These regulations must be interpreted in accordance with the International Labour Organisation's Minimum Age Convention, 1973 and it's Worst Forms of Child Labour Convention, 1999. The text of the Convention is available at www.ilo.org.

4. Minimum age of work

(1) A child worker who is under 15 years of age or is subject to compulsory schooling may not be employed as an employee and may not assist any person to carry on their business.

(2) However, a child worker who is under 15 or subject to compulsory schooling may -

(a) work in the performance of advertising, artistic or cultural activities in terms of a permit granted in terms of *Sectoral Determination 10: Children in the Performance of Advertising, Artistic and Cultural Activities* issued by the Minister of Labour in terms of the BCEA (employers in these sectors should study the sectoral determination which can be accessed on www.labour.gov.za);

(b) do the following work, other than as an employee as defined in the BCEA –

(i) collect contributions on behalf of a fund-raising organisation registered in terms of the Fund Raising Act (Act No. 107 of 1978);

(ii) do voluntary work for a church, charitable organisation or amateur sports club; and

(iii) as part of his/her schooling, do work that is appropriate for a person of that age or which does not place at risk the child's well-being, education, physical or mental health, or spiritual, moral or social development.

(3) Even though the child worker may perform types of work referred to in sub-paragraph (2)(a) to (b) above, such work is still subject to the provisions of the regulations summarised here.

(4) In terms of the South African Schools Act a child worker is subject to compulsory schooling until the last school day of the calendar year in which such learner reaches the age of fifteen years or the ninth grade, whichever occurs first.

5. Access to nutrition, health care and educational services

An employer who employs a child worker must ensure that their employment does not interfere with -

(a) their access to adequate nutrition;

(b) their access to adequate primary health care services; and

(c) the education of a child worker who is enrolled at a school or at any other educational institution.

6. Work away from parents or legal guardian

(1) A child worker may only perform work which will result in its being away overnight from its parents or legal guardian –

(a) if the child's parent or legal guardian consents in writing;

(b) if the child is enrolled in school, the schooling of a school going child is not adversely affected.

(2) In addition, the employer must provide —

(a) full details of the accommodation arrangements to the parent or legal guardian of the child worker for their approval;

(b) free of charge to the child, accommodation that –

(i) is clean, comfortable, suitable and safe for the child;

(ii) is not occupied by any adult other than the parent, legal guardian or a child worker minder appointed or designated by the parent of the child, if they accompany the child; and

(iii) sufficient bedding, lavatory and washing facilities for the child worker;

(c) the child worker with nutritious food or, if the child is able to purchase such food within a reasonable distance from the place of work or accommodation, provide the child with an allowance sufficient to purchase food and enable the child to purchase it at appropriate intervals.

(3) It is an offence for any person to recruit a child worker to perform work in violation of sub-paragraph (1) and (2)..

7. Prohibition of piecework and task work

(1) No person may require or permit a child worker to perform piecework or task work. Piecework is work in terms of which remuneration is based mainly on the quantity of work done. Task work is work in terms of which the remuneration of an employee is based mainly on the completion of set tasks.

(2) This does not prevent a child worker being paid a commission or receiving an incentive payment on the completion of a task if —

(a) the child is paid at least the minimum wage prescribed for that work in terms of any sectoral determination or bargaining council agreement;

(b) in the absence of any such minimum wage, the child, in addition to any commission or incentive payment received, is paid a basic wage, calculated on the basis of time worked, and this wage is more than the commission or incentive payment received, and is calculated on a consistent basis.

8. Maximum daily and weekly working time

(1) A child worker may not work more than 8 hours on any day.

(2) A child worker who is not enrolled at school may not work for more than 40 hours in any week.

(3) A child worker who is enrolled in school may not work for more than –

(a) 20 hours in any week during school term, and

(b) 40 hours in any week that falls entirely within school holidays

(c) two hours on any school day; or four hours on any school day followed by a non-school day (e.g. a Friday, or the last day of a school term.)

9. Night work

(1) A child worker may not work before 6 am or after 6 pm on any day, except where allowed in sub-paragraph (2).

(2) A child worker, other than one who is expected to be at school the following day, may work between 6 pm and 11 pm if –

(a) the work is in a restaurant, cinema, theatre or shop where there is adequate adult supervision; or

(b) the work is baby-sitting or child minding;

(3) Unless the parent or legal guardian agrees otherwise in writing, any person who requires or permits a child worker to work after 6pm must, at the end of the shift, provide him/her with safe transport home, at no cost to the child, parent or care-giver.

10. Prohibited work

An employer may not require or permit a child to work in any of the work:

(a) deep sea fishing;

(b) commercial diving or other hazardous work under water;

(c) slaughtering of animals;

(d) meat, poultry, or seafood processing;

(e) the manufacture or packing of tobacco products or any other work in which there is exposure to tobacco dust;

(f) logging;

(g) protecting or safeguarding any person or property or work involving the handling of firearms;

(h) refining petroleum products;

(i) filling cars with petroleum or other chemical fuels at a filling station, or doing work close to such activity;

(j) brewing, manufacturing or selling any liquid which in its final form would contain more than one per cent of alcohol;

(k) work in a bar, shebeen, tavern or pub or other establishment whose primary business is to sell alcoholic beverages to the general public, for consumption on the premises;

(l) the manufacture or application of tar or asphalt;

(m) work involving an exposure, or potential exposure, to blood-borne or air-borne pathogens;

(n) work in a health care or related facility, in circumstances where there is likely exposure to biological agents, including but not limited to Hepatitis, HIV, and tuberculosis, anaesthetics, anti-neoplastic medications or addictive drugs;

(o) work involving exposure to a hazardous substance, to lead, asbestos, silica, coal or other hazardous dusts or to pressurised gases;

(p) the production, transport, handling, storage, use of, or other work involving exposure to explosives or flammable substances;

(q) work in a casino or other gambling establishment;

(r) electrical work involving high voltage cables or other power sources in excess of 250 volts;

(s) welding. brazing or soldering;

(t) rock and stone crushing;

(u) operating vibrating equipment such as rock drills and riveters;

(v) operating tractors, winches, forklift vehicles, front-end loaders, earth moving equipment or similar heavy equipment;

(w) driving any motor vehicle or mobile plant;

(x) work in vehicles transporting passengers or heavy goods;

(y) work in a confined space.

11. Worst forms of child labour

(1) In addition, no person may require or permit a child to work in any of the following -

(i) underground mining;

(ii) work in connection with the operation of a smelter or furnace, or rolling mills that form and cut metals;

(iii) the production of aluminium, brass, bronze or similar alloys, charcoal or the fuel, coke;

(iv) the manufacture of auramine, isopropanol or magenta;

(v) the gasification of coal;

(vi) diving operations using aqualungs;

(vii) free diving below depths of 10 metres;

(viii) work in which there is a reasonably foreseeable risk of exposure to blood-borne and airborne pathogens;

(ix) work involving exposure to ionising radiation;

(x) work in chemically-based mineral extraction or similar operations;

(xi) any work in an environment in which the actual dry-bulb temperature is below minus 18 °C;

(xii) hard manual labour for a period of longer than 15 minutes in any hour in an environment in which the time-weighted average WBGT index, (as defined in the Environmental Regulations for Workplaces, made in terms of the Occupational Health and Safety Act, 1993) determined over a period of one hour, is greater than 36;

(xiii) work in circumstances in which it is reasonably foreseeable that the child will be exposed to physical, psychological or sexual abuse.

(2) Any form of work listed in sub-paragraph (1) above constitutes a worst form of child labour as contemplated in the Worst Forms of Child Labour Convention, 1999, adopted by the International Labour Organisation. These prohibitions may overlap to some extent with the prohibitions listed in paragraph 10, but the activities referred to in this paragraph are considered as exposing children to very serious harm. Penalties for breach should therefore be higher.

(3) No person may –

(a) employ a child in circumstances in which the child is unreasonably confined to the employer's premises;

(b) require or permit a child to engage for that person's benefit in one of following activities when this work is performed by a child as part of an organised business activity conducted by that person –

(i) begging;

(ii) scavenging or collecting waste from garbage or waste dumps; or

(iii) use, recruit, procure or offer a child for the commission of any serious offence (they are listed in schedules 1 and 2 of the Criminal Procedure Act, 1977).

(4) The BCEA regulations define which specific substances agents are considered very harmful to children.

12. Risk assessment

(1) Every employer who employs or provides work to a child worker, or permits any child worker to work at any place under their control, or with any machinery under their control, must in respect of such work undertake a risk assessment process which must at least the following:

(a) identifying the risks and hazards to which any child worker may be exposed;

(b) analysing and evaluating the risks and hazards that are identified;

(c) preparing and implementing –

(i) a documented plan of safe work procedures to remove, mitigate, reduce or control the risks and hazards that have been identified;

(ii) a monitoring plan; and

(iii) a review plan.

(2) The following factors must be taken in to account when making the risk assessment:

(a) the increased biological sensitivity of children to chemicals, biological agents, carcinogens and hormone disruptors;

(b) the increased vulnerability of children to sleep disruption;

(c) the vulnerability of children to direct and indirect coercion or abuse from any person, particularly when working alone;

(d) the relative lack of experience and maturity of children in making safety judgments;

(e) the reduced ability of children to adapt to inflexible work routines;

(f) the reduced ability of children to perceive dangers correctly;

(g) the reduced capacity of children to understand safety messages;

(h) whether the design of any machinery, tools, equipment and protective equipment is appropriate for children's stature;

(i) the implications of children working at the period when their skeletal structures and bones are still developing;

(j) children's physical development in relation to ergonomics, in order to ensure a healthy and safe working environment;

(k) the physiological, hormonal and other vulnerabilities of children at puberty.

(3) In the risk assessment process, the employer must have regard to the guidelines contained in Schedule 1 to the Health and Safety of Children at Work Regulations issued in terms of the OHSA.

13. Respiratory hazards

A child worker may not undertake any work where a person over the age of 17 performing the same work would be required in terms of the OHSA to wear respiratory protection equipment, i.e. equipment such as masks that protects workers from inhaling hazardous dusts or fumes.

14. Work in elevated position

(1) A child worker may not work at a height of more than 5 metres above the floor/ground.

(2) A child worker working at a height of more than 2 metres from the floor/ground must work under the supervision of the employer or a competent adult employee, and reasonable fall protection must be provided, such as a safety harness or railings.

15. Lifting of heavy weights

(1) A child worker performing any work may not, as part of their work, lift an object weighing more than –

(a) the lesser of 15 kg or 20 % of the child's body weight;

(b) more than 7,5 kg more than once per minute.

(2) A child worker may not lift objects weighing more than 5 kg at work for more than 2 hours without being granted a 30-minute period in which he or she is not required to lift such a weight.

16. Work in a cold environment

(1) The employer of a child worker working in an environment below the following actual dry-bulb temperature must be supplied with suitable protective warm clothing –

(a) 0°C where the work involves repeated entry into, or presence for more than two minutes in such environment;

(b) 6°C where the work involves repeated entry into, or presence for more than one hour in such environment.

(2) The protective warm clothing supplied to child worker must comply with Regulation 2(2)(b)(i) to (vi) of the Environmental Regulations for Workplaces

17. Work in a hot environment

(1) No person may require or permit a child worker to work or perform hard manual labour where the average temperature over one hour exceeds 30°C unless the child –

(a) is acclimatised to such working environment before he/she is required or permitted to work in such environment;

(b) has drink breaks every 15 minutes; and

(c) is cognisant of the need to drink at least 150ml of liquid every break and the employer provides the child with the necessary liquids.

(2) The term 'average temperature' referred to here is technically the time-weighted average WBGT index as defined in the Environmental Regulations for Workplaces, made in terms of the Occupational Health and Safety Act, 1993, and determined over a period of one hour.

18. Work in noisy environment

No person may require or permit a child worker to perform any work involving an exposure to a noise level in excess of 80 dB(A) unless the child is supplied with hearing protective equipment that complies with regulation 12 of the Noise-Induced Hearing Loss Regulations, made in terms of the Occupational Health and Safety Act, 1993. DB(A) is a unit used in measuring noise, and takes into account how often loud noises are heard, even if an environment is not noisy all the time.

19. Power tools and cutting or grinding equipment

(1) A child worker may not use any power-driven machinery or power tool, or any cutting or grinding equipment unless a risk assessment conducted in terms of the regulations has determined that its use is safe and without significant risks for the child.

(2) If the risk assessment indicates that the power tool or other equipment is safe and without significant risks for the child worker to use, if used with safety equipment or facilities, the child –

(a) must be provided with the necessary safety equipment and facilities that are usually required in terms of occupational health and safety regulations; and

(b) must be instructed in the use, maintenance and limitations of such equipment.

(3) Before starting such work the child worker must receive adequate training in the safe and appropriate use of the power tools or machinery from a person competent in their use.

(4) The child worker must be supervised by a competent person when using power tools or other equipment.

(5) An inspector may issue a notice prohibiting the use by child workers of any power tool or other machinery.

20. Report to Department of Social Development

(1) A labour inspector who finds a child worker being employed or used in contravention of the Act or of the BCEA or OHSA regulations shall refer the matter for investigation to a child protection organisation designated in terms of the Children's Act No 38 of 2005 or to the provincial department of social development in the province where the child works or lives, unless the labour inspector is satisfied that the child will not suffer any detriment due to steps being taken by the inspector to ensure compliance with the law.

(2) The relevant social worker must then investigate the circumstances of the child worker to determine whether he/she is in need of care and protection and, if so, take appropriate action to protect the child.

BCEA Regulations on Hazardous Work by Children

BASIC CONDITIONS OF EMPLOYMENT ACT, 1997

The Minister of Labour has, on the advice of the Employment Conditions Commission, made the following regulations in terms of section 44 and 45 of the Basic Conditions of Employment Act, 1997.

1. Definitions

In these Regulations any word or expression to which a meaning has been assigned in the Act shall have the meaning so assigned but, unless the context otherwise indicates—

(a) **"the Act"** means the Basic Conditions of Employment Act, 1997;

(b) **"child"** means a person under eighteen years of age;

(c) **"child worker"** means a child who is an employee as defined in the Act, which includes a child who assists any person to carry on or conduct their business; and

(d) **"employer"** means a person who –

(i) employs a child; or

(ii) allows a child worker to assist in carrying on or conducting their business;

(e) **"worst form of child labour"** means any work by a child in an activity listed in regulation 9.

2. Purpose and interpretation

(1) The purpose of these regulations is to –

(a) place conditions on the work that may be performed by child workers who are at least 15 years of age and no longer subject to compulsory schooling in terms of any law;

(b) prohibit any person from permitting or requiring such child workers to perform particular types of work specified in the regulations.

(2) No provision in these regulations may be interpreted as –

(a) permitting the employment of any child who is under 15 years of age or is subject to compulsory schooling in terms of any law;

(b) reducing any other condition of employment or prohibition applicable to the employment of any person in the Act or any other law insofar as it applies to the employment of a child who is at least 15 years of age and no longer subject to compulsory schooling.

(3) These regulations must be interpreted in accordance with International Labour Organisation's Minimum Age Convention, 1973 and the Worst Forms of Child Labour Convention, 1999.[6]

(4) To the extent that any sectoral determination establishes a basic condition of employment that applies specifically to child workers employed in that sector, the provisions of that determination shall have precedence over these regulations; provided that the provisions in these regulations on the worst forms of child labour shall always apply unless specifically excluded by the sectoral determination.

3. Access to nutrition, health care and educational services

Every employer who employs a child worker must ensure that their employment does not interfere with their access to -

(a) adequate nutrition;

(b) adequate primary health care services; and

(c) education if the child is enrolled at a school or other educational institution.

4. Work away from parents or legal guardian

(1) It is an offence for any person to require or permit a child worker to perform work which will result in the child being away overnight from their parents or legal guardian unless that person has the written consent of the child's parent or legal guardian and provided that –

(a) the child is not enrolled in school or, if the child is enrolled in school, the child's schooling is not adversely affected;

(b) full details of the accommodation arrangements are supplied to, and approved by, the parent or legal guardian of the child;

(c) the employer provides accommodation to the child that –

(i) is free of charge to the child;

(ii) is clean, comfortable, suitable and safe for the child;

(iii) is not occupied by any adult other than the parent, legal guardian or a child minder appointed by parent of the child, if they accompany the child; and

(iv) has sufficient bedding, lavatories and washing facilities for the child;

(d) the employer supplies the child with nutritious food or, if the child is able to purchase such food within a reasonable distance from his or her place of work or accommodation, the employer provides the child with an allowance sufficient to purchase such food at intervals that enable such purchase.

(2) It is an offence for any person to recruit a child worker to perform work in violation of sub-regulation (1).

[6] The text of the Conventions is available at www.ilo.org

5. Prohibition of piece-work and task work

(1) It is an offence for any person to require or permit a child worker to perform piece work or task work.

(2) For the purposes of this regulation,

(a) "piece work" means work in terms of which the remuneration of the child worker is based mainly on the quantity of work done;

(b) "task work" means work in terms of which the remuneration of the child worker is based mainly on the completion of set tasks.

(3) This regulation does not prevent the payment of a commission or an incentive payment on the completion of a task to a child worker provided that —

(a) the child is paid the minimum wage prescribed for that work in terms of any sectoral determination or bargaining council agreement;

(b) if no such minimum wage is prescribed, the child, in addition to any commission or incentive payment received, is paid a basic wage, calculated on the basis of time worked, and this wage is more than the commission or incentive payment received and is calculated on a consistent basis.

6. Maximum daily and weekly working time

(1) It is an offence for any person to require or permit a child worker who is not enrolled in school to work for more than 40 hours of work in any week.

(2) It is an offence for any person to require or permit a child worker who is enrolled in school to work

(a) for more than 20 hours in any week falling in the school term;

(b) for more than 40 hours of work in any week that falls entirely within school holidays.

(3) It is an offence for any person to require or permit child worker to work -

(a) on more than 8 hours on any day; or,

(b) if the child is enrolled in school, for more than –

(i) two hours on any day on which a child is expected to be at school; or

(ii) four hours on any day on which a child is expected to be at school but is not expected to be at school the following day.

7. Night work

(1) It is an offence for any person to require or permit a child worker to work –

(a) before 6 am on any day;

(b) after 6 pm on any day; or

(c) in breach of sub-regulations (2) and (3).

(2) A child worker, other than a one who is expected to be at school the following day, may work between 6 pm and 11 pm –

(a) in a restaurant, cinema, theatre or shop provided that there is adequate adult supervision; or

(b) for the purposes of baby-sitting or child minding.

(3) Unless the parent or legal guardian agrees otherwise in writing, any person who requires or permits a child worker to work after 6pm on any day in terms of sub-regulation (2) must at the end of the child's shift provide that child with safe transport to the child's home at no cost to the child, or the child's parent or care-giver.

8. Prohibited work

(1) It is an offence for any person to require or permit a child worker to work in any of the following –

(a) deep sea fishing;

(b) commercial diving or other hazardous work underwater;

(c) slaughtering of animals;

(d) meat, poultry, or seafood processing;

(e) the manufacture or packing of tobacco products or any other work in which there is exposure to tobacco dust;

(f) logging;

(g) the protecting or safeguarding of any person or property, or work involving the handling of firearms;

(h) the refining of petroleum products;

(i) filling cars with petroleum or other chemical fuels at a filling station, or doing work close to such activity;

(j) the brewing manufacturing or selling of any liquid which in its final form would contain more than one per cent of alcohol;

(k) work in a bar, shebeen, tavern or pub, or another establishment whose primary business is to sell alcoholic beverages to the general public, for consumption on the premises;

(l) the manufacture or application of tar or asphalt;

(m) work involving an exposure, or potential exposure, to blood-borne or air-borne pathogens;

(n) work in health care or veterinary or related facility, in circumstances where there is likely exposure to biological agents, including but not limited to Hepatitis, HIV, and tuberculosis, anaesthetics, anti-neoplastic medications or addictive drugs;

(o) work involving exposure to any of the following –

(i) hazardous substance or agent;

(ii) lead, asbestos, silica, coal or other hazardous dusts ;

(iii) pressurised gases;

(p) the production, transport, handling, storage, use of or other work involving exposure to explosives or flammable substances;

(q) work in a casino or other gambling establishment;

(r) electrical work involving high voltage cables or other power sources in excess of 250 volts;

(s) welding, brazing or soldering;

(t) rock or stone crushing;

(u) the operation of vibrating equipment such as rock drills and riveters;

(v) operating tractors, winches, forklift vehicles, front end loaders, earth moving equipment or similar heavy equipment;

(w) driving of any motor vehicles or mobile plant;

(x) work in vehicles transporting passengers or heavy goods;

(y) work in a confined space.

9. Worst forms of child labour

(1) In addition to any prohibition contained in regulation 8 it is an offence for any person to –

(a) require or permit a child to work in any of the following -

(i) underground mining;

(ii) work in connection with the operation of a smelter or furnace, or rolling mills that form and cut metals;

(iii) in the production of aluminium, brass, bronze or similar alloys, charcoal or the fuel, coke;

(iv) in the manufacture of auramine, isopropanol or magenta;

(v) in the gasification of coal;

(vi) diving operations covered by the Diving Regulations, made in terms of the Occupational Health and Safety Act, 1993, irrespective of whether or not the child is an employee as defined in the Diving Regulations;

(vii) free diving below depths of 10 metres;

(viii) work in which there is a reasonably foreseeable risk of exposure to blood-borne and airborne pathogens;

(ix) work involving an exposure to ionising radiation or a hazardous substance or agent;

(x) work in chemically-based mineral extraction or similar operations;

(xi) doing any work in an environment in which the actual dry-bulb temperature is below -18 °C;

(xii) doing hard manual labour for a period of longer than 15 minutes in any hour in an environment in which the time-weighted average WBGT index, as defined in the Environmental Regulations for Workplaces,

made in terms of the Occupational Health and Safety Act, 1993, determined over a period of one hour, is greater than 36;

(xiii) work in circumstances in which it is reasonably foreseeable that the child will be exposed to physical, psychological or sexual abuse;

(b) employ a child in circumstances in which the child is unreasonably confined to the employer premises;

(c) require or permit a child to engage for that person's benefit in one of following activities when this work is performed by a child as part of an organised business activity conducted by that person –

(i) begging;

(ii) scavenging or collecting waste from garbage or waste dumps; or

(d) use, recruit, procure or offer a child for the commission of any offence listed in Schedule 1 or Schedule 2 of the Criminal Procedure Act, 1977.

(2) For the purposes of regulation (1) a hazardous substance or agent is any one –

(a) listed in Schedule One of the Regulations for Hazardous Chemical Substances, made in terms of the Occupational Health and Safety Act, 1993;

(b) listed in Annexure B of the Regulations for Hazardous Biological Agents, made in terms of the Occupational Health and Safety Act, 1993;

(c) registered with the Department of Agriculture as a Hazard Group I or II pesticide; or

(d) listed in Schedule 1 to these regulations.

(3) Any form of work listed in this regulation shall constitute a worst form of child labour as contemplated in the Worst Forms of Child Labour Convention, 1999, adopted by the International Labour Organisation.

10. Investigation and prosecution of alleged offences concerning worst forms of child labour

(1) A labour inspector, who receives a complaint that any person has required or permitted a child to perform a worst form of child labour, or who in the performance of their duties observes any circumstances that may constitute work by a child in a worst form of labour must –

(a) investigate the alleged offence forthwith; or

(b) if the labour inspector is not authorised to investigate the contravention, refer it to a labour inspector who is so authorised.

(2) A labour inspector who investigates an allegation that a person has required or permitted a child to perform a worst form of child labour must -

(a) conduct the investigation thoroughly and expeditiously;

(b) prepare a written report that must be filed with the Director-General.

(3) The report prepared in terms of sub-regulation (2) must contain a recommendation as to whether or not –

(a) the alleged offence constitutes a worst form of child labour;

(b) a prosecution should be initiated in terms of this regulation or any other regulation or law.

(4) The Director-General must forward a copy of the report to the relevant prosecuting authority unless the investigation establishes no evidence of any offence.

(5) For the purposes of these regulations, a labour inspector includes any public servant or any designated agent of a bargaining council who has been designated by the Minister in terms of section 63(1)(b) of the Basic Conditions of Employment Act for the purpose of enforcing this regulation.

11. Medical examinations

(1) A labour inspector who has reason to believe that a child worker is employed in any work that may endanger his or her health may issue a written instruction to the employer requiring that the child be examined by a medical practitioner chosen by the child or a parent of the child or by the inspector.

(2) The costs of an examination in terms of this regulation shall be borne by the employer.

12. Report to department of social development

A labour inspector who finds a child worker being employed or used in contravention of Chapter 6 of the Act or in contravention of these regulations shall refer the child for investigation to a child protection organisation designated in terms of the Children's Act No 38 of 2005 or to the provincial department of social development in the province where the child works or lives, unless the labour inspector is satisfied that the child will not suffer any detriment due to steps being taken by the inspector to ensure compliance with the law.

13. Offences and Penalties

(1) Any person who requires or permits a child worker to work for them in contravention of these regulations commits an offence.

(2) Any person who is convicted of an offence in terms of these regulations may be sentenced to a fine or to imprisonment for a period of up to three years.

(3) If any person is charged with an offence in terms of which it is alleged that that person permitted a child worker to work in breach of any provision of these regulations it is an defence if that person can establish that the child –

(a) was not an employee of that person; and

(b) did not in any manner assist in carrying on or conducting the business of that person.

(4) Where any person is prosecuted for any offence involving the causing of injury to, or the death of, a child worker or any offence for a breach of any law

regulating health and safety at work and a labour inspector is of the view that the person being prosecuted may have required or permitted a child to perform any work that constituted a worst form of child labour as contemplated in these regulations, the labour inspector must bring such information to the attention of the relevant prosecuting authority.

(5) If a person is convicted of a offence, including an offence in terms of sub-regulation (4) in terms of which that person required or permitted a child worker to perform a worst form of child labour, the court on convicting that person and determining a sentence must take into account that –

(a) that South Africa has ratified the Worst Forms of Child Labour Convention, 1999;

(b) that the offence constitutes a worst form of child labour in terms of that Convention.

14. Exemptions

(1) The Minister may exempt work performed by a child worker who is 15 years or older from the application of these regulations on application by an employer or, in the case of work performed in terms of a learnership or approved vocational training programme, a sector education and training authority.

(2) The Minister may not grant an exemption in terms of this regulation, unless the Minister is satisfied the child worker will not be exposed to a significant risk of hazards that may affect the child's health or development.

15. Summary

Any person who employs a child worker must display the prescribed summary of these regulations in the workplace where it can be read by employees including child workers who are at the workplace, which may include a summary of other relevant regulations and laws, in their workplace. This summary is provided in Schedule 2 to these regulations.

16. Short title and commencement

These regulations shall be known as the BCEA Regulations on Hazardous Work by Children and will come into effect 21 days after the date of publication in the *Government Gazette*.

Schedule 1: Hazardous substances and agents

Hazardous substances and agents referred to in regulation 9(2)(d):

4-Aminobiphenyl
Arsenic and arsenic compounds
Asbestos
Benzene
Benzidine
Beryllium and beryllium compounds
N,N-Bis(2-chloroethyl)-2-naphthylamine (Chlornaphazine)
Bis(chloromethyl)ether and chloromethyl methyl ether

1,4-Butanediol dimethanesulfonate (Busulphan; Myleran)
Cadmium and cadmium compounds
1-(2-Chloroethyl)-3-(4-methylcyclohexyl)-1-nitrosourea (Methyl-CCNU; Semustine)
Chromium [VI] compounds
Coal-tars
Cyanide
Erionite
Ethylene oxide
Formaldehyde
Gallium arsenide
Lead
Mercury
Mineral oils, untreated and mildly treated
Mustard gas (Sulfur mustard)
2-Naphthylamine
Nickel compounds
Phosphorus-32, as phosphate
Plutonium-239 and its decay products, as aerosols
Radioiodines, short-lived isotopes, including iodine-131
Radionuclides, a-particle-emitting, internally deposited
Radionuclides, b-particle-emitting, internally deposited
Radium-224, -226, -228, and their decay products
Radon-222 and its decay products
Shale-oils
Silica, crystalline
Soots
Sulfuric acid, strong-inorganic-acid mists containing
Talc containing asbestiform fibres
2,3,7,8-Tetrachlorodibenzo-para-dioxin
Thiotepa
Treosulfan
Vinyl chloride

Schedule 2: Summary of regulations on the health and safety of children at work and on hazardous work by children

The Minister of Labour has made regulations to protect the health and safety of child workers at work under –

(a) section 44 and 45 of the Basic Conditions of Employment Act, 1997 (called the BCEA regulations);

(b) section 43 of the Occupational Health and Safety Act, 1993 (called the OHSA regulations).

This is a summary of the most important provisions of these two sets of regulations.

Any person who employs or uses the services of a child worker must display this summary in the workplace where it can be read by employees including child workers who are at the workplace.

1. Definitions

In this summary these terms means the following, unless the context indicates otherwise—

(1) **"child"** means a person under 18 years old;

(2) **"child worker"** means a child referred to in the definition of "employer";

(3) **"employer"** means a person who employs, or provides work to a child, subject to paragraph 3 below.

2. Purpose of regulations and notice

(1) The purpose of the regulations is to –

(a) protect the health and safety at work of child workers who are lawfully entitled to work;

(b) prohibit categories of work which child workers may not perform;

(c) place conditions on the work that may be performed by child workers

(d) identify which categories of work constitute worst forms of child labour, and to make appropriate enforcement provisions in this regard;

3. Coverage and interpretation of regulations

(1) The BCEA regulations cover child workers as defined in those regulations, namely children who are employed, including children who assist any person to carry on their business.

(2) The OHSA regulations cover all work performed by child workers as defined in those regulations.

(3) For the purposes of the BCEA regulations, any person who allows a child worker to assist them in carrying on their business is the employer of that child.

(4) The regulations do not -

(a) permit the employment of any child worker who is under 15 years of age or is subject to compulsory schooling in terms of any law;

(b) reduce any other condition of employment or prohibition applicable to the employment of any person in the Act or any other law, insofar as it applies to the employment of a child.

(5) These regulations must be interpreted in accordance with the International Labour Organisation's Minimum Age Convention, 1973 and it's Worst Forms of Child Labour Convention, 1999. The text of the Convention is available at www.ilo.org.

4. Minimum age of work

(1) A child worker who is under 15 years of age or is subject to compulsory schooling may not be employed as an employee and may not assist any person to carry on their business.

(2) However, a child worker who is under 15 or subject to compulsory schooling may -

(a) work in the performance of advertising, artistic or cultural activities in terms of a permit granted in terms of *Sectoral Determination 10: Children in the Performance of Advertising, Artistic and Cultural Activities* issued by the Minister of Labour in terms of the BCEA (employers in these sectors should study the sectoral determination which can be accessed on www.labour.gov.za);

(b) do the following work, other than as an employee as defined in the BCEA –

(i) collect contributions on behalf of a fund-raising organisation registered in terms of the Fund Raising Act (Act No. 107 of 1978);

(ii) do voluntary work for a church, charitable organisation or amateur sports club; and

(iii) as part of his/her schooling, do work that is appropriate for a person of that age or which does not place at risk the child's well-being, education, physical or mental health, or spiritual, moral or social development.

(3) Even though the child worker may perform types of work referred to in paragraph (2)(a) to (b) above, such work is still subject to the provisions of the regulations summarised here.

(4) In terms of the South African Schools Act a child worker is subject to compulsory schooling until the last school day of the calendar year in which such learner reaches the age of fifteen years or the ninth grade, whichever occurs first.

5. Access to nutrition, health care and educational services

An employer who employs a child worker must ensure that their employment does not interfere with -

(a) their access to adequate nutrition;

(b) their access to adequate primary health care services; and

(c) the education of a child worker who is enrolled at a school or at any other educational institution.

6. Work away from parents or legal guardian

(1) A child worker may only perform work which will result in its being away overnight from its parents or legal guardian –

(a) if the child's parent or legal guardian consents in writing;

(b) if the child is enrolled in school, the schooling of a school going child is not adversely affected.

(2) In addition, the employer must provide —

(a) full details of the accommodation arrangements to the parent or legal guardian of the child worker for their approval;

(b) free of charge to the child, accommodation that –

(i) is clean, comfortable, suitable and safe for the child;

(ii) is not occupied by any adult other than the parent, legal guardian or a child worker minder appointed or designated by the parent of the child, if they accompany the child; and

(iii) sufficient bedding, lavatory and washing facilities for the child worker;

(c) the child worker with nutritious food or, if the child is able to purchase such food within a reasonable distance from the place of work or accommodation, provide the child with an allowance sufficient to purchase food and enable the child to purchase it at appropriate intervals.

(3) It is an offence for any person to recruit a child worker to perform work in violation of sub-paragraphs (1) and (2).

7. Prohibition of piecework and task work

(1) No person may require or permit a child worker to perform piecework or task work. Piecework is work in terms of which remuneration is based mainly on the quantity of work done. Task work is work in terms of which the remuneration of an employee is based mainly on the completion of set tasks.

(2) This does not prevent a child worker being paid a commission or receiving an incentive payment on the completion of a task if —

(a) the child is paid at least the minimum wage prescribed for that work in terms of any sectoral determination or bargaining council agreement;

(b) in the absence of any such minimum wage, the child, in addition to any commission or incentive payment received, is paid a basic wage, calculated on the basis of time worked, and this wage is more than the commission or incentive payment received, and is calculated on a consistent basis.

8. Maximum daily and weekly working time

(1) A child worker may not work more than 8 hours on any day.

(2) A child worker who is not enrolled at school may not work for more than 40 hours in any week.

(3) A child worker who is enrolled in school may not work for more than –

(a) 20 hours in any week during school term, and

(b) 40 hours in any week that falls entirely within school holidays

(c) two hours on any school day; or four hours on any school day followed by a non-school day (e.g. a Friday, or the last day of a school term.)

9. Night work

(1) A child worker may not work before 6 am or after 6 pm on any day, except where allowed in sub-paragraph (2).

(2) A child worker, other than one who is expected to be at school the following day, may work between 6 pm and 11 pm if –

(a) the work is in a restaurant, cinema, theatre or shop where there is adequate adult supervision; or

(b) the work is baby-sitting or child minding;

(3) Unless the parent or legal guardian agrees otherwise in writing, any person who requires or permits a child worker to work after 6pm must, at the end of the shift, provide him/her with safe transport home, at no cost to the child, parent or care-giver.

10. Prohibited work

An employer may not require or permit a child to work in any of the work:

(a) deep sea fishing;

(b) commercial diving or other hazardous work under water;

(c) slaughtering of animals;

(d) meat, poultry, or seafood processing;

(e) the manufacture or packing of tobacco products or any other work in which there is exposure to tobacco dust;

(f) logging;

(g) protecting or safeguarding any person or property or work involving the handling of firearms;

(h) refining petroleum products;

(i) filling cars with petroleum or other chemical fuels at a filling station, or doing work close to such activity;

(j) brewing, manufacturing or selling any liquid which in its final form would contain more than one per cent of alcohol;

(k) work in a bar, shebeen, tavern or pub or other establishment whose primary business is to sell alcoholic beverages to the general public, for consumption on the premises;

(l) the manufacture or application of tar or asphalt;

(m) work involving an exposure, or potential exposure, to blood-borne or air-borne pathogens;

(n) work in a health care or related facility, in circumstances where there is likely exposure to biological agents, including but not limited to Hepatitis, HIV, and tuberculosis, anaesthetics, anti-neoplastic medications or addictive drugs;

(o) work involving exposure to a hazardous substance, to lead, asbestos, silica, coal or other hazardous dusts or to pressurised gases;

(p) the production, transport, handling, storage, use of, or other work involving exposure to explosives or flammable substances;

(q) work in a casino or other gambling establishment;

(r) electrical work involving high voltage cables or other power sources in excess of 250 volts;

(s) welding. brazing or soldering;

(t) rock and stone crushing;

(u) operating vibrating equipment such as rock drills and riveters;

(v) operating tractors, winches, forklift vehicles, front-end loaders, earth moving equipment or similar heavy equipment;

(w) driving any motor vehicle or mobile plant;

(x) work in vehicles transporting passengers or heavy goods;

(y) work in a confined space.

11. Worst forms of child labour

(1) In addition, no person may require or permit a child to work in any of the following -

(i) underground mining;

(ii) work in connection with the operation of a smelter or furnace, or rolling mills that form and cut metals;

(iii) the production of aluminium, brass, bronze or similar alloys, charcoal or the fuel, coke;

(iv) the manufacture of auramine, isopropanol or magenta;

(v) the gasification of coal;

(vi) diving operations using aqualungs;

(vii) free diving below depths of 10 metres;

(viii) work in which there is a reasonably foreseeable risk of exposure to blood-borne and airborne pathogens;

(ix) work involving exposure to ionising radiation;

(x) work in chemically-based mineral extraction or similar operations;

(xi) any work in an environment in which the actual dry-bulb temperature is below minus 18 °C;

(xii) hard manual labour for a period of longer than 15 minutes in any hour in an environment in which the time-weighted average WBGT index, (as defined in the Environmental Regulations for Workplaces, made in terms of the Occupational Health and Safety Act, 1993) determined over a period of one hour, is greater than 36;

(xiii) work in circumstances in which it is reasonably foreseeable that the child will be exposed to physical, psychological or sexual abuse.

(2) Any form of work listed in sub-paragraph (1) constitutes a worst form of child labour as contemplated in the Worst Forms of Child Labour Convention, 1999,

adopted by the International Labour Organisation. These prohibitions may overlap to some extent with the prohibitions listed in paragraph 10 but the activities referred to in this paragraph are considered as exposing children to very serious harm. Penalties for breach should therefore be higher.

(3) No person may –

(a) employ a child in circumstances in which the child is unreasonably confined to the employer's premises;

(b) require or permit a child to engage for that person's benefit in one of following activities when this work is performed by a child as part of an organised business activity conducted by that person –

(i) begging;

(ii) scavenging or collecting waste from garbage or waste dumps; or

(iii) use, recruit, procure or offer a child for the commission of any serious offence (they are listed in schedules 1 and 2 of the Criminal Procedure Act, 1977).

(4) The BCEA regulations define which specific substances agents are considered very harmful to children.

12. Risk assessment

(1) Every employer who employs or provides work to a child worker, or permits any child worker to work at any place under their control, or with any machinery under their control, must in respect of such work undertake a risk assessment process which must at least the following:

(a) identifying the risks and hazards to which any child worker may be exposed;

(b) analysing and evaluating the risks and hazards that are identified;

(c) preparing and implementing –

(i) a documented plan of safe work procedures to remove, mitigate, reduce or control the risks and hazards that have been identified;

(ii) a monitoring plan; and

(iii) a review plan.

(2) The following factors must be taken in to account when making the risk assessment:

(a) the increased biological sensitivity of children to chemicals, biological agents, carcinogens and hormone disruptors;

(b) the increased vulnerability of children to sleep disruption;

(c) the vulnerability of children to direct and indirect coercion or abuse from any person, particularly when working alone;

(d) the relative lack of experience and maturity of children in making safety judgments;

(e) the reduced ability of children to adapt to inflexible work routines;

(f) the reduced ability of children to perceive dangers correctly;

(g) the reduced capacity of children to understand safety messages;

(h) whether the design of any machinery, tools, equipment and protective equipment is appropriate for children's stature;

(i) the implications of children working at the period when their skeletal structures and bones are still developing;

(j) children's physical development in relation to ergonomics, in order to ensure a healthy and safe working environment;

(k) the physiological, hormonal and other vulnerabilities of children at puberty.

(3) In the risk assessment process, the employer must have regard to the guidelines contained in Schedule 1 to the Health and Safety of Children at Work Regulations issued in terms of the OHSA.

13. Respiratory hazards

A child worker may not undertake any work where a person over the age of 17 performing the same work would be required in terms of the OHSA to wear respiratory protection equipment, i.e. equipment such as masks that protects workers from inhaling hazardous dusts or fumes.

14. Work in elevated position

(1) A child worker may not work at a height of more than 5 metres above the floor/ground.

(2) A child worker working at a height of more than 2 metres from the floor/ground must work under the supervision of the employer or a competent adult employee, and reasonable fall protection must be provided, such as a safety harness or railings.

15. Lifting of heavy weights

(1) A child worker performing any work may not, as part of their work, lift an object weighing more than –

(a) the lesser of 15 kg or 20 % of the child's body weight;

(b) more than 7,5 kg more than once per minute.

(2) A child worker may not lift objects weighing more than 5 kg at work for more than 2 hours without being granted a 30-minute period in which he or she is not required to lift such a weight.

16. Work in a cold environment

(1) The employer of a child worker working in an environment below the following actual dry-bulb temperature must be supplied with suitable protective warm clothing –

(a) 0°C where the work involves repeated entry into, or presence for more than two minutes in such environment;

(b) 6°C where the work involves repeated entry into or presence for more than one hour in such environment.

(2) The protective warm clothing supplied to child worker must comply with Regulation 2(2)(b)(i) to (vi) of the Environmental Regulations for Workplaces

17. Work in a hot environment

(1) No person may require or permit a child worker to work or perform hard manual labour where the average temperature over one hour exceeds 30°C unless the child –

(a) is acclimatised to such working environment before he/she is required or permitted to work in such environment;

(b) has drink breaks every 15 minutes; and

(c) is cognisant of the need to drink at least 150ml of liquid every break and the employer provides the child with the necessary liquids.

(2) The term 'average temperature' referred to here is technically the time-weighted average WBGT index as defined in the Environmental Regulations for Workplaces, made in terms of the Occupational Health and Safety Act, 1993, and determined over a period of one hour.

18. Work in noisy environment

No person may require or permit a child worker to perform any work involving an exposure to a noise level in excess of 80 dB(A) unless the child is supplied with hearing protective equipment that complies with regulation 12 of the Noise-Induced Hearing Loss Regulations, made in terms of the Occupational Health and Safety Act, 1993. DB(A) is a unit used in measuring noise, and takes into account how often loud noises are heard, even if an environment is not noisy all the time.

19. Power tools and cutting or grinding equipment

(1) A child worker may not use any power-driven machinery or power tool, or any cutting or grinding equipment unless a risk assessment conducted in terms of the regulations has determined that its use is safe and without significant risks for the child.

(2) If the risk assessment indicates that the power tool or other equipment is safe and without significant risks for the child worker to use, if used with safety equipment or facilities, the child –

(a) must be provided with the necessary safety equipment and facilities that are usually required in terms of occupational health and safety regulations; and

(b) must be instructed in the use, maintenance and limitations of such equipment.

(3) Before starting such work the child worker must receive adequate training in the safe and appropriate use of the power tools or machinery from a person competent in their use.

(4) The child worker must be supervised by a competent person when using power tools or other equipment.

(5) An inspector may issue a notice prohibiting the use by child workers of any power tool or other machinery.

20. Report to Department of Social Development

(1) A labour inspector who finds a child worker being employed or used in contravention of the Act or of the BCEA or OHSA regulations shall refer the matter for investigation to a child protection organisation designated in terms of the Children's Act No 38 of 2005 or to the provincial department of social development in the province where the child works or lives, unless the labour inspector is satisfied that the child will not suffer any detriment due to steps being taken by the inspector to ensure compliance with the law.

(2) The relevant social worker must then investigate the circumstances of the child worker to determine whether he/she is in need of care and protection and, if so, take appropriate action to protect the child.

Occupational Health and Safety Act, 1993
Environmental Regulations for Workplaces, 1987

2. Thermal requirements

1. Subject to the provisions of subregulation (2), no employer shall require or permit an employee to work in an environment in which the time-weighted average dry-bulb temperature taken over a period of four hours is less than 6°C, unless the employer takes reasonable measures to protect such employee against the cold and further takes all precautions necessary for the safety of such employee: Provided that, where outdoor work is performed, the employer shall take such measures and such precautions in an environment in which the actual dry-bulb temperature is less than 6°C at any time.

2. No employer shall require or permit an employee to work in a refrigerated environment in which the actual dry-bulb temperature is below 0°C unless -

a. the maximum exposure of the employee does not exceed the periods as indicated in the following table :

Temperature °C	**Maximum exposure**
0° to -18°	No limit.
Lower than -18° but not lower than -34° degrees	Maximum continuous exposure during each hour = 50 minutes. After every exposure in a low-temperature area at least 10 minutes must be spent, under supervisions, in a comfortably warm environment.
Lower than -34° but not lower lower than -57°	Two periods of 30 minutes each, at least 4 hours apart. Total low- temperature exposure: 1 hour per day.
Lower than -57°	Maximum permissible exposure = 5 minutes during any 8-hour period.

b. the employee is provided with the following protective clothing:

i. A nylon freezer suit or equivalent and, where the said temperature is below -34°C, such suit or equivalent shall be of double layer;

ii. a woolen Balaclava or equivalent;

iii. fur-lined leather gloves or equivalent;

iv. waterproof outer gloves with knitted woolen or equivalent inners as well as a waterproof apron where wet or thawing substances are handled;

v. woolen socks; and

vi. waterproof industrial boots or equivalent;

Provided that an employee who works in a low-temperature area in which the temperature is not lower than - 18°C for periods not exceeding five minutes in every hour need only be provided with an ordinary overall, gloves shoes, or equivalent;

c) the employee is, beforehand and thereafter, at intervals not exceeding one year, certified fit to work in such environment by a registered medical practitioner or a registered nurse according to a protocol prescribed by such practitioner, and such employee is issued with a certificate to that effect; and

d) all the clothing worn by the employee is dry prior to entering the low-temperature area.

3) Where hand-held tools which vibrate at a frequency of vibration of less than 1 000 Hz are used at an actual dry-bulb temperature below 6°C, the employer shall provide an employee operating such tools with lined gloves, and ensure that he wears them.

4) Where the time-weighted average WBGT index, determined over a period of one hour, exceeds 30 in the environment in which an employee works, the employer of such employee shall -

a. if practicable, take steps to reduce the said index to below 30; or

b. where it is not practicable to reduce the said index to below 30 and where hard manual labour is performed-

i. have every such employee beforehand and thereafter, at intervals not exceeding one year, certified fit to work in such environment by a registered medical practitioner or a registered nurse according to a protocol prescribed by such practitioner, and every such employee shall, if found fit to work in such environment, be issued with a certificate to that effect by such practitioner or nurse;

ii. ensure that every such employee is acclimatised to such working environment before he is required or permitted to work in such environment;

iii. inform every such employee of the need to partake of at least 600 millilitres of water every hour;

iv. train every such employee in the precautions to be taken to avoid heatstroke; and

v. provide the means whereby every such employee can receive prompt first-aid treatment in the event of heatstroke:

Provided that, where the question arises as to whether any particular type of work does in fact constitute hard manual labour, the decision of an inspector shall be decisive.

3. Lighting

1. Every employer shall cause every workplace in his undertaking to be lighted in accordance with the illuminance values specified in the Schedule to these regulations: Provided that where specialized lighting is necessary for the performance of any particular type of work, irrespective of whether that type of work is listed in the Schedule or not, the employer of those employees who perform such work shall ensure that such specialized lighting is available to and is used by such employees.

2. The chief inspector may, by notice in the Gazette, from time to time modify the Schedule to these regulations as he deems necessary.

3. With respect to the lighting to be provided in terms of subregulation (1), the employers shall ensure that -

a. the average illuminance at any floor level in a workplace within five meters of a task is not less than one fifth of the average illuminance on that task;

b. glare in any workplace is reduced to a level that does not impair vision;

c. lighting on rotating machinery in such that the hazard of stroboscopic effects is eliminated; and

d. luminaires and lamps are kept clean and, when defective, are replaced or repaired forthwith.

4. With a view to the emergency evacuation of indoor workplaces without natural lighting or in which persons habitually work at night, every employer shall, in such

workplaces, provide emergency sources of lighting which are such that, when activated, an illuminance of not less than 0.3 lux is obtained at floor level to enable employees to evacuate such workplaces: Provided that where it is necessary to stop machinery or shut down plant or processes before evacuating the workplace, or where dangerous materials are present or dangerous processes are carried out, the illuminance shall be not less than 20 lux.

5. An employer shall ensure that the emergency sources of lighting prescribed by subregulation (4) -

   a. are capable of being activated within 15 seconds of the failure of the lighting prescribed by subregulation (1);

   b. will last long enough to ensure the safe evacuation of all indoor workplaces;

   c. are kept in good working order and tested for efficient operation at intervals of not more than three months; and

   d. where directional luminaires are installed, these are mounted at a height of not less than two meters above floor level and are not aimed between 10° above and 45° below the horizontal line on which they are installed.

6. An employer engaged in building work shall cause all rooms, stairways, passageways, gangways, basements and other places where danger may exist through lack of natural light, to be lighted such that it will be safe.

4. Windows

1. In order to effect visual contact with areas outside a workplace, where employees work the majority of their shift in a room of which the floor area is less than 100 square meters, the employer of such employees shall cause every such room to be provided with windows in such a way that -

   a. the total glazed area of such windows is not less than three fifths of the square root of the floor area of the room, both areas measured in square meters;

   b. the window sills are not higher and the window heads are not lower than one and a half meters above the floor level of the room; and

   c. such windows are glazed with transparent material.

2. Unless an inspector otherwise directs, the provisions of subregulation (1) shall not apply under conditions where natural light will have an adverse effect on the process or material used in a room, or where the process in a room has to be conducted under critical conditions of light, temperature, humidity or air movement, or where the judgement of texture or colour in a room has to be done under conditions of constant lighting quality and intensity, or where, for reasons of safety, privacy or security, compliance with the intended provisions becomes impracticable.

3. Where the penetration of direct sunlight into any workplace may pose a threat to the safety of persons in such workplace, the employer concerned shall ensure that such workplace is screened to avoid such penetration, but retaining, as far as is practicable, outside visual contact.

5. Ventilation

1. An employer shall ensure that every workplace in his undertaking is ventilated either by natural or mechanical means in such a way that -

   a. the air breathed by employees does not endanger their safety;

   b. the time-weighted average concentration of carbon dioxide therein, taken over an eight-hour period, does not exceed one half per cent by volume of air;

   c. the carbon dioxide content thereof does not at any time exceed three per cent by volume of air;

   d. the prescribed exposure limits for airborne substances therein are not exceeded; and

   e. the concentration therein of any explosive or flammable gas, vapour or dust does not exceed the lower explosive limit of that gas, vapour or dust.

2. Where the measures prescribed by subregulation (1) are not practicable, or where there is a danger of unsafe air in the breathing zone of an employee, the employer shall provide every such employee with, and ensure that he correctly uses, respiratory protective equipment of a type that reduces the exposure of the employee to a safe level and the employer shall, further, inform him of the dangers of and the precautionary measurers against excessive exposure.

3. The provisions of subregulation (1) (b) and (c) shall not apply in respect of workplaces where the ambient pressure differs by more than 20 percent from atmospheric pressure at sea level.

6. Housekeeping

1. A user of machinery shall provide and maintain sufficient clear and unobstructed space at every machine to enable work to be carried out without danger to persons.

2. An employer shall -

   a. with the exclusion of workplaces where building work is performed, make at least 2.25 square meters of effective open floor area available for every employee working in an indoor workplace;

   b. make available and maintain an unimpeded work space for every employee;

   c. keep every indoor workplace clean, orderly and free of materials, tools and similar things which are not necessary for the work done in such work place;

   d. keep all floors, walkways, stairs, passages and gangways in a good state of repair, skid-free and free of obstructions, waste or materials.

   e. keep the roof and walls of every indoor workplace sound and leak-free;

   f. board over or fence, or enclose with rails or guards, or take other measures which may be necessary under the circumstances to ensure the safety of persons, all openings in floors, all hatchways and all stairways and any open sides of floors or buildings through or from which persons are liable to fall: Provided that such boarding or guarding may be omitted or removed for the time and to the extent necessary for the access of persons or the movement of material; and

   g. erect a catch platform or net above an entrance or passageway or above a place where persons work or pass, or fence off the danger area if work is being performed above such entrance, passageway, place or danger area and there is a possibility of persons being struck by falling objects.

3. No employer shall require or permit any person to, and no person shall, dispose of any article from a high place except by hoist or chute unless arrangements have been made to secure the safety who may be struck by falling objects.

7. Noise and hearing conservation

1. This regulation shall apply to all employers (herein referred to as employer) at a workplace where the equivalent noise level (equivalent sound pressure level) resulting from activities at such workplace, to which any person in such workplace is exposed, is 85 dB (A) or higher.

2. Subject to the provisions of subregulations (3) and (4), no employer shall require or permit an employee to work in an environment in which he is exposed to an equivalent noise level equal to 85 dB(A) or higher.

3. The employer shall reduce the equivalent noise level to below 85 dB(A) or, where this is not reasonably practicable, he shall reduce the level to as low as is reasonably practicable and take all reasonable steps to isolate the source of the noise acoustically.

4. Where the equivalent noise level in any workplace cannot be reduced to below 85 dB(A), as contemplated in subregulation (3), the employer shall -

    a. demarcate the boundaries of all noise zones in such workplace by posting up notices to that effect in conspicuous places along such boundaries and at all entrances to and exits from any room where the whole of such room constitutes a noise zone; and

    b. prohibit any person from entering a noise zone unless such person wears hearing protectors.

5. In the case of building work where it is not reasonably practicable to comply with the provisions of subregulation (4)(a) owing to the nature or extent of the premises, the employer shall post up such notices at all exits from and entrances to such premises or where this is not reasonably practicable, display such notices in a conspicuous place as close as possible to the actual workplace or in such place as an inspector may direct.

6. Whenever an inspector is of the opinion that the employer has omitted or failed to reduce the equivalent noise level in a noise zone to as low as is reasonably practicable or to isolate the source of the noise acoustically, he may require such employer, by notice in writing, to take such further steps as such inspector considers reasonable and practicable for the purpose of conserving the hearing of employees entering or working in such noise zone.

7. The employer shall provide, free of charge, hearing protectors to each employee who works in or, to any person who is required or permitted to enter a noise zone, and no employer shall require or permit any person to work in or enter such noise zone, and no person shall work in or enter such noise zone, unless he wears such hearing protectors in the correct manner: Provided that where the equivalent noise level to which employees are exposed, is such that the attenuation of the hearing protectors does not reduce the said noise to below 85 dB(A) the employer concerned shall limit the time during which employees work in that noise zone in such a way that they are not exposed to an equivalent noise level equal to 85 dB(A) or higher.

8. The hearing protectors which the employer shall provide in terms of subregulation (7), shall be -

    a. for the sole use of a specific person: Provided that if an inspector is satisfied that the employer has taken adequate precautionary measures to ensure that the common use of hearing protectors will not result in the

spreading of infectious or contagious diseases, he may in writing, authorize the common use of hearing protectors;

b. maintained by the employer in an efficient and hygienic condition at all times; and

c. stored in a clean, dust-free container provided by the employer when not in use.

9. The employer shall properly instruct any person who is required to wear hearing protectors in the use of such protectors and inform him of noise zones where the wearing thereof is compulsory.

10. The employer shall -

a. ensure that every employee employed in a noise zone is subjected to audiometric examinations conducted in accordance with section 7 of SABS 083, by an audiometrist approved by the chief inspector;

b. keep records of the results of each audiometric examination and make such records available for inspection by an inspector if he so requires; and

c. keep such records for a minimum period of 30 years after termination of employment: Provided that if the employer ceases activities all such records shall be forwarded to the regional director.

11. In order to comply with the provisions of subregulation (4)(a), the employer shall obtain the services of an approved inspection authority, or an employee whose ability is verified by an approved inspection authority to ensure that noise zones are determined in accordance with section 4 of SABS 083.

8. Precautions against flooding

1. Where a substantial risk exists that a workplace may be flooded, the employer shall take measures to be informed forthwith of any imminent flooding.

2. Every employer shall take measures to be informed forthwith of any imminent flooding from constructions for conserving water, or which may cause water to converge or accumulate on his premises, and shall, prior to the erection of such a construction, give notice in writing to all persons situated in the danger zone below such construction of the possibility of flooding owing to such construction.

9. Fire precautions and means of egress

1. In order to expedite the evacuation of a workplace in case of fire, every employer shall ensure that -

a. any emergency escape door from any room or passage or at a staircase shall, as far as is practicable, be hung so as to open outwards;

b. every door of a room in which persons may be present, and every door of a passage or at a staircase serving as a means of exit from such room, shall be kept clear and capable of being easily and rapidly opened from inside so as to ensure quick and easy evacuation;

c. the provisions of paragraphs (a) and (b) shall also be complied with in respect of the outer escape exit from the workplace;

d. staircases and steps leading from one floor to another or to the ground shall be provided with substantial hand-rails;

e. staircases intended to be used as fire escapes shall -

i. be constructed of non-combustible material;

ii. be kept clear of any material or other obstruction; and

iii. not terminate in an enclosed area;

f. staircases, passages and exits intended for escape purposes shall be of a width and of a gradient which will facilitate the quick and safe egress of the number of persons intended to make use of them; and

g. having regard to the size, construction and location of a workplace, the number of persons, and the activity therein, such workplace is provided with at least two means of egress situated as far apart as is practicable.

2. Having regard to the size, construction and location of the workplace, and the amount and type of flammable articles uses, handled or stored on the premises, an employer shall provide on the premises an adequate supply of suitable fire-fighting equipment at strategic locations or as may be recommended by the fire chief of the local authority concerned, and such equipment shall be maintained in good working order.

10. Offences and Penalties

Any person who contravenes or fails to comply with any provision of regulation 2, 3(1), 3(3), 3(4), 3(5), 3(6), 4(1), 4(3), 5(1), 5(2), 6, 7, 8 or 9 shall be guilty of an offence and liable on conviction to a fine not exceeding R1 000 or to imprisonment for a period not exceeding six months and, in the case of a continuous offence, to an additional fine of R5 for each day on which the offence continues or to additional imprisonment of one day for each day on which the offence continues: Provided that the period of such additional imprisonment shall in no case exceed 90 days.

11. Withdrawal of Regulations

The following regulations are hereby withdrawn:

a. Regulations B.1 (1), B.1 (2), B.1 (3), B.1 (4), B.2, B.5, B.11, B.13, B.15 and B.17, published under Government Notice R. 929 of 28 June 1963, as amended by Government Notice R. 2237 of 30 November 1973;

b. regulations C.10, C.11 and C.12, published under Government Notice R.929 of 28 June 1963; and

c. regulation D.4, published under Government Notice R. 1934 of 13 December 1963, as amended by Government Notice R. 3475 of 9 October 1969.

Schedule - Minimum Average Values Of Maintained Illuminance (Measured On The Working Plain)

Location/Industry	Place or type of activity	Lux
Abattoirs(See also Outdoor areas)	Cold store, casting & stunning pens	100
	Bleeding area, slaughtering	150
	Dressing, evisceration, washing, tripery and skin sorting	200
	Inspection and grading	300
	Boning, cleaning, grinding, packing, & cutting	200
	Manufacture of by-products	100
Ablutions	Wash-rooms, toilets & changing rooms	100
Abrasive blasting	Sand or other	200
Aircraft manufacture	Stock park production	300
	Drilling, sheet aluminium layout, template work, wing section, cowling, welding, sub- assembly, landing gear, fuselage, final assembly	200
	Maintenance and repairs (hangers)	200
Assembly plants	Rough work, eg frame assembly, heavy machinery assembly	100
	Medium work, eg machined parts, engine assembly, vehicle body assembly	200
	Fine work, eg radio & telephone equipment, typewriter & office	500

	machinery assembly	
	Very fine work, eg small precision assembly	1000
Bakeries	Mixing & make-up rooms, oven rooms, wrapping rooms	100
	Decorating and icing	200
	General working areas	100
Banks	Counters (See also Offices)	300
	General working areas	200
Blacksmith	General working area	75
	Tempering	50
Boiler houses	Coal and ash handling	75
	Boiler rooms	100
Bookbinding	Folding, pasting, punching, stacking	200
	Cutting, assembly, embossing	300
	Finishing, blocking, inlaying and inspection	500
Boot and shoe	Sorting and grading	500
	Clicking & closing: Preparatory operations	500
	Cutting table & presses, stitching	500
	Bottom stock prep, lasting, bottoming, finish	500
	Shoe rooks	500
Box, carton & paper bag making	Corrugated boards, cartons, containers & bag manufacture, coating & laminating	150
	Associated printing	200
Brewing, distilling & softdrinks	General working area	100
	Brewing, bottling & canning plants	300
	Bottle inspection	300
Building & construction	Industrialized building plants	200
	Concrete shops	150
	General working areas	20
	Walkways and access	5
Canning & preserving	Inspection of products	300
	Preparation, kettle areas, mechanical cleaning, dicing, trimming	200
	Canned and bottle goods: retorts	150
	High speed labelling lines	200
	Can and bottle inspection	300
	Automatic processes	25
Carpet making	Winding, beaming	150
	Designing, Jacquard card cutting, patter work, tufting, topping, cutting, hemming, fringing	200
	Weaving, mending, inspection	300
	Dyeing	400
Cement, asbestos, etc. gypsum, talc, etc, products & moulded goods	Fiberising, mixing, shredding, agitating, flat & corrugated sheets & moulding goods mnf	200
	Pipe & pole manufacture: mixing, spinning, reinforcing, stripping	150
Cement manufacture	Control room, milling, conveying, drying, pumping, burners platform, coal plant milling feeding, bagging, bulk filling, loading	150
	Vertical control panel face	200
Ceramics	See Pottery & clay products	
Chemical works(See also Outdoor areas)	Hand furnaces, boiling tanks, stationary driers, stationary or gravity crystallizers, mechanical driers, evaporators, filtration plants, mechanical crystallizing, bleaching percolators, nitrators, electrolytic cells	100
	Controls, guages, valves, etc	100
	Control rooms: Vertical control panels	200
	Control desks	200
	General working areas	100
Clothing	Matching up	300
	Sorting, cutting, sewing	300
	Pressing, cloth treating	200

	Inspections, hand tailoring	500
Cold stores	General working areas	100
Confectionery (chocolates & sweets)	Mixing, blending, boiling	100
	Husking, winnowing, fat extraction, crushing, refining, feeding, bean cleaning, sorting, milling, cream making	150
	Hand decorating, inspection, wrapping, packing.	200
Court rooms	Seating	100
	Court	300
Dairies	General working areas	150
	Bottle inspection	300
	Bottle filling	300
	Despatching	100
Die-sinking & engraving	General	200
	Fine	500
	Hand engraving	500
Dry cleaning	See Laundering and dry cleaning	
Dye works	Reception, 'grey perching'	500
	Wet processes	150
	Dry processes	150
	Dyers offices	500
	Final perching (examination)	1500
Electrical goods manufacture	Impregnating processes, mica working	150
	Coil and armature processes : general	200
	fine (instrument coils)	400
Electricity generating stations (See also Outdoor areas)	Turbine halls (operating floor)	200
	Blowers, auxiliary generators	100
	Transformer chambers, etc	75
	Cable tunnels	50
	Battery and charging equipment rooms	100
	Boiler front (operating floor)	150
	Between boilers (operating floor), stairs, & operating platforms, & precipitator high voltage chamber	100
	Pulverizers, feeders, ash plant, conveyors (tunnel, junction tower)	75
	Boiler house and turbine house basements	100
	Pump houses & rooms, water treatment plant	100
	Overland conveyor housing walkways	50
	Control rooks: vertical control panel face	200
	rear of control panel	100
	control desks	200
	Computer room	500
	Switch houses & rooms	150
	Relay and telecommunication rooms	200
	Nuclear reactors and steam raising plants	150
	Reactor areas, boilers, galleries	150
	Gas circulator bays	150
	Reactor charge / discharge face	150
	High voltage substations	100
Fire stations	Appliance rooms	100
	External rooms	30
Forging	General	100
Foundries	Charging floor, tumbling, cleaning, shaking out, rough moulding and core making	100
	Fine moulding and core making , inspection	200
Furniture factories	Raw materials store	50
	Finished goods store	75
	Wood machining and assembly	150

	Rough sawing and cutting	150
	Machining, sundry & assembly of components	250
	Cabinet making: veneer sorting & preparation	500
	: veneer pressing	250
	: components store	75
	: fitting & final inspection	400
Upholstery: : cloth selection	750	
	: filling, covering	250
	: slipping	400
	: cutting, sewing	400
	Mattress making: assembly	250
	: tape edging	500
	Tool rooms : general	250
	: benches	400
	Spray booths: colour finishing	250
	: clear finishing	150
Garages	Parking areas (interior)	50
	Washing, polishing, greasing	100
	Servicing pits	100
	Repairs	200
	Work bench	250
	Apron fuel pumps	100
Gasworks (See also Outdoor areas)	Retort houses, oil gas plants, purifiers, coke screening and coke handling plants	50
	Governor, meter, compressor, booster, and exhauster houses	75
Gauge & tool rooms	General	500
General factory areas	Canteen / dining rooms	100
	Cloak rooms	100
	Entrances	100
	Rest rooms	100
	First aid rooms	100
Glass processing	Furnace rooms, bending, annealing ovens, mixing rooms, forming (blowing, drawing, pressing, rolling)	100
	Cutting to size, grinding, polishing, toughen	150
	Finishing (bevelling, decorating, etching, silvering)	200
	Brilliant cutting	500
	Inspections: general	150
	: fine	500
Glove making (See also Clothing)	General working areas	300
Hat making (See also Clothing)	Stiffening, braiding, cleaning, refining	200
	Forming, sizing, punching, flanging, finishing, ironing	100
	General working areas	100
Hosiery & knitwear	Circular and flat knitting machines, universal winders, cutting out, folding and pressing	200
	Lock stitch and overlocking machines	300
	Mending: light goods	800
	: dark goods	1000
	Examining and hand finishing: light goods	400
	: dark goods	800
	Linking or running up	300
Hotels & restaurants	Entrance halls	100
	Reception and accounts	200
	Stairs, corridors	100
	Laundries	150
	Kitchens	150
	General working areas	50
Inspection areas (engineering)	Rough work, eg counting, rough visual checks	100

	Medium work, eg 'go-no go' gauges	200
	Sub-assemblies	200
	Fine work, eg radio & telecommunications eqpt, calibrated scales, precision mechanisms, instruments	500
	Very fine work, eg gauging & inspection of small intricate parts	1000
	Minute work	1500
Iron and steel	Slab yards, melting shops, ingot stripping, soaking pits, blast furnace working areas, pickling & cleaning lines, mechanical pump houses, slapping & large section rolling mill	75
	Moulding preparation, light section, wire and cold strip mills, mill inspections and conditioning, sheet & plate finishing, tinning. galvanizing and roll shops	100
	Plate inspection	200
	Tinplate inspection & pulpits (control rooms)	200
	General working areas	75
Jewellery & watchmaking	Fine processes	500
	Minute processes	3000
	Gem cutting, polishing & setting	1000
Laboratories & test rooms	General laboratories, balance rooms	200
	Electrical & electronic instrument labs	300
	Calibrated scales, precision mechanical instruments	300
Laundering & dry cleaning	Receiving, sorting, washing, drying, ironing, (calendering), despatch	150
	Dry cleaning, bulk machine work	150
	Hand ironing, pressing, inspection, mending	200
	Spotting	250
Leather & tanning	Vats, cleaning, tanning, stretching, cutting, fleshing and stuffing	100
	Finishing, staking, splitting	150
	Pressing and glazing	300
	Cutting, scarfing and sewing	500
	Grading and matching	500
Libraries, museums & art galleries	Shelves	100
	Binding	300
	Cataloging, sorting	200
	General working areas	100
Lifts	Car interior	100
	Motor rooms	300
Machine shops & fitters benches	Rough bench & machinery work, rough checking and stock parts	100
	Medium bench and machine work, ordinary automatic machines, rough grinding, medium buffing and polishing	200
	Fine bench & machinery work, fine automatic machines, medium grinding, fine buffing & polishing	500
	Extra-fine bench & machine work, fine grinding	800
Materials handling	Wrapping, packing, labelling, despatch	150
	Sorting stock, classifying, loading	100
Milling (flour)	Cleaning, grinding, rolling, purifying, silks and packing	150
	Wetting tables, product control	200
Motor vehicle manufacture	General sub-assemblies, chassis assembly, trim. shops, body sub-assembly, body assembly	200
	Upholstery	400
	Final inspection	300
	Spray booths (See paint shops & spraying booths).	
Offices	Entrance halls and reception areas	100
	Conference rooms, general offices, typing & filing	300
	Computer and business machine operators	500
	Drawing offices	500
Outdoor areas	Abattoirs: lairage	20
	: race	50
	Ash handling, precipitator & fan area	20

	Bulk loading / unloading areas where manual operations are performed	50
	Bulk loading / unloading areas where operations are performed mechanically	10
	Cool-water screens	20
	Fuel pumps	100
	Storage areas (excluding dumps)	5
	Water clarification plant & storage tanks (operating areas)	50
	Marshalling yards	10
	Main entrances and exits	20
	Transformer and reactor terrain	20
	High voltage yard, distribution & substation	10
	Gangways, catwalks, stairways, etc	20
	Conveyor structure	10
Paint manufacture	Filling, blending, dispersion & reactor platform	150
	Batch mixing	300
	Colour matching	300
Paint shops and spraying booths	Rubbing, dipping, ordinary painting, spraying and finishing	200
	Fine painting, spraying and finishing	300
	Retouching and matching	500
Paper & paper board manufacture	Paper and board making: Machine houses, calendering, pulp mills, preparation plants, cutting, finishing, trim.	150
	Inspection and sorting (overhauling)	200
	Paper converting processes: general	150
	: associated printing	200
Passages & lobbies	All areas	75
Pharmaceutical & fine chemical	Raw material storage	150
	Control laboratories and testing	200
	Pharmaceutical manufacture:	
	grinding, granulating, mixing, drying, tabletting, sterilizing, washing, preparation of solutions, filling, labelling. capping, inspection	200
	Fine chemical manufacture: plant processing	150
	: fine chemical finishing	200
Photographic	Safety light: dark room	5
Plastics	Manufacture (See Chemical Works)	
	Processing:	
	calendering, extrusion	200
	moulding - compression, injection, blowing	150
	Sheet fabrication:	
	shaping	150
	trimming, machining, polishing	200
	cementing	150
Plating	Vats & baths, buffing, polishing, burnishing	200
Post offices	Counters	200
	General working areas	100
Pottery and Clay products	Grinding, filter pressing, kiln room, moulding, pressing, cleaning, trimming, glazing, firing	200
	Enamelling, colouring, decorating	300
Printing -	Type foundries:	
	Matrix making, dressing type, hand and machine casting	150
	Font assembly, sorting	300
	Printing plants:	
	Machine composition, imposing stones	150
	presses	200
	composition room	300
	proof reading	300
	Electrotyping:	
	Block-making, electroplating, washing, backing	150

	Moulding, finishing, routing	200
	Photo-engraving: Block making, etching, masking	200
	Finishing, routing	300
	Colour printing: inspection areas	500
Refrigeration	Chilling and cold rooms, icemaking	100
Rubber processing	Stock & fabric preparation	150
	Dipping, moulding, compounding, calendering	150
	Tyre and tube making	200
	Curing and inspection	300
Schools & educational institutions	Stairs, corridors	100
	Class and lecture rooms	200
	General working areas	100
Sheet metal	Benchwork, pressing, punching, shearing stamping, spinning, folding	150
	Scribing	200
	Sheet inspection	300
Shops, store rooms and warehouses	Stair, corridors	100
	General working areas	100
Soap manufacture	All processes, eg kettle houses & ancillaries batch or continuous soap rooting, soap stamping	150
	General areas	100
	Vertical control panel face	200
	Edible product processing & packing	150
Stairs, escalators & ramps	General	100
Storage battery manufacture	General	100
Structural steel fabrication	General	100
	Marking off	200
Sugar	Manufacture: crushing, settling, evaporating, boiling, curing, drying, packing	100
	Refining: centrifuging, metering, filtering, condensing	100
	Planning, mixing, drying	200
	Grading, colour inspection	500
Surgeries, hospitals & clinics	Stairs, corridors	100
	General working areas	100
Tailoring	Hand tailoring	500
Telephone exchanges	Manual exchange rooms (on desk)	100
	Main distribution frame rooms in automatic exchanges	200
	Battery rooms	100
Textile (cotton or linen)	Bale breaking, blowing, carding	100
	Roving, slubbing, spinning (ordinary counts), winding, hackling, spreading, cabling	100
	Warping, slashing, dressing, dyeing, doubling(fancy), spinning (fine counts)	150
	Heading (drawing in)	500
	Weaving: patterned cloth	500
	plain 'grey' cloth	500
	Cloth inspection	500
Textile (jute)	Weaving, spinning flat, jacquard carpet looms,. top winding	150
	Yarn calender	100
Textile (silk or synthetic)	Soaking, fugitive tinting, conditioning or setting of twist	150
	Spinning	300
	Winding, twisting, rewinding & combing, quilling, slashing	200
	Warping	200
	Healding (drawing in)	500
	Weaving, finishing	500
	Inspection	500
Textile (woollen)	Scouring, carbonizing, teasing, preparing, raising, brushing, pressing, back-washing, gilling, crabbing and blowing	100

	Blending, carding, combing (white), tentering drying, cropping	150
	Spinning, roving, winding, warping, combing (coloured), twisting	300
	Healding (drawing in)	500
	Weaving:	
	fine worsteds	500
	medium worsteds, fine woolens	300
	Heavy woollens	200
	Burling, mending	500
	Perching:	
	'grey'	500
	Finals	1500
Theatres, cinemas & halls	Stairs, corridors	100
	Booking offices	200
	Projection rooms	150
Tobacco	Primary manufacture: weighing, blending, conditioning, threshing, cutting	100
	Cigarette making: manufacturing processes, filter plug-making	500
	Inspection (catcher)	500
	Cigarette or tobacco packing	500
Upholstering	Furniture and vehicles	200
Warehouses & bulk storage (See also Material handling)	Small materials, racks, packing & despatch	150
	Issue counters	200
	Loading bays, large materials	75
	Inactive storage	20
Welding & soldering	Gas & arc welding, rough spot welding	150
	Medium soldering, brazing & spot welding (eg. domestic hardware)	500
	Fine soldering & spot welding, eg. instruments radio set assembly	500
	Very fine soldering & spot welding eg electronic printed circuits	1500
Woodworking & sawmilling	Rough sawing & bench work, sizing, planing, rough sanding	150
	Medium machine & bench work, gluing, veneering, cooperage	200
	Fine bench & machine work, fine sanding and finishing	200

Incorporation of Safety Standards

MACHINERY AND OCCUPATIONAL SAFETY ACT, 1983

Under the powers vested in me by section 36(1) of the Machinery and Occupational Safety Act, 1983 (Act 6 of 1983), I, Pieter Theunis Christiaan du Plessis, Minister of Manpower, hereby incorporate the South African Bureau of Standards Code of Practice for the Measurement and Assessment of Occupational Noise for Hearing Conservation Purposes, SABS 083-1983 and the South African Bureau of Standards Specification for the Acoustical Properties of Ear Protectors, SABS 572-1973, into the Environmental Regulations 1987.

P.T.C. DU PLESSIS

Minister of Manpower

GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

DEPARTMENT OF LABOUR

NO. R. 1589 **06 DECEMBER 2019**

DEPARTMENT OF EMPLOYMENT AND LABOUR

OCCUPATIONAL HEALTH AND SAFETY ACT, 1993
ERGONOMICS REGULATIONS, 2019

The Minister of Employment and Labour has, under section 43 of the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993), after consultation with the Advisory Council for Occupational Health and Safety, made the regulations in the Schedule.

TW NXESI, MP 20/11/2019
MINISTER OF EMPLOYMENT AND LABOUR

SCHEDULE

Definitions

1. In these Regulations "the Act" means the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993), and any word or expression to which a meaning has been assigned in the Act has the meaning so assigned and, unless the context otherwise indicates–

"adverse health effect" means the causation, promotion, facilitation or exacerbation of a structural or functional abnormality, with the implication that the abnormality produced has the potential of lowering the quality of life, contributing to a disabling illness or leading to premature death;

"competent person" in relation to ergonomics, means a person who–

(a) has in respect of the work or task to be performed the required knowledge, training and experience in ergonomics and, where applicable, qualifications specific to ergonomics: provided that where appropriate qualifications and training are registered in terms of the provisions of the National Qualifications Framework Act, 2008 (Act No. 67 of 2008), those qualifications and that training must be regarded as the required qualifications and training; and

(b) is familiar with the Act and the applicable regulations made under the Act;

"chief director: provincial operations" means the provincial director as defined in regulation 1 of the General Administrative Regulations, 2003, as published in Government Notice No. R. 929 of 25 June 2003;

"design" in relation to objects, systems or measurable human interaction includes drawings, calculations, design details and specification;

"designer" means any person who–

(a) prepares a design;

(b) checks and approves a design;

(c) arranges for a person at work under his or her supervision to prepare a design, including an employee of that person where he or she is the employer;

(d) designs temporary work, including its components; or

(e) contributes to, or has overall responsibility for machinery, plant or work systems design;

"ergonomic risk" means a characteristic or action in the workplace, workplace conditions, or a combination thereof that may impair overall system performance and human well-being;

"ergonomic risk assessment" means a programme, process or investigation to identify, analyse, evaluate and prioritise any risk from exposure to ergonomic risks associated with the workplace;

"ergonomics" means the scientific discipline concerned with the fundamental understanding of interactions among humans and other elements of a system, and the profession that applies theory, principles, data and methods to design in order to optimise human well-being and overall system performance;

"supplier" means a person who controls the supply, importation or resupply of machinery, plant or work systems;

"work system" means a system in which human participants or machines or human participants and machines perform work using information, technology and other resources to produce products or services for internal or external customers.

Scope of application

2. These Regulations will apply to–

(a) any employer or self-employed person who carries out work at a workplace, which may expose any person to ergonomic risks in that workplace; and

(b) a designer, manufacturer, importer or supplier of machinery, plant or work systems for use at a workplace.

Information, instruction and training

3. (1) An employer must, after consultation with the health and safety committee established in respect of a workplace under such employer's control or the health and safety representatives designated for that workplace or for different sections thereof, establish for all employees and mandatories or persons other than employees who may be affected or potentially exposed to ergonomic risks a training programme that incorporates the following:

(a) the content and scope of these Regulations;

(b) the potential sources of exposure to ergonomic risks;

(c) the nature of ergonomic risks;

(d) the potential risk to health associated with ergonomic risks;

(e) the control measures that are in place to prevent exposure to ergonomic risks;

(f) the procedure for reporting ergonomic risks to the health and safety representative or employer;

(g) the precautions to be taken by an employee to protect himself or herself against ergonomic risks; and

(h) the assessment of exposure, the necessity for medical surveillance and the long-term benefits of undergoing such surveillance.

(2) The employer must conduct the training contemplated in subregulation (1) prior to the placement of the relevant employee in the workplace.

(3) The employer must conduct refresher training at intervals that may be recommended by the health and safety committee or the health and safety representative.

Duties of persons who may be at risk of exposure to ergonomic risks

4. Any person who is exposed or may be exposed to ergonomic risks must obey any lawful instruction given to him or her by the employer or self-employed person or by anyone authorised by the employer or self-employed person, regarding–

(a) the use of measures adopted to control ergonomic risks;

(b) cooperation with the employer in determining the employee's exposure to ergonomic risks;

(c) the reporting of potential ergonomic risks to the health and safety representative or the employer;

(d) reporting for medical surveillance as required by regulation 8; and

(e) information, instruction and training received as contemplated in regulation 3.

Duties of designers, manufacturers, importers and suppliers

5. Any designer, manufacturer, importer or supplier of machinery, plant or work systems for use at work must–

(a) as far as is reasonably practicable, ensure that machinery, plant or work systems optimise human well-being and overall system performance;

(b) as far as is reasonably practicable, supply machinery, plant or work systems that can be transported, received, stored and handled in a manner that optimises human well-being and overall system performance;

(c) provide information, instruction and training as deemed necessary to allow potential users to achieve optimal human well-being and overall system performance during use of machinery, plant or work systems;

(d) as far as is reasonably practicable, install machinery, plant or work systems to achieve optimal human well-being and overall system performance; and

(e) provide information to potential users on the appropriate maintenance of machinery, plant or work systems to ensure safe operation and use.

Ergonomic risk assessment

6. (1) *(a)* An employer must, before the commencement of any work that may expose employees to ergonomic risks, have an ergonomic risk assessment performed by a competent person.

(b) The ergonomic risk assessment contemplated in paragraph *(a)* must be performed after consultation with the health and safety committee established in respect of a workplace under the employer's control or the health and safety representatives designated for that workplace or for different sections thereof.

(2) The ergonomic risk assessment contemplated in subregulation (1) must–

(a) be conducted at intervals not exceeding two years; and

(b) include–

(i) a complete hazard identification;
(ii) the identification of all persons who may be affected by the ergonomic risks;
(iii) how employees may be affected by the ergonomic risks;
(iv) the analysis and evaluation of the ergonomic risks; and
(v) the prioritisation of ergonomic risks.

(3) An employer must review the relevant ergonomic risk assessment made in accordance with subregulation (1) if–

(a) such assessment is no longer valid;

(b) control measures are no longer effective;

(c) technological or scientific advances allow for more effective control methods;

(d) there has been a change in–

(i) the work methods;
(ii) the type of work carried out; or
(iii) the type of equipment used to control the exposure; and

(e) an incident occurs or medical surveillance reveals an adverse health effect, where ergonomic risks are identified as a contributing factor.

Risk control

7. (1) An employer or self-employed person must ensure that the exposure of a person to ergonomic risks is prevented or, where this is not reasonably practicable, adequately controlled.

(2) In order to comply with subregulation (1) an employer or self-employed person must, as far as is reasonably practicable, remove or reduce exposure to ergonomic risks by implementing control measures in accordance with the hierarchy of controls.

Medical surveillance

8. (1) An employer must ensure that an employee is placed under medical surveillance, which is overseen by an occupational medicine practitioner, if–

(a) the ergonomic risk assessment referred to in regulation 6 indicates the need for the employee to be placed under medical surveillance; or

(b) an occupational health practitioner recommends that relevant employees must be under medical surveillance, in which case the

employer may call upon an occupational medicine practitioner to ratify the appropriateness of such recommendation.

(2) An employer must ensure that the medical surveillance contemplated in subregulation (1) consists of–

(a) in the case of a new employee, an initial health examination before the employee commences employment or within 30 days of commencement of such employment;

(b) a periodic health examination informed by the ergonomic risk assessment, at intervals specified by an occupational medicine practitioner, but not exceeding two years; and

(c) an exit health examination informed by the ergonomic risk assessment.

Maintenance of controls

9. Every employer or self-employed person must, as far as is reasonably practicable, ensure that any control provided for the benefit of employees–

(a) complies with these Regulations;

(b) is fully and appropriately implemented; and

(c) is maintained in good working order.

Records

10. (1) An employer or self-employed person must–

(a) keep records of documents contemplated in regulations 3, 6, 7, 8(2) and 9;

(b) keep records for a minimum period of–

(i) 40 years for records contemplated in regulations 6 and 8(2);

(ii) three years for records contemplated in regulations 7 and 9;

(iii) the length of time the employee remains at the workplace for records contemplated in regulation 3;

(c) make available to–

(i) the relevant health and safety representative, health and safety committee or to an inspector, the records contemplated in regulations 3, 6, 7 and 9;

(ii) any person, the records contemplated in regulation 8(2), subject to formal written consent of the employee.

(2) (a) If the employer ceases activities, the employer must hand over or forward by registered post all records to the relevant chief director: provincial operations.

(b) The records referred to in paragraph *(a)* must contain at least the following information of the employee:

(i) surname and forenames;

(ii) gender;

(iii) date of birth;

(iv) name of spouse or closest relative; and

(v) where available, permanent residential address and postal code.

Ergonomics health and safety technical committee

11. (1) The chief inspector must, after consultation with the Minister, establish an ergonomics health and safety technical committee which must consist of–

(a) a chairperson;

(b) two persons designated by the chief inspector from the employees of the Department of Employment and Labour;

(c) three persons designated by employer's organisations to represent employers;

(d) three persons designated by employees' organisations to represent the federation of unions;

(e) one person to represent a professional body recognised by the chief inspector;

(f) persons who are competent in respect of the matters to be dealt with by the ergonomics health and safety technical committee who have been co-opted by the committee with the authorisation of the chief inspector;

(g) one person from the field of ergonomics representing a higher educational institution; and

(h) one person representing occupational medicine.

(2) The chief inspector–

(a) must appoint members of the ergonomics health and safety technical committee for a period that he or she may determine at the time of the appointment;

(b) may, after having afforded a member a reasonable opportunity to respond, discharge such a member at any time, for reasons that are fair and just; and

(c) may appoint a new member in the place of a member who is discharged in terms of paragraph *(b)*.

(3) The ergonomics health and safety technical committee must–

(a) advise the chief inspector on ergonomics related matters, including, but not limited to, codes, standards and training requirements;

(b) make recommendations and submit reports to the chief inspector regarding any matter to which these Regulations apply;

(c) advise the chief inspector regarding any matter referred to the ergonomics health and safety technical committee by the chief inspector;

(d) perform any other function for the administration of a provision of these Regulations that may be requested by the chief inspector; and

(e) conduct its work in accordance with the instructions and rules of conduct framed by the chief inspector.

Offences and penalties

12. Any person who contravenes or fails to comply with any of the provisions of regulations 3, 4, 5, 6, 7, 8, 9 and 10 is guilty of an offence and liable, upon conviction, to a fine or to imprisonment for a maximum of 12 months and, in the case of a continuous offence, to an additional fine not exceeding R200,00 for each day on which the offence continues or to additional imprisonment of one day for each day the offence continues: provided that the period of such imprisonment will not exceed 90 days.

Short title and commencement

13. These Regulations will be called the Ergonomics Regulations, 2018, and will come into operation on the date of publication in the *Gazette*.



employment & labour

Department:
Employment and Labour
REPUBLIC OF SOUTH AFRICA

Annexure 1

Explanatory Notes to Ergonomics Regulations 2019

Chief Directorate: Occupational Health and Safety

NO: XXX

FOREWORD

The purpose of this document is to provide guidance to all employers, employees and the public alike, who are responsible for or concerned with the control and prevention of exposure to ergonomic risks in the workplace.

This guide does not replace the Ergonomics Regulations of 2019. It is intended to give practical insight into the application of the Regulations. It should always be read in conjunction with the Ergonomics Regulations and the Occupational Health and Safety Act of 1993.

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INTRODUCTION

Ergonomics (human factors will be considered the same as ergonomics in this document) takes a systems approach to understanding work acknowledging the interactions between the various elements within the work-system including tools/technology, tasks, environment, organisation and persons in the workplace. Ergonomics aims to balance these interactions through the design of the system using a human-centred approach. Applied comprehensively in a workplace, ergonomics can be as important a concept as strategic planning and quality control. It has a real and direct impact on health and safety, productivity and performance. Ergonomics can affect an entire work-system by enhancing the most important component - the ability to balance task demands with employee capabilities.

The practical benefits of ergonomics are, but not limited to:

- Labour – improved health, well-being and safety of employees
- Business – improved productivity, efficiency and prevention of occupational incidents and adverse health effects
- Government – a workplace that is safe and without risk to the health of employees

The regulations speak to an ergonomics programme approach which should be integrated into existing occupational health and safety programmes. An ergonomics programme is a systematic process for anticipating, identifying, analysing and controlling ergonomic risks, which should include but not be limited to, ergonomics hazards identification and risk assessment, risk controls, information and training, monitoring and evaluation and medical surveillance. It is important to acknowledge that ergonomics is not a stand alone hazard, but rather part of the broader approach to ensuring a workplace that is safe and without risk to the health of employees as well as productivity at work.

Regulation 2: Scope of Application

These Regulations are intended to protect the health and safety of any person who may be exposed to ergonomic risks in the workplace.

Regulation 3: Information, Instruction and Training

The provision of information, instruction and training for any person who may be exposed to ergonomic risks is of paramount importance, in order to assist employers and employees in reducing the exposure to ergonomic risks. The employer must ensure they are familiar with basic ergonomic principles, as well as establish a training programme for all employees exposed to ergonomic risks.

The employer must ensure that he or she obtains suitable information in order to train employees effectively. Training of employees may be conducted either internally or externally.

Information and training must be planned carefully and presented on commencement of employment. The frequency of training thereafter should depend on the severity of the ergonomic risks and should be determined by the health and safety committee. It is of the utmost importance that health and safety committees and health and safety representatives are thoroughly trained and educated with regards to ergonomics. This is to ensure that the health and safety representatives or committees are able to make informed decisions relating to their discretionary powers.

An employer should verify that employees understand ergonomic risks, with health and safety committee members, health and safety representatives and employees contributing to developing and implementing training programmes in relation to ergonomics.

It is the duty of employers to ensure that all employees have thorough knowledge of the provisions of the Act and these regulations. The aspects of training included in the regulation is the minimum content of a training programme however, the employer should provide a suitable training programme that is understandable to all their employees.

Regulation 4: Duties of those who may be at risk of exposure to ergonomic risks

Employees or any other person exposed to ergonomic risks at the workplace, have a moral and legal duty to comply with any lawful instruction and procedure (written or oral) given by or on behalf of employers. In addition, employees must comply with the requirements laid down by the Act and other applicable regulations. These instructions and procedures may differ from one workplace to another because workplaces are not identical.

Regulation 5: Duties of Designers, Manufacturers, Importers and Suppliers

Effective use of ergonomics in the design process will result in a workplace that is safe and without risk to the health of employees. Ergonomics is design driven, therefore it does not stop with determining risk but with the resolution and implementation of new designs to mitigate the risks identified, whether these risks are for incidents, adverse health effects or poor productivity. Designing tasks, plant, machinery and work-systems to suit the employee can reduce human error, incidents and adverse health effects. Failure to observe ergonomic principles can have serious consequences for employees and for the employer.

The following should be taken into account by the designer, manufacturer, importer and supplier:

- Ergonomics needs to be taken into account in all steps of the life cycle of the plant, machinery or work systems. The design, installation, operation, maintenance and decommissioning should be considered
- Employee characteristics
- Foreseeable operating conditions including upsets and emergencies.
- The interface between the employee and the system
- Instructions, technical information, warning signs, safe operation for the employee must be provided
- Where possible, SANS standards must be taken into account

Regulation 6: Ergonomics Risk Assessment

It is the duty of the employer to conduct a risk assessment for all tasks where an employee is exposed to ergonomic risks. The risk assessment may be carried out by an employee who is familiar with the task, provided they have the competency to do so. Before an employee conducts the risk assessment, it is the responsibility of the employer to ensure that the individual has the adequate level of competence to conduct the risk assessment. The employer may require a health and safety professional who has to demonstrate appropriate competence to conduct the risk assessment when the task being carried out is complex. While one individual may be able to carry out a risk assessment, it may be beneficial to draw on the knowledge and competencies of others.

The risk assessment should include at least the following steps:

- Identifying the hazards employees are exposed to
- Identifying the employees who are exposed to the risks and how they may be affected
- Analysing and evaluating the risk
- Prioritising the risks

The risk assessment should be conducted and or reviewed at least every two years and recorded. Shorter review periods may be necessary if new information becomes available or there has been a change in task or control measures. The risk assessment should also be reviewed if a reportable incident occurs or if an employee suffers an adverse health effect as a result of exposure to ergonomic risks.

Regulation 7: Risk Control

The introduction of a sound ergonomics programme will go a long way towards controlling ergonomic risks. However, it is good practice to continually monitor adverse health effects at the workplace, in order to check that the risk control measures are working. There are many cases where problems are still occurring and further steps are needed to solve the problem. The following factors should be taken into account in controlling the risk:

Ergonomic risks should be reduced to the lowest reasonably practicable level through control and prevention measures in the order of priority below:

1. Elimination: The job should be redesigned so that the hazard is removed from the workplace
2. Substitution: The current task should be replaced with a less hazardous task. It is important to ensure that the new design is less hazardous than the original
3. Engineering controls: Use equipment or other measures to reduce the risks associated with tasks. Priority should be given to measures which protect collectively over individual measures
4. Administrative controls: Identify and implement new procedures that will allow work to be done safely
5. Personal protective equipment: Only once all the previous measures have been tried and shown to be ineffective in controlling risk to a reasonably

practicable level, personal protective equipment (PPE) should be considered. When PPEs are used it is important that employees are involved in the fitting and consulted in the selection of fit for purpose PPE

Regulation 8: Medical Surveillance

Medical surveillance in the workplace is an integral part of occupational health surveillance. Surveillance is the close observation of a person or group, especially those identified by the risk assessment. It refers to the detection of adverse health effects resulting from occupational exposures at as early a stage as possible, so that appropriate preventive measures can be instituted promptly. For this reason, medical surveillance is placed at a secondary level of prevention as the adverse health effect is still reversible or more easily treatable.

Medical surveillance should have a clearly defined objective for targeted employees and medical procedures, such as questionnaires and health examinations, must be available to achieve the objective. Medical surveillance must be risk based and tailored to a specific adverse health effect that is to be prevented. Medical surveillance for ergonomics should be either incorporated into existing medical surveillance, for employers who have already implemented such surveillance or establish ergonomics medical surveillance for the workplace.

Medical surveillance is performed at regular pre-determined intervals; at the beginning, termination of employment and throughout the employment period and/or as determined by the occupational medicine practitioner. Medical surveillance must be carried out by occupational medicine practitioners and occupational health practitioners.

Medical surveillance includes the following elements:

1. Identification of employees according to the ergonomics risk assessment, for which the medical surveillance activities will be appropriate;
2. An initial health examination and collection of clinical history;
3. Periodic health examinations at regularly scheduled intervals;
4. More frequent and scheduled health examinations, as indicated on the basis of findings from these examinations;
5. A written report of medical findings;
6. Employee training to recognise symptoms of exposures to ergonomic risks; and
7. Employer actions in response to the identified adverse health effects on employees with ongoing data analysis to evaluate collected information and institute control measures, including employee rehabilitation at the workplace.

Regulation 9: Maintenance of Controls

The employer should implement a planned maintenance programme for all plant, machinery and systems in order to reduce the ergonomic risks. The programme should include a system for reporting defects by employees and a corrective action plan.

Health and Safety Representative and employees must report any defects in plant, machinery or systems immediately to the employer.

Regulation 10: Records

Well-kept records may provide useful information in the risk assessment process. The analysis of records may provide a link between the exposure to ergonomic risks and adverse health effects caused by the exposure to ergonomic risks.

The employer must ensure that records are kept for; information and training provided to employees, ergonomics risk assessments conducted at the workplace, the results of health examinations conducted on employees; and action plans for the implementation of control measures and the maintenance of such control measures.

Due to the nature of ergonomics adverse health effects occurring over time, retention of records is needed to investigate any causal relationship, if any, between exposure to ergonomic risks and diagnoses. Records of incidents must also be kept in order determine whether there was an exposure to ergonomic risks.

Regulation 11: Ergonomics Health and Safety Technical Committee

The chief inspector must establish a health and safety Technical Committee (TC) for ergonomics. The TC shall consist of a tripartite structure which includes; government, organised business and organised labour and specialists in the field of ergonomics. The specialists will include a person from a professional body recognised by the chief inspector, a person from a higher education institution and a person representing occupational medicine. The chief inspector may co-opt a person or persons to the TC, who have competence in a specific matter relating to ergonomics health and safety.

The duties of the ergonomics health and safety technical committee include;

- Advising the chief inspector on matters relating to codes, standards and training requirements in terms of ergonomics or any matter referred to the TC
- Making recommendations to the chief inspector on matters applying to the Ergonomics Regulations
- Performing any other function of administration for the Ergonomics Regulations

The TC must also work within the instructions and rules of conduct established by the chief inspector.

DEPARTMENT OF LABOUR

Government Notice. R: 1031 **30 May 1986**

General Safety Regulations, 1986

The Minister of Manpower has, in terms of section 35 of the Machinery and Occupational Safety Act, 1983 (Act 6 of 1983) made the regulations contained in the Schedule hereto.

SCHEDULE

Definitions

1. In these regulations "the Act" means the Machinery and Occupational Safety Act, 1983 (Act 6 of 1983), and any expression to which a meaning has been assigned in the Act shall have the meaning so assigned and, unless the context indicates otherwise -

"Boatswain's chair" means a suspended platform seat intended for supporting one person in an elevated position;

"building work" means building work as defined in the General Administrative Regulations published under Government Notice R206 of 5 October 1984;

"confined space" means an enclosed, restricted, or limited space in which, because of its construction, location or contents, or any work activity carried on therein, a hazardous substance may accumulate or an oxygen-deficient atmosphere may occur, and includes any chamber, tunnel, pipe, pit, sewer, container, valve, pump, sump, or similar construction, equipment, machinery or object in which a dangerous liquid or dangerous concentration of gas, vapour, dust or fumes may be present;

"fire resistance" means the minimum period for which a building element or component will comply with the requirements for stability, integrity, and insulation when tested in accordance with SABS 0177: Part II;

"flammable liquid" means any liquid which produces a vapour that forms an explosive mixture with air, and includes any liquid with a closed-cup flash-point of less than 55 degrees C;

"high-risk substance" means a substance listed in the Schedule to the General Administrative Regulations published under Government Notice R.2206 of 5 October 1984, as amended from time to time;

"putlog scaffold" means a scaffold supported by a single row of standards and the structure in connection with which it is being used;

"SABS 0177: Part II" means the South African Bureau of Standards' code of practice entitled Fire Resistance Test For Building Elements, SABS 0177: Part II – 1981.

"scaffold" means any temporary elevated platform and supporting structure used for supporting workmen or materials or both;

"Suspended scaffold" means a working platform suspended from supports by means of one or more separate suspensions from each support;

"trestle scaffold" means a working platform supported on trestles, stepladders, tripods and the like.

Personal safety equipment and facilities

2. (1) Subject to the provisions of paragraphs (f), (g), (h) and (i) of regulation 5 of the General Administrative Regulations published under Government Notice R. 2206 of 5 October 1984, every employer and every user of machinery shall make an evaluation of the risk attached to any condition or situation which may arise from the activities of such employer or user, as the case may be, and to which persons at a workplace or in the course of their employment or in connection with the use of machinery are exposed, and he shall take such steps as may under the circumstances be necessary to make such condition or situation safe. (Replaced by GAR, 1994 by Government Notice R. 17403 of 6 September, 1996.)

(2) Where it is not practicable to safeguard the condition or situation contemplated in subregulation (1), the employer or user of machinery, as the case may be, shall take steps to reduce the risk as much as is practicable, and shall provide free of charge and maintain in a good and clean condition such safety equipment and facilities as may be necessary to ensure that any person exposed to any such condition or situation at a workplace or in the course of his employment or on premises where machinery is used is rendered safe.

(3) Taking into account the nature of the hazard that is to be countered, and without derogating from the general duties imposed on employers and users of machinery by subregulations (1) and (2), the safety equipment and facilities contemplated in subregulation (2) shall include, as may be necessary --

(a) suitable goggles, spectacles, face shields, welding shields, visors, hard hats, protective helmets, caps, gloves, gauntlets, aprons, jackets, capes, sleeves, leggings, spats, gaiters, protective footwear, protective overalls, or any similar safety equipment or facility of a type that will effectively prevent bodily injury;

(b) waterproof clothing, high-visibility clothing, chemical-resistant clothing, low temperature clothing, chain mail garments, waders, fire retardant or flame-proof clothing, ice-jackets, or any similar safety equipment of a type that will effectively protect the wearer thereof against harm;

(c) belts, harnesses, nets, fall arresters, life lines, safety hooks, or any similar equipment of a type that will effectively protect persons against falls;

(d) mats, barriers, locking-out devices, safety signs, or any similar facility that will effectively prevent slipping, unsafe entry or unsafe conditions;

(e) protective ointments, ear-muffs, ear-plugs, respirators, breathing apparatus, masks; air lines, hoods, helmets, or any similar safety equipment or facility of a type that will effectively protect against harm;

(f) suitable insulating material underfoot where persons work on a floor made of metal stone, concrete or other similar material; and

(g) generally, such safety equipment or facilities as may be necessary to render the persons concerned safe.

(4) An employer or a user of machinery, as the case may be, shall take steps to ensure that no safety equipment or facility provided as required by this or any other regulation is removed from a workplace or from premises where machinery is used, except for purposes of cleaning, repair, maintenance, modification, mending or replacement, and no person shall remove any such safety equipment or facility from a workplace or premises where machinery is used, except for the aforesaid purposes.

(5) An employer shall instruct his employees in the proper use, maintenance and limitations of the safety equipment and facilities provided.

(6) An employer shall not require or permit any employee to work unless such an employee uses the required safety equipment or facility provided in terms of this or any other regulation.

(7) The provisions of this regulation shall not be construed as derogating from the provisions of any specific regulation prescribing specific safety equipment or facilities.

Intoxication

2A.(1) Subject to the provisions of subregulation (3), an employer or a user, as the case may be, shall not permit any person who is or who appears to be under the influence of intoxicating liquor or drugs, to enter or remain at a workplace.

(2) Subject to the provisions of subregulation (3), no person at a workplace shall be under the influence of or have in his or her possession or partake of or offer any other person intoxicating liquor or drugs.

(3) An employer or a user, as the case may be, shall, in the case where a person is taking medicines, only allow such person to perform duties at the workplace if the side effects of such medicine do not constitute a threat to the health or safety of the person concerned or other persons at such workplace.

Display of substituted notices and signs

2B. If the provisions of any regulation prescribe a particular notice or sign to be displayed by an employer or by a user at a workplace, the employer or user may, in lieu thereof, display a corresponding symbolic sign, as contained in a safety standard incorporated for this purpose into these regulations under section 44 of

the Act, in which case the employer or user shall be deemed to have complied with such provisions.

Admittance of persons

2C.(1) Subject to section 8 of the Act, an employer or user, as the case may be, shall not permit a person to enter a workplace where the health or safety of such person is at risk or may be at risk, unless such person enters such workplace with the express or implied permission of and subject to the conditions laid down by such employer or user: Provided that such express or implied permission shall not apply in respect of a person entitled by law to enter such workplace or premises.

(2) An employer or a user, as the case may be, shall, if he deems it necessary in the interests of health and safety, post up a notice at every entrance to a workplace prohibiting the entry of unauthorised persons to such workplace and no person shall enter or remain at such workplace without the permission of the employer or user, as the case may be.

First aid, emergency equipment and procedures

3. (1) An employer shall take all reasonable steps that are necessary under the circumstances, to ensure that persons at work receive prompt first aid treatment in case of injury or emergency.

(2) Where more than five employees are employed at a workplace, the employer of such employees shall provide a first aid box or boxes at or near the workplace which shall be available and accessible for the treatment of injured persons at that workplace.

(3) (a) Taking into account the type of injuries that are likely to occur at a workplace, the nature of the activities performed and the number of employees employed at such workplace, the employer shall make sure that the first aid box or boxes contemplated in sub-regulation (2) contain suitable first aid equipment which include at least the equipment listed in the Annexure hereto.

(b) Such an employer shall make sure that only articles and equipment contemplated in subregulation (a) or other similar equipment or medicine is kept in the first aid box or boxes.

(4) Where more than 10 employees are employed at a workplace, the employer of such employees shall take steps to ensure that for every group of up to 50 employees at that workplace, or in the case of a shop or an office as contemplated in the Basic Conditions of employment Act, 1983 (Act No. 3 of 1983), for every group of up to 100 employees, at least one person is readily available during normal working hours, who is in possession of a valid certificate of competency in first aid, issued by -

(a) the SA Red Cross Society;

(b) the St. John Ambulance;

(c) the SA First Aid League; or

(d) a person or organisation approved by the chief inspector for this purpose.

(5) An employer shall at a workplace where a high risk substance or toxic, corrosive or similar hazardous substances are used, handled, processed or manufactured, ensure that the first aid worker contemplated in subregulation (4) is trained in the first aid procedures that are necessary for the treatment of injuries that may result from such activities, including the acute detrimental effects of exposure to such substances, and in the emergency procedures which are necessary in the case of accidental leakage or dumping of such substances.

(6) An employer shall affix a prominent notice or sign in a conspicuous place at a workplace, indicating where the first aid box or boxes are kept as well as the name of the person in charge of such first aid box or boxes.

(7) An employee with an open wound, cut, sore or any similar injury, who works in a workplace where a substance contemplated in subregulation 5 is used, handled, processed or manufactured, shall report such injury to his employer forthwith. The employer may not permit such employee to continue working before the injury has been cleaned with soap and water or with a diluted disinfectant.

(8) Where an employee is exposed or can be exposed to a potential hazard of injury to the eye through contact with a biological or chemical substance, the employer concerned shall make sure that there is an eyewash fountain or any similar facilities, in the immediate vicinity of the workplace of such employee and that the employee is trained in the use thereof.

(9) Where an employee at a workplace is exposed or can be exposed to a potential hazard of injury to or absorption through the skin as a result of sudden contact with a large amount of toxic, corrosive, high risk or similar hazardous substance, the employer concerned shall make sure that there is a fast-reacting deluge-shower with clean water or a similar facility in the immediate vicinity of the workplace of such employee and that the employee is trained in the use thereof.

Use and storage of flammable liquids

4. (1) No employer shall require or permit any person to work in a place where the vapour of any flammable liquid is generated to such an extent that it constitutes an actual or potential fire or explosion hazard or endangers the safety of any person, unless the provisions of subregulations (2) to (12) of this regulation are complied with.

(2) No employer shall require or permit a flammable liquid to be used or applied other than in a room, cabinet or other enclosure specially constructed for this purpose of fire-resisting material or in a place which, owing to its situation or construction or any other feature or circumstance, is of such a nature that-

(a) no fire or explosion hazard is, can or may be created thereat;

(b) any vapour resulting from such use or application is efficiently dispersed and diluted into the atmosphere subject to the provisions of the Air Pollution Prevention Act, 1965 (Act 45 of 965); and

(c) no other workplace can or may be contaminated by such vapour.

(3) An employer shall cause every room, cabinet or enclosure contemplated in subregulation (2) to be fitted with an efficient intake and exhaust ventilation system to remove any vapour therefrom and to prevent its recirculation in a manner which may lead to the contamination of any other workplace of the creation of a fire or explosion hazard: Provided that, notwithstanding any other provision of this regulation, an employer shall provide every employee doing spraying with a respirator, mask or breathing apparatus of a type approved by the chief inspector, and that any such employee shall while spraying use such apparatus provided to him.

(4) Where spraying is done in any room the employer concerned shall cause the ventilation system contemplated in subregulation (3) to conform to the following requirements:

(a) if the air supply and extraction is horizontal, the average air speed measured at a level of 1.5 meters above the floor, or at the level of the platform on which persons stand to work, shall not be less than 0.5 meters per second;

(b) if the air supply is vertical and the extraction thereof is done through slits or a grill along the side walls at floor level, the average air speed measured as a level of 1.5 meters above the floor, or at the level of the platform on which persons stand to work, shall not be less than 0.4 meters per second; or

(c) if the air supply is vertical and the extraction thereof is done through a grill over the whole of the floor area, the average air speed measured at a level of 1.5 meters above the floor, or at the level of the platform on which persons stand to work, shall not be less than 0.3 meters per second.

(5) Where spraying is done into any cabinet or enclosure as contemplated in subregulation (2), the employer concerned shall cause the ventilation system contemplated in subregulation (3) to comply with the following requirements:

(a) where the area of the open face of the cabinet is not more than one square metre, the average speed of air movement through the said face shall not be less than one metre per second;

(b) where the area of the open face is more than one square metre but less than two square meters, the average speed of air movement through the said face shall not be less than 0.75 meters per second; or

(c) where the area of the open face is equal to or exceeds two square meters, the average speed of air movement through the said face shall not be less than 0.5 meters per second.

(6) With regard to the ventilation system contemplated in subregulation (3) the employer shall cause --

(a) all ducts, trunks and enclosures of the system to be of fire resistant material with a smooth interior finish and to be constructed in such a manner as to facilitate the cleaning thereof;

(b) the system to be kept in operation during working hours as well as for at least the period of time thereafter that may be necessary to clear the vapour from the atmosphere of the room, cabinet or enclosure to below 25 per cent of the lower explosive limit of that vapour; and

(c) the work to be so organized that the flow of air towards the intake of such ventilation system is not obstructed and draws the spray or vapour of the flammable liquid away from any employee operating the equipment.

(7) With regard to any room contemplated in subregulation (2) the employer shall cause every such room --

(a) with a floor area exceeding 20 square meters to have at least two separate entrances at opposite ends of the room, which shall be fitted with doors openings outwards that cannot be locked; and

(b) to be fitted with an inspection window of strengthened and shatterproof glass that cannot be opened.

(8) (a) An employer shall not permit--

(i) any fire, flame or naked light or anything which may generate static electricity or any other thing which may ignite a flammable liquid or its vapour, to be used in or taken into any room, cabinet or enclosure contemplated in subregulation (2) in which any such flammable liquid is used, sprayed or stored, and shall affix a suitable and conspicuous sign prohibiting any such act at all the entrances to any such room, cabinet or enclosure;

(ii) any person to, and no person shall, smoke in any place in which flammable liquid is used or stored, and such employer shall affix a suitable and conspicuous notice prohibiting such smoking at all the entrances to any such place; and

(iii) any process capable of causing sparks or fire, or the application of any heat for the drying of sprayed or treated articles, to take place in any room, cabinet or enclosure used for spraying, before the space or atmosphere has been cleared of all vapour.

(b) No person shall contravene any prohibition made known as contemplated in subparagraph (i) or (ii) of paragraph (a).

(9) With respect to any room, cabinet or enclosure contemplated in subregulation (2), the employer concerned shall cause --

(a) discarded cotton waste, cleaning rags or similar material to be removed daily and safely disposed of;

(b) only that quantity of flammable liquid needed for work on one day to be taken into or kept in such room, cabinet or enclosure: Provided that partially consumed stock may be stored in a properly marked, fireproof wall cabinet inside the work place;

(c) all drums, cans, canisters or similar containers holding flammable liquids to be kept tightly closed when not in actual use and, after their contents have been used up, to be removed from the workplace and safety disposed of daily; and

(d) every such room, cabinet or enclosure to be kept clean and all fans, ducts, trunks and enclosures of the ventilation system contemplated in subregulation (3) to be kept clean and in good working order: Provided that any cleaning, scraping or scouring shall be done with implements that cannot cause sparking if the concentration of the vapour exceeds 25 per cent of the lower explosive limit of that vapour.

(10) An employer shall cause every flammable liquid store to be --

(a) separated by means of fire-resisting material with a fire-resistance of two hours from any room, cabinet or enclosure contemplated in subregulation (2);

(b) constructed of fire-resisting material with a fire-resistance of two hours;

(c) constructed in such a way that, in case of spillage, a volume of the flammable liquid in question equal to the quantity of flammable liquid ordinarily kept in store plus 10 per cent of that quantity, can be contained;

(d) ventilated to the open air in such a manner that vapour cannot accumulate inside the store; and

(e) clearly marked with a sign indicating that it is such a store and also indicating the amount of flammable liquid which may be stored therein.

(11) Taking into account the construction and location of the premises in question and the quantity and types of flammable liquids involved, an employer shall install an adequate amount of efficient fire-fighting equipment in suitable locations in and around every building in which such substances are used, handled or stored, or as may be recommended by the fire chief of the local authority concerned.

(12) The provisions of this regulation shall not be construed as applying to the use of flammable liquids in the course of or in connection with building work: Provided that every employer engaged in building work shall ensure that, where flammable liquids are used or applied at the workplace concerned, this is done in such a manner that no fire or explosion hazard is created, and that the workplace is effectively ventilated: Provided further that where the workplace cannot be ventilated effectively the employer shall provide every employee involved with a respirator, mask or breathing apparatus of a type approved by the chief inspector, and shall take steps to ensure that every such employee, while using or applying flammable liquid, uses the apparatus supplied to him.

Work in confined spaces

5. (1) An employer or a user of machinery shall take steps to ensure that a confined space is entered by an employee or other person only after the air

therein has been tested and evaluated by a person who is competent to pronounce on the safety thereof, and who has certified in writing that the confined space is safe and will remain safe while any person is in the confined space, taking into account the nature and duration of the work to be performed therein.

(2) Where the provisions of subregulation (1) cannot be complied with the employer or user of machinery, as the case may be, shall take steps to ensure that any confined space in which there exists or is likely to exist a hazardous gas, vapour, dust or fumes, or which has or is likely to have, an oxygen content of less than 20 per cent by volume, is entered by an employee or other person only when--

(a) subject to the provisions of subregulation (3), the confined space is purged and ventilated to provide a safe atmosphere therein and measures necessary to maintain a safe atmosphere therein have been taken; and

(b) the confined space has been isolated from all pipes, ducts and other communicating openings by means of effective blanking other than the shutting or locking of a valve or a cock, or, if this is not practicable, only when all valves and cocks which are a potential source of danger have been locked and securely fastened by means of chains and padlocks.

(3) Where the provisions of subregulation (2)(a) cannot be complied with, the employer or user of machinery shall take steps to ensure that the confined space in question is entered only when the employee or person entering is using breathing apparatus of a type approved by the chief inspector and, further, that--

(a) the provisions of subregulation (2) (b) are complied with;

(b) any employee or person entering the confined space is using a safety harness or other similar equipment, to which a rope is securely attached which reaches beyond the access to the confined space, and the free end of which is attended to by a person referred to in paragraph (c);

(c) at least one other person trained in resuscitation is and remains in attendance immediately outside the entrance of the confined space in order to assist or remove any or persons from the confined space, if necessary; and

(d) effective apparatus for breathing and resuscitation of a type approved by the chief inspector is available immediately out side the confined space.

(4) An employer or user of machinery shall take steps to ensure that all persons vacate a confined space on completion of any work therein.

(5) Where the hazardous gas, vapour, dust or fumes contemplated in subregulation (2) are of an explosive or flammable nature, an employer or user of machinery shall further take steps to ensure that such a confined space is entered only if --

(a) the concentration of the gas, vapour, dust or fumes does not exceed 25 per cent of the lower explosive limit of the gas, vapour, dust or fumes concerned where the work to be performed is of such a nature that it does not create a source of ignition; or

(b) such concentration does not exceed 10 per cent of the lower explosive limit of the gas, vapour, dust or fumes where other work is performed.

(6) The provisions of this regulation shall mutatis mutandis also apply, in so far as they can be so applied, to any work which is performed in any place or space on the outside of and bordering on or in the immediate vicinity of, any confined space, and in which place or space, owing to its proximity to the confined space, any hazardous article, oxygen-deficient atmosphere or dangerous concentration of gas, vapour, dust or fumes may occur or be present.

Work in elevated positions

6. No employer shall require or permit any person to work in an elevated position, and no person shall work in an elevated position, unless such work is performed safely from a ladder or scaffolding, or from a position where such person has been made as safe as if he were working from scaffolding.

Working in danger of engulfment

7. No employer shall require or permit any person to, and no person shall, enter any place from or into which solid or particulate material is being discharged where a danger exists of a person being engulfed by such solid or particulate material, unless --

(a) such a person is provided with and properly uses a safety belt and rope;

(b) at least one other person who has been properly instructed, is and remains in attendance outside such place to keep the persons therein under continuous observation in order to render assistance in case of emergency; and

(c) the precautions prescribed by regulation 5 of these regulations are taken if dangerous gas, fumes, dust or vapour may be present in such a place.

Stacking of articles

8. (1) No employer shall require or permit the building of stacks which consist of successive tiers, one on top of another, unless --

(a) the stacking operation is executed by or under the personal supervision of a person with specific knowledge and experience of this type of work;

(b) the base is level and capable of sustaining the weight exerted on it by the stack;

(c) the articles in the lower tiers are capable of sustaining the weight exerted on them by the articles stacked above them;

(d) all the articles which make up any single tier are consistently of the same size, shape and mass;

(e) pallets and containers are in good condition; and

(f) any support structure used for the stacking of articles is structurally sound and can support the articles to be stacked on it.

(2) An employer shall not permit --

(a) articles to be removed from a stack except from the topmost tier or part of that tier; and

(b) anybody to climb onto or from a stack, except if the stack is stable and the climbing is done with the aid of a ladder or other safe facility or means.

(3) An employer shall take steps to ensure that --

(a) persons engaged in stacking operations do not come within reach of machinery which may endanger their safety;

(b) stacks that are in danger of collapsing are dismantled immediately in a safe manner; and

(c) the stability of stacks is not endangered by vehicles or other machinery or persons moving past them.

(4) Unless a stack is otherwise supported an employer shall take steps to ensure that tiers of stacked material consisting of sacks, cases, cartons, tins or similar containers --

(a) are secured by laying up articles in a header and stretcher fashion and that corners are securely bonded; and

(b) are stepped back half the depth of a single container at least every fifth tier or that, alternatively, successive tiers are stepped back by a lesser amount: Provided that at least the same average angle of inclination to the vertical is achieved: Provided further that where the containers are of a regular shape and their nature and size are such that the stack will be stable, they may be stacked with the sides of the stack vertical if the total height of the stack does not exceed three times the smaller dimension of the underlying base of the stack.

(5) Notwithstanding the provisions of subregulation (4), free-standing stacks that are built with the aid of machinery may, with the approval of an inspector, be built to a height and in a manner permitted by the nature of the containers being stacked: Provided that --

(a) the stacks are stable and do not overhang; and

(b) the operator of the stacking machinery is rendered safe as regards falling articles.

Welding, flame cutting, soldering and similar operations

9. (1) No employer or user of machinery shall require or permit welding or flame cutting operations to be undertaken, unless -

(a) the person operating the equipment has been fully instructed in the safe operation and use of such equipment and in the hazards which may arise from its use;

(b) effective protection is provided and used for the eyes and respiratory system and, where necessary, for the face, hands, feet, legs, body and clothing of persons performing such operations, as well as against heat, incandescent or flying particles or dangerous radiation;

(c) leads and electrode holders are effectively insulated; and

(d) the workplace is effectively partitioned off where practicable and where not practicable all other persons exposed to the hazards contemplated in paragraph (b) are warned and provided with suitable protective equipment.

(2) No employer or user of machinery shall require or permit welding or name cutting operations to be undertaken in a confined space, unless --

(a) effective ventilation is provided and maintained; or

(b) masks or hoods maintaining a supply of safe air for breathing are provided and used by the persons performing such operations.

(3) No employer or user of machinery shall require or permit electric welding to be undertaken in wet or damp places, inside metal vessels or in contact with large masses of metal, unless --

(a) the insulation of the electrical leads is in a sound condition;

(b) the electrode holder is completely insulated to prevent accidental contact with current-carrying parts;

(c) the welder is completely insulated by means of boots, gloves or rubber mats; and

(d) at least one other person who has been properly instructed to assist the welder in case of an emergency is and remains in attendance during operations: Provided that the provisions of this sub-regulation shall not apply to a welding process where the maximum voltage to earth does not exceed 50 volts.

(4) No employer or user of machinery shall require or permit welding, flame cutting, grinding, soldering or similar work to be undertaken in respect of any tube, tank, drum, vessel or similar object or container where such object or container --

(a) is completely closed, unless a rise in internal pressure cannot render it dangerous; or

(b) contains any substance which, under the action of heat, may --

(i) ignite or explode; or

(ii) react to form dangerous or poisonous substances,

unless a person who is competent to pronounce on the safety thereof has, after examination, certified in writing that any such danger has been removed by opening, ventilating or purging with water or steam, or by any other effective means.

(5) Where hot work involving welding, cutting, brazing or soldering operations is carried out at places, other than workplaces which have been specifically designated and equipped for such work, the employer shall take steps to ensure that proper and adequate fire precautions are taken.

Operating trains

10. (1) An employer or a user of machinery who operates a train or a train of tramway-trucks, as the case may be, shall cause a signalman carrying a red flag or red light to be stationed at every level crossing where a railway line or tramway crosses or joins a railway or a road, or shall provide other adequate means at such crossing to warn -

(a) the driver of the train or the train of tramway-trucks of the approach of a train; and

(b) traffic on the road of the approach of the train or train of tramway-trucks.

(2) An employer or a user of machinery shall not permit a train or a train of tramway-trucks to be run over a level crossing contemplated in subregulation (1) at a speed in excess of 10 kilometers per hour, and the driver thereof shall not exceed such speed.

(3) No person shall drive or permit any other person to drive a locomotive, unless authorised to do so by his employer or the user of machinery, as the case may be.

(4) An employer or a user of machinery shall not, except as provided for in subregulation (5), authorise any person to drive a locomotive while it is being used for the conveyance of persons other than those required for the working of the locomotive or train, unless such person is the holder of a locomotive engine driver's certificate issued by the South African Transport Services or in terms of regulations made under the Mines and Works Act, 1956 (Act 27 of 1956).

(5) In the case of a locomotive other than a steam locomotive, having a design speed not exceeding 20 kilometres per hour, an employer or user of machinery, as the case may be, may authorize a person who has attained the age of 18 years to drive such a locomotive while it is being used for the conveyance of persons: Provided that --

(a) the employer or user of machinery is satisfied that the sight and hearing of any such person are not defective and that he does not suffer from any other physical or mental infirmity which is likely to interfere with the efficient and safe performance of his duties; and

(b) the person so authorised is competent to carry out the duties assigned to him.

(6) The provisions of this regulation shall not apply to trains operated by the South African Transport Services.

Supervision of building work

11. (1) Every employer who performs building work shall charge a full-time employee, designated in writing by the employer, with the duty of supervising the

performance of such building work: Provided that if such employer himself has the experience contemplated in subregulation (2) and supervises the work himself, such charging and designation need not be done.

(2) An employee contemplated in subregulation (1) shall be a person who has had at least two years, experience in the type of building work for which he is to be designated.

(3) (a) An employer may designate one or more subordinate employees to assist the designated employee referred to in subregulation (l), and every such subordinate employee shall, to an extent which shall be clearly defined by the employer in his letter of designation, have the same duties as the first designated employee: Provided that the designation of any such subordinate employee shall not relieve the designated employee referred to in subregulation (1) of any personal accountability for failing in his supervisory duties contemplated in terms of this regulation.

(b) Where an employer has not designated any subordinate employee as contemplated in paragraph (a), or, in the opinion of an inspector, not a sufficient number of such subordinate employees, an inspector may require the employer to designate the number of subordinate employees indicated by him and the provisions of paragraph (a) shall apply in respect of such subordinate employees as if they were in the first instance designated under that paragraph.

Roof work

12. Every employer shall provide, and cause to be used, suitable roof ladders or duck-boards or crawling-boards for persons required to work on any roof that has an unsafe pitch or surface, or that is covered or is to be covered with material through which a person could fall: Provided that suitable safety belts attached to the structure or any similar effective equipment may be used in place of roof-ladders, duck-boards or crawling boards on pitched roofs covered with non-fragile material.

Demolition and excavation

13. Every employer who performs building work shall, with respect to any such work in connection with the demolition of a structure or the making of an excavation --

(a) with regard to a structure being demolished, take steps to ensure that --

(i) no floor, roof or other part of the structure is so overloaded with debris or material as to render it unsafe;

(ii) all practicable precautions are taken to avoid the danger of the structure collapsing when any part of the framing of a framed or partly framed building is removed, or when reinforced concrete is cut; and

(iii) precautions are taken in the form of adequate shoring or such other means as may be necessary to prevent the accidental collapse of any part of the structure or of any adjoining structure;

(b) not require or permit any person to, and no person shall, work under unsupported overhanging material or in an excavation which is more than 1.5 m deep and which has not been adequately shored or braced if there is a danger of the overhanging material or the sides of the excavation collapsing:

(c) take steps to ensure that any support, shoring or bracing contemplated in paragraph (b), is designed and constructed so that it is strong enough to support the overhanging material or the sides of the excavation in question;

(d) where the stability of an adjoining building, structure or road is likely to be affected by demolition work on a building or the making of an excavation, take such steps as may be necessary to ensure the stability of such building, structure or road and the safety of persons;

(e) ascertain as far as is practicable the location and nature of electricity, water, gas or other similar services which may in some way be affected by the work to be performed, and shall before the commencement of such work that may in this way affect any such service, take such steps as may be necessary under the circumstances to render all persons involved safe;

(f) cause convenient and safe means of access to be provided to every excavation in which persons are required to work and which is more than 1.5 m deep: Provided that, in the case of an excavation which is more than 50 m in length, a safe means of access shall be provided at intervals of not more than 50 m;

(g) cause every excavation which is more than 1.5 m deep, including all bracing and shoring, to be inspected by a person who is competent to pronounce on the safety thereof, at least once before every shift and before the commencement of work after rain, to ensure the safety of persons; and

(h) cause every excavation which is accessible to the public or which is adjacent to public roads or thoroughfares, or whereby the safety of persons may be endangered, to be--

(i) adequately protected by a barrier or fence at least one metre high and as close to the excavation as is practicable; and

(ii) provided with red warning lights or any other clearly visible boundary indicators at night or when visibility conditions are poor.

Ladders

13A (1) An employee shall ensure that every ladder is constructed of sound material and is suitable for the purpose for which it is used, and -

(a) is fitted with non-skid devices at the bottom ends and hooks or similar devices at the upper ends of the stiles which shall ensure the stability of the ladder during normal use; or

(b) is so lashed, held or secured whilst being used as to ensure the stability of the ladder under all conditions and at all times.

(2) No employer shall use a ladder, or permit it to be used, if it -

(a) (i) has rungs fastened to the stiles only by means of nails, screws, spikes or in like manner; or

(ii) has rungs which have not been properly let into the stiles: Provided that in the case of welded ladder or ladders of which the rungs are bolted or riveted to the stiles, the rungs need not be let into the sides; or

(b) has damaged stiles, or damaged or missing rungs.

(3) No employer may permit that -

(a) a ladder which is required to be leaned against an object for support be used which is longer than 9 m; and

(b) except with the approval of an inspector, the reach of a ladder be extended by fastening together two or more ladders: Provided that the provisions of this subregulation shall not apply to extension of free-standing ladders.

(4) In the case of wooden ladders the employer shall ensure that -

(a) the ladders are constructed of straight grained wood, free from defects, and with the grain running in the length of the stiles and rungs; and

(b) the ladders are not painted or covered in any manner, unless it has been established that there are no cracks or other inherent weaknesses: Provided that ladders may be treated with oil or covered with clear varnish or wood preservative.

(5) When work is done from a ladder, the employer shall -

(a) take special precautionary measures to prevent articles from falling off; and

(b) provide suitable sheaths or receptacles in which hand tools shall be kept when not being used.

(6) An employer shall ensure that a fixed ladder which exceeds 5 m in length and is attached to a vertical structure with an inclination to the horizontal level of 75 or more -

(a) has its rungs at least 150 mm away from the structure to which the ladder is attached; and

(b) is provided with a cage which -

(i) extends from a point not exceeding 2.5 m from the lower level to a height of at least 900 mm above the top level served by the ladder; and

(ii) shall afford firm support along its whole length for the back of the person climbing the ladder, and for which purpose no part of the cage shall be more than 700 mm away from the level of the rungs:

Provided that the foregoing provisions of paragraph (b) shall nor apply if platforms, which are spaced not more than 8 m apart and suitable for persons to rest on, are provided.

Ramps

13B.(1) An employer shall ensure that every ramp -

(a) is constructed in accordance with accepted technical standards;

(b) has a safety factor of at least two with respect to the load it is expected to carry: Provided that the design makes sufficient provision for the load on the ramp as a result of the turning, braking and acceleration of vehicles, if the ramp is used for vehicles; and

(c) has an inclination to the horizontal level of not more than 34° or one vertical to one and one half horizontal.

(2) An employer shall ensure that every ramp -

(a) the inclination of which renders additional foothold necessary, in every case where the inclination is more than 14° or one vertical to four horizontal, is provided with stepping laths which -

(i) are placed at suitable intervals; and

(ii) extend the full width of the ramp: Provided that the stepping laths may be interrupted over a width not exceeding 230 mm to facilitate the movement of barrows; and

(b) which is higher than 2 m and is provided on both sides with -

(i) substantial guard rails which are at least 900 mm and not exceeding 1 000 mm in height, and

(ii) toe-boards which are at least 150 mm high and so affixed that no open space exists between the toe-board and the ramp.

Boatswain's Chairs

13C. An employer shall ensure that every boatswain's chair or similar device is securely suspended and is so constructed as to prevent any occupant from falling therefrom.

Scaffold framework

13D.(1) An employer shall ensure that -

(a) Scaffold standards are properly propped against displacement and are secured vertically on firm foundations: Provided that putlog scaffolds shall incline slightly towards the structure;

(b) (i) steel scaffold standards with 'heavy', 'medium', 'light', or 'very light', platform loadings which shall not exceed 320, 240, 160 and 80 kg/m2 respectively, are spaced not more than 1.8 m, 2 m, 2.5 m and 3 m apart, respectively; and

(ii) wooden scaffold standards are spaced not more than 3 m apart;

(c) ladders are spaced vertically not more than 2.1 m apart;

(d) putlogs or transoms --

(i) which do not support a platform, are spaced at the same distances as the distances prescribed in paragraph (b) in respect of scaffold standards.

(ii) which support a platform, are spaced not more than 1.25 m apart if the platform is constructed of solid timber boards; and

(e) every part of a wooden scaffold frame has a diameter of at least 75 mm or a section of similar strength.

(2) No employer shall use a scaffold, or permit it to be used unless it -

(a) is securely and effectively braced to ensure stability in all directions;

(b) is secured at suitable vertical and horizontal distances to the structure to which work is being done, unless it is designed to be completely free-standing;

(c) is so constructed that it has a throughout factor of safety of at least two; and

(d) is inspected at least once a week and every time after bad weather by a person who has adequate experience in the erection and maintenance of scaffolds, and all findings are recorded in a register or report book.

(3) No employer shall require or permit that -

(a) a scaffold with a supporting wooden framework exceeds a height of 10 m; and

(b) a scaffold is erected, altered or dismantled by or under the supervision of a person other than a person who has had the necessary training and experience of such work and who has been appointed by the employer in writing for this purpose.

Scaffold platforms

13E.(1) An employer shall ensure that -

(a) every plank of a solid wooden scaffold platform is at least 275 mm wide and 38 mm thick;

(b) every plank which forms part of a scaffold platform is supported at distances not exceeding 1.25 m, and its ends are projected not less than 70 mm and not more than 200 mm beyond the last prop;

(c) every plank of a scaffold platform is firmly secured to prevent its displacement; and

(d) every platform is so constructed as to prevent materials and tools from falling through.

(2) An employer shall ensure that every scaffold platform-

(a) with 'heavy' 'medium', 'light' or 'very light' platform loadings as referred to in regulation 13D (1) (b) (i) is not less than 1 125 mm and not more than 1 380 mm, not less than 1 125 mm and not more than 1 150 mm, not less than 900 mm and not more than 1 150 mm, and not less than 675 mm and not more than 1

150 mm, respectively, wide: Provided that where a platform is used only as a gangway, a platform width of 450 mm shall be sufficient;

(b) which is more than 2 m above the ground is on all sides, except the side facing the structure, provided with-

(i) substantial guard rails of at least 900 mm and not exceeding 1 000 mm in height; and

(ii) toe-boards which are at least 150 mm high from the level of the scaffold platform and so affixed that no open space exists between the toe-boards and the scaffold platform: Provided that if the toe-boards are constructed of timber, they shall be at least 25 mm thick;

(c) is not more than 75 mm from the structure: Provided that where workmen must sit to work, this distance may be in creased to not more than 300 mm; and

(d) is kept free of waste, projecting nails or any other obstructions, and is kept in a non-slip state.

(3) No employer shall require or permit that a working platform which is higher than 600 mm be supported on a scaffold platform, and shall provide an additional guard rail of at least 900 mm and not exceeding 1000 mm in height above every such working platform.

(4) An employer shall ensure that convenient and safe access is provided to every scaffold platform, and where the access is a ladder, the ladder shall project at least 900 mm beyond the top of the platform.

Suspended scaffolds

13F. (1) An employer shall ensure that the outriggers of each suspended scaffold -

(a) are constructed of steel or any other material of similar strength and have a factor of safety of at least four with respect to the load it is to carry;

(b) have an overhang of not more than 1.8 m beyond the edge of the structure and are of such length that the counteracting length can be anchored securely:

(c) are, otherwise than by means of weights at the inner-ends, properly propped, suitably spaced and firmly anchored: Provided that an inspector may grant permission that outriggers may be anchored by means of weights; and

(d) are provided with stop or other effective devices at the outer-ends to prevent the displacement of ropes.

(2) An employer shall ensure that the working platform of every suspended scaffold is suspended by:

(a) pulley-blocks, sheaves, winches or hoists of the correct size for the ropes being used;

(b) at least two independent steel wire ropes in the case of a working platform which is not wider than 912 mm, and at least four independent steel wire ropes in the case of a working platform which is 912 mm and wider; and

(c) steel wire ropes of which the factor of safety is at least ten with respect to the maximum load which each rope is to carry.

(3) An employer shall ensure that -

(a) the hand or power-driven machinery used for the lifting or lowering of the working platform of a suspended scaffold is so constructed and maintained that an uncontrolled movement of the working platform cannot occur;

(b) the machinery referred to in paragraph (a) is so situated that it is easily accessible for inspection;

(c) the rope connections to the outriggers are vertically above the connections to the working platform; and

(d) in the case of a working platform suspended by two ropes only, the connections of the ropes to the working platform are of such height above the level of the working platform as to ensure the stability of the working platform.

(4) An employer shall ensure that the working platform of every suspended scaffold -

(a) is at least 456 mm and not exceeding 1.8 m in width;

(b) is suspended as near as possible to the structure to which work is being done and, except when light work is being done, is secured at every working position to prevent horizontal movement between the working platform and the structure;

(c) is on all sides, except the side facing the structure, provided with substantial guard rails of at least 900 mm and not exceeding 1000 mm in height above the level of the working platform: Provided that in the case of a working platform suspended by two ropes only, the guard rails shall be on all sides; and

(d) is on an sides provided with toe-boards which are at least 150 mm high from the level of the working platform and so affixed that no open space exists between the toe-boards and the working platform: Provided that if the toe-boards are constructed of timber, they shall be at least 25 mm thick.

Trestle scaffolds

13G.(1) No employer shall use a trestle scaffold, or permit it to be used, unless -

(a) it is soundly constructed of solid material, and

(b) all reasonable precautionary measures have been taken to prevent the unexpected spreading of its supporting legs when it is in use.

(2) No employer shall use a trestle scaffold or permit it to be used, if it -

(a) is higher than 3 m; or

(b) consists of more than two tiers.

Offences and penalties

14. Any person who contravenes or fails to comply with any provision of regulation 2(1), 2(2), 2(4), 2(5), 2(6), 2A, 2C, 3, 4, 5, 6, 7, 8(1), 8(2), 8(3), 8(4), 9, 10(1), 10(2), 10(3), 10(4), 11(1), 12, 13A, 13B, 13C, 13D, 13E, 13F, or 13G shall be guilty of an offence and liable, on conviction to a fine or to imprisonment for a period not exceeding six months and, in the case of a continuous offence, to an additional fine of R200 for each day on which the offence continues, or to additional imprisonment of one day for each day on which the offence continues: Provided that the period of such additional imprisonment shall in no case exceed 90 days.

Withdrawal of Regulations

15. The following regulations are hereby repealed:

(a) regulations B.6, B.12 and B.14, published under Government Notice R. 929 of 28 June 1963;

(b) regulations C. 14, C.16, C.17, C.20, C.47, C.48 and C.50, published under Government Notice R. 929 of 28 June 1963, as amended by Government Notices R. 3475 of 9 October 1969 and R. 109 of 26 January 1973;

(c) regulation C.13A, published under Government Notice R. 109 of 26 January 1973; and

(d) regulations D.3, D.5, D.13, D.14 and D.16, published under Government Notice R. 1934 of 13 December 1963, as amended by Government Notices R. 3475 of 9 October 1969, R. 1336 of 21 August 1970 and R. 109 of 26 January 1973.

Short title

16. These regulations shall be called the General Safety Regulations.

Annexure

Government Notice R.2245 of 7 August 1992

Minimum contents of a First Aid Box

In the case of shops and offices, the quantities stated under items 1, 8, 9, 10, 14, 15, 17, and 18 may be reduced by half.

Item 1	Wound cleaner / antiseptic (100ml)
Item 2	Swabs for cleaning wounds
Item 3	Cotton wool for padding (100g)
Item 4	Sterile gauze (minimum quantity 10)
Item 5	1 pair of forceps (for splinters)
Item 6	1 pair of scissors (minimum size 100mm)
Item 7	1 set of safety pins
Item 8	4 triangular bandages
Item 9	4 roller bandages (75mm x 5m)
Item 10	4 roller bandages (100mm x 5m)
Item 11	1 roll of elastic adhesive (25mm x 3m)
Item 12	1 Non-allergenic adhesive strip (25mm x 3m)
Item 13	1 Packet of adhesive dressing strips (minimum quantity 10 assorted sizes)
Item 14	4 First aid dressing (75mm x 100mm)
Item 15	4 First aid dressings (150mm x 200mm)
Item 16	2 Straight splints
Item 17	2 Pairs large and 2 pairs medium disposable latex gloves
Item 18	2 CPR mouth pieces or similar devices

General Notice R.283 of 28 March 1988
Incorporation of Safety Standards

Under the powers vested in me by section 36(1) of the Machinery and Occupational Safety Act, 1983 (Act 6 of 1983), I, Eli van der Merwe Louw, Minister of Manpower, hereby incorporate into the General Safety Regulations, 1986, as amended, the safety standards specified in the Schedule hereto.

E van der M. Louw
Minister of Manpower

SCHEDULE

1. Regulation 9(1)(e)

British Standard specifications BS 6158 entitled “Specification for Safety Devices for Fuel Gases and Oxygen or Compressed Air for Welding, Cutting and Related Processes”.

DIN Standard specifications DIN 8521 entitled “Safety Devices against Flashback Backflow in Welding, Cutting and Allied Processes - Safety Requirements, Testing”.

International Standards Organisation specification ISO 5175 entitled “Equipment Used in Gas Welding, Cutting and Allied Processes - Safety Devices of Fuel Gases and Oxygen or Compressed Air- General Specifications, Requirements and Tests”.

2. Regulation 13B

The South African Bureau of Standards Code of Practice SABS 085 entitled “The Design, Erection, Use and Inspection of Access Scaffolding”.

3. Regulation 13C

The South African Bureau of Standards Code of Practice SABS 087 entitled “Handling, Storage and Distribution of Liquefied Petroleum Gas in Domestic, Commercial and Industrial Installations”.

Part I: “Consumer Liquefied Petroleum Gas Cylinder Installations”.

Part II: “Installations in Mobile Units and Small Non-Permanent Buildings”.

Part III: “Bulk Liquefied Petroleum Gas Storage and Allied Facilities at Consumer's Premises”.

Part IV: “Transportation of Liquefied Petroleum Gas in Bulk by Road”.

Part V: “Liquefied Petroleum Gas as Engine Fuel”.

Part VII: “Retail outlet and similar Liquefied Petroleum Gas Filling Sites for Small Containers”.

Part VIII: “The Fuelling of Fork Lift Trucks and Other Liquefied Petroleum Gas Operated Vehicles”.

Government Notice No. R.736 of 1 September 2001

Withdrawal of Government Notice No. R. 1847 and incorporation of Health and Safety Standard: General Safety Regulations

Under section 44 of the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993). I, Membathisi Mphumzi Shepherd Mdladlana, Minister of Labour, after consultation with the Advisory Council for Occupational Health and Safety, hereby-

(1) Withdraw Government Notice No. R. 1847 as published on 16 September 1988;

(2) Incorporate the South African Bureau of Standard’s code of Practice SABS 0338:1999 entitled "Homologation of Respiratory Equipment" into the General Safety Regulation as amended by Government Notice No. R. 2245 of 7 August 1992; and

(3) Require that as from 1 September 2001 all respiratory protective equipment shall be submitted to the South African Bureau of Standards, Pretoria, for homologation.

Government Gazette

REPUBLIC OF SOUTH AFRICA

Regulation Gazette No. 7233

Vol. 438 Pretoria 27 December 2001 No. 22956



AIDS HELPLINE: 0800-123-22 Prevention is the cure

GOVERNMENT NOTICE
GOEWERMENTSKENNISGEWING

DEPARTMENT OF LABOUR
DEPARTEMENT VAN ARBEID

No. R. 1390 **27 December 2001**

OCCUPATIONAL HEALTH A ND SAFETY ACT, 1993

REGULATIONS FOR HAZARDOUS BIOLOGICAL AGENTS

The Minister of Labour has under section 43 of the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993) on the recommendation of the Advisory Council for Occupational Health and Safety, made the regulations in the Schedule.

SCHEDULE

Definitions

1. In these Regulations any word or expression to which a meaning has been assigned in the Act shall have the meaning so assigned and, unless the context indicates otherwise—

"biological agent" means any micro-organism, cell culture or human endoparasite, including any which have been genetically modified, which may cause an infection, allergy or toxicity, or otherwise create a hazard to human health;

"decontamination" means to remove, as far as is reasonably practicable, all inanimate objects by way of sweeping, cleaning, washing, ventilating or any other process aimed at removing the contaminant;

"diagnostic laboratory" means a workplace where diagnostic or other screening procedures are performed on blood or other potentially infectious materials;

"disinfect" means to render non-viable virtually all recognised pathogenic micro-organisms, but not necessarily all microbial forms;

"engineering control measures" means control measures that remove or reduce the exposure of persons at the workplace by means of engineering methods;

"Facilities Regulations" means the Facilities Regulations promulgated by Government Notice No. R. 2362 of 5 October 1990 under section 43 of the Act;

"General Administrative Regulations" means the General Administrative Regulations promulgated by Government Notice No. R.1449 of 6 September 1996 under section 43 of the Act;

"HBA" means hazardous biological agents which are micro-organisms, including those that have been genetically modified, pathogens, cells, cell cultures and human endoparasites that have the potential to provoke an infection toxic effects, subdivided into the following groups:

(*a*) Group I HBA are HBA that is unlikely to cause human disease;

(*b*) Group 2 HBA are HBA that may cause human disease and be a hazard to exposed persons, which is unlikely to spread to the community and for which effective prophylaxis and treatment is usually available;

(*c*) Group 3 HBA are HBA that may cause severe human disease, which presents a serious hazard to exposed persons and which may present a risk of spreading to the community, but for which effective prophylaxis and treatment is available;

(*d*) Group 4 HBA are HBA that causes severe human disease and is a serious hazard to exposed persons and which may present a high risk of spreading to the community, but for which no effective prophylaxis and treatment is available.

"micro-organisms" means microbiological entities, cellular or non-cellular, capable of replication or of transferring genetic material;

"monitoring" means the planning and carrying out of the measurement programme and the recording of the results thereof;

"respiratory protective equipment" means a device which is worn over at least the mouth and nose to prevent the inhalation of airborne hazardous biological agents, and which conforms to a standard, acceptable to the chief inspector;

"safety equipment" means a contrivance or a device designed to as far as possible try and prevent injury;

"standard precautions" means a synthesis of the major features of Universal Precautions (UP) and Body Substance Isolation (BSI) and applies to all persons coming into contact

with potentially infected persons, animals or animal products and potentially contaminated blood and other body fluids in health care facilities or elsewhere and—

(*a*) apply to—

(i) all blood;

(ii) all body fluids, secretions and excretions, except sweat, regardless of whether they contain visible blood or not;

(iii) non-intact skin;

(iv) mucous membranes; and

(v) tissues; and

(*b*) are designed to reduce the risk of transmission of HBA from both recognised and unrecognised sources of infection in workplaces;

"the Act" means the Occupational Health and Safety Act,1993 (Act No. 85 of 1993)

Scope of application

2. (1) Subject to subregulation (*2*), these Regulations shall apply to every employer and self-employed person at a workplace where—

(*a*) HBA is deliberately produced, processed, used, handled, stored or transported; or

(*b*) an incident, for which an indicative list is given in Annexure A to these Regulation occurs that does not involve a deliberate intention to work with a HBA but may result in persons being exposed to HBA in the performance of his or her work.

(2) Regulations 8, 14, 15, 16 and 17 shall not apply to an employer or self-employed person at a workplace where the exposure is restricted to a Group I HBA.

Classification of biological agents

3. (1) The chief inspector may publish in the *Government Gazette* for the purpose of these regulations a document, which may be revised or reissued from time to time, entitled "Categorisation of Biological Agents according to hazard and categories of containment" (Annexure B) to these Regulation containing a list of biological agents together with the classification of each agent.

(2) Where a biological agent has not been assigned a classification, the employer and

self-employed person shall provisionally classify that agent in accordance with subregulation (3) below, having regard to the nature of the agent and the properties of which he or she may reasonably be expected to be aware.

(3) When provisionally classifying a biological agent, the employer and self-employed person shall assign that agent to one of the groups and if there is according to its level of risk of infection doubt as to which of two alternative groups would be most appropriate, the HBA shall be assigned to the higher of the two.

Information and training

4.(1) An employer shall, before any employee is exposed or may be exposed to HBA and after consultation with the health and safety committee established for that section of the workplace, ensure that the employee is adequately and comprehensively informed and trained, on both practical aspects and theoretical knowledge with regard to—

(a) the contents and scope of these Regulations;

(b) the potential risks to health caused by the exposure;

(a) the measures to be taken by the employer to protect an employee against any risk of being exposed;

(d) the importance of good housekeeping at the workplace and personal hygiene requirements;

(e) the precautions to be taken by an employee to protect him- or herself against the health risks associated with the exposure, including the wearing and use of protective clothing and respiratory protective equipment;

(f) the necessity, correct use, maintenance and potential of safety equipment, facilities and engineering control measures provided;

(g) the necessity of medical surveillance;

(h) the safe working procedures regarding the use, handling, storage, labelling, and disposal of HBA at the workplace;

(i) the procedures to be followed in the event of exposure, spillage, leakage, injury or any similar emergency situation, and decontaminating or disinfecting contaminated areas; and

(j) the potential detrimental effect of exposure on the human reproductive process.

(2) An employer or a self-employed person shall give instructions in writing of the procedures contemplated in subregulation (1)(*i*) to the drivers of vehicles carrying the HBA.

(3) Every employer and every self-employed person shall ensure that he or she or any person who in any manner assists him or her in the carrying out or conducting of his or her business has the necessary information and has undergone sufficient training in order for him or her to identify the potential risks and the precautions that should be taken.

Duties of persons who might be exposed to HBA

5.(1) Any person who is or might be exposed to HBA, shall obey any lawful instruction given by or on behalf of th employer of a self-employed person regarding—

(*a*) the prevention of an uncontrolled release of a HBA;

(*b*) the adherence to instructions regarding environmental and health practices, personal hygiene and good housekeeping;

(*c*) the wearing of personal protective equipment and clothing as prescribed by these Regulations;

(*d*) the wearing of personal samplers, when necessary, to measure personal exposure to airborne hazardous biological substances;

(*e*) the disposal of materials containing HBA and the disinfection and decontamination of any site contaminated by an HBA;

(*f*) the reporting during normal working hours for such medical examination or test as contemplated in regulation 8(1); and

(*g*) information and training as contemplated in regulation 4.

(2) Any person shall immediately report to the employer, the health and safety representative or self-employed person any possible accidental exposure to a HBA at the workplace, and the employer or self-employed person shall ensure that such incident is investigated and recorded in accordance with regulation 8 of the General Administrative Regulations.

Risk assessment by employer or self-employed person

6.(1) An employer or a self-employed person contemplated in regulation 2 shall, after consultation with the relevant health and safety representative or relevant health and safety committee, cause a risk assessment to be made and thereafter at intervals not exceeding two years, to determine if any person might have been exposed to a HBA.

(2) An employer shall inform the relevant health and safety representative or health and safety committee in writing of the arrangements made for the assessment contemplated in subregulation (1), give them reasonable time to comment thereon and ensure that the results of the assessment are made available to the relevant health and safety representative or health and safety committee, which may comment thereon.

(3) When making the assessment, the employer or self-employed person shall keep a record of the assessment and take into account matters such as—

(*a*) the nature and dose of the HBA to which an employee may be exposed and the suspected route of exposure;

(*b*) where the HBA might be present and in what physical form it is likely to be;

(*c*) the nature of the work, process and any reasonable deterioration in, or failure of, any control measures;

(*d*) what effects the HBA can have on an employee; and

(*e*) the period of exposure.

(4) An employer or a self-employed person shall cause the risk assessment to be conducted on the basis of all available information as far as is reasonably practicable, including—

(*a*) classification of the HBA into the relevant risk group, according to its level of risk of infection;

(*b*) recommendations from the manufacturer, supplier or a competent person regarding the control measures necessary in order to protect the health of persons against such agents as a result of their work;

(*c*) information on diseases that may be contracted as a result of the activities at the workplace;

(*d*) potential allergenic or toxic effects that may result from the activities at the

workplace; and

(*e*) knowledge of diseases from which an employee might be suffering and which may be aggravated by conditions at the workplace.

(5) An employer shall review the assessment required by subregulation (1) forthwith if there—

(*a*) is a reason to suspect that the previous assessment is no longer valid; or

(*b*) has been a change in a process involving a HBA or in the methods, equipment or procedures in the use, handling, control or processing of HBA, and the provisions of subregulations (2), (3) and (4) shall apply.

Monitoring exposure at workplace

7. An employer shall ensure that the exposure of employees to a HBA is monitored in accordance with a suitable procedure that is standardised, sufficiently sensitive and of proven effectiveness in any case which it is—

(*a*) requisite for ensuring the maintenance of adequate control of the exposure of employees to HBA; or

(*b*) otherwise requisite for protecting the health of employees.

Medical surveillance

8.(1) An employer shall ensure that an employee is under medical surveillance if—

(*a*) the results of the assessment referred to in regulation 6 indicate that an employee might have been exposed to HBA;

(*b*) the exposure of the employee to any HBA hazardous to his or her health is such that an identifiable disease or adverse effect to his or her health may be related to the exposure, there is a reasonable likelihood that the disease or effect may occur under the particular conditions of his or her work and there are techniques such as pre-clinical biomarkers where appropriate for detecting sensitisation to allergens or an inflammatory response associated with exposure to diagnose indications of the disease or the effect as far as is reasonably practicable; or

(*c*) an occupational health practitioner recommends that the relevant employee should be under medical surveillance, in which case the employer may call upon an occupational medicine practitioner to ratify the appropriateness of such

recommendation.

(2) In order to comply with the provisions of subregulation (1), the employer shall after extensive counselling and education offer the employee the opportunity to have—

(a) an initial health evaluation, which should be carried out by an occupational health practitioner immediately before or within 14 days after a person commences employment, where any exposure exists or might exist, which comprises—

(i) an evaluation of the employee's medical and occupational history;

(ii) a physical examination; and

(iii) any biological tests and other appropriate medical tests or any other essential examination that in the opinion of the occupational health practitioner is desirable in order to enable the practitioner to do a proper evaluation;

(b) periodic medical examinations and tests in cases where a HBA is known to be capable of causing persistent or latent infections which—

(i) in the light of present knowledge, are undiagnosable, until signs or symptoms develop;

(ii) can have particularly long incubation periods;

(iii) can result in an illness which is recurrent in spite of treatment; and

(iv) are known to have serious long-term effects.

(c) All tests and examinations as contemplated in paragraphs *(a)* and *(b)* shall be conducted according to a written medical protocol.

(3) The employer shall, in accordance with regulation 8 of the General Administrative Regulations, investigate and record all incidents that result or might result in infections or the death of an employee.

(4) All occupational health practitioners shall submit to the health and safety committee for approval a written protocol for procedures to be followed when dealing with abnormal results.

Records

9.(1) An employer shall—

(*a*) keep records of all assessments, monitoring results and medical surveillance reports required by regulations 6, 7 and 8 respectively: Provided that personal medical records shall be made available only to an occupational health practitioner;

(*b*) subject to the provisions of paragraph (*c*), make the records contemplated in paragraph (*a*), excluding personal medical records, available for inspection by an inspector;

(*c*) subject to the formal written consent of an employee, allow any person to peruse the records with respect to that particular employee;

(*d*) make the records of all risk assessments and monitoring results available for perusal by the health and safety representative or health and safety committee;

(*e*) keep all records of risk assessments and monitoring results for a minimum period of 40 years;

(*f*) keep all medical surveillance records for a minimum period of 40 years, and if the employer ceases activities, all those records shall be handed over or forwarded by registered post to the relevant provincial director; and

(*g*) keep a record of the examinations and tests carried out in terms of regulation 12(*b*) and of any repairs resulting from these investigations and tests, which records shall be kept for at least three years;

(2) A self-employed person shall keep records of all risk assessments for a minimum period of 40 years, and if the self-employed person ceases activities, all those records shall be handed over or forwarded by registered post to the relevant provincial director.

Control of exposure to HBA

10.(1) An employer and self-employed person shall ensure that the—

(*a*) exposure of persons to HBA in the working environment is either prevented or, where this is not reasonably practicable, adequately controlled; and

(b) standard precautions contained in Annexure C to these Regulation are implemented to reduce the risk of transmission of HBA from recognised and

unrecognised sources of infection in a workplace.

(2) Where reasonably practicable, the employer or self-employed person shall control the exposure of persons to a HBA in the working environment by applying the following measures where appropriate:

(*a*) Limiting the amount of HBA used which might contaminate the working environment;

(*b*) limiting the number of employees who will be exposed or might be exposed;

(*c*) introducing engineering control measures for the control of exposure, which may include the following:

(i) Process separation, automation or enclosure;

(ii) the installation of local extraction ventilation systems to processes, equipment and tools for the control of emissions of an airborne HBA;

(iii) separate workplaces for different processes;

(iv) proper access control to prevent unauthorized access; and

(v) immediate personal or environmental disinfection.

(*d*) introducing appropriate work procedures that employees must follow where materials are used, processes are carried out, or incidents might occur that could give rise to the exposure of an employee to HBA, and such procedures shall include written instructions to ensure—

(i) the safe handling, use and disposal of HBA;

(ii) the proper use and maintenance of process machinery, installations, equipment, tools and local extraction and general ventilation systems;

(iii) the regular cleaning of machinery and work areas by vacuum cleaners fitted with a suitable filter that prevents contamination of the environment; and

(iv) that a system whereby changes in work procedures and processes that indicate the need for early corrective action can be readily identified;

(*e*) ensuring that emissions to the atmosphere comply with the provisions of the Atmospheric Pollution Prevention Act, 1965 (Act No. 45 of 1965);

(*f*) displaying the biohazard sign shown in Annexure D to these Regulation and other relevant warning signs; and

(*g*) specifying procedures for taking, handling and processing samples that might contain HBA.

Personal protective equipment and facilities

11. (1) If it is not reasonably practicable to ensure that the exposure of an employee is adequately controlled as contemplated in regulation 10, the employer shall in the case of—

(*a*) airborne HBA, provide the employee with suitable respiratory protective equipment and protective clothing; and

(*b*) HBA that can be absorbed through the skin, provide the employee with suitable impermeable personal protective equipment.

(2) Where respiratory protective equipment is provided, the employer shall ensure that—

(a) the relevant equipment is capable of preventing the exposure to the HBA concerned;

(*b*) the relevant equipment is correctly selected and properly used;

(*c*) information, instructions, training and supervision which would be necessary with regard to the use of the equipment are known to the employees; and

(*d*) the equipment is kept in good condition and efficient working order.

(3) An employer shall as far as is reasonably practicable—

(*a*) not issue personal protective equipment which has been used to an employee, unless it is capable of being decontaminated and sterilised prior to use;

(*b*) provide separate containers or storage facilities for personal protective equipment and protective clothing when not in use; and

(*c*) take steps to ensure that all protective equipment and protective clothing not in use are stored in a demarcated area with proper access control.

(4) An employer shall as far as is reasonably practicable, ensure that all contaminated personal protective clothing issued is cleaned and handled in accordance with the following procedures:

(a) Where such clothing is cleaned on the premises of the employer, care shall be taken to prevent contamination during handling, transporting and cleaning;

(*b*) where the clothing are sent off the premises to a contractor for cleaning

purposes, the clothing shall be placed in impermeable, tightly sealed colour coded containers and such containers shall be clearly identified with a boihazard label as depicted in Annexure D to these Regulations as contaminated; and

(*c*) ensure that the contractor as contemplated in subregulation (4)(*b*) is fully informed of the requirements of these Regulations and the precautions to be taken regarding the handling of contaminated clothing.

(5) Subject to the provisions of subregulation (4)(*b*), an employer shall ensure that no person removes dirty or contaminated personal protective equipment and personal protective clothing from the premises: Provided that where contaminated personal protective equipment has to be disposed of, it shall be treated as HBA waste as contemplated in regulation 17.

(6) Subject to the provisions of the Facilities Regulations an employer shall, where reasonably practicable, provide employees using personal protective equipment and clothing as contemplated in subregulation (1) with—

(*a*) adequate washing facilities which are readily accessible and located in an area where the facilities will not become contaminated, in order to enable the employees to meet the standard of personal hygiene consistent with the adequate control of exposure, and to avoid the spread of HBA;

(*b*) two separate lockers labelled "protective clothing" and "personal clothing" respectively, and ensure that the clothing is kept separately in the locker concerned; and

(*c*) separate "clean" and "dirty" change rooms if the employer uses or processes HBA to the extent that the HBA could endanger the health of persons outside the workplace.

Maintenance of control measures, equipment and facilities

12. An employer shall ensure that—

(*a*) all control measures, equipment and facilities provided in terms of regulations 10 and 11 are maintained in good working order; and

(*b*) thorough examinations and tests of engineering control measures are carried out at intervals not exceeding 24 months by an approved HBA inspection authority or by a person whose ability to do the measurements, analysis and tests is verified

by such an approved HBA inspection authority.

Prohibitions

13.(1) No person shall—

(*a*) use compressed air to remove HBA from any surface or person;

(*b*) eat, drink, smoke, keep food or beverages or apply cosmetics in an HBA workplace or require or permit any other person to eat, drink, smoke, keep food or beverages or apply cosmetics in such a workplace; or

(*c*) leave a controlled area without prior removal of protective or contaminated clothing and equipment.

(2) An employer or self-employed person shall cause a notice to be posted at a conspicuous place prohibiting the provision of (*a*), (*b*) and (*c*).

Labelling, packaging, transporting and storage

14. An employer or self-employed person shall, as far as is reasonably practicable, take steps to ensure that—

(*a*) all HBA under his or her control in storage, transit or being distributed, are properly contained and controlled to prevent the spread of contamination from the workplace;

(*b*) the colour coded containers in which HBA are transported are clearly marked with a bio-hazard sign as depicted in Annexure D to these Regulation and other relevant warning signs that identify the contents; and

(*c*) the driver is trained in and equipped with a certificate in emergency procedures.

Special measures for health and veterinary isolation facilities

15.(1) Subject to the provisions of regulation 6, every employer and self-employed person shall, in the case of health and veterinary isolation facilities, take into account—

(*a*) uncertainties about the presence of HBA in a patient or animal and the materials and specimens taken from them;

(*b*) the hazard represented by HBA known or suspected to be present in a patient, animal, materials and specimens taken from them; and

(c) the risks posed by the nature of the work.

(2) An employer or self-employed person as contemplated in subregulation (1) shall ensure that the correct containment measures as indicated in Annexures C and E to these Regulation are selected for persons and animals in isolation facilities that are suspected of being infected with Group 3 or Group 4 HBA in order to minimise the risk of infecting others.

Special measures for laboratories, animal rooms and industrial processes

16. In the case of laboratories, animal rooms and industrial processes the employer or self-employed person contemplated in regulation 2 shall ensure that the containment measures required in—

(a) Annexure C and E are implemented in laboratories and in rooms for laboratory animals, including diagnostic laboratories, and in rooms for laboratory animals that have been deliberately infected with Group 2, 3 and 4 HBA or where laboratory animals are suspected of carrying such agents;

(b) Annexure C and E are implemented in laboratories handling materials in respect of which uncertainty prevails about the presence of HBA that may cause human disease, but that do not have as their aim working with HBA as such: Provided that the containment measures that are required for Group 3 or 4 are implemented where it is known or suspected that it is necessary; and

(*c*) Annexure C and F are implemented where Group 2, 3 or 4 HBA are used in industrial processes: Provided that where it has not been possible to carry out a conclusive assessment of HBA, but where the use envisaged might involve a serious health risk for persons, such activities may be carried out only in workplaces where the containment measures correspond to the requirement for Group 3 HBA.

Disposal of HBA

17. An employer or self-employed person as contemplated in regulation 2 shall—

(a) lay down written procedures for appropriate decontamination and disinfection;

(*b*) implement written procedures enabling infectious waste to be handled and disposed of without risk;

(*c*) ensure that all fixtures and equipment including vehicles, re-usable containers

and covers which have been in contact with HBA waste are disinfected and decontaminated after use in such a manner that it does not cause a hazard inside or outside the premises concerned;

(*d*) ensure that all HBA waste that can cause exposure is disposed of only on sites specifically designated for this purpose in terms of the Environmental Conservation Act, 1989 (Act No. 73 of 1989), in such a manner that it does not cause a hazard inside or outside the site concerned;

(*e*) ensure that all employees involved in the collection, transport and disposal of HBA waste and who may be exposed to that waste are provided with suitable personal protective equipment; and

(*f*) ensure that if the services of a waste disposal contractor is used, a provision is incorporated into the contract stating that the contractor shall comply with the provisions of these Regulations.

Offences and penalties

18. Any person who contravenes or fails to comply with any provisions of regulation 3 to 17 shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 12 months and, in the case of a continuous offence, to an additional fine of R200 for each day on which the offence continues or additional imprisonment of one day for each day on which the offence continues: Provided that the period of such additional imprisonment shall in no case exceed 90 days.

Short title

19. These Regulations shall be called Regulations for Hazardous Biological Agents.

ANNEXURE A

[Regulation 2(1)(b)]

INDICATIVE LIST OF INCIDENTS)

Incidents or exposure during work—

(*a*) in a food production plant;

(*b*) where there is contact with animals or products of animal origin;

(*c*) in health care, including isolation and post-mortem units;

(*d*) in clinical, veterinary and diagnostic laboratories;

(*e*) in sewage purification installations; and

(*f*) in a general workplace.

ANNEXURE B
HAZARDOUS BIOLOGICAL AGENTS GIUDELINES

CATEGORISATION OF BIOLOGICAL AGENTS ACCORDING TO HAZARD AND CATEGORIES OF CONTAINMENT:

INTRODUCTION

1. The attached list must be read in conjunction with the *Hazardous Biological Agents,* and in particular regulation 3.

2. Agents listed are categorised on the basis of their ability to cause disease by infection.

3. In allocating agents to a hazard group in the list no account is taken of particular effects on those whose susceptibility to infection may be affected for one or other reason such as pre-existing disease, medication, compromised immunity, pregnancy or breastfeeding. Additional risk to such workers should be considered as part of the assessment required by the *Hazardous Biological Agents.*

4. Biological agents that have not been classified for inclusion into Group 2 to 4 in the list are not implicitly classified in Group I.

5. If more than one species of any particular agent is known to be pathogenic to humans, the most prominent of these is generally named, together with the wider reference 'species' (spp) to indicate the fact that the other species of the same genus may be hazardous. If a whole genus is mentioned in this way, it is implicit that species and strains that are non-pathogenic to humans are excluded.

6. When a strain is attenuated or has lost known virulence genes, the containment required by the classification of its parent strain need not necessarily apply, subject to assessment appropriate to the risk in the workplace, for example when such strain is used as a product or as part of a product for prophylactic or therapeutic purposes. (See 2)

7. All viruses that have been isolated in humans and that have not been assessed and allocated to a group in the list are to be classified in Group 2 as a minimum, except where there is evidence that they are unlikely to cause disease in humans.

8. The requirements as to containment consequent upon the classification of parasites apply only to stages in the life cycle of the parasite in which it is liable to be infectious for humans.

9. The list also gives a separate indication where biological agents are capable of causing allergic or toxic reactions, where an effective vaccine is available.

   The following notations identify the indications:

   A: Possible allergic effects;
   T: Toxin production;

V: Effective vaccine available;
NIV: National Institute of Virology.

The selection of control measures for biological agents should take into account the fact that there is no exposure limits for them. Their ability to replicate and to infect at very small doses means that exposure may have to be reduced to levels that are diminishingly low.

For each activity the first consideration should be whether it could be carried out in a way that involves exposure to a less harmful biological agent. This may be practicable, for example, in teaching and some types of research. If there is more than one way of carrying out the activity then the method carrying the least risk should be chosen.

If the least harmful alternative still involves exposure or potential exposure to biological agent, or the nature of the activity is such that there is no choice, and it is not reasonably practicable to prevent exposure by some other means, then exposure should be adequately controlled. All of the measures listed in Annexure E should be considered, and each should be used where and to the extent that—

(*a*) it is applicable; and
(*b*) the assessment carried but under regulation 6 shows that it will lead to a non-negligible reduction in risk.

Not all the listed measures will be required in every case. The assessment may indicate, for example, that a specific mode of transmission and route of infection is required, a susceptible host is needed, there is low prevalence of the infection in that particular activity, and that illness is easily treatable, leading to rapid and complete recovery.

In such a case the risk would be relatively low and the control measures required less stringent. Another factor that will determine whether controls are to be applied will be the extent to which the activity involves the handling or deliberate use of a biological agent, or exposure is incidental to the main purpose of the work. However, the level of risk should be the principal consideration - if the risk is sufficiently high and can be reduce by some of the listed measures, they should be applied in full.

Certain special measures are required in health and veterinary care facilities, laboratories, animal rooms and industrial processes to ensure that biological agents are not transmitted to workers or outside the controlled area. For laboratories, animal rooms and industrial processes rules are laid down for the derivation of containment level from the hazard classification of the agent, or from what is suspected about the possible presence of an agent. Laboratories screening for an agent which falls in Group 3 and 4, but which is not ordinarily expected to be present (for example a microbiological laboratory in a food factory screening for salmonella, with the possibility of finding *Salmonella typhi*), should achieve at least containment level 2, but switch to the appropriate higher level if the agent is found and if work is to continue with it. In a laboratory that does not deliberately work with biological agents, but where the presence of agents calling for containment levels 3 or 4 is nevertheless known or suspected, those containment levels should be used.

Agents with reduced virulence may be used at a lower than normal level of containment

if the alteration has effectively changed their classification.

A biological agent that falls or is treated as falling into Hazard Group I may be a Group 3 genetically modified organism, because of environmental risks associated with it or because, though now unlikely to cause human disease, it is derived by genetic modification from a pathogenic parental organism. In the latter case, the selection of containment measures appropriate to the agent's reduced virulence and corresponding group may be permitted. Where there is a mismatch, as in the case of a genetically modified organism or biological agent which is non-hazardous to humans, but environmentally harmful, more stringent requirements should be followed.

Where the rules as set out lead to a particular containment level for an activity, all the measures appropriate to that level should normally be used. Some selection may be done, however, to suit individual circumstances, provided that the risk is not increased by doing so.

Regulation 11 sets out additional requirements in respect of personal protective equipment used to protect employees against biological agents. The object of these requirements is to prevent the equipment itself from acting as the means by which agents are transmitted, and they should be followed accordingly.

Where workers are exposed to biological agents the information and instructions given to them, if applicable, should be set down in the form of written instructions, outlining procedures to be followed after a serious incident involving the handling of a biological agent as well as the procedure for handling any Group 4 agent.

If the nature of the workplace and the activity are such that employees may need instant access to this information, or where a reduction in risk may be expected by having the information conspicuously displayed in the workplace, it should also be set out on notices displayed in the workplace.

BACTERIA

Key:

A: allergic effects
T: Toxic effects
V: Vaccine available
NIV: National Institute of Virology

Biological Agent	**Classification**	**Notes**
Acinetobacter calcoaceticus	2	
Acinetobacter lwoffi	2	
Actinobacillus actinomycetem-comitans	2	
Actinomadura madurae	2	

Actinomadura pelletieri	2	
Actinomyces spp	2	
Aeromonas hydrophila	2	
Alcaligenes spp	2	
Arcanobacterium haemolyticum (*Corynebacterium haemolyticum*)	2	
Arizona spp	2	
Bacillus anthracis	3	V
Bacillus cereus	2	
Bacteroides spp	2	
Bartonella spp (*Rochalimaea* spp)	2	
Bordetella bronchiseptica	2	
Bordetella parapertussis	2	
Bordetella pertussis	2	V
Borrelia burgdorferi	2	
Borrelia spp	2	
Brucella spp	3	
Burkholderia cepacia	2	
Burkholderia mallei (*Pseudomonas mallei*)	3	
Burkholderia pseudomallei (*Pseudomonas pseudomallei*)	3	
Burkholderia spp	2	
Campylobacter spp	2	
Cardiobacterium hominis	2	
Chlamydia pneumoniae	2	

Chlamydia psittaci (non-avian strains)	2	
Chlamydia psittaci (avian strains)	3	
Chlamydia trachomatis	2	
Clostridium botulinum	2	T, V
Clostridium perfringens	2	
Clostridium tetani	2	T, V
Clostridium spp	2	
Corynebacterium diphtheriae	2	T, V
Corynebacterium minutissimum	2	
Corynebacterium pseudo-tuberculosis	2	
Corynebacterium spp	2	
Coxiella burnetii	3	
Edwardsiella tarda	2	
Ehrlichia sennetsu (*Rickettsia sennetsu*)	3	
Ehrlichia spp	3	
Eikenella corrodens	2	
Enterobacter spp	2	
Enterococcus spp	2	
Erysipelothrix rhusiopathiae	2	
Escherichia coli (with the exception of non-pathogenic strains)	2	
Flavobacterium meningosepticum	2	

Fluorobacter bozemanae (formerly *Legionella*)	2	
Francisella tularensis (Type A)	3	V
Francisella tularensis (Type B)	2	
Fusobacterium spp	2	
Gardnerella vaginalis	2	
Haemophilus ducreyi	2	
Haemophilus influenzae	2	
Haemophilus spp	2	
Helicobacter pylori	2	
Klebsiellla oxytoca	2	
Klebsiella pneumoniae	2	
Klebsiella spp	2	
Legionella pneumophila	2	
Legionella spp	2	
Leptospira interrogans (all serovars)	2	
Listeria ivanovii	2	
Listeria monocytogenes	2	
Moraxella catarrhalis	2	
Moraxella lacunata	2	
Morganella morganii	2	
Mycobacterium africanum	3	V
Mycobacterium avium/intracellulare	3	
Mycobacterium bovis (BCG strain)	2	
Mycobacterium bovis	3	V
Mycobacterium chelonae	2	

Mycobacterium fortuitum	2	
Mycobacterium kansasii	3	
Mycobacterium leprae	3	V
Mycobacterium malmoense	3	
Mycobacterium marinum	2	
Mycobacterium microti	3	
Mycobacterium paratuberculosis	2	
Mycobacterium scrofulaceum	3	
Mycobacterium szulgai	3	
Mycobacterium simiae	3	
Mycobacterium tuberculosis	3	V
Mycobacterium ulcerans	3	
Mycobacterium xenopi	3	
Mycoplasma hominis	2	
Mycoplasma pneumoniae	2	
Neisseria gonorrhoeae	2	
Neisseria meningitidis	2	V
Nocardia spp	2	
Pasteurella spp	2	
Peptrostreptococcus spp	2	
Plesiomonas shigelloides	2	
Porphyromonas spp	2	
Prevotella spp	2	
Proteus mirabilis	2	
Proteus penneri	2	

Proteus vulgaris	2	
Providencia spp	2	
Pseudomonas aeruginosa	2	
Pseudomonas mallei - see *Burkholderia mallei*	3	
Pseudomonas pseudomallei - see *Burkholderia pseudomallei*	3	
Rhodococcus equi	2	
Rickettsia spp	3	
Rochalimaea quintana - see *Bartonella* spp	2	
Rochalimaea spp - see *Bartonella* spp	2	
Salmonella arizonae	2	
Salmonella enteritidis	2	
Salmonella (other serovars)	2	
Salmonella paratyphi A, B, C	2	
Salmonella typhi	3	V
Salmonella typhimurium	2	
Serpulina spp	2	
Serratia liquefaciens	2	
Serratia marcescens	2	
Shigella boydii	2	
Shigella dysenteriae (Type 1)	3	T
Shigella dysenteriae (other than Type 1)	2	
Shigella flexneri	2	
Shigella sonnei	2	

Staphylococcus aureus	2	T
Stenotrophomonas maltophilia	2	
Strepobacillus moniliformis	2	
Streptococcus spp	2	
Treponema spp	2	
Ureaplasma urealyticum	2	
Vibrio cholerae (including El Tor)	2	T, V
Vibrio parahaemolyticus	2	
Vibrio spp	2	
Yersinia enterocolitica	2	
Yersinia pestis	3	V
Yersinia pseudotuberculosis	2	
Yersinia spp	2	

VIRUSES

Biological Agent	**Classification**	**Notes**
Adenoviridae	2	
Alphavirus	2* (contact NIV)	V
Arenaviridae:		
Ippy 2		
Lassa fever	4	
Lymphocytic chloriomeningitis	3	
Mobala	2	
Mopeia	3	
Astroviridae	2	
Bunyaviridae:		
Akabane	3	
Bunyamwera	2	
Germiston	3	
Hantaviruses [contact NIV]		
Nairoviruses:		

Bhanja	3	
Crimean/Congo haemorrhagic fever	4	
Hazara	2	
Phleboviruses:		
Rift Valley fever	3	V
Other Bunyaviridae known to be pathogenic	2* [contact NIV]	
Caliciviridae:		
Hepatitis E	3	
Norwalk	2	
Other Caliciviridae	2	
Coronaviridae	2	
Filoviridae:		
Ebola Reston (Siena)	4	
Ebola Sudan	4	
Ebola Zaire	4	
Ebola Ivory Coast	4	
Marburg	4	
Flaviviridae:		
Flaviviruses		
Dengue viruses Type 1-4	3	
Israel turkey meningitis	3	
Spondweni	3	
Wesselsbron	3	
West Nile fever	3	
Yellow fever	3	V
Hepatitis C group viruses:		
Hepatitis C	3	
Other Flaviviruses known to be pathogenic	2* [contact NIV]	
Hepadnaviridae:		
Hepatitis B	3	V
Hepatitis D (delta)	3	V
Herpesviridae:		
Cytomegalovirus	2	
Epstein-Barr virus	2	
Herpes simplex types 1 and 2	2	
Herpesvirus varicella-zoster	2	
Herpesvirus simaie (B virus)	3	
Human herpesvirus type 6 – HHV6	2	

Human herpesvirus type 7 – HHV7	2	
Orthomyxoviridae		
Influenza types A, B and C2	2	V (for A, B)
Tickborne orthomyxoviridae:		
Dhori and Thogoto	2	
Papovaviridae:		
BK and JC viruses	2	
Human papillomaviruses	2	
Paramyxoviridae		
Measles	2	V
Mumps	2	V
Newcastle disease	2	
Parainfluenza (Types 1 to 4)	2	
Respiratory syncytial virus	2	
Rinderpest	4	
Canine distemper		
Parvoviridae:		
Human parvovirus (B19)	2	
Picornaviridae		
Acute haemorrhagic conjunctivitis		
Virus (AHC)	2	
Coxsackie viruses	2	
Echoviruses	2	
Polioviruses	2	V
Rhinoviruses	2	
Hepatoviruses:		
Hepatitis A		
(Human enterovirus type 72)	2	V
Poxviridae:		
Buffalopox	2	
Cowpox	2	
Milker's nodes	2	
Molluscum contagiosum virus	2	
Monkeypox	3	V
Orf 2		
Vaccinia	2	
(including strains originally classified as rabbitpox virus)		

Variola (major and minor) (all strains, including "white virus")	4	V
Yatapox (Tana & Yaba)	2	
Reoviridae:		
Coltivirus	2	
Human rotaviruses	2	
Orbiviruses (includes - African horsesickness serogroup L - Blue tongue serogroup L	2	
Reoviruses	2	
Retroviridae:		
Human immunodeficiency viruses	3	
Human T-cell lymphotropic viruses (HTLV) types 1 and 2	3	
Simian immunodeficiency virus	3	
Rhabdoviridae:		
Lagos bat	3	
Duvenhage	3	
Makola	3	
Rabies	3	V
Togaviridae:		
Alphaviruses:		
Chikungunya	3	
Middelburg	2	
Ndumu	3	
O'nyong-nyong	2	
Semliki forest	3	
Sindbis	2	
Rubiviruses:		
Rubella	2	V
Toroviridae*	2	
Unclassified viruses:		
Blood-borne hepatitis viruses not yet identified	3	
Equine morbillivirus	3	
Unconventional agents:		
- Associated with:		
Creutzfeldt-Jakob disease	3	
Gerstmann-Strussler-Scheinker syndrome	3	
Kuru	3	

- Including strains isolated from cats and exotic species e.g. elephants, cheetahs.
- Including strains originally classified as rabbitpox virus.
- All strains including "whitepox virus".

PARASITES

Biological Agent	**Classification**	**Notes**
Acathamoeba spp	2	
Ancylostoma duodenale	2	
Angiostrongylus cantonensis	2	
Angiostriongylus costaricensis	2	
Ascaris lumbriciodes	2	A
Ascaris suum	2	A
Babesia divergens	2	
Babesia microti	2	
Balantidium coli	2	
Blastocystis homines	2	
Brugia spp	2	
Capillaria spp	2	
Clonorchis - see *Opisthorchis*		
Cryptosporidium spp	2	
Cyclospora cayetanensis	2	
Cyclospora spp	2	
Dientamoeba fragilis	2	
Dipetalonea – see *Mansonella*	2	
Diphyllobothrium latum	2	

Dracunculus medinensis	2
Echinococcus granulosus	3
Echinococcus multilocularis	3
Echinococcus vogeli	3
Entamoeba histolytica	2
Enterobius vermicularis	2
Enterocytozoon bieneusi	2
Fasciola gigantica	2
Fasciola hepatica	2
Fasciolopsis buski	2
Giardia lamblia (*Giardia intestinalis*)	2
Hymenolepis diminuta	2
Hymenolepis nana	2
Isopora belli	2
Leishmania brasiliensis	3
Leishmania donovani	3
Leishmania major	2
Leishmania tropica	2
Leishmania spp	2
Loa loa	2
Mansonella ozzardi	2
Mansonella perstans	2
Mansonella streptocerca	2
Naegleria fowleri	3
Necator americanus	2

Onchocerca volvulus	2
Opisthorcis sinensis (*Chlonorchis sinensis*)	2
Opisthorchis viverrini (*Clonorchis viverrini*)	2
Opisthorchis felineus	2
Opisthorchis spp	2
Paragonimus spp	2
Plasmodium falciparum	3
Plasmodium spp (human & simian)	2
Sarcocystis suihominis	2
Schistosoma spp	2
Strongyloides spp	2
Taenia saginata	2
Taenia solium	3
Toxocara canis	2
Toxocara cati	2
Toxoplasma gondii	2
Trichinella nativa	2
Trichinella nelsoni	2
Trichinella pseudospiralis	2
Trichinella spiralis	2
Trichomonas vaginalis	2
Trichostrongylus orientalis	2
Trichostrongylus spp	2
Trichuris trichiura	2

Trypanosoma brucei brucei	2
Tryposoma brucei gambiense	2
Trypanosoma brucei rhodesiense	3
Trypanosoma cruzi	3
Trypanosoma rangeli	2
Wuchereria bancrofti	2

ANNEXURE C

[Regulations10(1)(*b*), *15(2) and 16(a), (b)* and (*c*)]

PRECAUTIONS FOR WORKPLACES

FIVE MAIN ROUTES OF TRANSMISSION:

1. **Contact**

The most important route of transmission in a workplace is by—

(*a*) direct contact with an infected or contaminated body surface or fluid; and

(*b*) indirect contact via contact with an object previously contaminated with organisms from an infected person or animal.

2. **Droplet Transmission**

Droplets are generated during coughing, sneezing, talking and during procedures such as suctioning.

Droplets may carry organisms that can infect a new host if they are deposited on conjunctivae, nasal mucosa or the mouth.

Droplets do not remain suspended in the air.

Droplets do not travel more than one metre.

3. **Airborne Transmission**

Small particles (droplet nuclei) that remain suspended in air for long periods of time have a far greater potential for spreading disease than large droplets.

Few organisms are carried by this route, the most important being *Mycobacterium tuberculosis* and the viruses causing measles and chickenpox.

Prevention of spread requires an enclosed area with at least six air changes per hour, or an open window that provides adequate ventilation.

4. **Common Vehicle Transmission**

Transmission by items such as food, water, devices and equipment.

Normal hygienic practices and proper sterilisation or disinfection of equipment should make this type of spread a rare event in certain workplaces, e.g. hospitals.

5. **Vector-Borne Transmission**

Vectors such as mosquitoes, flies, fleas, etc. are hopefully not frequently encountered in workplaces as a cause of outbreaks.

In areas where there is a problem the appropriate measures, e.g. screens on windows and the use of insecticides must be instituted.

Two levels of precautions are recommended:

(*a*) **Standard Precautions**

These are applied at all times to all patients irrespective of their diagnosis. All body fluids (except sweat) are regarded as potentially infectious.

(*b*) **Transmission-Based Precautions**

These are applied when a specific infectious disease is diagnosed or suspected.

The route by which the disease is transmitted will determine the category of precautions that must be applied.

PRECAUTIONS

A. Administrative Controls

1. Education and Training
2. Adherence to precautions

B. Precautionary measures

1. Standard Precautions
2. Airborne Precautions
3. Droplet Precautions
4. Contact Precautions
5. Formidable Epidemic Disease (e.g. viral haemorrhagic fevers) Precautions

A. ADMINISTRATIVE CONTROLS

1. EDUCATION AND TRAINING

A system must be developed to ensure that hospital patients, employees, contractors and visitors are educated about:

* the use of precautions.
* their responsibility for adhering to the precautions.

2. ADHERENCE TO PRECAUTIONS

Periodic evaluation of adherence to precautions must be carried out. The findings are to be used to implement improvements.

B. PRECAUTIONARY MEASURES

1. STANDARD PRECAUTIONS

Standard precautions are used for the protection of all people exposed to HBA.

1.1 HAND WASHING

* Wash hands after touching blood, body fluid, secretions, excretions and contaminated items, whether or not gloves are worn.

* Wash hands (when working with patients):

  ➢ immediately after gloves are removed.

  ➢ between patient contact.

  ➢ where indicated to prevent cross-contamination of different body sites.

* Use plain (non-antimicrobial) soap for routine hand washing.

* Use an antimicrobial agent or an alcohol hand disinfectant for specific circumstances (e.g. control of outbreaks or hyperendemic infections) as defined by the infection control program. (See contact precautions.)

1.2 GLOVES

• Wear gloves (clean, intact non-sterile gloves are adequate) when touching blood, body fluid, secretions, excretions and contaminated items.

* Put on clean intact gloves just before touching mucous membranes and non-intact skin.

* Change and dispose of gloves between tasks and procedures—

  ➢ on the same person.

  ➢ after contact with material that may contain high concentration of micro-organisms.

* Remove gloves promptly after use—

  ➢ before touching non-contaminated items and environmental surfaces.

  ➢ before attending to another person.

* Wash hands immediately to avoid transfer of micro-organisms to other persons and environments.

1.3 MASK, EYE PROTECTION, FACE SHIELD

* Wear a mask and eye protection or a face shield—

  ➢ to protect mucous membranes of the eyes, nose and mouth.

  ➢ during procedures and activities that are likely to generate splashes or

sprays of blood or body fluid, secretions and excretions.

1.4 PROTECTIVE CLOTHING

* Wear appropriate protective clothing to protect skin and to prevent soiling of clothing during procedures and activities that are likely to generate splashes or sprays of blood, body fluid, secretions and excretions.

* Select protective clothing that is appropriate for the activity and amount of fluid likely to be encountered.

* Remove soiled protective clothing as promptly as possible and consider it contaminated.

* Wash hands immediately after removal of protective clothing to avoid transfer of micro-organisms to other people or environments.

1.5 PATIENT-CARE EQUIPMENT

* Handle patient-care equipment soiled with blood, body fluids, secretions and excretions in a manner that prevents—

  - skin and mucous membrane exposures.
  - contamination of clothing.
  - transfer of micro-organisms to other environments.

* Ensure that reusable equipment is not used for the care of another patient until—

  - it has been cleaned.
  - it has been reprocessed appropriately.

* Ensure that:—
  - sufficient disposable syringes and needles are at all times available for use.
  - provision is made for their safe disposal.

1.6 ENVIRONMENTAL CONTROL

* Ensure that adequate procedures are in place for routine care, cleaning and disinfection of environmental surfaces, and other frequently used or potentially contaminated surfaces.

* Disinfection of environmental surfaces is not routinely required. Simple cleaning is adequate unless there has been significant soiling by potentially infectious body fluids.

1.7 LINEN

* Process, handle and transport used linen contaminated with blood, body fluid, secretion and excretions in colour coded, impervious containers and all possible measures should be observed to prevent—

  - ➢ skin and mucous membrane exposure.
  - ➢ contamination of clothing.
  - ➢ transfer of micro-organisms to other persons and environments.

1.8 OCCUPATIONAL HEALTH

1.8.1 **Injuries**

* Take care to prevent injuries when—

  - ➢ using needles, scalpels and other sharp instruments or devices.
  - ➢ handling sharp instruments after a procedure.
  - ➢ cleaning instruments.
  - ➢ disposing of used needles.

Never

* Re-cap needles or manipulate them using both hands, if it is absolutely necessary to resheath a needle. A variety of mechanical devices that are commercially available must be used.

* Use any other technique that involves directing the point of a needle toward any part of the body.

Do not

* Remove used needles from disposable syringes by hand.

* Bend or break or otherwise manipulate needles by hand.

Do

* Place used disposable syringes and needles, scalpel blades and other sharp objects in appropriate puncture-proof containers that are as close as possible to the area in which the procedure is carried out.

* Transport them safely to the disposal area.

1.8.2 **Resuscitation**

Use mouthpieces, resuscitation bags or other ventilation devices as an alternative method to mouth-to-mouth resuscitation in areas where the need for resuscitation is predictable.

1.9 PATIENT PLACEMENT

* Place in an isolation area (single or private room) patients who—

  ➢ contaminate the environment.

  ➢ do not or cannot be expected to assist in maintaining appropriate personal hygiene or environmental control.

* If an isolation area is not available, consult infection control professionals regarding patient placement or other alternatives.

2. AIRBORNE PRECAUTIONS

In addition to Standard Precautions, use Airborne Precautions for—

* patients known or suspected of being infected with micro-organisms transmitted by airborne droplet nuclei, i.e. small particle residue of evaporated droplets containing micro-organisms that—

  ➢ remain suspended in the air;

  ➢ can be widely dispersed by air currents within a room or over a long distance.

2.1 PATIENT PLACEMENT

Ideally place patients in a private room that has—

* monitored negative air pressure in relation to the surrounding areas.

* 6 -12 air changes per hour.

* Appropriate discharge of air outdoors or monitored high-efficiency filtration

of room air before the air is circulated to other areas of the hospital.

Where this is not possible

* Use—

  - a room with a simple extraction fan providing at least six air changes per hour.

  - a room with an open window, and adequate ventilation.

* When an isolation area is not available, place the patient in a room with another patient who has active infection with the same micro-organism, and no other infection, unless otherwise recommended.

* When a private room is not available and cohorting is not desirable, consultation with infection control professionals is advised before patient placement.

* Keep the patient in the room and keep the door closed.

2.2 RESPIRATORY PROTECTION

Tuberculosis:

* Respiratory protection may be worn when entering the room of a patient known or suspected to have infectious pulmonary tuberculosis.

* Measles (rubeola) and chickenpox (varicella).

* Susceptible persons should not enter the room of patients known or suspected of having measles or varicella if other immune caregivers are available.

* If susceptible persons must enter the room they must wear respiratory protection.

* Persons immune to measles or varicella need not wear respiratory protection.

2.3 PATIENT TRANSPORT

Movement and transport of the patient should be kept to a minimum.

* If transport or movement is necessary, the patient must wear a surgical mask to minimise dispersal of droplet nuclei.

2.4 ADDITIONAL PRECAUTIONS FOR PREVENTING TRANSMISSION OF TUBERCULOSIS

* Respirators—

  - must be worn by all who enter the room.
  - must be able to filter particles 1 micron or less in size with a filter efficiency of 95%.

* Effective treatment of the patient

* Isolation—

  - there is significant clinical improvement in the patient's condition.
  - ideally, two negative acids fast bacilli smears must be obtained.
  - ideally a smear positive patient will require isolation for a minimum of two weeks.

3. DROPLET PRECAUTIONS

In addition to Standard Precautions, use Droplet Precautions for patients known or suspected to be infected with micro-organisms transmitted by droplets (large particle droplets that can be generated during coughing, sneezing, talking or respiratory therapy).

3.1 PATIENT PLACEMENT

Place the patient in an isolation area, e.g. private or single room

* When a private room is not available and cohorting is not achievable, maintain spatial separation of at least one metre between the infected patient and other patients and visitors.

* Additional ventilation measures are not necessary and the door may remain open.

3.2 MASKS

Wear a mask when working within one metre of the patient. However, logistically some hospitals may want to implement the wearing of a mask to enter the room.

3.3 PATIENT TRANSPORT

Movement and transport of the patient from the room should be kept to a minimum. If transport or movement is necessary, minimise dispersal of droplets by masking the patient.

4. CONTACT PRECAUTIONS

In addition to Standard Precautions use Contact Precautions for—

specified patients known or suspected to be infected or colonised with epidemiologically important micro-organisms that can be transmitted by direct contact with the patient (hand to skin contact occurs when performing patient care activities that required touching the patient's dry skin) - or indirect contact (touching) environmental surfaces or patient care items in the patient's environment.

4.1 PATIENT PLACEMENT

Place the patient in an isolation area, e.g. private or single room

* When a private room is not available, place the patient in a room with patients who have active disease with the same microorganism but no other infection (cohorting).

* When neither a private room nor cohorting is achievable, consider the epidemiology of the microorganism and the patient population when determining patient placement.

Consultation with infection control professionals is advisable before patient placement.

4.2 GLOVES AND HAND WASHING

In addition to wearing gloves and washing hands as outlined in Standard Precautions—

* Wear clean gloves when entering the room.

* Change gloves after having contact with infective material.

* Remove gloves before leaving the patient's environment.

* Wash hands immediately after glove removal with an antimicrobial or an alcohol hand rub.

* Ensure that hands do not touch potentially contaminated environmental surfaces or items in the patient's room to avoid transfer of micro-organisms to other patients or the environment.

4.3 PROTECTIVE CLOTHING

In addition to wearing a gown or plastic apron as outlined in Standard Precautions—

* Wear a clean, non-sterile gown and/or plastic apron as appropriate—

  - when entering a room where soiling of clothing is anticipated.
  - following substantial contact with the patient.
  - following contact with environmental surfaces or items in the patient's room.
  - if the patient is incontinent or has diarrhoea, an ileostomy or a colostomy.
  - where wound drainage is not contained by a dressing.

* Remove the gown or plastic apron before leaving the patient's environment.

* After gown or plastic apron removal, ensure that clothing does not make contact with potentially contaminated environmental surfaces to avoid transfer of micro-organisms to other patients or environments.

4.4 PATIENT TRANSPORT

* Movement and transport of the patient from the room should be minimised.

* Ensure that precautions are maintained to minimize the risk of transmission of micro-organisms to other patients and contamination of environmental surfaces or equipment.

4.5 PATIENT-CARE EQUIPMENT

Where possible dedicate the use of non-critical patient-care equipment to a single patient (or cohort of patients infected or colonised with the pathogen requiring precautions).

Avoid sharing equipment between patients

- If the use of common equipment or items is unavoidable, then these must be cleaned and disinfected before use for another patient.

4.6 ADDITIONAL PRECAUTIONS FOR PREVENTING THE SPREAD OF MULTI-DRUG-RESISTANT MICRO-ORGANISMS

* Limit antibiotic use and prevent misuse.

* Educate staff.

* Detect multi-drug-resistant micro-organisms early by laboratory and infection control surveillance.

* Consult an Infection Control Practitioner regarding further management.

5. FORMIDABLE EPIDEMIC DISEASE (FED) ISOLATION

* Standard and contact precautions plus additional items such as respirators, visors, water repellent gowns and boots, caps, double gloves are required.

* Standard precautions are adequate during the non-haemorrhagic phase in cases of haemorrhagic fevers, such as Ebola and Congo-Crimean haemorrhagic fever.

5.1 ISOLATION AREA

* This may be a dedicated viral haemorrhagic fever (VHF) unit or a dedicated sideward or private room, preferably with an anteroom.

* The door must be kept closed, and strict access control must be implemented.

5.2. GOWNS

* Impervious disposable gowns must be worn over a theatre scrub suit.

5.3 GLOVES

* Two pairs are worn, the one pair on top of the other.

* Sterile latex gloves are used because of the thicker quality and longer non-roll cuff.

5.4 BOOTS

* Impervious boots or overshoes are worn in the isolation room.

They must be—

- high enough to cover the area of skin below the trouser legs.
- strong enough to withstand wear and tear.

5.5 THEATRE CAPS/GOGGLES OR VISORS

* Worn inside the isolation room.
* Theatre caps.

A theatre cap worn with a visor providing full protection of the head and neck is preferred.

5.6 MASKS AND RESPIRATORS

* Masks – good quality, high-filtration respirators are necessary.

5.7 Formidable Epidemic Disease Pack (FED Pack)

A FED pack contains all the isolation gear necessary, must be safely stored in an area not accessible to unauthorised persons. The FED pack must be immediately replenished after every usage.
This pack is available immediately, is portable and is used until the patient is diagnosed or transferred to an isolation unit or an infectious diseases hospital. The pack is kept in a box or in a trolley. The box (or trolley) is distinctive and kept in an easily accessible place. The pack contents are replenished as required by the infection control staff.

Instruction posters provide instructions for untrained personnel until infection control professionals arrive to provide guidance and instruction in VHF procedures.

Contents—

* Sterile latex gloves of varying sizes.
* Disposable impermeable gowns.
* Goggles or visors.

* Masks.

* Shoe covers (half-leggings).

‡Theatre caps.

* Blood tubes, labels, bio-hazard plastic specimen bags, a rigid, walled container for transportation of specimens and bio-hazard stickers.

* Masking tape used for—

  - sealing boxes of refuse.
  - fixing instruction posters to the wall.
  - securing tops of plastic shoe covers.

* Plastic refuse bags for contaminated refuse.

* Autoclavable bags for non-disposable items.

* Clear plastic bags.

* Sodium-hypochlorite sachets of powder (NaOCl) and liquid 1% hypochlorite.

* Plastic-covered instruction posters containing detailed instructions on how to—

  - put on isolation gear.
  - undress safely.
  - collect and handle specimens safely.
  - mix disinfectants.
  - disinfect and handle contaminated equipment.
  - dispose of linen and refuse.
  - deal with a blood spill.

5.8 The infection control professionals must ensure that staff follows correct procedures and that equipment is available for disposal of refuse.

* All refuse bags are colour coded, double bagged and are placed into cardboard boxes.

* Refuse bags are sealed and labelled with bio-hazard stickers and tape.

* Containers are escorted to the incinerator.

* Their immediate incineration is ensured.

5.9 Transporting VHF specimens

These specimens require a special container and packaging:

- The specimen is placed in a bio-hazard bag.
- The patient's label is placed in the outer pouch.
- The specimen is then wrapped in absorbent material and placed in an unbreakable screw-top container.
- The container is labelled with a bio-hazard sticker and the destination (name of the receiving laboratory).
- It is preferably delivered by hand.
- If the specimen has to be posted or sent by courier a second unbreakable container is used and labelled accordingly.

5.10 Management of soiled linen, refuse and equipment

Bedding

* All bedding used is either disposable or condemned linen that is subsequently incinerated.

* Mattresses must be covered with durable plastic covers

  - The covers are disposable.
  - If the mattress becomes soiled with blood or body substance it must be destroyed.

Linen and Refuse

* All linen (disposable and condemned) is placed into plastic refuse bags

  - The person inside the cubicle or room takes the sealed bag and places it in a second bag held by another person outside the room.
  - This bag is then sealed and sent for incineration.

Terminal disinfection of equipment

* All equipment is washed down well with a hypochlorite-detergent.

* It is then dried, using a paper towel.

If the equipment is not autoclavable, it must be wrapped in clear plastic bags, then—

- double bagged into a clean bag held by a second person outside the cubicle.
- clearly labelled with the contents and a biohazard sticker attached.
- sent to Central Sterilizing Service Department (CSSD) for ethylene oxide gas sterilization.

* Autoclavable items must be placed in Asepto type bags—
  - labelled as above.
  - sealed in clean plastic bags for transport to CSSD.
  - autoclavable plastic bags may be used if available.

Furniture or environment

* All furniture, walls and floors are washed down well with hypochlorite-detergent.

TABLE 1

Infection/Condition	Precautions Type*	Duration†
Abscess		
Draining, major[a]	C	D1
Draining, minor or limited[b]	S	
AIDS[c]	S	
Actinomycosis	S	
Adenovirus infection, in infants and young children	D, C	D1
Amebiasis	S	
Anthrax		
Cutaneous	S	
Pulmonary	S	
Antibiotic-associated colitis (see C *difficile)*		
Arthropodborne viral encephalitides (eastern, western, Venezuelan equine encephalomyelitis: St Louis, California encephalitis)	S[d]	
Arthropodborne viral fevers (dengue, yellow fever, Colorado tick fever)	S[d]	
Ascariasis	S	
Aspergillosis	S	
Babesiosis	S	
Blastomycosis, North American, cutaneous or pulmonary	S	
Botulism	S	
[a]No dressing or dressing does not adequately contain damage		
[b]Dressing covers and adequately contains drainage.		
Bronchiolitis (see respiratory infections in infants and young children)		
Brucellosis (undulant, Malta, Mediterranean fever)	S	
Campylobacter gastroenteritis (see gastroenteritis)		
Candidiasis, all forms including mucocutaneous	S	

Cat-scratch fever (benign inoculation lymphoreticulosis)	S	
Cellulitis, uncontrolled drainage	C	D1
Chancroid (soft chancre)	S	
Chickenpox (varicella) (see F[e] for varicella exposure)	A, C	F[e]
Chlamydia trachomatis		
Conjuctivitis	S	
Genital	S	
Respiratory	S	
Cholera (see gastroenteritis)		
Closed-cavity infection		
Draining, limited or minor	S	
Not draining	S	
Clostridium *spp*		
C. botulium	S	
C. difficile	C	D1
C. perfringens		
Food poisoning	S	
Gas gangrene	S	
Coccidiodomycosis (valley fever)		
Draining lesions	S	
Pneumonia	S	
Colorado tick fever	S	
Congenital rubella	C	F
Conjunctivitis		
Acute bacterial	S	
Chlamydia	S	
Conococcal	S	
Acute viral (acute hermorhagic)	C	D1
Coxsackle virus (see enteroviral nfection)		
Creutzfeldt-Jakob disease	S[d]	
Croup (see respiratory in infants and young children)		
Cryptococcosis	S	
Cryptosporidiosis (see gastroenteritis)		
Cysticercosis	S	
Cytomegalovirus infection neonatal or immunosuppressed	S	
Decubitus ucler, infected		
Major[a]	C	D1
Minor or limited[b]	S	
Dengue	S[d]	
Diarrhea acute-infective etiology suspected (see gastroenteritis)		
Diptheria		
Cutaneous	C	CN[m]
Pharyngeal	D	CN[m]
Ebola viral hemorrhagic fever	C	D1
Echnococcosis (hydatidosis)	S	
Echovirus (see enteroviral enfection)		
Encephalitis (see enteroviral infection)		
Encephalitis or encephalomyelitis (see specific etiologic agents)		
Endometritis	S	
Enterobiasis (pinworm disease, oxyuriasis)	S	
Enterococcus species (see multidrug-resistant organisms if epdidemiologically significantorvancomycin resis-		
tant)		
Enterocolitis. C. difficile	C	D1
Enteroviral infctions		
Adults	S	
Infants and young children	C	D1
Epiglottitis caused by H. influenzea	D	U[24 hrs]
Epstein-Barr virus infection, including infectious mononucleosis	S	
Erythema infectiosum (also see Parvovirus B19)	S	
Escherichia coli *gastroenteritis (see gastroenteritis)*		
Food poisoning		
Botulism	S	
Clostridium perfringens or welchii	S	
Staphylococcal	S	
Furunculosis-staphylococcal		
Infants and young children	C	D1
ngrene (gas gangrene)	S	
Gastroenteritis		
Campylobacter sp	S[l]	
Cholera	S[l]	
C. difficile	C	D1
Cryptosporidium *species*	S[l]	
E. coli		

Enterohemorrhagic O157.H7	S[l]	
Diapered or incontinent	C	D1
Other species	S[l]	
Giardia lamplia	S[l]	
Rotavirus	S[l]	
Diapered or incontinent	C	D1
Salmonelia *species (including S. typhi)*	S[l]	
Shigella species	S[l]	
Diapered or incontinent	C	D1
Vibrio parahamolyticus	S[l]	
Viral (if not covered elsewhere)	S[l]	
Yersinia enterocolitica	S[l]	
German measles (rubella)	D	F[v]
Giardiasis (see gastroenteritis)		
Gonococcal ophthalmia neonatorum (gonorrheal ophtalmia acute conjunctivitis of newborn)	S	
Gonorrhea	S	
Granuloma inguinale (donovanosis, granuloma venereum)	S	
Guillain-Barre syndrome	S	
Hand, foot and mouth disease (see enterviral infection)		
Hantavirus *pulmonary syndrome*	S	
Helicobacter pylori	S	
Hemorrhagic fevers (for example Lassa and Ebola)	C[l]	D1[l]
Hepatitis, viral		
Type A	S	
Diapered or incontinent patients	C	F[k]
Type B-HBsAg positive	S	
Type C and other unspecified, non-A, non-B	S	
Type E	S	
Herpangina (see enteroviral infection)		
*Herpes simplex (*Herpesvirus hominis*)*		
Encephalitis	S	
Neonatal[l] (see F[l] for neonatal exposure)	C	D1
Mucocutaneous disseminated or primary severe	C	D1
Mucocutaneous, recurrent (skin, oral, genital)	S	
Herpes zoster (varicella zoster)		
Localized in immunocompromised patient or disseminated	A, C	D1[m]
Localized in normal patient	S[m]	
Histoplasmosis	S	
HIV (see human immunodeficiency virus)	S	
Hookworm disease (ancyclostomiasis, uncinariasis)	S	
Human immunodeficiency virus (HIV) infection[c]	S	
Impetigo	C	U[24 hrs]
Infectious mononucleosis	S	
Influenza	D[n]	D1
Kawasaki syndrome	S	
Lassa fever	C	D1
Legionnaires disease	S	
Leprosy	S	
Leptospirosis	S	
Lice (pediculosis)	C	U[24 hrs]
Listeriosis	S	
Lyme disease	S	
Lymphocytic choriomeninggitis	S	
Lymphogranuloma venereum	S	
Malaria	S	
Marburg virus disease	A	D1
Measles (rubeola) all presentations	A	D1
Meliodiosis all forms	S	
Meningitis		
Aseptic (non bacterial or viral meningitis) (also see enteroviral infections)	S	
Bacterial, gram-negative enteric in neonates	S	
Fungal		
H. influenzea, *known or suspected*	D	U[24 hrs]
Listeria monocytogenes	S	
Neisseria meningitidis (meningococcal) known or suspected	D	U[24 hrs]
Pneumococcal	S	
Tuberculosis	S	
Other diagnosed bacterial	S	
Meningococcal pneumonia	D	U[24 hrs]
Meningococcal (meningococcal sepsis)	D	U[24 hrs]
Molluscum contagiosum	S	
Mucormycosis	S	

Multidrug-resistant organisms, infection or colonization[2]		
Gastrointestinal	C	CN
Respiratory	C	CN
Pneumococcal	S	
Skin, wound or burn	C	CN
Mumps (infections parotitis)	D	F[2]
Mycobacteria non tuberculosis (atypical)		
Pulmonary	S	
Wound	S	
Mycoplasma *pneumonia*	D	D1
Necrotizing enterocolitis	S	
Nocardiosis draining lesions or ther presentations	S	
Norwalk agent gastroenteritis (see viral gastroenteritis)		
Orf	S	
Parainfluenza virus infection, respiratory in infants and young children	C	D1
Parvovirus B19	D	F
Pediculosis (lice)	C	U[24 hrs]
Pertussis (whooping cough)	D	F[3]
Pinworm infection	S	
Plague		
Bubonic	S	
Pneumonic	D	U[72 hrs]
Pleurodynia (see enterovival infection)		
Pneumonia		
Adenovirus	D.C	DI
Bacterial not listed elsewhere (including gram –negative bacterial)	S	
Burkholderia cepacia in patience with CF including respiratory tract colonization	S	
Clamydia	S	
Fungal		
H. influenzae		
Adults	S	
Infants and children (any age)	D	U24 hrs
Legionella	S	
Meningococcal	D	U24 hrs
Multidrug – resistant bacterial (see multidrug- resistant organisms)		
Mycoplasma *(primary atypical pneumonia)*	D	DI
Pneumococcal		
Multidrug- resistant (see multidrug –resistant organisms)		
Pneumocystis carinii	S	
Pseudomonas cepacia (see Burkholderia cepacia)	S	
Staphylococcus aureus	S	
Streptococcus, *Group A*		
Adults	S	
Infants and children	D	U24hrs
Viral		
Adults	S	
Infants and young children (see respiratory infectious disease, acute)		
Poliomyelitis	S	
Psittacosis (ornithosis)	S	
Q fever	S	
Rabies	S	
Rat-bite fever (Streptopacillus moniliformis disease. Spirillum minus disease)	S	
Relapsing fever	S	
Resistant bacterial infection or colonization (see multidrug resistant organisms)		
Respiratory infectious disease acute (if not covered elsewhere)		
Adults	S	
Infants and young children[2]	C	DI
Respiratory syncytial virus infection in infants and young children and immunocompromisedadults	C	DI
APPENDIX A.		
Reye's syndrome	S	
Rheumatic fever	S	
Rickettsiai fever, tickborne (Rocky Mountain spotted fever, tickborne typhus fever)	S	
Rickettsiaipox (vesicular rikettsiosis)	S	
Ringworm (dermatophytosis, dermatomycosis, tinea)	S	
Ritter's disease (staphylococcal scalded skin syndrome)	S	
Rocky Mountain spotted fever	S	
Roseola infantum (exanthum subitum)	S	
Rotavirus infection (see gastroenteritis)		
Rubella (German measles) (also see congenital rubella)	D	Fv
Salmonellosis (see gastroenteritis)		
Scabies	C	U24 hrs
Scalded skin syndrome, staphylococcal (Ritter's disease)	S	
Schistosomiasis (bilharziasis)	S	

Shigellosis (see gastroenteritis)		
Sporotrichosis	S	
Spirillium minus *disease (rat-bite fever)*	S	
Staphylococcal disease (S. aureus)		
Skin wound or burn		
Major	C	DI
Minor or limited	S	
Enterocolitis	S	
Multidrug resistant(see multidrug-resistant organisms)		
Pneumonia	S	
Scalded skin syndrome	S	
Toxic shock syndrome	S	
Streptobacillus moniliformis disease (rat-bite fever)	S	
Streptococcal disease (group A *Streptococcus*)		
Skin wound or burn		
Major	C	U24 hrs
Minor or limited	S	
Endometritis (puerperal sepsis)	S	
Pharyngitis in infant and young children	D	U24 hrs
Pneumonia in infant and young children	D	U24 hrs
Scarlet fever in infant and young children	D	U24 hrs
Streptococcal disease (group B Streptococcus) neonatal	S	
Streptococcal disease (not group A or B) unless covered elsewhere	S	
Multidrug-resistant bacterial (see multidrug-resistant organisms)		
Strongyloidiasis	S	
Syphilis		
Skin and mucous membrane including congenital primary secondary	S	
Latent (tertiary) and seropositivity without lesions	S	
Tapeworm disease		
Hymenolepis nana	S	
Taenia soluim (pork)	S	
Other	S	
Tetanus	S	
Tinea (fungus infection dermatophytosis dermatomycosis ringworm)	S	
Toxoplasmosis	S	
Toxic shock syndrome (staphylococcal disease)	S	
Trachoma acute	S	
Trench mouth (Vincent angina)	S	
Trichinosis	S	
Trichomoniasis	S	
Trichuriasis (whipworm disease)	S	
Tuberculosis		
Extrapulmonary draining lesion (including scrofula)	S	
Extrapulmonary mengitis	S	
Pulmonary confirmed or suspected or laryngeal disease	A	F[w]
Skin-test positive with no evidence of current pulmonary disease	S	
Tularemia		
Draining lesion	S	
Pulmonary	S	
Typhoid *(Salmonella typhi)* fever (see gastroenteritis)		
Typhus endemic and epidemic	S	
Urinary tract infection (including pyelonephritis) with or without urinary catheter	S	
Varicella (chickenpox)	A.C	F[s]
Vibrio parahaemolyticus (see gastroenteritis)		
Vincent's angina (trench mouth)	S	
Viral deceases		
Respiratory (if not covered elsewhere)		
Adults	S	
Infants and young children (see respiratory infectious disease acute)		
Whooping cough (pertussis)	D	F[s]
Wound infections		
Major	C	DI
Minor or limited	S	
Yersinia entercolitica gastroenteritis (see gastroenteritis)		
Zoster (varicella-zoster)		
Localized in immunocompromised patient, disseminated	A.C	DI[w]
Localized in normal patient	S[w]	
Zygomycosis (phycomycosis mucormycosis)	S	

Abbreviations used

Type of precautions:

Standard precautions (S) are applied at all times in addition to either:

A Airborne
C Contact
D Droplet
VHF Viral haemorrhagic fever

Duration of precautions:

CN until antibiotics are discontinued and culture-negative

DH duration of hospitalisation

DI duration of illness (with wound lesions, DI means until they stop draining)

U until time specified in hours (hrs) after initiation of effective therapy.

F footnote number under type

Meaning of superscript number (i.e. F^{E} Standard precaution is applied at all times)

[a]No dressing, or dressing does not contain drainage adequately.

[b]Dressing covers and contains drainage adequately.

[c]Also see syndromes or conditions listed in Table 2.

[d]Install screens in windows and doors in endemic areas.

[e]Maintain precautions until all lesions are crusted. The average incubation period for varicella is 10 to 16 days, with a range of 10 to 21 days. After exposure, use varicella-zoster immune globulin (VZIG) when appropriate and discharge susceptible patients if possible. Place exposed susceptible patients on Airborne Precautions beginning 10 days after exposure and continuing until 21 days after last exposure (up to 28 days if VZIG has been given). Susceptible persons should not enter the room of the isolated patient on precautions if other immune caregivers are available.

[f]Isolate all infants on precautions during any admission until one year of age, unless nasopharyngeal and urine cultures are negative for virus after age three months of age.

[g]Additional special precautions are necessary for handling and decontamination of blood, body fluids and tissues, and contaminated items from patients with confirmed or suspected disease.

[h]Until two cultures are taken at least 24 hours apart are negative.

[i]Consult the National Institute of Virology for guidelines issued by provincial health departments. Use Contact Precautions for diapered or incontinent children less than six years of age for duration of illness. Maintain precautions in infants and children under three years of age for duration of hospitalisation; in children three to fourteen years of age, until two weeks after onset of symptoms; and others, until one week after onset of symptoms. For infants delivered vaginally or by Caesarean section and if mother has active infection and membranes have been ruptured for more than four to six hours.

[m]Persons susceptible to varicella are also at risk for developing varicella when exposed to patients with zoster lesions; therefore, susceptibles should not enter the room if other immune caregivers are available.

[n]Many hospitals encounter logistic difficulties and suspected or diagnosed limitations when admitting multiple patients with suspected influenza during community outbreaks. If sufficient private rooms are unavailable, consider cohorting patients or, at the very least, avoid room sharing with high-risk patients.

[o]Patients should be examined for evidence of current (active) pulmonary tuberculosis. If evidence exists, additional precautions are necessary (see tuberculosis 3).

[p]Resistant bacteria judged by the infection control program, based on current state, regional or national recommendations, to be of special clinical and epidemiologic significance.
For nine days after onset of swelling.
Maintain precautions for duration of hospitalisation when chronic disease occurs in an immunodeficient patient. For patients with a transient plastic crisis or red cell crisis, maintain precautions for seven days.
Maintain precautions for five days after patient is placed on effective therapy.
Avoid cohorting or placement in the same room with a cystic fibrosis (CF) patient who is not infected or colonised with *B. cepacia*. Persons with CF who visit or provide care and are not infected or colonised with *B. cepacia* may elect to wear a mask when within one metre of a colonised or infected patient.
Avoid placement in the same room with an immunocompromised patient.
Until seven days after onset of rash.
Discontinue precautions only when TB patient is improving clinically and has three consecutive negative sputum smears collected on different days or TB is ruled out.
Maintain all precautions until the patient stops bleeding.

TABLE II

CLINICAL SYNDROMES OR CONDITIONS WARRANTING ADDITIONAL EMPIRIC PRECAUTIONS TO PREVENT TRANSMISSION OR EPIDEMIOLOGICALLY IMPORTANT PATHOGENS PENDING CONFIRMATION OF DIAGNOSIS*

Clinical Syndrome or Condition**	Potential Pathogens	Empiric Precautions
Diarrhoea		
Acute diarrhoea-like infections: Contact cause in an incontinent or diapered patient.	Enteric pathogens***	Contact
Diarrhoea in an adult with a history of recent antibiotic use	Clostridium	Droplet
Rash or exanthems, generally, etiology unknown		
Petechial or ecchymotic with fever	*Neisseria meningitidis*	Droplet
Vesicular	Varicella	Airborne and contact
Maculopapular with coryza and fever	Measles	Airborne
Respiratory infections		
Cough/fever/upper lobe pulmonary infiltrate in an HIV-negative patient or a patient at low risk for HIV infection	*Mycobacterium tuberculosis*	Airborne
Cough/fever/pulmonary infiltrate in any lung location in an HIV-infected patient or a patient at high risk of HIV infection	*Mycobacterium tuberculosis*	Airborne
Paroxysmal or severe persistent cough during periods of pertussis activity	*Bordella pertussis*	Droplet
Particularly bronchiolitis and croup in infants and young children	Respiratory syncytial virus or parainfluenza virus	Contact

Risk of multidrug-resistant micro-organisms

History of infection or colonisation with multidrug-resistant organisms	Resistant bacteria	Contact
Skin and wound if urinary tract infection in a patient with a recent hospital or nursing home stay in a facility where multidrug-resistant organisms are prevalent.	Resistant bacteria	Contact

Skin and wound infection

Abscess or draining wound that can not be covered	*Staphylococcus aureus,* Group A *streptococcus*	Contact

* Infection control professionals are encouraged to modify or adapt this table according to local conditions. To ensure that appropriate empiric precautions are always implemented, hospitals must have systems in place to evaluate patients routinely according to these criteria as part of their pre-admission care.

** Patients with the syndromes or conditions listed below may present atypical signs or symptoms (e.g. pertussis in neonates and adults may not have paroxysmal or severe cough). The clinician's index of suspicion should be guided by the prevalence of specific conditions in the community, as well as clinical judgement.

*** The organisms listed under "Potential Pathogens" are not intended to represent the complete, or even the most likely, diagnosis, but rather possible etiologic agents that require additional precautions beyond Standard Precautions until they can be ruled out.

SYNOPSIS OF TYPES OF PRECAUTIONS AND PATIENTS REQUIRING THE PRECAUTIONS[α]

Abbreviations used in list of precautions.

α See Table I for a complete list of infections requiring precautions, including appropriate footnotes.

ß Certain infections require more than one type of precaution.

Γ See "Guidelines for Preventing the Transmission of Tuberculosis in Health-Care Facilities" available from the Department of Health.

1. Standard Precautions

Use Standard Precautions for the care of all patients.

2. Airborne Precautions

In addition to Standard Precautions, use Airborne Precautions for patients known or suspected to have serious illnesses transmitted by the airborne droplet nuclei. Examples of such illnesses include—

- Measles
- Varicella (including disseminated zoster)[ß]
- Tuberculosis[Γ]

3. Droplet Precautions

In addition to Standard Precautions, use Droplet Precautions for patients known or suspected to have illnesses transmitted by large-particle droplet.

Examples of such illnesses include:

- Invasive *Haemophilus influenzae* Type B disease, including meningitis, pneumonia, epiglottitis and sepsis.
- Invasive *Neisseria meningitidis* disease, including meningitis, pneumonia and sepsis.

Other serious bacterial respiratory infections spread by droplet transmission, including:

- Diphtheria (pharyngeal)
- Mycoplasma pneumonia

- Pertussis
- Pneumonic plague
- Streptococcal pharyngitis, pneumonia or scarlet fever in infants and young children

Serious viral infections spread by droplet transmission, including—

- ➢ Adenovirus[6]
- ➢ Influenza
- ➢ Mumps
- ➢ Parvovirus B12
- ➢ Rubella

4. Contact Precautions

In addition to Standard Precautions, use Contact Precautions for patients known or suspected to have serious illnesses easily transmitted by direct contact or by contact with items in the patient's environment. Examples of such illnesses include—

- Gastrointestinal, respiratory, skin or wound infections or colonisation with multidrug-resistant bacteria judged by the infection control program, based on current state, regional, or national recommendations, to be of special clinical and epidemiologic significance.
- Enteric infections with a low infectious dose or prolonged environmental survival, including:
  - ➢ *Clostridium difficile*
- For diapered or incontinent patients: enterohaemorrhagic *Escherichia coli* O157: H7, Shigella, Hepatitis A or Rotavirus
- Respiratory syncytial virus, parainfluenza virus or enteroviral infections in infants and young children.

Skin infections that are highly contagious or that may occur on dry skin, including:

- Diphtheria (cutaneous)
- Herpes simplex virus (neonatal or mucocutaneous)
- Impetigo

- Major (non-contained) abcesses, cellulitis or decubitus ulcers
- Pediculosis (lice)
- Scabies
- Staphylococcal furunculosis in infants and young children.
- Zoster (disseminated or in the immunocompromised host)
- Viral/haemorrhagic conjunctivitis
- Viral haemorrhagic infections (Ebola, Lassa, Marburg, Congo-Crimean) (during early non-haemorrhagic stages)

5. Formidable Epidemic Disease (FED) Precautions

In addition to Standard Precautions and Contact Precautions, use FED precautions for persons proven or suspected of having a viral haemorrhagic fever. Examples of such diseases are:

- Ebola Viral Haemorrhagic Fever
- Marburg Haemorrhagic Fever
- Congo-Crimean Haemorrhagic Fever
- Lassa Fever

ANNEXURE D

[Regulations 10(2)(f), 11(4)(b) and14(b)]

BIO-HAZARD SIGN



ANNEXURE E

[Regulations 15(2) and 16(a) and (b)]

INDICATIONS CONCERNING CONTAINMENT MEASURES AND CONTAINMENT LEVELS

The measures contained in this Annexure shall be applied according to the nature of the activities, the assessment of risk and the nature of the HBA concerned.

	A. CONTAINMENT MEASURES	B. CONTAINMENT LEVELS		
		Level 2	Level 3	Level 4
1.	The workplace is to be separated from any other activities in the same building	No	Recommended	Yes
2.	Input air and extract air in the workplace are to be filtered using High Efficiency Particulate Air (HEPA) Filter or likewise.	No	Yes, or extract air and safe discharge of air	Yes, on input and extract air and safe discharge of air
3.	Access is to be restricted to authorised persons only.	Recommended	Yes	Yes, via airlock
4.	The workplace should be sealable in order to permit disinfection.	No	Recommended	Yes
5.	Specified disinfection procedures.	Yes	Yes	Yes
6.	The workplace is to be maintained at an air pressure negative to atmosphere.	No	Recommended	Yes
7.	Efficient vector control, e.g. rodents and insects.	Recommended	Yes	Yes
8.	Surfaces impervious to water and easy to clean.	Yes, for bench	Yes, for bench and floor	Yes, for bench, walls, floor and ceiling
9.	Surfaces resistant to acids, alkalis, solvents, disinfectants.	Recommended	Yes	Yes

10.	Safe storage of a biological agent.	Yes	Yes	Yes, secure storage
11.	An observation window or alternative is to be present so that occupants can be seen.	Recommended	Recommended	Yes
12.	A laboratory is to contain own equipment.	No	Recommended	Yes
13.	Infected material, including any animal, is to be handled in a safety cabinet or isolator or other suitable container.	Where appropriate	Yes, where infection is by airborne route	Yes
14.	Incinerator for disposal of animal carcasses.	Recommended	Yes (available)	Yes, on site

ANNEXURE F

[Regulation 16 C]

CONTAINMENT FOR INDUSTRIAL PROCESSES

Group 1 biological agents

For work with group 1 biological agents, including life-attenuated vaccines, the principles of good occupational safety and hygiene should be observed.

Group 2, 3 and 4 agents

It may be appropriate to select and combine containment requirements from different categories below on the basis of a risk assessment related to any particular process or part of a process.

A. CONTAINMENT MEASURES	B. CONTAINMENT LEVELS		
	Level 2	**Level 3**	**Level 4**
1. Viable organisms should be handled in a system, which physically separates the process from the environment.	Yes	Yes	Yes
2. Extracted air from the closed system should be treated so as to—	minimise release	prevent release	prevent release
3. Sample collection, addition of materials to a closed system and transfer of viable organisms to another closed system should be performed so as to—	minimise release	prevent release	prevent release
4. Bulk culture fluids should not be removed from the closed system unless the viable organisms have been—	inactivated by validated means	inactivated by validated chemical or physical means	inactivated by validated chemical or physical means
5. Seals should be designed as to—	minimise release	prevent release	prevent release
6. Closed systems should be located within a controlled area.	Optional	Optional	Yes, and purpose-built

(a) Biohazard signs should be posted	Optional	Yes	Yes
(*b*) Access should be restricted to nominated personnel only.	Optional	Yes	Yes, via an airlock
(*c*) Personnel should wear protective clothing.	Yes, work clothing	Yes	A complete change
(*d*) Decontamination and washing facilities should be provided for personnel.	Yes	Yes	Yes
(*e*) Personnel should shower before leaving the controlled area.	No	Optional	Yes
(f) Effluent from sinks and showers should be collected and inactivated before release.	No	Optional	Yes
(*g*) The controlled area should be adequately ventilated to minimise air contamination.	Optional	Optional	Yes
(*h*) The controlled area should be maintained at an air pressure negative to atmosphere.	No	Optional	Yes
(*i*) Input air and extract air to the controlled area should be HEPA filtered.	No	Optional	Yes
(*j*) The controlled area should be designed to contain spillage of the entire contents of the closed system.	No	Optional	Yes
(*k*) The controlled area should be sealable in order to permit fumigation.	No	Optional	Yes

(*l*)	Effluent before final discharge.	Inactivated by validated means	Inactivated by validated chemical or physical means	Inactivated by validated chemical or physical means

GOVERNMENT NOTICE

DEPARTMENT OF EMPLOYMENT AND LABOUR

No. R. **2020**

COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993 (ACT NO 130 OF 1993)

NOTICE ON COMPENSATION FOR OCCUPATIONALLY-ACQUIRED NOVEL CORONA VIRUS DISEASE (COVID-19) UNDER COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 130 of 1993 AS AMENDED

1. I, Vuyo Mafata, Compensation Commissioner, after consultation with the Compensation Executive Committee, hereby make the following notice in terms of Section 6A of the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No 130 of 1993) as amended. The proposed notice is attached as Schedule A.

SCHEDULE

2. The notice for compensation of occupationally-acquired novel Corona virus disease (Covid-19) comes into effect on the date of publication hereof and shall be implemented with immediate effect thereon.
3. All employers and Medical Service Providers must follow the stipulated prescripts when submitting claims and supporting medical reports for Covid-19.
4. When submitting reports online through the CompEasy system or Mutual Association Claims systems, Medical Service Providers must use the emergency Covid-19 ICD-10 code: **U07.1** as proposed by the World Health Organization (WHO).

VUYO MAFATA
COMPENSATION COMMISSIONER
DATE: 2020/03/20

SCHEDULE A **Circular No. CF/03/2020**

NOTICE ON COMPENSATION FOR OCCUPATIONALLY-ACQUIRED NOVEL CORONA VIRUS DISEASE (COVID-19)

COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993 (NO. 130 OF 1993) AS AMENDED.

The following notice is issued to clarify the position of the Compensation Fund with regard to compensation of claims for Covid-19.

1. Acronyms

COID Act	Compensation for Occupational Injuries and Diseases Act, 130 of 1993
Covid-19	Novel Corona Virus Disease of 2019
DOH	Department of Health, South Africa
WHO	World Health Organization
ILO	International Labour Organization
SARS-Cov-2	Severe Acute Respiratory Syndrome Corona Virus 2
RNA	Ribonucleic Acid

2. Definition

Coronavirus Disease (COVID-19) is a viral infection of the upper respiratory system which presents with flu-like symptoms ranging from mild fever, dry cough, runny nose, sneezing to moderate and severe symptoms like productive cough, high fever, shortness of breath and general malaise. In its severe form it can present with pneumonia, cough with haemoptysis and respiratory failure. It is transmitted through droplets suspended in the air during coughing and sneezing from an infected source.

Occupationally-acquired COVID-19 is a disease contracted by an employee as defined in the COID Act arising out of and in the course of his or her employment. This notice deals with occupationally-acquired COVID-19 resulting from single or multiple exposures to confirmed case(s) of COVID-19 in the workplace or after an official trip to high-risk countries or areas in a

previously COVID-19-free individual.

A claim for occupationally-acquired COVID-19 shall clearly be set out as contemplated in and provided for in sections 65 and 66 of the COID Act.

3. Diagnosis

3.1. Occupationally-acquired COVID-19 diagnosis relies on:

a) Occupational exposure to a known source of COVID-19;
b) A reliable diagnosis of COVID-19 as per the WHO guidelines;
c) An approved official trip and travel history to countries and/or areas of high risk for COVID-19 on work assignment;
d) A presumed high-risk work environment where transmission of COVID-19 is inherently prevalent; and
e) A chronological sequence between the work exposure and the development of symptoms.

3.2. COVID-19 can be reliably diagnosed by:

a) Sputum, nasopharyngeal or oropharyngeal swab specimen collected from all patients at admission tested by real time polymerase chain reaction (PCR) for SARS-Cov-2 RNA performed within three hours of collection.

3.3. Occupations at Risk:

3.3.1. Very high exposure risk occupations

Very high exposure risk jobs are those with high potential for exposure to known or suspected sources of COVID-19 during specific medical, post mortem, or laboratory procedures. Workers in this category include:

a) Healthcare workers (e.g. doctors, nurses, dentists, paramedics, emergency edical technicians) performing aerosol-generating procedures (e.g. intubation, cough induction procedures, bronchoscopies, some dental procedures and exams, or invasive specimen collection) on known or suspected COVID-19 patients.
b) Healthcare or laboratory personnel collecting or handling specimens from known or suspected COVID-19 patients (e.g. manipulating cultures from known or suspected

COVID-19 patients).

c) Morgue workers performing autopsies, which generally involve aerosol-generating procedures, on the bodies of people who are known to have, or suspected of having, COVID-19 at the time of their death.

3.3.2. High exposure risk occupations

High exposure risk jobs are those with high potential for exposure to known or suspected sources of COVID-19. Workers in this category include:

a) Healthcare delivery and support staff (e.g. doctors, nurses, and other hospital staff who must enter patients rooms) exposed to known or suspected COVID-19 patients.
(**Note:** when such workers perform aerosol-generating procedures, their exposure risk level becomes very high.)
b) Medical transport workers (e.g. ambulance personnel and porters) moving known or suspected COVID-19 patients in enclosed vehicles.
c) Mortuary workers involved in preparing (e.g. for burial or cremation) the bodies of people who are known to have, or suspected of having COVID-19 at the time of their death.

3.3.3. Medium exposure risk occupations

Medium exposure risk jobs include those that require frequent and/or close contact with (i.e. within 2 meters of) people who may be infected with SARS-CoV-2, but who are not known or suspected COVID-19 patients. In areas without ongoing community transmission, workers in this risk group may have frequent contact with travellers who may return from international locations with widespread COVID-19 transmission.

In areas where there is ongoing community transmission, workers in this category may have contact with the general public (e.g. in schools, high-population-density work environments, such as labour centres, consulting rooms, point of entry personnel and some high-volume retail settings).

3.3.4. Low exposure risk occupations

Lower exposure risk (caution) jobs are those that do not require contact with people known to be, or suspected of being infected with Covid-19, nor frequent close contact with (i.e. within 2 meter of) the general public. Workers in this category have minimal occupational contact with the public and other co-workers.

3.3.5. The Medical Officers in the Compensation Fund will determine whether the diagnosis of Covid-19 was made according to acceptable medical standards.

4. Impairment

4.1. Assessment of permanent impairment shall be determined three months after diagnosis and when Maximum Medical Improvement (MMI) has been reached.

4.2. The degree of impairment will be evaluated based on the complications of the Covid-19 from the affected body system(s).

5. Benefits

5.1. Temporary total disablement (TTD

a) Payment for temporary total disablement shall be made for as long as such disablement continues, but not for a period exceeding 30 days.

5.1.1. Suspected and Unconfirmed Cases

a) For self-quarantine recommended by registered Medical Practitioner in accordance with the DOH/WHO/ILO guidelines, the employer will be liable for remuneration for days of absence.

5.1.2. Confirmed Cases

a) For confirmed cases and where the Compensation Fund has accepted liability, temporary total disablement shall be paid from the date of diagnosis up to 30 days.

b) In an event where there are complications, the Commissioner has a right to review the case.

5.2. Permanent Disablement:

In an event where there are complications the Commissioner has a right to assess each case on merit and determine if there is any permanent disablement.

5.3. Medical Aid

In all accepted cases of COVID-19, medical aid shall be provided for a period of not more than 30 days from the date of diagnosis. If in the opinion of the Director-General further medical aid will reduce the extent of the disablement this shall be considered.

5.4. Death Benefits

Reasonable burial expenses, widow's and dependent's pensions shall be payable, where applicable, if an employee dies as a result of the complications of COVID-19.

6. Reporting

6.1. The following documentation should be submitted to the Compensation Commissioner or the employer individually liable or the mutual association concerned:

a) Employer's Report of an Occupational Disease (W.CL.1)
b) Notice of an Occupational Disease and Claim for Compensation (W.CL.14)
c) Exposure and Medical Questionnaire
d) First Medical Report in respect of an Occupational Disease (W.CL.22) indicating U07.1 as the ICD-10 code for Covid-19
e) Exposure History (W.CL. 110) and/or any other appropriate employment history which may include any information that may be helpful to the Compensation Commissioner.

f) A medical report on the employee's symptoms that details the history, establishes a diagnosis of COVID-19 and laboratory results and chest radiographs where appropriate or any other information relevant to the claim.
g) For each consultation, a Progress Medical Report (W.CL. 26).
h) Final Medical Report in respect of an Occupational Disease (W.CL.26) when the employee's condition has reached Maximum Medical Improvement (MMI).
i) An affidavit by the employee if employer cannot be traced or will not timeously supply a W.CL.1, where applicable.

6.2. Online claims for Covid-19 must be made through the following channels, indicating the correct ICD-10 code – U07.1:

Compensation Fund: CompEasy **(www.labour.gov.za)**
Rand Mutual Assurance: CompCare **(www.randmutual.co.za)**
Federated Employers Mutual: IMS **(https://roe.fem.co.za)**

6.3. Submission of manual claims for COVID-19 must be sent to these email addresses:
Compensation Fund: covid19claims@labour.gov.za or phone 0860 105 350
Rand Mutual Assurance: contactcentre@randmutual.co.za or phone 086 022 2132
Federated Employers Mutual: FEM-Registry@fema.co.za or phone 011 359 4300

7. Claims Processing

The Office of the Compensation Commissioner shall consider and adjudicate upon the liability of all claims. The Medical Officers in the Compensation Commissioners' Office are responsible for medical assessment of the claim and for the confirmation of the acceptance or rejection of the claim.

NOTICE ON COMPENSATION FOR OCCUPATIONALLY-ACQUIRED NOVEL CORONA VIRUS DISEASE (COVID-19)

employment & labour
Department:
Employment and Labour
REPUBLIC OF SOUTH AFRICA

Compensation Fund, Delta Heights Building 167 Thabo Sehume Street, Pretoria 0001
Tel: 0860 105 350 | Email address: covid19claims@labour.gov.za www.labour.gov.za

COVID-19 EXPOSURE AND MEDICAL QUESTIONNAIRE (To be completed by employer):

Employee details

Name and Surname	
Contact Number	
Nationality	
ID Number	
Email Address	
Occupation	

Employer details

Name of Employer				
Industry/Sector				
Province				
Contact person				
Contact details	**Email**		**Phone No.**	

EXPOSURE HISTORY:
Has the Employee travelled to any high risk countries/areas? Yes / No

If Yes

Area Travelled To	
Date Travelled	
Length of Stay	
Reason for Travel	

Compensation Fund
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employment & labour
Department:
Employment and Labour
REPUBLIC OF SOUTH AFRICA

Compensation Fund, Delta Heights Building 167 Thabo Sehume Street, Pretoria 0001
Tel: 0860 105 350 | Email address: covid19claims@labour.gov.za www.labour.gov.za

If No, has the employee been exposed to a confirmed occupationally-exposed case in the workplace Yes / No, If Yes

Date of Contact		
Contact Reported?	**Yes**	**No**
Period of Exposure		
Cases on quarantine in area of work		
Total confirmed cases in the workplace		

MEDICAL HISTORY:
Does the employee suffer from any pre-existing medical conditions? Yes/No

Has the employee been diagnosed with any other occupational disease? Yes/No

If Yes to any of the above, please check all that apply or specify in the box below:

Medical Condition			
	Pregnancy (trimester: _____)		Post-partum (< 6 weeks)
	Cardiovascular disease, including hypertension		Immunodeficiency, including HIV
	Diabetes		Renal disease
	Liver disease		Chronic lung disease
	Chronic neurological or neuromuscular disease		Malignancy
	Other(s), please specify:		

Medical Condition		**Year of Diagnosis**	**On Treatment?**	
Pre-existing conditions:			Yes	No
Occupational diseases:			Yes	No

Name	**Signature**	**Date**

Compensation Fund
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DEPARTMENT OF EMPLOYMENT AND LABOUR

NO. R. 342 **20 April 2021**

COVID-19 TEMPORARY EMPLOYEE/EMPLOYER RELIEF SCHEME (C19 TERS) DIRECTION, 2021

No. R. 2021

DIRECTION BY THE MINISTER OF EMPLOYMENT AND LABOUR IN TERMS OF REGULATION 4(10) OF THE REGULATIONS MADE BY THE MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS IN TERMS OF SECTION 27(2) OF THE DISASTER MANAGEMENT ACT, 2002 (ACT NO. 57 OF 2002)

I, **Thembelani Waltermade Nxesi**, the Minister of Employment and Labour, acting in terms of Regulation 4(10) of the Regulations made by the Minister of Cooperative Governance and Traditional Affairs in terms of section 27 (2) of the Disaster Management Act, 2002 (Act No. 57 of 2002) hereby issue this Direction to pay TERS benefits only to employees who are contributors to UIF, in terms of the UIF Act, 2001 and from when the condition precedent payment occurs and when it occurs, from date of this direction.

MR T W NXESI, MP
MINISTER OF EMPLOYMENT AND LABOUR
DATE: 08/04/2021

1

SCHEDULE

DIRECTION PROVIDING COVID-19 TERS BENEFITS FOR CERTAIN CATEGORIES OF EMPLOYEES

1. Definitions

In this Direction, unless the context otherwise indicates-

"COVID-19" means the 2019 coronavirus (SARS- COV2/COVID-19);

"Directive" means the Directives issued by the Minister of Employment and Labour on 25 March 2020 in GN 215 of 26 March 2020 GG 43161 as amended on 6 April 2020 and 16 April 2020 and corrected on 20 April 2020 and as amended on 26 May 2020 and as issued on 11 August 2020; and as issued 04 September 2020; and as issued 03 March 2021;

"Regulation" means the Regulation issued by the Minister of Cooperative Governance and Traditional Affairs under regulation gazette No 11217 vol 666 of 29 December 2020, and any other thereafter, published in terms of section 27(2) of the Disaster Management Act, 2002 (Act No. 57 of 2002) pursuant to the declaration of a national disaster dated 15 March 2020 in terms of section 3 of that Act;

"high-risk contact" means contact with any person who has tested positive for Covid-19 as set out in the OHS Direction or a direction issued by the Minister of Health;

"OHS Direction" means the Consolidated Direction on OHS Measures (GNR 639 of 2 June 2020);

"remuneration" bears the same meaning as the definition of the term in the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997) read with section 35(5) of that Act and the Schedule to Government Notice 69, *GG* 24889 of 23 May 2003;

"sliding scale" means the sliding scale contained in the UI Act in accordance with which benefits are calculated in terms of the UI Act;

"UI Act" means the Unemployment Insurance Act, 2001 ,(Act No.63 of 2001)

"vulnerable employee" means an employee -

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(a) with known or disclosed health issues or comorbidities or any other condition that may place the employee at the higher risk of complications or death than other employees if infected with COVID-19; or

(b) above the age of 60 years (or otherwise stipulated in any amended OHS Direction or National Disaster Regulation) who is at a higher risk of complications or death if infected.

" **Other list"** means list of sectors in addition to what is in **" Annexure A"** as the Minister may prescribe in terms of the Directive from time to time.

2. Incorporation of Directive for certain categories of employer and employee

2.1 Notwithstanding the withdrawal of the Directive with effect from 15 October 2020, in terms of the withdrawal notice of 27 November 2020, GG 43943, the provisions of the Directive of 4 September 2020 are incorporated in this Direction-

2.1.1 subject to sub-paragraphs 2.3 and 2.4; and

2.1.2 only in respect of the employers and employees contemplated in sub-paragraph 2.3, and only if such employees are contributors for purposes of the UI Act and their employers have declared and paid for them with the Fund.

2.2 The benefit shall be de-linked from the UIF's normal benefits and provisions thereto.

2.3 The employees contemplated in sub-paragraph 2.1.2 are those employees whose employers–

2.3.1 are not permitted to commence operations, either partially or in full, in terms of the Regulations published by the Minister of Cooperative Governance and Traditional Affairs in December 2020, and any other thereafter, in terms of section 27(2) of the Disaster Management Act, 2002 (Act No. 57 of 2002) pursuant to the declaration of a national disaster dated 15 March 2020 in terms of section 3 of that Act, and who operate in a sector specified in Annexure A;

2.3.2 are unable to make alternative arrangements for vulnerable employees to work from home or take other measures as contemplated in clause 20.3 of the OHS Direction, irrespective of whether the employer operates in a sector specified in Annexure A or not ;

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2.3.3 are unable to make use of their services either fully or partially because of operational requirements based on the economic, technological, structural or similar needs of the employer caused by compliance with the Regulations made in terms of section 27 (2) of the Disaster Management Act, 2002 (Act No. 57 of 2002) or directions made under regulation 4(10) of those Regulations in particular the need to limit the number of employees at the workplace through rostering, staggering of working hours, short time, and the introduction of shift system;

2.3.4 are required to ensure that they remain in isolation or in quarantine in terms of the OHS Direction or a direction issued by the Minister of Health following a high risk-contact, irrespective of whether the employer operates in a sector specified in Annexure A or not . Employees in 2.3.3 need not first exhaust their sick leave before claiming benefit in this direction;

2.4 Clause 3.5, 3.6 and 5.3 in the Directive are replaced with the following clauses:

"3.5 Subject to clauses 3.6 and 5.3, a qualifying employee will receive a benefit calculated in terms of section 13 (1) of the UI Act.

3.6 Subject to clause 5.3, should the benefit calculated in terms of clause 3.5 together with any remuneration earned fall below R3 500, the benefit will be increased to ensure that the employee, in total of both, receives R3 500.

5.3 The employer, provided that the amount threof is disclosed upfront in the benefit application, shall be entitled to supplement the amount received from the Fund; provided further that the benefit and any remuneration received for work performed by the employee in any period shall not exceed 100% of the remuneration that the employee would ordinarily have received for working during that period.

3. Reduced work time benefits

3.1 Subject to the availability of sufficient credits, contributors whose employers do not operate in the sectors set out in Annexure A and whose

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employers are unable to make use of their services either fully or partially as a result of compliance with the Regulations made in terms of section 27 (2) of the Disaster Management Act, 2002 (Act No. 57 of 2002) or directions made under regulation 4(10) of those Regulations, shall be entitled to a reduced work time benefit in accordance with section 12(1B) of the UI Act.

3.2 Nothwithstanding anything to the contrary in section 12(1B) of the UI Act but subject to clause 3.3, the amount of the reduced work time benefit shall not be calculated with reference to the benefit level as contemplated in section 12(1B), but by utilising the IRR and sliding scale as provided for in the UI Act.

3.3 The employer shall be entitled to supplement the reduced time benefit amount received from the Fund; provided that the reduced time benefit amount, as calculated in terms of clause 3.2 as well as any remuneration received by the employer for work performed by the contributor in any period shall not exceed 100% of the remuneration that the contributor would ordinarily have received for working during that period, provided that such supplement amount is disclosed upfront in the benefit application.

4. Application for benefits

4.1 An employer or employee contemplated herein may apply for the benefits contained in this Direction as provided under clause 5 of the Directive and in terms of any additional procedural prescripts that may be required by the UIF.

4.2 In order to prove that an employer is unable to make alternative arrangements for vulnerable employees to work from home or take altenative measures, and to prove that an employee is in quarantine or isolation and is entitled to benefits the following is required of the employer;

4.2.1 Must submit the categories of data in (a) to (e) below to the National Institute for Occupational Health in the manner set out in the National Department of Health Guidelines:

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(a) Each employee's vulnerability status for serious outcomes of a COVID -19 infection;

(b) Details of the COVID -19 screening of employees who are symptomatic;

(c) Details of employees who test positive in terms of a positive laboratory test for the COVID -19 virus;

(d) Details of employees identified as high risk contacts within the workplace if a worker has been confirmed as being positive;

(e) details on the post -infection outcomes of those testing positive, including the return to work assessment outcome;

4.2.2 The employee declaration returns by the employer will confirm loss of income and thus inability to make alternative arrangements for the affected employees.

5. Commencement and duration

This Direction, which substitutes the one gazette on 3 March 2021,despite the date of publication by notice in the Gazette, is deemed to commence on 16 October 2020 and remains in operation until 15 March 2021.

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ANNEXURE A

1. Cinemas
2. Theatres
3. Casinos
4. Museums , galleries, libraries and archives
5. Gyms and fitness centres
6. Restaurants
7. Venues hosting auctions
8. Venues hosting professional sports
9. Night clubs
10. Swimming pools
11. Bars, taverns and shebeens
12. Public parks
13. Domestic and international air travel
14. Rail, bus services and taxi services
15. E- hailing services
16. Sale, dispensing and distributions and transportation of liquor
17. Beaches, dams, rivers and lake
18. Passengers ships
19. Venues where social events are held
20. Venues hosting concerts and live performance
21. Hotels, lodges, bed and breakfast, time share facilities , resorts and guest houses
22. Conferencing, dining, entertainment and bar facilities
23. International sports , arts and cultural events
24. **Any industries that form part of the value chain of the above as per the discretion of the UIF.**

DEPARTMENT OF MINERAL RESOURCES

NO. 29 **17 JANUARY 2020**

MINE HEALTH AND SAFETY ACT, 1996 (ACT NO 29 OF 1996)

GUIDELINE FOR THE COMPILATION OF A MANDATORY CODE OF PRACTICE FOR THE MANAGEMENT OF WORKING IN CONFINED SPACES AT MINES

I, **DAVID MSIZA,** Chief Inspector of Mines, under section 49(6) of the Mine Health and Safety Act, 1996 (Act No. 29 of 1996) and after consultation with the Council, hereby issues the guideline of a mandatory code of practice for the management of working in confined spaces at mines in terms of the Mine Health and Safety Act, as set out in the Schedule.

D MSIZA
CHIEF INSPECTOR OF MINES

SCHEDULE

Reference Number: DMR 16/3/2/4-B4
Last Revision Date: 30 April 2019
Date First Issued: First edition
Effective Date: 01 July 2020

DEPARTMENT OF MINERAL RESOURCES

MINE HEALTH AND SAFETY INSPECTORATE

GUIDELINE FOR THE COMPILATION OF A

MANDATORY CODE OF PRACTICE FOR

THE MANAGEMENT OF WORKING IN CONFINED SPACES AT MINES



CHIEF INSPECTOR OF MINES

mineral resources
Department:
Mineral Resources
REPUBLIC OF SOUTH AFRICA

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PART 2 OF 2

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AIDS HELPLINE: 0800-0123-22 Prevention is the cure

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PART A: THE GUIDELINE

1. FOREWORD

1.1. Occurrences of **confined space** related incidents were reported in the South African mining industry over the past few years. Interventions to facilitate the management of safe entry and work in **confined spaces** is required.

1.2. Effective prevention and management of confined space incidents in the mines warrants the adoption, implementation and monitoring of formal and robust preventive measures amongst South African mines. The adoption and implementation of a guideline for working in **confined spaces** will promote a safer and healthier workplace in South African mining industry.

1.3. A research project (SIM 160606: Minimum standards for **confined spaces**) was undertaken by the **MHSC** via the **SIMRAC** to develop minimum standards to assist the South African mining industry to adopt and implement robust and effective strategies for the control of management of confined space incidents.

1.4. The **MHSC** subsequently instructed **MOHAC** to develop a guideline on the management of working in **confined spaces**.

2. LEGAL STATUS OF GUIDELINES AND COPs

2.1. In accordance with section 9(2) of the **MHSA**, an employer must prepare and implement a **COP** on any matter affecting the health or safety of employees and other persons who may be directly affected by activities at the mines if the **CIOM** requires it. These **COPs** must comply with any relevant guideline issued by the **CIOM** (section 9(3). Failure by the employer to prepare or implement a **COP** in compliance with this guideline is a breach of the **MHSA**.

3. THE OBJECTIVE OF THE GUIDELINE

3.1. This guideline has been developed to assist employers to set minimum standards, which, when adhered to, will assist the South African mining sector in the:

a) Management of working in **confined spaces**; and

b) Elimination of confined space related incidents.

4. DEFINITIONS AND ACRONYMS

a) **"Bump test"** means a brief exposure of gas monitor to gas to verify that the sensors respond and the instrument alarms function accordingly.

b) **"Confined space"** means an enclosed or partially enclosed space that is not intended or designed primarily as place of work. Due to its nature, a Confined Space poses particular hazards to personnel that include the potential for:

- An oxygen deficient or otherwise non-breathable atmosphere.
- An oxygen enriched environment supportive of combustion conditions
- An atmosphere that is explosive or flammable.
- An atmosphere that is toxic or contains harmful contaminants.
- Temperature levels that pose a hazard to personnel.
- Entrapment **risks** due to the nature of the Confined Space's entry and exit points.
- Engulfment **risks** due to the inrush of free-flowing solids or fluids.

Entry to a confined space is defined as a person's whole body, upper body or head being located within the confined space.

c) **"CIOM"** means Chief Inspector of Mines

d) **"COP"** means a Code of Practice.

e) **"DMR"** means Department of Mineral Resources.

f) **"MHSA"** means Mine Health and Safety Act, 1996 (Act 29 of 1996) as amended.

g) **"MHSC"** means Mine Health and Safety Council.

h) **"MOHAC"** means Mining Occupational Health Advisory Committee.

i) **"Permit"** means an official document giving someone authorization to do something.

j) **"Risk"** means the likelihood that occupational injury or harm to persons will occur.

k) **"SAMI"** means South African Mining Industry.

l) **"SIMRAC"** means Safety in Mines Research Advisory Committee.

m) **"Standby person / control attendant"** means a person located outside the **permit** space who controls and records Confined Space entry and performs other duties as defined by the **COP**.

5. SCOPE

This mandatory guideline covers the:

5.1. Management of working in **confined spaces**; and

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5.2. Elimination of confined space related incidents for all employees at a mine.

6. MEMBERS OF TASK COMMITTEE

This guideline was prepared by members of a task team, which comprised of:

• Mr N. Mokhonoana	(State)	[Chairperson]
• Mr T. Motitimi	(State)	
• Ms. M. Hlapane	(State)	
• Adv. H. van Vuuren	(Labour)	
• Ms S. Nongingi	(Labour)	
• Prof. C.J. Badenhorst	(Employers)	
• Mrs. R. Engelbrecht	(Employers)	

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PART B: AUTHOR`S GUIDE

1. The **COP** must, where possible, follow the sequence laid out in Part C: Format and content of the **COP**. The pages as well as the chapters and sections must be numbered to facilitate cross-reference. Wording must be unambiguous and concise.

2. It should be indicated in the **COP** and on each annexure to the **COP** whether:

2.1. The annexure forms part of the guideline and must be complied with or incorporated in the **COP**, or whether aspects thereof must be complied with or incorporated in the **COP**; or

2.2. The annexure is merely attached as information for consideration in the preparation of the **COP** (i.e. compliance is discretionary).

3. When annexures are used the numbering should be preceded by the letter allocated to that particular annexure and the numbering should start at one again. (e.g. 1, 2, 3, …A1, A2, A3, …).

4. Whenever possible illustrations, tables, graphs and the like, should be used to avoid long descriptions and/or explanations.

5. When reference has been made in the text to publications or reports, references to these sources must be included in the text as footnotes or side notes as well as in a separate bibliography.

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PART C: FORMAT AND CONTENT OF THE COP

1. TITLE PAGE

1.1. The title page must include the following:

1.2. Name of mine;

1.3. The heading of the **COP**: “Mandatory code of practice for the management of confined spaces”;

1.4. A statement to the effect that the **COP** was drawn up in accordance with this guideline **DMR 16/3/2/4-B4** issued by the **CIOM**;

1.5. The mine’s reference number for the **COP**;

1.6. Effective date of the **COP**; and

1.7. Revision dates.

2. TABLE OF CONTENTS

The **COP** must have a comprehensive table of contents.

3. STATUS OF THE COP

3.1. This section must contain statements to the effect that:

3.2. The mandatory **COP** was drawn up in accordance with Guideline **DMR 16/3/2/4-B4** issued by the **CIOM**.

3.3. This is a mandatory **COP** in terms of sections 9(2) and (3) of the **MHSA**.

3.4. The **COP** may be used in an incident/accident investigation/inquiry to ascertain compliance and also to establish whether the **COP** is effective and fit for purpose.

3.5. This **COP** must be read in conjunction with other relevant and applicable **COP** such as the guideline for the compilation of a mandatory **COP** for an occupational health programme (occupational hygiene and medical surveillance) on personal exposure to airborne pollutants, guideline for the compilation of a mandatory **COP** for the right to refuse dangerous work and leave dangerous working places.

3.6. All managerial instructions or recommended procedures (voluntary **COPs**) and standards on the relevant topics must comply with the **COP** and must be reviewed to assure compliance.

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4. MEMBERS OF THE DRAFTING COMMITTEE

4.1. In terms of section 9(4) of the **MHSA** the employer must consult with the health and safety committee on the preparation, implementation or revision of any **COP**.

4.2. It is recommended that the employer should, after consultation with the employees in terms of the **MHSA**, appoint a committee responsible for the drafting of the **COP**.

4.3. The members of the drafting committee assisting the employer in drafting the **COP** should be listed giving their full names, designations, affiliations and experience. This committee should include competent persons sufficient in number to effectively draft the **COP**.

5. GENERAL INFORMATION

5.1. The general information relating to the mine must be stated in this paragraph.

5.2. The following minimum information must be provided:

5.2.1. A brief description of the mine and its location;

5.2.2. The commodities produced;

5.2.3. The mining and/or processing methods or combination of methods used at the mine or surface works must be listed and their particular **risks** associated with these methods;

5.2.4. The unique features of the mine or surface works that have a bearing on the **COP** must be set out and cross referenced to the **risk** assessment conducted; and

5.2.5. Other relevant **COPs**.

6. TERMS AND DEFINITIONS

6.1. Any word, phrase or term of which the meaning is not absolutely clear or which will have a specific meaning assigned to it in the **COP**, must be clearly defined. Existing and/or known definitions should be used as far as possible. The drafting committee should avoid jargon and abbreviations that are not in common use or that have not been defined. The definitions section should also include acronyms and technical terms used.

7. RISK MANAGEMENT

7.1. Section 11 of the **MHSA** requires the employer to identify hazards, assess the health and safety **risks** to which employees may be exposed while they are at work, record the significant hazards identified and **risks** assessed. The **COP** must address how the significant **risks** identified in the **risk** assessment process must be dealt with, having regard to the requirements of sections 11(2) and (3) that, as far as reasonably practicable, attempts should first be made to eliminate the **risk**, thereafter to control the **risk** at source, thereafter to minimise the **risk** and thereafter, insofar as the **risk** remains, to provide personal protective equipment and to institute a program to monitor the **risk**.

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8. **ASPECTS TO BE ADDRESSED IN THE COP**

The **COP** must set out how significant **risks** are identified and assessed in terms of the **risk** assessment process referred to in paragraph 7, and how it will be addressed. The **COP** must cover at least the aspects set out below:

8.1. **Identification and register of confined spaces**

The **COP** should ensure that:

8.1.1. **Confined spaces** are identified by a competent person through the mine's **risk** management process and access into the confined space shall be physically restricted using barriers to prevent unauthorised entry whenever possible.

8.1.1.1. The **risk** assessment should cover the following (but not limited to):

a) The health and safety **risks** associated with entering and working in a confined space;

b) The reportable accident on fined space;

c) The **risk** assessment must at least consider and record the following information:

(i) Hazards anticipated to be harmful to employee's health as well as those to be flammable, explosive and those that require monitoring.

(ii) Any potential **risk** of engulfment.

(iii) How the work itself may change or deteriorate workplace conditions.

(iv) Ventilation requirements for the duration of work inside the confined space.

(v) Any other control measures required for entry and work in a confined space.

(vi) Any other information critical to the health and safety of the employees entering and working in a confined space.

8.1.2. All **confined spaces** are recorded in a register;

8.1.3. A confined space **risk** assessment should be conducted before any work or entry is conducted;

8.1.4. A site-specific procedure is developed and implemented to ensure safe confined space entry and work;

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8.1.5. Appropriate signage shall be posted at each entry point denoting that a **permit** is required prior to entry. Where signage is impractical other means of communication need to be used; and

8.1.6. All employees potentially involved in confined space entry or work are aware of the procedure and the register and are conversant with the contents and requirements thereof.

8.2. **Appointments, roles and responsibilities**

The **COP** should ensure that the following is clearly defined:

8.2.1. Appointments

8.2.1.1. A manager is appointed in writing to take accountability for all confined space entry or work on the mine;

8.2.1.2. A supervisor is appointed in writing to oversee specific confined space entry or work;

8.2.1.3. A person qualified in occupational hygiene techniques to measure levels of exposure to hazards is appointed in writing to test the atmosphere before and during confined space entry or work;

8.2.1.4. A confined space attendant/standby person shall be appointed in writing for every confined space entry or work; and

8.2.1.5. All other employees involved with confined space work.

8.2.2. Roles and responsibilities *(see Annexure 1, for information purposes)*

8.2.2.1. The **COP** should ensure that all the roles and responsibilities are clearly defined in relation to confined space/s.

8.2.2.2. All other employees involved with confined space work shall be trained of their roles and responsibilities, hazards that they will be exposed too in a confined space and record shall be kept thereof.

8.3. **Control measures**

The **COP** should ensure that:

8.3.1. No person enters a confined space or work inside a confined space without implementing a confined space procedure in relation to any relevant confined space **risks**, that render that work safe and without **risk** to health.

8.3.2. While planning activities requiring a potential entry in a confined space, alternative and safer methods shall always be considered. Whenever management discretion exists, the key principles guiding the application of the hierarchy of control shall be used to

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scrutinize the **risk** assessment process and explore all alternatives to avoid the need of having personnel enter **confined spaces**.

8.3.3. The hierarchy of control is applied when considering the control of confined space hazards, first considering elimination, engineering controls and administrative controls before resorting to personal protective equipment.

8.3.4. In managing **risks** associated with a confined space, all relevant matters must be considered, including:

8.3.4.1. Whether the work can be carried out without the need to enter the confined space;

8.3.4.2. The nature of a confined space;

8.3.4.3. The hazards associated with any airborne contaminant or unsafe level of oxygen;

8.3.4.4. If the work has to be carried out in the confined space:

a) The range of methods by which the work can be carried out; and

b) A task specific confined space rescue plan is developed and authorised by the person responsible.

8.4. **Permit system**

The **COP** should ensure that:

8.4.1. No employer must allow or direct a worker to enter a confined space to carry out work unless a confined space entry **permit** for the work has been issued. The **permit** process must include the following elements:

8.4.1.1. A **risk** assessment, including the need for a competent person monitoring identified hazards, concentrations of flammable and explosive substances;

8.4.1.2. Specify the work to be performed in the confined space;

8.4.1.3. Isolation procedures for airborne pollutants and other energy sources;

8.4.1.4. The requirement for control measures;

8.4.1.5. The sign-in and sign-out of all persons entering the confined space;

8.4.1.6. Display of the **permit**;

8.4.1.7. Communication equipment;

8.4.1.8. Safety specification of equipment to be taken into the confined space;

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8.4.1.9. Barricading;

8.4.1.10. Rescue plan and equipment;

8.4.1.11. Standby person/Control Attendant; and

8.4.1.12. A completion procedure.

8.5. **Energy isolation and lockout**

The **COP** should ensure that:

8.5.1. All energy sources are identified and physically isolated or locked out before entry or work in the confined space is allowed;

8.5.2. harmful materials and airborne pollutants are identified and confirmed 'not present' before entry;

8.5.3. **confined spaces** surfaces are cleared prior to entry to remove materials that may fall on, or create a harmful atmosphere for personnel; and

8.5.4. Only intrinsically safe equipment is used inside **confined spaces** where flammable or potentially explosive atmospheres are likely. In certain **confined spaces** (e.g. inside metal tanks) suitable precautions to prevent electric shock must include the use of extra low voltage equipment (typically less than 25 V) and, where necessary, residual current devices.

8.6. **Atmosphere**

The **COP** should ensure that:

8.6.1. The atmosphere inside a confined space is safe and without **risk** to health as far as reasonable practicable before entry into and work inside a confined space is allowed.

8.6.2. Measures are implemented to ensure that a health and safe atmosphere is maintained throughout the entire period of confined space work.

8.6.3. The concentration of any harmful hazard/s identified in the atmosphere of the confined space is less than 5% of its lower explosive limit (LEL), so far as is reasonably practicable. If it is not reasonably practicable, and the concentration of any harmful hazard/s identified in the atmosphere of the confined space:

a) Is equal to or greater than 5% but less than 10% of its LEL—the employer must ensure that any worker is immediately removed from the space unless a suitably calibrated, continuous-monitoring flammable gas detector is used in the confined space; or

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b) Is equal to or greater than 10% of its LEL—the employer must ensure that any worker is immediately removed from the confined space.

8.6.4. Where a flammable atmosphere may exist in a confined space and there is a **risk** of fire and explosion, all ignition sources in the vicinity must be controlled.

8.7. **Atmosphere testing and monitoring**

The **COP** should ensure that:

8.7.1. The atmosphere inside a confined space is tested prior to entering for relevant harmful, flammable substances and oxygen content. The testing may require specialized instrumentation to checking all extremities of the confined space without physically getting into the confined space (telescopic rod, vacuum pump, probe/hose).

8.7.2. Atmospheric monitoring is conducted by a competent person.

8.7.3. Monitoring requirements, e.g. frequency, are detailed on the confined space entry **permit**.

8.7.4. Atmospheric monitoring results are recorded on the confined space entry **permit** and be available at the entry point to the confined space.

8.7.5. If atmospheric monitoring cannot confirm a safe environment prior to entry, then personnel must not enter the confined space until further controls are implemented and the working atmosphere becoming safe for entry and work.

8.7.6. Atmospheric testing equipment have a current and valid calibration certificate. A **bump test** should be conducted before each day's use in accordance with the manufacturer's instructions.

8.8. **Ventilation**

8.8.1. The **COP** should ensure that where the **risk** assessment has identified the need for ventilation, then this must be covered by a documented procedure approved by a 12.1 Appointee.

8.8.2. If the maintenance of a safe oxygen level in a confined space is dependent on mechanical ventilation, equipment shall:

a) Be continuously monitored while the confined space is occupied; and

b) Have the control (include remote power supply) clearly identified, tagged and manned to guard against unauthorised interference.

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8.9. **Standby person/control attendant**

The **COP** should ensure that a standby person/control attendant is utilised for Confined Space work.

8.9.1. The standby person/control attendant must:

8.9.1.1. Be trained and competent to undertake standby duties;

8.9.1.2. Be present at the entry/exit point at all times while personnel are in the confined space;

8.9.1.3. Not engage in any other work activity or task;

8.9.1.4. Control and record the movement of personnel into and exiting the confined space;

8.9.1.5. Be able to communicate with personnel inside the confined space and with key/rescue personnel at all times;

8.9.1.6. Not enter the confined space, even in an emergency; and

8.9.1.7. Knowledgeable about the rescue plan.

8.10. **Personal protective equipment**

The **COP** should ensure that:

8.10.1. Where it is not reasonably practicable to ensure the confined space contains a safe oxygen level, or safe levels of airborne contaminants, the employer shall ensure that:

a) Every person required to enter the confined space is provided with:

(i) Appropriate respiratory protective equipment (RPE) which would render sufficient protection against the contaminant encountered.

(ii) Where there is the **risk** of asphyxiation, the entrants are provided with self-contained breathing apparatus. Space other personal protective equipment to protect them from any other health or safety hazards which may be encountered in the confined space.

b) Where employees are required to make use of full body harnesses when working inside a confined space, lifelines must be attached to the harnesses and should run back to a point outside the confined space.

8.11. **Communication**

The **COP** should ensure that:

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8.11.1. The employer shall ensure that a system of work is provided that would:

8.11.2. Enable adequate and effective communication:

a) Between involved role players outside the confined space;

b) Between those inside the confined space;

c) Between those inside the confined space and those outside; and

d) To summon help in case of an emergency.

8.12. **Entry and exit procedures**

The **COP** should ensure that:

8.12.1. The employer shall ensure that a system of work is provided that would keep formal record of confined space entry and exit.

8.13. **Signs and barricading**

The **COP** should ensure that:

8.13.1. The employer shall ensure that before any work in relation to a confined space starts, a system of work is provided that would ensure that the space is properly barricaded and appropriate signage posted.

8.14. **Employee training**

The **COP** should ensure that:

8.14.1. All employees involved with any work or responsibility in relation to a confined space, directly and indirectly, are made conversant with all requirements in terms of safe entry and work inside the confined space.

8.14.2. The training provided to relevant workers must be role based and cover appropriate information:

a) Each person's specific roles and responsibilities in relation to the confined space;

b) The nature of all hazards associated with a confined space;

c) The need for, and appropriate use of, **risk** control measures;

d) The selection, use, fit, testing and storage of any personal protective equipment;

e) The contents of any relevant confined space entry **permit**, and

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f) Emergency and rescue procedures.

8.15. **Maintenance of control measures**

The **COP** should ensure that:

8.15.1. The employer shall ensure that a system of work is provided for the inspection and maintenance of control measures as an integral part of the safe system of work. Maintenance may involve visual checks, inspections, testing of equipment, preventative maintenance and remedial work. Equipment that should be regularly inspected include:

a) Atmospheric testing and sampling equipment;

b) Personal protective equipment including respirators;

c) Ventilation equipment;

d) Safety harness and lines; and

e) emergency and rescue equipment.

8.16. **Confined space rescue plan**

The **COP** should ensure that:

8.16.1. A task specific Confined Space Rescue Plan are developed by competent personnel that identifies the methods by which a rescue will be initiated, and personnel will be extracted from the Confined Space in the event of an emergency.

8.16.2. The plan must include details of the specific equipment required to be in place prior to entry and the location / number of rescue personnel to be available.

8.16.3. Rescuers shall be trained, fit to carry out their task and capable of using any equipment provided for rescue, e.g. breathing apparatus, lifelines, fire-fighting equipment.

8.17. **Fitness to work**

The **COP** should ensure that:

8.17.1. Every employee required to enter or work in a confined space is assessed and declared medically fit by an occupational medical practitioner, specifically for work in a confined space. The occupational medical practitioner shall take into account all potential hazards such as physical, chemical and psychological stresses (not limited to) associated with work in a confined space.

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8.18. **Record keeping**

The **COP** should ensure that any confined space related documents/records are kept at the mine and made readily available.

8.19. **System review**

The **COP** should ensure that:

8.19.1. The mine's confined space procedure, **risk** assessment, entry **permit** and control measures are review and if necessary revise at appropriate intervals:

a) When there is any reason to believe that entry and work is not safe;

b) Any facet of the system is not applicable anymore;

c) Control measures do not minimise the **risk** as far as is reasonably practicable;

d) Before a change at the workplace that is likely to give rise to a new or different health and safety **risk** that the control measure may not effectively control;

e) If a new hazard or **risk** is identified;

f) If the results of consultation indicate that a review is necessary;

g) If a health and safety representative requests a review;

h) After an incident occurred, and

i) At least every 24 months.

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PART D: IMPLEMENTATION

1. IMPLEMENTATION PLAN

1.1. The employer must prepare an implementation plan for its **COP** that makes provision for issues such as organizational structures, responsibilities of functionaries and programs and schedules for this **COP** that will enable proper implementation of the **COP**. (A summary of/and a reference to, a comprehensive implementation plan may be included).

1.2. Information may be graphically represented to facilitate easy interpretation of the data and to highlight trends for the purpose of **risk** assessment.

2. COMPLIANCE WITH THIS CODE OF PRACTICE

2.1. The employer must institute measures for monitoring and ensuring compliance with the **COP**.

3. ACCESS TO THE CODE OF PRACTICE AND RELATED DOCUMENTS

3.1. The employer must ensure that a complete **COP** and related documents are kept readily available at the mine for examination by any affected person.

3.2. A registered trade union with members at the mine or where there is no union, a health and safety representative on the mine, or if there is no health and safety representative, an employee representing the employees on the mine, must be provided with a copy on written request to the manager. A register must be kept of such persons or institutions with copies to facilitate updating of such copies.

3.3. The employer must ensure that all employees are fully conversant with those sections of the **COP** relevant to their respective areas of responsibility.

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ANNEXURE 1: Roles and responsibilities

1. **Only trained employees can work in permit-required spaces**

1.1. Confined space tasks employees are trained to understand and safely perform the jobs of:

a) Authorized entrants

b) Attendants

c) Entry supervisors

2. **Authorized entrants enter and work in permit-required spaces**

2.1. They must be able to:

2.1.1. Identify the space's hazards and potential consequences, as well as signs and symptoms of exposure.

2.1.2. Properly use any necessary equipment to:

a) Test, monitor, and ventilate the atmosphere in the space.

b) Communicate with others working in and outside the space.

c) Protect themselves from exposure to dangerous levels of toxins, power, equipment, etc.

3. **Attendants stand outside the space to monitor and protect authorized entrants.**

They must be able to:

3.1. Remain outside the space during entry operations.

3.2. Maintain accurate count of authorized entrants in the space.

3.3. Identify the space's hazards, exposure consequences, and signs that authorized entrants have been exposed to hazards.

3.4. Stay in constant contact with workers in the space.

3.5. Monitor activities in and outside the space that could affect entrant safety.

3.6. Order entrants to evacuate the space immediately if:

3.6.1. Conditions in or outside the space endanger authorized entrants.

3.6.2. Workers in the space show signs of dangerous exposure.

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3.6.3. The attendant can't safely and effectively perform all his or her duties:

a) Summon rescue or emergency services or perform permitted nonentry rescues.

b) Keep unauthorized persons away from the space and alert authorized entrants and entry supervisor if such people enter the **permit** space.

4. **Entry supervisors take responsibility for permits and safety procedures**

4.1. They:

4.1.1. Identify the space's hazards, consequences, and signs of exposure.

4.1.2. Make sure the entry **permit** is complete and that:

a) Listed tests and hazard removal/controls have been completed;

b) Listed procedures are followed;

c) Listed safety, communications, and rescue equipment is in place; and

d) Rescue services are available.

4.1.3. Sign the **permit** and allow entry into the space.

4.1.4. Cancel the entry and **permit** when operations are completed or the **permit** expires or a dangerous condition arises.

4.1.5. Remove unauthorized individuals from the **permit** area.

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DEPARTMENT OF MINERAL RESOURCES AND ENERGY

NOTICE 280 OF 2020

MINE HEALTH AND SAFETY ACT, 1996 (ACT NO. 29 OF 1996)

GUIDELINES FOR A MANDATORY CODE OF PRACTICE ON THE MITIGATION AND MANAGEMENT OF COVID-19 OUTBREAK

I, David Msiza, Chief inspector of Mines, under section 49(6) of the Mine Health and Safety Act, 1996 (Act No. 29 of 1996) and after consultation with the Council, hereby issue the Guideline on the Mitigation and Management of COVID-19 outbreak, as set out in the Schedule.



DAVID MSIZA

CHIEF INSPECTOR OF MINES

SCHEDULE

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DEPARTMENT OF MINERAL RESOURCES AND ENERGY

MINE HEALTH AND SAFETY INSPECTORATE

GUIDELINE FOR THE COMPILATION OF A

MANDATORY CODE OF PRACTICE ON

MITIGATION AND MANAGEMENT OF COVID-19 OUTBREAK



CHIEF INSPECTOR OF MINES

mineral resources & energy
Department:
Mineral Resources and Energy
REPUBLIC OF SOUTH AFRICA

DEPARTMENT OF MINERAL RESOURCES AND ENERGY

MINE HEALTH & SAFETY INSPECTORATE

GUIDELINE FOR THE COMPILATION OF A MANDATORY CODE OF PRACTICE FOR THE MITIGATION AND MANAGEMENT OF COVID-19 OUTBREAK



Chief Inspector of Mines

DATE: 18 MAY 2020

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PART A: THE GUIDELINE

1. FOREWORD

1.1 During late 2019, the first cases of a new disease, later named COVID-19 by the World Health Organization (WHO), were reported by healthcare workers from Wuhan, China. In January 2020, the WHO declared COVID-19, as a public health emergency of international concern and later in March 2020 declared it a global pandemic.

1.2 On 15 March 2020 the President of South Africa declared a national state of disaster on COVID -19, in terms of the Disaster Management Act; which introduced several restrictions aimed to curb the disease. Despite these measures, the numbers of COVID-19 increased dramatically and, on the 26th of March 2020, a document called the *"Guiding Principles on the Prevention and Management of COVID-19 in SAMI"* was issued by the Department, in a bid to provide guidance to the SAMI members on how to prevent and manage the spread of COVID-19 pandemic. The Guiding Principles were developed through the Mine Health and Safety Council (MHSC) in consultation with the tripartite stakeholders.

1.3 The President further announced that Companies whose operations require continuous processes such as furnaces and underground mine operations will be required to make arrangements for care and maintenance to avoid damage to their operations. The lockdown was extended from the 16th of April 2020 to the end of April 2020.

1.4 On the 29th of April 2020, the Minister of Mineral Resources and Energy issued directions in terms of regulation 10(8) of the regulations issued in terms of section 27(2) of the Disaster Management Act No. 57 of 2002.

1.5 Following an order handed down in the Labour Court of South Africa on the 1st of May 2020, the CIOM in consultation with MHSC developed a guideline in accordance with Section 9 of the Mine Health and Safety Act of 1996 (Act "29 of 1996 as amended) (the MHSA") (as amended). The guideline requires employers to prepare and implement a code of practice for the prevention, mitigation and management of COVID-19 outbreak.

1.6 This guideline has been developed to provide a framework to mitigate and manage COVID-19 outbreak amongst employees in the South African Mining Industry and any other person/s (SAMI) and any other person/s they may contact in the community.

2. LEGAL STATUS OF THE GUIDELINE AND CODES OF PRACTICE

2.1 In accordance with Section 9(2) of the Mine Health and Safety Act, 1996 (Act 29 of 1996), as amended (**MHSA**), an employer must prepare and implement a Code of Practice (**COP)** on COVID-19 pandemic present and spreading in South Africa. This **COP** must comply with any relevant guidelines and instructions issued by the **CIoM** [Section 9(3) MHSA], including regulations and guidelines from Disaster Management Act (Act no 57 of 2002) and all other applicable statutory obligations related to COVID-19. Failure by the employer to prepare and implement the mine's COP in line with this guideline constitutes a criminal offence and a breach of the **MHSA**.

3. OBJECTIVES OF THE GUIDELINE

The objective of this guideline is to assist employers as far as reasonably practicable to establish and maintain a COVID-19 prevention, mitigation and management programme at mines.

4. DEFINITIONS AND ACRONYMS

"CIoM" means Chief Inspector of Mines;

"confirmed case" means a person who has been diagnosed with COVID-19 by means of a laboratory diagnostic method approved by the Department of Health;

"COP" means Code of Practice in terms of section 9 of the MHSA;

"COVID-19" means Corona Virus Infection Disease 2019 caused by the severe acute respiratory syndrome corona virus 2 (SARS-CoV-2);

"Disinfect" means the process of cleaning using chemicals to destroy microorganisms;

"DMRE" means the Department of Mineral Resources and Energy;

"DOH" means the Provincial Department of Health;

"EAP" means Employee Assistance Programme;

"Employee" means any person who is employed or working at a mine (including the mine's contractors);

"Exposure" means the state of having no protection from something harmful, for purposes of this guideline exposure is in reference to SARS-CoV-2;

"health care worker" means all healthcare professionals primarily engaged to enhance health by providing preventative, curative, promotional or rehabilitative health care services;

"Isolation" means separating a sick individual with a contagious disease from healthy individuals that are not infected with such disease in a manner that aims to prevent the spreading of infection or contamination;

"MHSA" means Mine Health and Safety Act, 1996 (Act No.29 of 1996) as amended;

"MHSC" means the Mine Health and Safety Council, established in terms of section 41(1) of the MHSA;

"NDOH" means National Department of Health;

"NICD" means National Institute for Communicable Diseases;

"**OMP**" means a medical practitioner who holds a qualification in occupational medicine or an equivalent qualification, recognised by the Health Professions Council of South Africa;

"PPE" means Personal Protective Equipment;

"PUI" means Person Under Investigation;

"Quarantine" means the restriction of activities or separation of a person, who was or may potentially be exposed, to COVID-19 and who could potentially spread the disease to other non-exposed persons, to prevent the possible spread of infection or contamination to healthy individuals; with the objective of monitoring their symptoms and ensuring the early detection of cases.

"RTW" means Return to Work;

"SAMI" means South African Mining Industry;

"Self-Isolation" means separating yourself from others to the greatest extent possible, when you are sick with signs of COVID-19 and you have been told by a health care provider to separate yourself from others;

"Vulnerable employees" means Employees with known or disclosed health issues or comorbidities or with any condition which may place such employees at a higher risk of complications or death if they are infected with SARS-CoV-2; also employees above the age of 60 who are at a higher risk of complications or death if they are infected with SARS-CoV-2.; and

"WHO" means World Health Organization.

5. SCOPE

5.1 This guideline applies to all mines or part/s thereof, employees, irrespective of employment category, and in the SAMI that might be exposed to COVID-19 in the performance of their duties.

5.2 This guideline provides minimum requirements and best practices for the compilation of a COP for the prevention, mitigation and management of COVID-19 outbreak. The aim is to ensure that mine employees returning to work and any other person/s at mines, are protected from transmission of the Coronavirus at the workplace, and where reasonably practicable, in the community, whilst providing guidance to all stakeholders regarding their roles and responsibilities in the management of COVID-19 outbreak.

5.3 This Guideline must be read in conjunction with the following documents and any other applicable statutory obligations related to COVID-19:

5.3.1 Regulations issued in terms of section 27(2) of the Disaster Management Act, 2002.

5.3.2 Directions issued by the Minister of Mineral Resources and Energy in terms of regulation 10(8) of the regulations issued in terms of section 27(2) of the Disaster Management Act No. 57 of 2002.

5.3.3 Guiding Principles of Management of COVID-19 in SAMI.

5.3.4 Guidelines developed by the World Health Organization; National Department of Health, and National Department of Employment and Labour.

6. MEMBERS OF THE TASK TEAM

State	Organised Labour	Employers
Dr L. Ndelu	Mr. J. Kok	Dr. T Balfour
Dr D. Mokoboto	Mr. D. Blaauw	Mr. B Mongoma
Ms C. Kekana	Ms S. Nongingi	Mr. J Oosthuyzen
Ms D. Mahlaba	Mr. A. Hlakoana	Dr K. Baloyi
Ms M. Hlapane		Mr. T Letanta

PART B: AUTHOR'S GUIDE

1. The **COP** must, where possible, follow the sequence laid out in Part C: Format and content of the COP. The pages as well as the chapters and sections, must be numbered, where possible, to facilitate cross-referencing. Wording must be unambiguous and concise.

2. It must be indicated in the **COP** and on each annexure to the **COP** whether:

2.1 The annexure forms part of the **COP** and must be complied with or incorporated in the **COP** or whether aspects thereof must be complied with or incorporated in the **COP**; or

2.2 The annexure is merely attached as information for consideration in the preparation of the **COP** (i.e. compliance is discretionary).

3. When annexures are used, the numbering must be preceded by the letter allocated to that particular annexure and the numbering must start at one again. (e.g. 1, 2, 3 and A1, A2, A3).

4. Whenever possible illustrations, tables, graphs and the like, must be used to avoid long descriptions and/or explanations.

5. When reference has been made in the text to publications or reports, references to these sources must be included in the text as footnotes or side notes as well as in a separate bibliography.

PART C: FORMAT AND CONTENT OF THE MANDATORY COP

1. TITLE PAGE

The **COP** must have a title page reflecting at least the following:

1.1 The name of the mine;

1.2 The heading: “Mandatory Code of Practice for the prevention, mitigation and management of COVID-19 outbreak”;

1.3 A statement to the effect that the **COP** was drawn up in accordance with guideline **DMRE16/3/2/5-A3** issued by the **CIoM**;

1.4 The mine reference number for the **COP**;

1.5 The effective date;

1.6 The revision dates (if applicable); and

1.7 The **DMRE** mine code number.

2. TABLE OF CONTENTS

The **COP** must have a comprehensive table of contents.

3. STATUS OF THE MANDATORY CODE OF PRACTICE

3.1. This section must contain statements to the effect that:

i. Due to the highly transmissible nature of the SARS-CoV-2, the employer will collaborate as far as possible with national, provincial and the local authorities in dealing with the control of the pandemic including in the community.

ii. The guideline has been compiled specifically with the view to provide guidance to all stakeholders regarding their roles and responsibilities with regards to the mitigation and management of COVID-19 outbreak.

iii. This guideline requires the mitigation and management of COVID-19 outbreak at the mine. In implementing the requirements of this guideline, the employer is required to continue complying with the provisions of MHSA as amended and it's the related guidelines including the Guiding Principles on the Management of COVID-19 in the SAMI Instruction issued by the (CIoM).

iv. In ensuring that mine employees are provided with a healthy and safe working environment that is also maintained, the employer must put a procedure in place to be followed by employees to exercise the right in section 23 of the MHSA during the COVID-19 outbreak.

v. This guideline must be considered as a living document which may need to be updated as new developments on the prevention and management of COVID-19 emerges.

vi. The employer must apply the requirements of this guideline as a minimum (where applicable) guiding principle in developing his/her own guideline in preventing and managing COVID-19 transmission.

1.2 The **COP** was drawn up in accordance with guideline **DMRE16/3/2/5-A3** issued by the **CIoM**;

1.3 This is a mandatory **COP** in terms of Section 9(2) of the **MHSA**;

1.4 The **COP** may be used in an investigation to ascertain compliance and to establish whether the **COP** is effective and fit for purpose;

1.5 All managerial instructions, recommended procedures (voluntary **COPs**) and standards on the relevant topics must comply with the **COP** and must be reviewed to ensure compliance.

4. MEMBERS OF THE DRAFTING COMMITTEE.

4.1 In terms of Section 9(4) of the **MHSA** the employer must consult with the health and safety committee and any other affected parties on the preparation, implementation or revision of any **COP**.

4.2 It is recommended that the employer must, after consultation with the employees in terms of the **MHSA**, appoint a steering committee for COVID-19 responsible for the drafting of the **COP**.

4.3 The members of the drafting committee assisting the employer in drafting the **COP**, must be listed giving their full names, designations, affiliations and experience. This committee must include competent persons sufficient in number to effectively draft the **COP**.

5. GENERAL INFORMATION

General relevant information relating to the mine must be stated in this section of the **COP**, which must include at least the following:

5.1 A brief description of the mine and its location;

5.2 The commodities produced;

5.3 The mining method or combination of methods used at the mine must be listed. This section must discuss the degree of mechanisation, taking care to identify the potential risk of exposure to SARS-CoV-2, and possible exposure scenarios;

5.4 The general controls in place to prevent exposure to SARS-CoV-2;

5.5 Other related regulations, COPs and management standards must be reviewed concurrently to avoid conflict of requirements as laid down by the employer. The objective would be to have an integrated system; and

5.6 The unique features of the mine that have a bearing on this **COP** and cross-reference them to the risk assessment conducted.

6. TERMS AND DEFINITIONS

Any word, phrase or term of which the meaning is not absolutely clear, or which will have a specific meaning assigned to it in the **COP**, must be clearly defined. Existing and/or known definitions must be used as far as possible. The drafting committee must avoid jargon and abbreviations that are not in common use or that have not been defined. The definitions section must also include acronyms and technical terms used.

7. RISK MANAGEMENT

7.1 Section 11 of the **MHSA** requires the employer to identify hazards, assess the health and safety risks to which employees may be exposed and other affected persons may be exposed, record the significant hazards identified and risks assessed. The employer must determine how the significant risks identified in the risk assessment process must be dealt with, having regard to the requirement of Section 11(2) and 11(3) that, as far as reasonably practicable, attempts must first be made to eliminate the risk, thereafter to control the risk at source, thereafter to minimise the risk and thereafter, insofar as the risk remains, to provide personal protective equipment and to institute a programme to monitor the risk.

7.2 To assist the employer with the risk assessment with all reasonable available information such as incidents statistics, research reports, manufacturers specifications, approvals, design and performance criteria for all relevant equipment must be obtained and considered.

7.3 In addition to the periodic review required by Section 11(4) of the **MHSA**, the **COP** must be reviewed and updated within a reasonable period after implementation thereof, taking into account the number of COVID-19 illnesses at the mine and the results of investigations conducted in terms of section 11(5) of the MHSA

8. KEY ELEMENTS TO BE ADDRESSED IN THE COP

The following key elements must be addressed in the **COP**:

8.1 Risk assessment and review

8.2 Start-up and on-going procedure for mines

8.3 COVID-19 Management Programme

8.4 Monitoring and reporting

8.5 Compensation for occupationally acquired novel corona virus (COVID-19)

8.1. RISK ASSESSMENT

8.1.1 In terms of Section of 11 of the (MHSA), the employer must assess and respond to risk.

8.1.2 The employer is required to conduct a risk-based assessment covering all workings at mines and the risk assessment should be described with reference to but not limited to:

8.1.3 All sources of SARS-CoV-2 infection transmission.

8.1.4 Health effects associated with exposure to SARS-CoV-2.

8.1.5 Nature of the key workplace operations and activities that pose all potential risk of SARS-CoV-2 transmission.

8.1.6 Occupations and number of employees who are likely to be exposed to and spread the SARS-CoV-2.

8.1.7 Mines essential occupations or critical skills that might be impacted by SARS-CoV- 2 transmission.

8.1.8 The risk of vulnerable employees to SARS- CoV- 2 while at work.

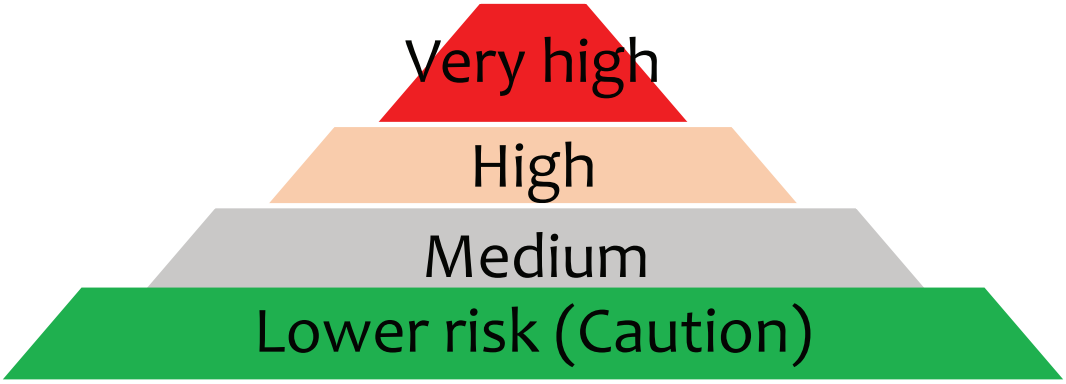
8.1.9 Control measures in place, i.e. engineering, administrative, personal protective equipment etc.

8.1.10 De-densification of employees on transport modes and other spaces.

8.1.11 The additional control measures required to be instituted in order to reduce exposure and the spread of SARS-CoV-2, such as the review of Human Resource policies around business travel, sick leave, and other related policies to account for SARS-CoV-2.

8.1.12 Frequency of any ongoing monitoring to assess the effectiveness of the controls mentioned above.

8.1.13 The mine's risk assessment methodology to take cognisance of the WHO classification of the risk of SARS-CoV-2 infection into 4 risk groups, which are illustrated by the following below Figure 1:



i. **Very high exposure risk**

High potential for exposure to known or suspected sources of SARS-CoV-2 during specific medical, post-mortem, or laboratory procedures.

ii. **High exposure risk**

High exposure risk jobs are those with high potential for exposure to known or suspected sources of SARS-CoV-2.

iii. **Medium exposure risk**

Medium exposure risk jobs include those that require frequent and/or close contact with i.e., within 2 meters of people who may be infected with COVID-19, but it is unknown.

iv. Low exposure risk

Low exposure risk jobs are those that do not require contact with people known to be or suspected of being infected with COVID -19 nor frequent contact (within 2 metres) with the general public.

NOTE: The attached **Annexures 1 – 3**, can be utilized by employers for the purpose of conducting COVID-19 risk assessment.

8.1.14 Scientific and evidence-based approach

In implementing any solution driven measure, the employer must aim to apply the best available evidence gained from scientific methods for decision making in preventing exposure SARS-CoV-2.

8.1.2. Review of the risk assessment

8.1.2.1 The employer must review the risk assessment regularly and whenever circumstances arise or change at the mine that could have an impact on the original assessments and the risk of contracting COVID-19 and at least in the following instances when:

i. Outcomes of local outbreaks or community surveillance become known to the mine.
ii. Outcomes of medical surveillance programmes indicate the need for it;
iii. a MHSA Section 11(5) investigation and /or any other investigation/s indicates the need;

iv. New or revised legislation is introduced;

v. New mining methods are introduced;

vi. Process changes are introduced (e.g. in process plants);

vii. New types of machinery are introduced; and

viii. New epidemiological, public health and medical information on the infection, spread of, symptoms or any other relevant information comes to light in respect of the pandemic that may influence the risk assessment.

8.2 START UP PROCEDURE FOR MINES

The employer must put a start-up procedure in place to address the following:

8.2.1 Prior to allowing any mine or shaft to commence with their mining activities after a prolonged stoppage; a safe precautionary start-up procedure is developed **(See Annexure 4).**

8.2.2. The start-up procedure must be aligned with the Instruction refenced COVID-19 issued by theCIoM–on the 20th April 2020 **(See Annexure 5).**

8.2.3 Routine cleaning or disinfection or industrially sanitising of surfaces that employees come into contact with such as the following areas (but not limited thereto), as determined by the mine's risk assessment:

8.2.3.1 All transportation of employees provided by employer to the mine.

8.2.3.2 Change Houses and its surrounding facilities.

8.2.3.3 Lamp rooms.

8.2.3.4 Waiting areas.

8.2.3.5 Refuge Bays.

8.2.3.6 Offices especially in open plan spaces.

8.2.3.7 Healthcare facilities (fixed and mobile).

8.2.3.8 Kitchen and dining areas.

8.2.3.9 Mine accommodation.

8.2.3.10 Security access points and guard houses.

8.2.3.11 Functional and physical assessment areas and heat tolerance screening centres.

8.2.4 Screening and testing procedures.

8.2.5 Withdrawal procedures, to be used by mines in the event of a localised COVID-19 outbreak.

8.2.6 Measures in place to collaborate with the DOH with the prevention and management of COVID-19 for migrant workers at ports of entry.

8.3 COVID-19 MITIGATION AND MANAGEMENT PROGRAMME

8.3.1 In considering management of COVID-19 infection transmission, the employer must consider the following principles:

8.3.1.1 Ensure that employees returning from areas which are regarded as epicentres of COVID-19 are quarantined for 14 days before they return to work.

8.3.1.2 To prevent the COVID-19 workplace infection, the employer must develop a policy and/or integrate COVID-19 management into the existing mine's policies, COPs and standard operating procedures for Health and Safety.

8.3.1.3The mine's COP and procedure must include the following for employees who have signs and/or symptoms of COVID-19:

i. A dedicated 24-hour hotline which employees will use to reach the mine's dedicated healthcare workers or the mine's contracted service/s of healthcare workers assigned to assist with COVID-19;
ii. Procedure to report when an employee is sick or experiencing symptoms of COVID-19;
iii. How, where and the duration (the required number of days being determined by the NICD) of isolation will take place for employees suspected of being infected with COVID-19;
iv. The site/s where employees with suspected COVID-19 infection will be screened, diagnosed and treated. This must include what will lead to

admission to a health care facility and all associated transport arrangements; and

v. The requirements of self-isolation

8.3.1.4The mines COP and procedures must also include steps that will be taken by employees who have been in contact with confirmed COVID-19 cases and are/not symptomatic which, must include as a minimum:

i. A dedicated 24-hour hotline which employees will use to reach the mine's dedicated healthcare workers or the mine's contracted service/s of health care workers assigned to assist with COVID-19 from home/mine accommodation;

i. ii)Procedure to be followed and arrangements for the employees to be tested (including the associated PPE required for such an employee). This must include what will lead to admission to a health care facility and all associated transport arrangements; and

ii. How, where and the duration (the required number of days being determined by the NICD) of self-quarantine or isolation (as determined by the test results and the advice of the health care worker) will take place for those employees;

NOTE: The criteria for a PUI are dynamic and change from time to time. For the latest criteria visit the NICD website.

8.3.2The following must be considered in the development of the COVID-19 COP:

8.3.2.1 Provide adequate, usable, and appropriate training, and information material about:

i. Mine's relevant job functions;

ii. Proper hygiene practices and the use of any workplace controls (including PPE);

iii. Prevention of COVID-19 stigma and discrimination amongst the suspected, the infected and their families;

iv. The provision of the mine's support service or collaboration/contracted support service for the employees through the Employee Assistance Programme (EAP) or collaboration with the Public Service;

v. The employer must develop a process where an employee will be able to disclose any pre-existing conditions prior to returning to work; and

vi. The available Covid-19 National Hotline/s for their knowledge and information sharing with other community members.

8.3.1.2 The employer must as far as possible with employees' consent and respecting medical confidentiality be informed through the designated healthcare worker if the employees have pre-existing conditions that will make them more susceptible to severe COVID-19. Such employees will only be permitted to work after receiving a certificate of fitness to work from an occupational medical practitioner. Where employees are not permitted to work due to a confirmed pre-existing condition, the employer must arrange for transportation of such employees back to their homes.

8.3.1.3 The employer must utilize a risk-based method to prioritise high-risk individuals for more active interventions such as prophylaxis and individualised counselling.

8.3.1.4 Review of the mines emergency response plans in consideration of COVID-19.

8.3.3 Before arrival of employees at the mine's premises, the employer must:

8.3.3.1 Develop a procedure for the management of the return to work of employees after the lockdown, which must include a history of COVID-19 contact from areas of residence during the lockdown through the use of a questionnaire.

8.3.3.2. Communicate and establish a process for collaborating with the Department of Health (DOH) District Communicable Diseases unit in order to be familiar with the district's plan including the district's process on early outbreak

detection, diagnosis (testing) procedures, isolation, quarantine, reporting procedures for COVID-19 and arrangements for hospitalisation of employees who require it (if a mine does not have the hospital facilities).

8.3.3.3. Ensure sufficient availability of resources such as:

i. Facilities - pre-screening areas, isolation areas, quarantine areas;

ii. Staff - security personnel, medical staff, social worker, counselling psychologists, employee assistance programme specialists and administrative assistants;

iii. Equipment and medical supplies including soap and water, sanitisers, appropriate PPE for healthcare workers and employees, and waste disposal receptacles for used PPE;

iv. Flu vaccination that prioritizes those at high risk of contracting COVID-19 and give prophylaxis where required, and

v. Cleaning and disinfection consumables and services.

8.3.3.4 As far as reasonably practicable communicate to employees'; new procedures to be implemented for medical surveillance before they leave areas of residence during and after the lockdown.

8.3.3.5 Develop a calibration or a verification procedure for non-contact thermal scanning/screening i.e. when, where, who and how to calibrate or verify the non- contact instrument/s to correlate with the core body temperature. The calibration or verification procedure should be in line with the Original Equipment Manufacturer's specification.

8.3.3.6 Screen on a daily basis healthcare employees and staff assisting with the RTW before mass screening of employees.

8.3.3.7 Screen employees from labour sending areas within South Africa who use their own transport at the mine before they return to work.

8.3.3.8 Where the employer transports the migrant employees, screening must be done before boarding the transport, in collaboration with the relevant DOH

8.3.3.9 The employer must at the start and increase of capacity at the mine make arrangements to transport employees from their homes to their respective

areas of operations and put mechanisms in place to screen employees before boarding, isolation and quarantine at source where required.

8.3.3.10 In cases of employees commuting using public transport the employer must provide two cloth face masks.

8.3.3.11 The determination of the appropriate PPE used, must be done in combination with a risk assessment and expert advice on the characteristics and limitations of each type of PPE, in the context of reasonably practicable.

8.3.3.12 Apply de-densification and/physical distancing (between 1-2 metre/s) opportunities and provision of the relevant PPE for mass transport and at areas of the mine where close contact may occur.

8.3.3.13 Apply a staggered approach on the number of employees screened per day for return to work to minimise crowding at the screening areas and at the medical centre as well as transporting employees to the medical centre.

8.3.3.14 Create awareness material for employees on COVID-19 and where necessary update with the latest available information. Awareness material should be created as far as possible in predominant language spoken in the peri-mining community area.

8.3.3.15 Display posters on COVID19 to be visible at all areas of the mine as identified through the risk assessment.

8.3.3.16 Inform employees of their duty to report should they test positive for COVID-19 during the nationwide lockdown, long weekend or leave.

8.3.3.17 The employee is obliged to provide COVID-19 test results to the employer where available, and with a letter from the relevant health facility stating the date of onset of symptoms, diagnosis, date of specimen collection of positive tests if applicable, and expected date when isolation ends.

8.3.3.17(A) The employer is obliged to provide COVID-19 test results to the employee

8.3.3.18 Establish a procedure for screening all persons entering the mine and ensuring that they comply with protective measures including PPE and social/physical distancing while on site.

8.3.4 Arrival of employees at the mine's premises, the employer must:

8.3.4.1 Implement an Infection Prevention and Control (IPC) measures at all areas as identified by the mines risk assessment.

8.3.4.2 Ensure that hand hygiene practices are maintained at the strategic points as identified by the risk assessment and work places where close contact among employees is likely to occur including in underground working places.

8.3.4.3 Ensure that in highly congested areas (such as residences, kitchens, cages and underground working places), a maximum occupation/capacity as guided by the relevant regulation/s and risk assessment is always maintained.

8.3.4.4 Implement social/physical distancing between 1-2 metre/s when in contact with other people, and where this is not possible, issue appropriate PPE.

8.3.4.5 Induct and regularly update employees' awareness training material on signs and symptoms of COVID-19 on their return.

8.3.4.6 Implement a calibration or verification procedure for non-contact thermal scanning/screening i.e. when, where, who and how to calibrate or verify the non- contact instrument/s to correlate with the core body temperature.

8.3.4.7 As far as possible with employee consent and respecting medical confidentiality be informed through the designated healthcare worker if an employee has pre-existing condition that will cause an employee to be unfit to return to work or classified as vulnerable employee.

8.3.4.8 Intensify awareness on the importance of adherence to taking of chronic medication for management of non-communicable diseases.

8.3.4.9 Ensure that hand hygiene practices are maintained at the strategic points as identified by the risk assessment and work places where close contact among employees is likely to occur including in underground working places.

8.3.4.10 Specify minimum standard required PPE to be worn in order to prevent exposure to SARS-CoV-2 (including to and from work) and these requirements must take into consideration other standards and regulation dealing with PPE for occupational hazards at mines (**See Annexure 6**).

NOTE: Taking into account the risk classification groups described in section 8.1.13 of this guideline, a guide is made in Table 1 to classify the risk for the purpose of providing appropriate PPE, jobs in the mining industry according to the level of risk. This exercise can only be refined and concluded by the individual mining companies, depending on such mining company's specific circumstances and within the context of what is reasonably practicable.

Table 1: Risk classification for the purpose of providing PPE

CLASSIFICATION	MINE EMPLOYEES AT RISK (This list is not exhaustive)
i. Very high risk	a) Intensive Care Unit b) Occupational health practitioners conducting cough inducing procedures, e.g. spirometry. c) HCWs collecting specimens for diagnosis of COVID-19, e.g. throat swabs. d) Ambulance personnel that do intubation into trachea. e) Health Care Employees (HCWs) that do removal of cardio-respiratory organs for autopsy.
ii. High risk	a) HCWs that examine employees (at Occupational health centres, medical stations and other places with potential to be in contact with a COVID-19 patient (known and unknown), ambulance drivers transporting the sick. b) Underground employees who are in confined environments during waiting to be transported, during transportation to underground and to various working stations. c) Security staff at high volume access points or conducting temperature checks and/or alcohol testing. d) Health and Safety reps during investigation of underground working sites e) Hospital waste cleaners

	f)	Change room attendants
	g)	Cleaners involved in workplace disinfection e.g. Following the removal of a PUI and underground sanitation employees.
iii. Medium risk	a)	Security staff at entrances to facilities and mines
	b)	Mine employees in work areas where social/physical distancing is possible and being practiced
	c)	Change room cleaners
	d)	Laundry staff
	e)	Occupational hygienists -personal sampling procedures
	f)	Clerks working at occupational health centres
	g)	Human resource practitioners that interact very closely with people
	h)	Office cleaners
iv. Low risk	a)	Office employees
	b)	Control room operators

8.3.4.11 Ensure that awareness is conducted in respect of correct PPE usage, fit testing (where applicable), removal, storage, disposal and workplace practices required to prevent exposure to SARS-CoV-2. Awareness should be conducted as far as possible in predominant language spoken in the peri-mining community area.

8.3.4.12 Provide receptacles for all used PPE and where applicable receptacles for hazardous biological waste.

8.3.4.13 Ensure that waste management procedure is in place and that it addresses equipment handling; transport and disposal sites.

8.3.5 Screening and testing for COVID-19

8.3.5.1 The employer must put a system in place to screen all persons (who are not employees) entering all mine premises, at the designated areas. Anyone who fails screening must be denied access and advised to seek medical assistance.

8.3.5.2 The employer must put in place a system to screen all the employees on a daily basis at mine's accommodation, at a designated areas. This is to isolate and quarantine any possible cases and suspects.

8.3.5.3 The employer must establish a system of symptom screening by a designated person at the start and end of every shift at designated areas. Pre-shift screening must include a temperature check. Any reported symptoms during or at the end of the shift must be referred for a temperature check.

Note: The employer must note and follow the calibration or verification procedure prior to screening the employees.

8.3.5.4 The employer must put systems in place to ensure that employees with elevated temperature ≥ 37.5^{o}C to be referred for further assessment by the healthcare worker and employees with the temperature of ≥ 38.0^{o}C to be isolated (isolation in this cases referring to separation of such employees into temporary waiting areas while awaiting assessment) for assessment by a healthcare worker.

8.3.5.5 Employees will be tested only if they meet the PUI criteria, which includes having symptoms of a respiratory illness of recent or sudden onset. (**See Annexure 7 and Annexure 7(a) on the PUI criteria**).

8.3.5.6 The employer must ensure that results are communicated with the employee.

8.3.5.7 Employees returning to work at the start and increase of capacity at the mine, and pass the COVID-19 screening test must be referred to the Occupational Health Centre for fitness to work assessment.

8.3.5.8 Employees with pre-existing conditions that will make them more susceptible to severe COVID-19 must be identified and only be permitted to work after being declared fit by an occupational medical practitioner

8.3.5.9 A risk-based method to prioritise high-risk individuals for more active interventions such as prophylaxis and individualised counselling, must be used.

8.3.5.10 Scheduling of dates for flu vaccination should be made when vaccines are available and employees with pre-existing conditions must be prioritised.

8.3.5.11 The employer must put in place a contact tracing programme for contacts of COVID-19 cases identified on the mine and communicate with the DOH on tracing of contacts beyond the mine. The NICD contact tracing protocol must be followed.

8.3.6 Isolation

8.3.6.1 The employer must identify and implement designated areas for isolation, whereby the following must apply:

i. Assessment of employees for COVID-19 signs and symptoms.

ii. Referral of employees who meet the NICD criteria of a PUI.

iii. For employees who show symptoms whilst at work, the employer must put systems in place in order to ensure that such employees are removed from the working place to designated isolation area, in order to protect the other employees.

8.3.6.2 The employer must put in place a contact tracing programme for contacts of COVID-19 cases identified on the mine and communicate with the DOH on tracing of contacts beyond the mine. The NICD contact tracing protocol must be followed.

8.3.7 Follow up system

8.3.7.1 The employer must implement a follow up system, whereby the following will be applied:

i. An arrangement will be made for medical assessment and a letter be obtained from the isolation/health care facilities. In case of self-isolation an employee must submit a letter from the legal health care worker.

ii. The fitness to work assessment and issuing of a certificate of fitness

8.3.8 Referral for further management for other conditions other than COVID-19

8.3.8.1 The employer must implement a referral system that will assist in determining the following:

i. Employees with abnormal findings (which are not related to COVID-19) to a medical centre for further assessment and management.

ii. The provision of psychosocial support services by the mines through inhouse or contracted Employee Assistance Programme (EAP) or collaboration with the Public Service.

8.3.8.2 Differential diagnosis for elevated temperature and respiratory symptoms in mine employees and exclude underlying medical conditions.

8.3.9 Self-Isolation

8.3.9.1 The employer must allow the employees to self-isolate where possible, under the following conditions:

i. Under the guidance of a healthcare worker employees whose test results

are positive for COVID-19 and have mild disease, with the capacity to self-isolate may do so at home for 14 days.

ii. Employees must be provided with the necessary PPE and contact tracing must commence thereafter in accordance with NDOH procedures.

iii. The medical centre team/healthcare worker must follow-up telephonically with the employee on a daily basis, record progress and recommend further medical assessment, as required.

iv. A register of employees presenting with symptoms, i.e. PUI and who are referred for isolation, as per NDOH guidelines, must be kept, as well as list of contacts.

8.3.10 Prevent infection to employees and those visiting the mine operation

8.3.10.1 Alignment of medical surveillance system to the COVID-19 pandemic:

i. The employer must perform a risk assessment with regards to potential cross infection linked to the different activities (e.g. spirometry, eye testing, audiometry, temperature measurements, Heat Tolerance Screening, etc.) embodied in the medical surveillance system. Protection of Health for all is paramount. Consider as an option full protective gear where applicable for protection of health care workers. Unless sufficient infection prevention control (IPC) measures are put in place, all spirometry and/or audiometry is to be suspended.

ii. At the discretion of the appointed occupational medical practitioner, the employer must conduct a Heat Tolerance Screening Test as per the mine's risk assessment, and if not practical to implement Heat Tolerance Screening Test only allow specific occupation/s to undergo natural acclimatization.

8.3.10.2 The employer must establish and maintain a personal hygiene programme in mitigation of transmission of COVID-19, and to the following but not limited to:

i. Maintaining physical distancing.
ii. Regular washing of hands with soap.
iii. Regular sanitising of hands with alcohol-based hand rub (ABHR) or other appropriate sanitisers.
iv. Avoid touching of face areas (mouth, eyes and nose).
v. Avoid physical hand contact such as handshakes.
vi. Avoid using other people's personal belongings such as stationery, cell phones and sharing food etc.
vii. When coughing or sneezing do not use hands, rather use a tissue/toilet paper or the inside of the elbow.
viii. Use disposable tissues rather than a handkerchief; immediately dispose of these tissues in a closed bin and wash or sanitise hands thereafter.
ix. Avoid big crowds and travelling.
x. Avoid touching objects before sanitising, like trollies, toilet seats, turnstiles, tables and chairs.
xi. Coach and teach family members.
xii. Wearing and handling of appropriate PPE.

8.3.10.3 The employer must develop and implement measures that will prevent the spread of COVID-19 infection to employees and any person entering the mine operations reasonably practicable.

8.3.11 Use of breathalyser testing

For alcohol testing, the employer must use his/her discretion on which tests to implement depending on feasibility and availability e.g. single use (lowest risk) or multiple use (medium risk and used with protective measures in place). The employer must also assess the health and safety risks in order to prevent cross infection in implementing breathalyser testing. (**See Annexure 8**).

8.3.12 Use of biometrics

8.3.12.1 The use of Biometric systems can be applied by the employer provided the following are complied with:

i. Use of sanitizers at all times and all employees are informed.
ii. All necessary health and safety measures as informed by Risk Assessment are adhered to.
iii. The biometric system is regularly disinfected before and after each use.

8.3.12.2 The employer must specify the action required and care to be taken when preparing, handling, issuing, retrieving and disinfect occupational hygiene equipment. (**See Annexure 9**).

8.4 MONITORING AND REPORTING

The employer must establish a steering committee for COVID-19 to address the following:

8.4.1 Record and report to the relevant authority (NICD) and relevant mine's health and safety structure as per available guidelines (confidentiality must be adhered to), using forms provided by NICD.

8.4.2 Investigate all confirmed Covid-19 positive cases at the mine, in terms of section 11(5)(a)(ii) and (iii) and report within 24hours to the Principal Inspector of Mines using the NICD form.

8.4.3 Consolidate the NICD reports into a monthly report and that must be reported to the Principal Inspector of Mines as determined by the DMRE.

8.4.4 Keep the COVID-19 data (data for monitoring and investigation reports) at the mine as required by the NDOH and NICD.

8.4.5 Appoint a COVID-19 Compliance Officer in line with the DMA with the necessary powers to provide oversight on the implementation of this guideline.

8.5 COMPENSATION FOR OCCUPATIONALLY ACQUIRED NOVEL CORONA VIRUS DISEASE (COVID-19)

8.5.1 The employer must follow the process stipulated in the Notice on Compensation for occupationally acquired novel corona virus disease. (**See Annexure 10**).

PART D: IMPLEMENTATION

1. IMPLEMENTATION PLAN

1.1 The employer must prepare an implementation plan for its COP that makes provision for issues such as organisational structures, responsibilities of functionaries and programmes and schedules for the COP, that will enable proper implementation of the COP (a summary of and a reference to, a comprehensive implementation plan may be included).

1.2 Information may be graphically represented to facilitate easy interpretation of the data and to highlight trends for the purposes of risk assessment.

2. COMPLIANCE WITH THE CODE OF PRACTICE

The employer must institute measures for monitoring and ensuring compliance with the COP.

3. ACCESS TO THE CODE OF PRACTICE AND RELATED DOCUMENTS

3.1 The employer must ensure that a complete **COP** and related documents are kept readily available at the mine for examination by any affected person.

3.2 A registered trade union with members at the mine or where there is no such union, a health and safety representative on the mine, or, if there is no health and safety representative, an employee representing the employees on the mine, must be provided with a copy. A register must be kept of such persons or institutions with copies to facilitate updating of such copies.

3.3 The employer must ensure that all employees are fully conversant with those sections of the **COP** relevant to their respective areas of responsibilities.

ANNEXURE 1: For Information Purposes

Worker COVID-19 Risk Assessment

ANNEXURE 2: For Information Purposes

Specialised health risk assessment for workplaces (by employers and self-employed persons)

ANNEXURE 3: For Information Purposes

COVID-19 Walk-through Risk Assessment

ANNEXURE 4: For Information Purposes

Guideline on safe and healthy start-up procedure post the COVID-19 lockdown, which resulted in extended shutdown of active mining operations

ANNEXURE 5: Mandatory

Start- Up Procedure of Mines by Employers and Employees Following A 21 Day National Lockdown

ANNEXURE 7: For Information Purposes

Criteria for Person Under Investigation

Persons with acute respiratory illness with sudden onset of at least one of the following: cough, sore throat, shortness of breath or fever [≥ 38°C (measured) or history of fever (subjective)] irrespective of admission status **AND**

In the 14 days prior to onset of symptoms, met at least one of the following epidemiological criteria:

• Were in close contact[1] with a confirmed[2] or probable[3] case of SARS-CoV-2 infection;

OR

• Had a history of travel to areas with presumed ongoing community transmission of SARS-CoV-2; i.e., China, USA, Spain, United Kingdom, South Korea, Japan, Iran, Hong Kong, Italy, and Taiwan (NB Affected countries will change with time, consult the NICD website for current updates); A history of travel to provinces or districts with high community transmissions should be considered as well.

OR

• Worked in, or attended a health care facility where patients with SARS-CoV-2 infections were being treated;

OR

• Admitted with severe pneumonia of unknown aetiology

[1]Close contact: A person having had face-to-face contact or was in a closed environment with a COVID-19 case; this includes, amongst others, all persons living in the same household as a COVID-19 case and, people working closely in the same environment as a case. A healthcare worker or other person providing direct care for a COVID-19 case, while not wearing recommended personal protective equipment or PPE (e.g., gowns, gloves, NIOSH-certified disposable N95 respirator, eye protection). A contact in an aircraft sitting within two seats (in any direction) of the case, travel companions or persons providing care, and crew members serving in the section of the aircraft where the case was seated. [2]Confirmed case: A person with laboratory confirmation of SARS-CoV-2 infection, irrespective of clinical signs and symptoms. [3]Probable case: A PUI for whom testing for SARS-CoV-2 is inconclusive (the result of the test reported by the laboratory) or who tested positive on a pan-coronavirus assay.

Clinicians must also be vigilant for the possibility of atypical clinical presentations among immunocompromised patients. Consider the possibility of influenza (Northern

Hemisphere season ends in April or May) and bacterial pneumonia and manage accordingly.

ANNEXURE 7 (a): For Information Purposes

Revised COVID-19 NOTIFIABLE MEDICAL CONDITIONS CASE DEFINITIONS.5 April 2020)

ANNEXURE 8: For Information Purposes

Control Measures to Manage the Risk of Exposure to Breathalyser

1. It is recommended that the procedure is performed outdoors. Where the procedure must be performed indoors, there has to be adequate ventilation and natural or artificial UV light to reduce the amount of viable organism in the air.
2. The breathalyser must be held with an extended arm away from the operator. The person must blow into the blow point, directed past the operator. This is in cases where the operator is required to hold the device.
3. It is recommended for an operator to wear mask, gloves and goggles. This is provided that they are fully trained and competent in the use of this PPE in infection control.
4. The operator will require training to put on and take off the mask without contaminating their faces and autoinoculation of their mucus membranes.
5. If possible, the people being tested can hold the device themselves - this would be preferable.
6. The mouth of the person being tested must be at a distance of 50mm from blow point.
7. Employees must be instructed not place lips on blow point.
8. The person must be instructed to blow steadily towards the blow point for 2 to 3 seconds.

ANNEXURE 9: For Information Purposes

Handling of occupational hygiene personal sampling with regards to COVID-19.

ANNEXURE 10: Mandatory

Notice on compensation for occupationally acquired corona virus under COIDA, Amended Act

ANNEXURE 11: For Information Purposes

Spirometry Testing

NOTE: To be suspended unless effective IPC can be guaranteed

Process evaluation for spirometry testing

During the spirometry manoeuvre, the client is required to take a deep breath and exhale maximally into the spirometer to produce a Spirograph. This needs to be done at least three times to produce an acceptable test result. This forced manoeuvre often results in coughing and spluttering which can result in the release of droplets from the airway into the environment. The technician conducting the spirometry is usually sitting below the standing client or next to the client when sitting and there is a likelihood of the droplets landing on the face and mucus membranes of the tester. The client cannot move far away due to the cord connecting the spirometer to the computer. The operator must be in close proximity to the client to assess for any change in condition and to possibly support the client. The filters that are normally used will protect the spirometer from most microbes but it does not prevent the droplets from the client's mouth going into the environment if they cough or splutter during or after the manoeuvre.

With the current pandemic, there may be individuals who are infected, asymptomatic and shedding the virus. The SARS CoV-2 cannot be compared to other respiratory pathogens in that it is highly contagious and extremely virulent and if not always deadly, results in morbidity and required isolation

resulting in absenteeism. The impact that it has had on the world is unprecedented. The impact it could have on the working community in mines and industry will be devastating.

Control measures

In the usual day to day management of risk, spirometry requires standard infection control precautions such as adequate ventilation and airflow, UV

lights, use of appropriate filters, adequate environmental cleaning, the use of gloves by the operator and effective hand hygiene. In the current environment the operator is required to do a risk assessment on the client to establish risk of infection by utilising a respiratory questionnaire. In the case where there is any doubt, the test is delayed and the client referred for medical assessment. Should spirometry be essential, then a mask, eye protection and gloves should be donned for the procedure.

Guideline for the Compilation of a Mandatory Code of Practice on

Minimum Standards of Fitness to Perform Work at a Mine



MINE HEALTH AND SAFETY INSPECTORATE

mineral resources
Department:
Mineral Resources
REPUBLIC OF SOUTH AFRICA

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DEPARTMENT OF MINERAL RESOURCES

MINE HEALTH AND SAFETY INSPECTORATE

GUIDELINE FOR THE COMPILATION OF A

MANDATORY CODE OF PRACTICE ON THE

MINIMUM STANDARDS OF FITNESS TO PERFORM WORK ON A MINE



CHIEF INSPECTOR OF MINES

mineral resources
Department:
Mineral Resources
REPUBLIC OF SOUTH AFRICA

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PART A: THE GUIDELINE

1. INTRODUCTION

1.1 This guideline has been drafted to assist **OMPs** in determining fitness to perform specified work at a mine or entity that reports under Mine Health and Safety Act (Act 29 of 1996) as amended, or to continue to perform such work.

1.2 This guideline outlines the most common approaches to be followed by the **OMP** to determine fitness-to-work of an employee suffering from a medical condition of a bodily system. It should however be noted that the approaches described within this guideline are not meant to be too prescriptive and **OMPs** should be allowed to introduce other approaches for evaluation of fitness to work as long as such approaches are supported by evidenced-based medical trials or by the appropriate medical associations e.g. South African/ American Thoracic Society, etc.

1.3 Legislation (**MHSA**/ EEA) requires that for every job for which a fitness-to-work medical examination is done is to have specific minimum health standards in relation to the essential functions of such a job. An **OMP** is responsible for executing fitness-to-work medical examinations and must ensure that he/she is familiar with the specific physical and mental requirements of each job for which he has to issue a fitness to work certificate.

1.4 Templates are provided as an Annexure for guidance on identifying possible risks and hazards associated with certain diseases and conditions. These are however not absolute guidelines, and they could be implemented as such.

2. LEGAL STATUS OF GUIDELINES AND COPS

2.1 In accordance with section 9(2) of the **MHSA** an employer must prepare and implement a **COP** on any matter affecting the health or safety of employees and other persons who may be directly affected by activities at the mines if the Chief Inspector of Mines requires it. These **COPs** must comply with any relevant guideline issued by the Chief Inspector of Mines (section 9(3)). Failure by the employer to prepare or implement a **COP** in compliance with this guideline is a contravention of the **MHSA**.

3. THE OBJECTIVE OF THIS GUIDELINE

3.1 The objective of this guideline is to assist the employer charged with the task of preparing a **COP** which, if implemented and complied with, would:

3.1.1 Be appropriate, considering the health and safety of all employees at the mine;

3.1.2 Ensure the employee is fit to perform that employees' work at the mine;

3.1.3 Ensure that the health of the employee who is certified as fit for a specific job is such that the employee will be able to perform that work without an unacceptable health or safety risk to that employee or any other person;

3.1.4 Establish a baseline against which to measure subsequent changes in the health status of the employee; and

3.1.5 Ensure compliance to obligations as prescribed in other relevant labour legislation (**LRA**; **EEA**; **BCEA**) and relevant **COPs**.

4. DEFINITIONS AND ACRONYMS

In this guideline for a **COP** or any amendment thereof, unless the context otherwise indicates:

"COP" means Code of Practice.

"DMR" means the Department of Mineral Resources.

"MHSA" means Mine Health and Safety Act, 1996 (Act No. 29 of 1996) as amended.

"OMP" means Occupational Medical Practitioner.

"EEA" means Employment Equity Act (Act 55 of 1998).

"LRA" means Labour Relations Act (Act 66 of 1995).

"BCEA" means Basic Condition of Employment Act (Act 75 of 1997).

"OREP" means Occupational Risk Exposure Profile.

Health impact assessment (HIA) means the provision of information about how any policy, program practices and exposures may affect the health of a population, and the distribution of those effects within the population.

The social model means a model that concentrates on the person as a valued member of a very diverse society. It suggests that the disabled person is a unique individual who has the right to the same opportunities in housing, education, transport and facilities as anyone else. The solution according to this model is to bring about attitudinal, environmental and organisational changes within present day society. It is felt that disabled people need to be encouraged to play an equal part in decision making processes, particularly when the decisions affect them personally.

Medical model means a model that in the terms cited by psychiatrist Ronald D. Laing for the "set of procedures in which all doctors are trained." This set includes complaint, history, physical examination, ancillary tests if needed, diagnosis, treatment, and prognosis with and without treatment. This does not allow the person affected to have any say in the decision of fitness to work.

"Strenuous work" means physically and demanding tasks combined with extended hours of work where the work rate exceeds 160 $W.m^{-2}$.

5. SCOPE

5.1 This guideline covers a basic approach for the **OMP** advising on minimum standards of fitness to perform work at a mine.

5.2 This guideline does not stipulate specific advice on every medical condition. However, conditions not dealt with in the guideline, which could have an impact on health or safety, should also be taken into account when determining an employee's fitness to perform work. The hazard identification and risk assessment approach contemplated in the **MHSA** should be applied to fitness to perform work at a mine.

5.3 The **OMP** conducting the medical examination should be satisfied in each case that no disease or impairment is present which could either be significantly aggravated by working at a mine or represent an unacceptable health or safety risk to any person.

6. MEMBERS OF THE TASK GROUP

6.1 Principal drafting members

• Dr Chris de Beer	Occupational Medicine Practitioner and Certified Professional in Medical Incapacity and Disability Management
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6.2 Additional drafting members

• Dr Johan Schoeman	Professional Occupational Hygienist
• Dr Nico Claassen	Specialist Physiologist and Extra-ordinary lecturer
• Mr Jaco Snyman	Project Manager

6.3 Independent specialists consulted

• Dr Nomonde Mabuya	Occupational Medicine Practitioner
• Me Zuritha du Preez	Senior Human Resource Consultant – Matla Collieries, Mpumalanga
• Mr Lukas Coetsee	Attorney of Law
• Mr Francois Strydom	Attorney of Law
• Mr Paul Venter	Experienced Underground Mine Captain

6.4 System specialists consulted

• Prof James Kerr	Specialist Physician
• Dr Thomas Gray	Specialist Physician
• Dr Danie du Toit	Ophthalmologist
• Dr Helena Oosthuizen	Endocrinologist
• Dr Hardie de Beer	Dermatologist
• Dr Jan Chabalala	Specialist Psychiatrist
• Dr Nomonde Mabuya	Occupational Medicine Practitioner
• Dr Daneel Heyns	Orthopaedic Surgeon
• Dr Pite Bresler	Ear, Nose and Throat Surgeon

- Dr S Fatmi Neurosurgeon

6.5 State member

- Dr L Ndelu Chief Directorate: Occupational Health
- Dr D Mokoboto Medical Inspector

6.6 Employer member

- Dr K Baloyi

6.7 State

- Mr. A Letshele

PART B: AUTHOR'S GUIDE

1. The **COP** must, where possible, follow the sequence laid out in Part C "Format and Content of the **COP**". The pages as well as the chapters and sections must be numbered to facilitate cross-reference. Wording must be unambiguous and concise.

2. It should be indicated in the **COP** and on each annex to the **COP** whether-

2.1 The annexure forms part of the guideline and must be complied with or incorporated in the **COP** or whether aspects thereof must be complied with or incorporated in the **COP**; or

2.2 The annexure is merely attached as information for consideration in the preparation of the **COP** (i.e. compliance is discretionary).

3. When annexures are used the numbering should be preceded by the letter allocated to that particular annex and the numbering should start at one (1) again. (e.g. 1, 2, 3, A1, A2, A3).

4. Whenever possible illustrations, tables, graphs and the like should be used to avoid long descriptions and/or explanations.

5. When reference has been made in the text to publications or reports, these sources must be included in the text as footnotes or side notes as well as in a separate bibliography.

PART C: FORMAT AND CONTENT OF THE MANDATORY COP

1. TITLE PAGE

The **COP** should have a title page reflecting at least the following:

1.1 Name of the mine;

1.2 The heading: “Mandatory Code of Practice for Minimum Standards of Fitness to Perform Work at a Mine”;

1.3 A statement to the effect that the **COP** was drawn up in accordance with **DMR** reference number **DMR** 16/3/2/3-A3 issued by the **CIOM**;

1.4 The mine’s reference number for the **COP**;

1.5 Effective date; and

1.6 Revision dates (if applicable).

2. TABLE OF CONTENTS

The **COP** must have a comprehensive table of contents.

3. STATUS OF COP

Under this heading the **COP** must contain statements to the effect that:

3.1 The **COP** was drawn up in accordance with Guideline **DMR** reference number **DMR** 6/3/2/3-A3 issued by the **CIOM**;

3.2 This is a mandatory **COP** in terms of section 9(2) and (3) of the **MHSA**;

3.3 The **COP** may be used in an accident investigation/inquiry to ascertain compliance and also to establish whether the code is effective and fit for purpose;

3.4 The **COP** supersedes all previous relevant **COPs**; and

3.5 All managerial instructions, recommended procedures (voluntary **COPs**) and standards on the relevant topics must comply with the **COP** and must be reviewed to ensure compliance.

4. MEMBERS OF DRAFTING COMMITTEE

4.1 In terms of section 9(4) of the **MHSA** the employer must consult with the health and safety committee on the preparation, implementation and revision of any **COP**.

4.2 It is recommended that the employer should, after consultation with the employees in terms of the **MHSA**, appoint a committee responsible for the drafting of the **COP**.

4.3 The members of the drafting committee assisting the employer in drafting the **COP** should be listed giving their full names, designations, affiliations and experience. This committee should include competent persons sufficient in number to effectively draft the **COP**.

5. GENERAL INFORMATION

Relevant information relating to the mine must be stated in this paragraph. The following minimum information must be provided –

5.1 A brief description of the mine and its location;

5.2 The commodities produced;

5.3 The mining methods/mineral excavation processes;

5.4 A description of the systems in use on the mine to determine, implement and monitor minimum standards of fitness to perform work at the mine; and

5.5 Other relevant **COPs**.

6. TERMS AND DEFINITIONS

Any word, phrase or term of which the meaning is not absolutely clear or which will have a specific meaning assigned to it in the **COP**, must be clearly defined. Existing and/or known definitions should be used as far as possible. The drafting committee should avoid jargon and abbreviations that are not in common use or that have not been defined. The definitions section should also include acronyms and technical terms used.

7. RISK MANAGEMENT

7.1 Section 7 and 11 of the **MHSA** requires the employer to identify hazards assess the health and safety risks to which employees may be exposed while they are at work, consider the capabilities of employees in respect of health and safety, record the significant hazards identified and risks assessed and develop medical standards for each job on the mine. The employer must determine how the significant risks identified in the risk assessment process must be dealt with.

7.2 To assist the employer with the risk assessment all possible relevant information such as accident statistics, ergonomic studies, research reports, manufacturers specifications, approvals, design criteria, performance figure for all relevant equipment, medical condition/disease impacts, etc. should be obtained and considered.

7.3 The existence of a medical condition with the likelihood of precipitating an acute illness or medical emergency is of particular concern in a mine, given that evacuation may entail a delay in providing treatment, and may put the health or safety of that individual or that of others at risk. The risk of an adverse outcome in the case of acute illness must be seen in the context of the particular mine/ entity in which an

employee works. For example, evacuation from deep level and open cast mines would not result in the same delays or risks.

7.4 In addition to the periodic review required by section 11(4) of the **MHSA**, the **COP** should be reviewed and updated after every serious incident relating to the topic covered in the **COP**, or if significant changes are introduced to procedures, mining and ventilation layouts, mining methods, plant or equipment and material. The results of any risk assessments required by section 11 of the **MHSA** and any relevant occupational exposure should also be considered.

7.5 The **OMP**, before making a decision on fitness to work, must consider all relevant legal obligations including those prescribed in the Labour Relations Act (**LRA**), Employment Equity Act (**EEA**), Basic Conditions of Employment Act (**BCEA**) and all relevant **COPs** linked to these Acts with special reference to management of employees with medical incapacity and disability.

The processes leading to a decision on fitness to work on a mine need to be based on risk management principles. Impairments may increase individual risk, but more importantly that of other employees also. Additionally, work exposures and environmental conditions may also impact on the ability of an employee to control impairment effectively, thereby increasing risk to health and safety. All these factors need to be considered prior to making a recommendation. However, to allow for reasonableness in taking fitness to work decisions, **OMPs** and employers should evaluate each case on its own merits, and should generally not allow “blanket exclusions” of employees suffering from certain conditions.

7.6 The methodology used for Risk Assessment is of particular concern for determining fitness to work on a mine/ entity and the **OMPs** responsible should make decisions, especially where an employee is found not to be fit to work in a specific job, by taking into consideration the specific risks of the specific job instead of “generalisation” of working groups (e.g. a truck driver with respiratory pathology working in a dust area but who has a relative low risk because of working in a relative safe area of an enclosed air conditioned environment).

7.7 Risk Assessment should be an integrated process between Management, Occupational Health (Including Occupational Medicine and Occupational Hygiene), Safety Professionals and Health and Safety Representatives. Where an employee’s medical condition constitutes an unreasonable risk to continue his/her work, such risk must be confirmed in writing by the **OMP** after taking into consideration the specifics of his/her medical condition and his/her working environment. Medical confidentiality must be respected at all times and cases related to medical detail may only be discussed on the Health and Safety Committee after written, informed consent has been obtained from the employee. Where such an employee does not consent to disclosure of his/her medical information to the Health and Safety Committee, the **OMP** should note such objection in writing and make the final decision on fitness to work taking into account the information available to the **OMP** at the time.

7.8 The employee’s medical condition should be interpreted in functional terms and in the context of the job requirements. Some disabilities or impairments may be irrelevant to perform a particular job without risk to health or safety and therefore such person is fit to do such work. This means that decisions on fitness to work must be based on

specific risk profiles of the individual job rather than the worst-case scenario on the mine.

8. ASPECTS TO BE ADDRESSED IN THE COP

The **COP** should address the process of health risk and health impact assessment, including ergonomic risks (see Annexure 1 attached: Health and Safety Risk Profile of the Mining Industry).

8.1 Extent and frequency of medical examination:

8.1.1 Initial/pre-placement examinations:
The **OMPs** must act on health disorders that are detected during initial or any other examination, either immediately or by appropriate referral. Fitness-to-work decisions must be reasonably practicably delayed until the state of maximum medical improvement has been reached. Employees should be informed of their obligation to comply fully to prescribed medical treatment regimens during this process and during the period of employment.

8.1.2 Periodic examination
Periodic examinations will be risk specific, taking into account the physical requirements of the occupation and workplace hazard exposure and results of risk assessment.

It is recommended that the result of this examination be either:

8.1.2.1 **The standards has been met:** a miner is fit for usual category of work.

8.1.2.2 **The standards has not been met:** a miner is unfit for usual category of work.

8.1.2.3 Discretion of the **OMP**.

The **COP** should address the discretion of the **OMP**:

8.1.2.3(a) At any periodic medical examination, the standards of fitness required of an employee should generally be the same as the initial standards of fitness to perform work.

8.1.2.3(b) Where there is illness or impairment present the **OMP** should always consider the effect this would have on the ability of the employee to continue work without endangering the health or safety of that employee or any other person.

8.1.2.3(c) It is impractical to cover all medical problems that employees may develop after employment and therefore the **OMP** should use professional discretion when applying the standards of fitness at periodic medical examinations.

The **COP** must consider the following:

8.1.2.3(d) The period of further exposure of the employee. Some occupational diseases take a long time to develop and further deterioration of health may continue

even after discontinuing exposure to the hazard. The further exposure of an employee to such a hazard where there is significant impairment present should be questioned. Where it is not practicable to reduce such exposure, it must be considered whether continuous exposure to these hazards (adversely affecting the employee's health) should be allowed and for what period of time. Where serious, permanent disablement could result, further exposure is undesirable thus e.g. an employee with more than 60 dB average pure tone hearing loss (0,5 kHz, 1, 2 and 3 kHz) is not fit to work in a noise zone at a mine.

8.1.2.3(e) The experience of the employee. Experience in a certain occupation or type of work usually enables employees to perform such work safely and without risk to their own or fellow employee's health or safety. This experience may compensate for impairment in such a way that allows the employee to continue performing work effectively without risk to health or safety.

8.1.2.3(f) The ability to protect the employee from further deterioration in health or impairment at work and reduce risk to fellow employees.

8.1.2.3(g) Supervision at work may reduce or eliminate health or safety risk due to illness or impairment. Examples are:

- Personal protective equipment may be required and its use supervised to ensure compliance where impairment has resulted from failure to use such equipment;

- Supervised work may ensure that an employee with an illness that may cause harm to that employee (e.g. Diabetes) will be able to receive help immediately. Where such supervision is not possible the employee would not be able to perform such work without risk;

- Similarly, a serving driver for passenger and goods conveyance is no longer fit to work as a driver if there is more than 40 dB averaged pure tone (0,5, 1, 2 and 3 kHz) (note: see paragraph 8.3.5.2.1) hearing loss, due to unacceptable risk to himself and fellow employees;

- Supervised medication may eliminate or reduce risk to the health or safety of an employee or fellow employees: A well-controlled, responsible diabetic under close medical surveillance and supervision may be able to perform work without creating unacceptable risk; and

- Where such supervision is not possible or where there is a documented reluctance of the employee to comply with such measures, the **OMP** should consider these in declaring an employee fit or unfit to continue to work.

8.1.2.3(h) The **COP** must address the comprehensive assessment of the employee, taking into account of all physical, emotional and psychological factors:

- In deciding whether an employee is fit to continue to work, consideration must be given as to how one condition may aggravate another.

- A holistic approach is required that takes cognisance of the employee's health, experience, the type of work, the risk involved etc. and how these collectively affect fitness to work.
- The employee's medical condition should be interpreted in functional terms and in the context of the job requirements. Some disabilities or impairments may be irrelevant to performing a particular job without risk to health or safety and therefore such a person is fit to do such work.

8.1.2.3(i) Alterations in exposure or medical surveillance:

- The **OMP** may consider declaring a person fit to continue working subject to certain conditions such as closer supervision and monitoring, which might include reduction in exposure or more frequent medical surveillance.
- Where the standards for fitness are not met at periodical examination, the results of the medical examination should be discussed with the employee to ensure full understanding of the risks and consequences.
- Should an employee be declared fit to work, despite certain impairments and where certain qualifications are applied to certain working standards and supervision etc., this must be discussed with the employee and the importance of these stressed to the employee.
- The **OMP** must notify the employer of the qualifications or conditions subject to which the employee may continue to perform specific work.

8.2 Exit medical examinations

The **COP** must address the exit medical examination by ensuring that all employees or persons who previously have been employed at a mine, have the right to appeal any finding of an **OMP** contained in an exit to the Medical Inspector in terms of section 20 of the **MHSA**. Regarding appeals, the Medical Inspector may, as far as possible, be assisted by the disclosure, in confidence, of personal medical information, in accordance with section 15 of the **MHSA**.

8.3 Categorisation of fitness to work

The **COP** should categorise the standards that has been met if an employee is fit for a particular job; or the standards that has not been met if an employee is unfit for a particular job:

8.3.1 Permanently unfit **or** temporarily unfit

The **COP** should address the issues related to unfitness at work and consider the following:

- Should a serving employee be found unfit to perform work by the **OMP**, the reason thereof and the effective date must be recorded in the employee's medical record.
- A decision that an employee is unfit to perform that employee's usual category of work should be reached only after thorough consideration of the case and the **OMP** should fully discuss the considerations with the employee. If requested in

writing by the employee, the employee's own medical practitioner should be informed of the decision and the reasons for it.

- If an employee is declared unfit to perform work by the **OMP** as a result of an occupational disease, the employer must conduct an investigation in terms of Section 11 (5) of **MHSA**.
- The **OMP** will follow appropriate procedures in terms of the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No 130 of 1993) (COIDA) or Occupational Diseases in Mines and Works Act 1973 (Act No 78 of 1973) (ODMWA) if applicable.
- The Mine Health and Safety Act contains provision (Section 20) for an employee to dispute a finding of unfitness to perform a particular category of work. In this case the employer will take reasonable steps to assist the employee.

8.3.2 Review of fitness after absence for medical reasons

Provision is made for the review of fitness after a period of absence due to medical reasons, irrespective of whether the reason is occupationally- or non-occupationally related or whether due to illness or injury. Sick note certificates used by mine medical practitioners will provide space for the treating doctor to indicate whether an employee is fit for his/her usual occupation. If declared unfit, or if the treating doctor is unsure of the employee's status of fitness, the employee may be referred to the occupational health centre for assessment.

In the case where the treating doctor is not employed by the mine, the sick note will be routed through the business unit's occupational health practitioner when the employee resumes work. The OHP will either accept the sick note as is or arrange for a review of fitness. The review of fitness will apply to all levels of employees, as well as the employees of contractors to the business unit.

8.3.3 Disability evaluation and transfer examinations (failed fitness-to-work examination).

Where the **OMP** certifies an employee as "not fit" for work, the **OMP** must make reference to why such decision was made e.g. "not able to comply with physical demands of job" as well as the reason for making this decision e.g. unable to climb stairs.

Reasonable care should be exercised in the process of evaluating potential impaired employees to not utilize the employee benefits of sick leave unnecessarily. Employees should be kept in employment as far as reasonably practicable while conducting investigations, except where further work exposures may drastically impact on an employee's wellbeing or safety, e.g. hearing impairment and pneumoconiosis. Where employees are removed from their job during these investigations, the case should be managed in line with the prescripts of the "Management of Medical Incapacity due to Ill-health and Injury" guideline.

8.4 Minimum standards of fitness to perform work at a mine

The **COP** should take the following into consideration:

8.4.1 The **OMP**, as the responsible competent person in terms of section 13 of the MHSA, must establish minimum health standards depending on findings of risk and health impact assessments at the specific mine.

8.4.2 This includes establishing and maintaining a risk based medical surveillance system for determining fitness to perform work of a strenuous nature.

8.4.3 The system should be holistic to include medical, physical and functional work capacity assessments.

8.4.4 The decision for fitness should be based on the outcomes of medical, physical and functional work capacity assessments. Failure to meet the standards of a single test should be dealt with in a discretionary way by the **OMP**. Some chronic conditions may need adequate supervision and control for successful accommodation to occur. The employee must give consent for disclosure of his condition, and allow for employer involvement with management and monitoring of compliance to treatment regimens.

8.4.5 To allow for substantive fairness in the process of fitness to work recommendations, **OMPs** should make notes and keep records of all aspects informing them on reaching recommendations. These records should be kept in the employee's medical file, and their confidentiality information maintained.

When making the decision about a person's ability to do a specific job it is imperative to take cognisance of the World Health Organisation's (WHO) stance to apply the Social Model approach rather than the Medical Model. (Refer to ILO Disability Management Code) (Annexure 1).

The **OMP** must determine minimum standards for each job category (**OREP** or man job specifications) as demonstrated in table 1 below.

Table 1: Categorisation and minimum standards for strenuous work

Very Heavy	**Manual Material Handling:** Consists of 34-66% of the work shift (daily exposure). **Work Environment:** Manual material handling takes place in restricted work environments (ceiling heights of 0.850m - 1.5m). **Heat Exposure:** Daily exposure to high environmental heat loads for more than 34% of the work shift. **Production / Non-production Related:** Work tasks are imposed by a process (directly linked to production).

Heavy	**Manual Material Handling:** Consists of 34-66% of the work shift (daily exposure). **Work Environment:** Manual material handling takes place in unrestricted work environments. **Heat Exposure:** Daily exposure to high environmental heat loads for more than 34% of the work shift. **Production / No-production Related:** Work tasks are imposed by a process (directly or indirectly linked to production).
Moderate	**Manual Material Handling:** Load handling consists of less than 34% of the work shift on a daily basis or more than 34% of the work shift on an occasional basis. **Work Environment:** Unrestricted work environments or supervisory work in restricted environments. **Heat Exposure:** Occasional exposure or daily exposure in case of supervisory work. **Production / Non-production Related:** Work tasks indirectly linked to production.
Light	**Manual Material Handling:** Load handling consists of less than 34% of the work shift - occasional load handling. **Work Environment:** Unrestricted work environments and/or occasional exposure to restricted work areas. **Heat Exposure:** Occasional exposure. **Production / Non-production Related:** Work tasks indirectly linked to production.
Sedentary	**Manual Material Handling:** Load handling limited to loads of up to 10kg, occasional exposure only. **Work Environment:** Unrestricted. Work tasks take place in a seated/standing work position for at least 50% of the work shift. **Heat Exposure:** Not exposed to heat.

	Production / Non-production Related: Not linked to production.
Roaming	**Manual Material Handling:** None. No external workloads required other than wearing PPE. **Work Environment:** Unrestricted. **Heat Exposure:** Low exposure to heat. **Production / Non-production Related:** Not linked to production. i.e. no external workloads; physical demands essentially restricted to walking, climbing or crawling wearing prescribed PPE but not transporting any equipment etc.

8.5 Different bodily systems

The **COP** should address the following:

8.5.1 Cardiovascular system

The cardiovascular system should be free from acute or chronic disease, which may impair ability to undertake the required physical exertion for a particular category of work. Persons with cardiovascular disease, particularly ischaemic heart disease or uncontrolled hypertension, are not suitable for employment as drivers of passenger or dangerous goods conveyances. A Physical Work Capacity screening (PWC) may be recommended by the **OMP** as an objective assessment of the cardiovascular system.

With reference to hypertension, controlled blood pressure should be below 140 mm Hg (systolic) and 90 mm Hg (diastolic).

8.5.2 Respiratory system

8.5.2.1 The respiratory system should be free from acute or chronic disease, which may impair the ability to meet the required physical performance of a particular category of work.

8.5.2.2 For screening purposes a lung function test is normal if FEV1 is greater than 80% of predicted or the (FEV_1/FVC) ratio is equal to or greater than 70%.

8.5.2.3 In individuals where there are mild abnormalities of lung function this test should not be the sole criterion on which an individual is precluded from mine work. If the individual otherwise appears to have a normal cardio-respiratory system and is able to meet the physical performance requirements of the specified occupation then he may be found fit for a particular category of work. Refer to the MOHAC Guidance Note for occupational medical practitioners on lung function testing.

8.5.2.4 Any respiratory impairment, whether occupational or non-occupational in origin, equal to or greater than that which may be required for a certification of second degree occupational lung disease, would disqualify an employee for work in an environment considered a respiratory risk.

8.5.2.5 Active, infectious pulmonary tuberculosis

The **OMP** will refer an employee suffering from active tuberculosis for appropriate treatment. The employee is not fit to work in a condition where there is continuous infectivity or serious permanent impairment. Employees, where either one or both lungs have been seriously affected by previous tuberculosis, should not be exposed to dust environments

8.5.3 Endocrine and metabolic system

8.5.3.1 Diabetes mellitus

Diabetics may be employed in such occupations as the **OMP** may consider safe having regard to their condition. Insulin dependent diabetics should not work underground except under exceptional circumstances where the **OMP** is satisfied that all required health or safety concerns have been met. Well-controlled, mild non-insulin dependent diabetics may be certified fit to work in a particular category of work underground. Well-controlled, mild non-insulin dependent diabetics may be certified fit to work by the **OMP** as drivers for non-passenger or ordinary goods conveyance.

8.5.3.2 Obesity

A degree of obesity adversely affecting heat tolerance or the ability to exercise, mobility, general health or possible medical evacuation may render a person unfit for a particular category of work. Obesity may also be associated with sleep apnoea.

8.5.4 Diseases of the blood and blood forming organs

Any significant disease of the hematopoietic system may preclude employment in certain categories of work.

8.5.5 Mental and behavioural disorders

8.5.5.1 Acute or Chronic Psychosis

A person suffering from a psychosis may not be fit for a particular category of work.

8.5.5.2 Alcohol or substance abuse / dependency

To be guided by the Alcohol and Substance Abuse Policy, as directed by the Health and Safety Committee at the mine.

8.5.6 Reproductive system

Women should be protected against health risks during pregnancy, after birth and while breast feeding.

The Department of Labour (DoL) has provided a Code of Practice in terms of Section 87 (1) (b) of the Basic Conditions of Employment Act (75 of 1997). Occupational Medicine Practitioners should refer to this code to guide them on the management of this category of employees (Ref: No 19453 Government Gazette, 13 November 1998; No R.1441 13 November 1998).

8.5.7 Diseases of the nervous system and sensory organs

8.5.7.1 Epilepsy and other conditions of altered or impaired consciousness

8.5.7.1.1 Any medical condition which may result in an altered or impaired level of consciousness, including epilepsy, renders a person unsuitable for employment in certain areas or occupations on a mine, such as underground, or operation of moving machinery or in dangerous situations such as working at heights, near water, high voltage electricity or any other potentially dangerous situations.

8.5.7.1.2 Notwithstanding the above, an epileptic under medical treatment and without any events within a preceding period of two years may be considered fit for certain categories of work underground or on surface.

8.5.7.1.3 No persons with a history of epilepsy may ever be certified fit as a driver for passenger or dangerous goods conveyance.

8.5.7.2 Ear, nose and throat

An ear, nose and throat examination is required (which includes intact tympanic membranes and functioning Eustachian tubes) and the minimum standards set out below must be met for occupations involving changes in barometric pressure and /or exposure to noise.

8.5.7.2.1 Audiometric Standards

Pure tone audiometric screening at 0,5 kHz, 1 kHz, 2 kHz and 3 kHz must meet the following criteria:

8.5.7.2.1(a) Age 16-39: pure tone average of 15 dB or less

8.5.7.2.1(b) Age 40 AND ABOVE: Pure tone average of 25 dB or less

8.5.7.2.1(c) IRRESPECTIVE OF AGE: a threshold of 45 dB or less at 3 kHz.

8.5.7.2.2 Hearing Aids

The use of a hearing aid by those working in a designated noise zone should not be permitted.

8.5.7.2.3 Vision and eye disorders

Binocular vision is necessary for all categories of underground employees.

Visual acuity, corrected, should be:

8.5.7.2.3(a)	Underground:	6/9 binocular	6/12 weaker eye
8.5.7.2.3(b)	Surface	6/18 binocular	6/24 weaker eye
8.5.7.2.3(c)		Passengers or goods conveyance	6/9 binocular 6/9 worst

Colour vision and normal visual fields are required for passenger, dangerous and non-dangerous goods conveyances and certain other occupations, such as electricians. A normal visual field refers to at least 50 degrees nasal and 70 degrees temporal vision.

8.5.7.2.4 Skin

A history of or presence of skin conditions liable to be aggravated by working conditions may preclude employment in a particular category of work.

8.5.8 Musculo skeletal system

SPINE

There should be sufficient musculo-skeletal integrity to undertake the required physical exertion for a particular category of work. Physical Work Capacity (PWC) or Functional Work Capacity (FWC) may be recommended by the **OMP** to assess fitness to perform work of a strenuous nature.

It will be important for **OMPs** to differentiate between degenerative processes which are normal for a specific age and “pathological” degeneration before a decision is made on fitness to work and in most cases a specialist orthopaedic surgeon or specialist neurosurgeon opinion should be considered. Occupational therapy, physiotherapy and biokineticist functionality evaluation reports may assist the **OMP** with Fitness To Work (FTW) recommendations.

8.5.9 Diseases of the digestive system

There should not be any significant disease of the digestive system, which may impair ability to perform a particular category of work.

The **OMP** will take special care to ensure that persons suffering from Gastro-Intestinal Infectious Diseases should not be involved in the handling of food.

8.5.10 Diseases of the genito-urinary system

There should no unexplained proteinuria, glycosuria, haematuria or other urinary abnormalities, which may render a person unfit for a particular category of work.

8.5.11 Heat tolerance

For employees working in conditions where the wet bulb temperature is equal to or exceeds 27,5 degrees Celsius, or the dry the bulb temperature is equal to or exceeds 37.0 degrees Celsius, the **COP** drawn up in accordance with the Guideline for the Mandatory **COP** on Thermal Stress Management of the **DMR** should be applied. Employees, who need to work in such environments, must meet all the physical requirements and pass the necessary screening tests prescribed in that guideline and **COP** before being declared fit to work.

8.6 Medical surveillance and records

This issue is dealt with comprehensively in the Guideline for the Compilation of a Mandatory **COP** on the Roles and Responsibilities of Occupational Health Practitioners in a System of Medical Surveillance on a Mine (**DMR** 16/3/3/3-A7). The following comments are made in order to link the relevant **COPs**:

8.6.1 Occupational medical surveillance will be done at each of the occupational health centers. Staff conducting medical examinations will be competent in terms of requirements of the **MHSA**.

8.6.2 Records will be kept in a medically confidential manner at occupational health centers and computerized network records will have appropriate access controls. These may be made available only in accordance with the ethics of medical practice, or if required by law or court order, or if the employee has in writing consented to the release of the information (section 15 of **MHSA**).

8.6.3 Employees are entitled to copies of, or copies of parts of, medical surveillance records or records of occupational hygiene measurements that relate to themselves (section 19 of the **MHSA**).

8.6.4 All reasonable steps will be taken to ensure that records of medical surveillance will be stored safely and not be destroyed or disposed of for 40 years from the last date of medical surveillance of an employee, as prescribed by the **MHSA** (sections 15(2) and 13(8)).

8.6.5 Medical surveillance procedures will be transparent and open to discussion with all role-players. Endeavors will be made to conduct these professionally, scientifically and based on best reasonable current medical practice.

8.7 Medically affected employee policy and procedures

The **COP** must address a formalized policy and procedure in place, which will effect fair assessment and encourage optimal placement of employees found unfit for their usual category of work.

Out of cycle assessments:

Employees may refer themselves or may be referred for assessment as to fitness to continue in their current occupation at **any time**, e.g.:

- An employee who has problems in coping with the physical demands of his occupation.
- An employee may suspect a work-related illness, such as boot dermatitis.

Line Management or the Human Resources Department may refer an employee who is unable to cope at work.

8.8 Appeals

Should the employee or his/her representative dispute the decision that the employee is unfit to perform work, the employee may lodge an appeal in terms of Section 20 of the **MHSA** with the Medical Inspector.

8.9 Conclusion

It is clearly impossible to encompass within the guideline specific advice on every medical condition. However, as a general rule the **OMP** conducting the examination should be satisfied in each case that no medical condition or impairment is present which could either be significantly aggravated by working in a mine/ entity or represent an unacceptable health or safety risk to the individual employee, or any other person at the mine. Conditions not specified in the guideline, which impact on health or safety should also be assessed in the light of this general principle. For assessment of fitness to work on a mine/ entity according to this guideline an employee is an employee as defined by both **MHSA**.

There may be different evidence-based guidelines which can be used for assessment of medical impairment and the ability to do specific work, for example the official disability guidelines used by American Academy for Disability Evaluating Physicians. The Guides to the Evaluation of Permanent Medical Impairment - 6th Edition (American Medical Association) describes the levels of impairment of bodily systems to indicate to **OMPs** when such impairments could be classified as Minimal, Mild, Moderate and Severe; this supports the **OMPs** to create a more informed opinion on the work stressors that employees with medical conditions can cope with.

PART D: IMPLEMENTATION

1. IMPLEMENTATION PLAN

1.1 The employer must prepare an implementation plan for its **COP** that makes provision for issues such as organisational structures, responsibilities of functionaries and programs and schedules for this **COP** that will enable proper implementation of the **COP**. (A summary of/and a reference to, a comprehensive implementation plan may be included.)

1.2 Information may be graphically represented to facilitate easy interpretation of the data and to highlight trends for the purpose of risk assessment.

2. COMPLIANCE WITH THE COP

The employer must institute measures for monitoring and ensuring compliance with the **COP**.

3. ACCESS TO THE COP AND RELATED DOCUMENTS

3.1 The employer must ensure that a complete **COP** and related documents are kept readily available at the mine for examination by any affected person.

3.2 A registered trade union with members at the mine or where there is no such union, a health and safety representative on the mine, or if there is no health and safety representative, an employee representing the employees on the mine, must be provided with a copy on written request to the manager. A register must be kept of such persons or institutions with copies to facilitate updating of such copies.

3.3 The employer must ensure that all employees are fully conversant with those sections of the **COP** relevant to their respective areas of responsibility.

ANNEXURE 1: Minimum Standards Table – for compliance (from original document)

PARAMETER	NO HAZARD	MINES / WORKS SURFACE	MINES UNDERGROUND	SURFACE OR UNDERGROUND	
Fitness category	1	2	3	4	5
Frequency of examination	3 yearly	Annual	Annual	Annual	Annual
Minimum age	16	18	18	21	21
Visual acuity loss (corrected)	-	6/18 binocular 6/24 worst	6/9 binocular 6/12 worst monocular vision - refer **OMP**	6/9 binocular 6/9 worst monocular vision - refer **OMP**	
Colour blindness (consider testing)	-	-	-	Consider exclusion	Consider exclusion
Hearing (Average binaural hearing loss in 0,5,1,2,3 kHz frequencies)	-	Initial: Age 16–39 <15dB, 40+ <25dB, also <45dB at 3kHz → Temp unfit. Previous employer to refer for Diagnostic Audiogram. If compensated previously, provide proof			
		> 60dBA – unsuitable		> 40dBA - unsuitable	
Spirometry	-	FVC <80% of expected FEV1/FVC <70% of expected Refer to **OMP**			
		If certified with 1° degree or 2° degree silicosis – not fit to work in silica exposed environment > 10% of OEL – refer **OMP**			
Epilepsy	-	Unsuitable (until 2ys fit free)		Permanent Exclusion	
Diabetes	Well controlled Diabetes – OK Well controlled NIDDM – OK IDDM – OK, depending on hazards exposure Adequate sugar control for the work environment		Well controlled NIDDM – OK IDDM - Unsuitable, except in special circumstances (Refer **OMP**)	Well controlled NIDDM - OK IDDM - Unsuitable	NIDDM / IDDM - Unsuitable

Alcohol / drug abuse screening	Refer **OMP**	Refer **OMP**	Refer **OMP**	Unsuitable if positive (must test)
Heat tolerance screening (if exposed to heat) **Referral for HTS** (see Guideline for the Mandatory **COP** for an Occupational Health Programme on Thermal Stress **COP**)	-	Any history of repeated heat cramps - Refer to **OMP** Any history of heat exhaustion/heat stroke – Refer to **OMP** Failed HTS x3 – Refer to **OMP** Refer for HTS if indicated in Thermal Stress **COP** or if risk factors below is present (1 AND 2 plus 3 OR 4): 1. Age >50ys; 2. BMI >30; 3. Employee has any chronic medical condition; 4. Any history of heat related illness since last visit		
Weight (refer BMI nomogram) BMI 20-26 Normal	BMI <15 or >35 - Counsel	BMI < 19 or >35 or weight <50kg or >130 kg – Refer to RFA, then **OMP**		
Physical Labor **Physical / Functional work capacity**	-	Referral during annual medical surveillance or out-of-cycle examination only if risk factors at the discretion of the OHP/**OMP**		

Category 4

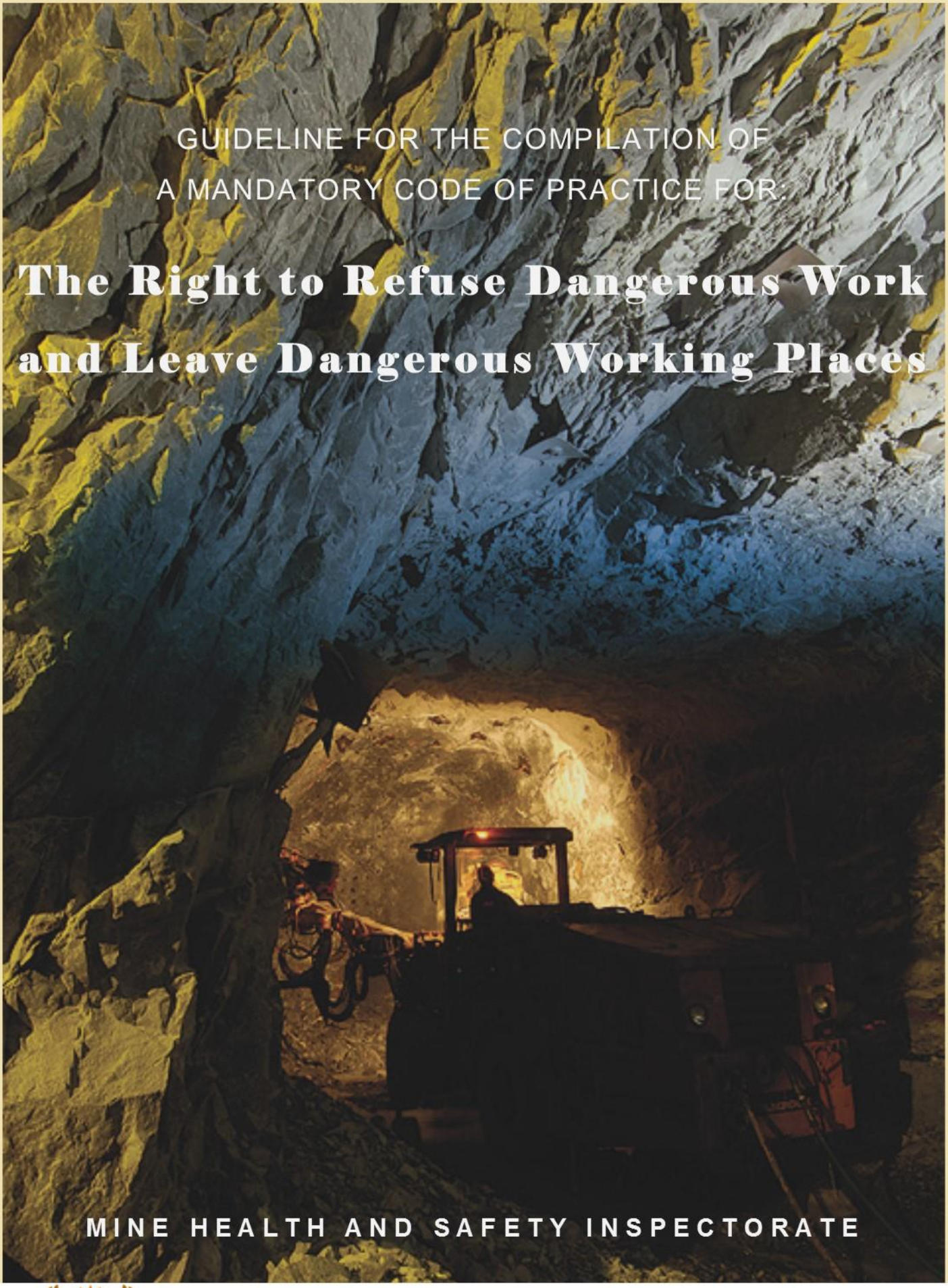
NON-PASSENGER AND ORDINARY GOODS CONVEYANCE AND WORK INVOLVING HEAVY OR POTENTIALLY DANGEROUS MACHINERY

e.g. Drivers or operators of non-passenger locomotives, dump trucks, delivery vehicles, loaders, cranes, forklifts, tractors, pumps, riggers, shaft timbermen, ventilation fan attendants, fridge plant staff, electricians, instrument technicians and other occupations thought to fall within this category.

Category 5

PASSENGER AND DANGEROUS GOODS CONVEYANCE

e.g. Winding Engine Drivers, Drivers of Busses, taxis, locomotives, onsetters, banksmen and other occupations thought to fall within this category.



GUIDELINE FOR THE COMPILATION OF
A MANDATORY CODE OF PRACTICE FOR:

The Right to Refuse Dangerous Work and Leave Dangerous Working Places

MINE HEALTH AND SAFETY INSPECTORATE

mineral resources
Department:
Mineral Resources
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DEPARTMENT OF MINERAL RESOURCES

MINE HEALTH AND SAFETY INSPECTORATE

GUIDELINE FOR THE COMPILATION OF A

MANDATORY CODE OF PRACTICE ON

THE RIGHT TO REFUSE DANGEROUS WORK AND LEAVE A DANGEROUS WORKING PLACE



CHIEF INSPECTOR OF MINES

mineral resources
Department:
Mineral Resources
REPUBLIC OF SOUTH AFRICA

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PART A: THE GUIDELINE

1. FOREWORD

1.1 At the **MHSC OHS** Summit held in November 2011, the stakeholders adopted an action plan aimed at improving various aspects of health and safety at mines. As part of implementing the 2011 Summit Action Plan, the **MHSC** subsequently instructed **MRAC** to develop a draft guideline on the **RRDW** for the South African mining sector. This guideline has its origins in that request.

1.2 Under common law employers are required to provide and maintain a work environment that is safe and without risk to the health or safety of employees. This is reflected in section 2 of the **MHSA** which requires the employer to ensure, as far as reasonably practicable, that the mine is commissioned, operated, maintained and decommissioned in such a way that employees can perform their work without endangering the health and safety of themselves or of any other person.

1.3 Arising from this entitlement to a safe working environment, employees have the **RRDW** under common law. (There are certain exceptions, e.g. policemen, firemen, security guards, etc. who are specifically employed to do certain dangerous work.) This right entails not only that the employee is entitled to leave a working place where he / she has reason to believe that the working place is unsafe (the **RLDWP**), but also that an employee is entitled to refuse to do work in a working place that is safe, but in which there is any equipment, machine, device or thing the employee is required to use or operate which is likely to endanger himself/herself or any other employee (the **RRDW**). Put differently, the **RRDW** can be exercised either by refusing to do the required work but remaining in the working place, or by refusing to do the required work and leaving the working place.

1.4 Section 23(1)(a) of the **MHSA** partly reflects the common law mention above. It gives employees the **RLDWP** if circumstances arise which, with **reasonable justification**, appear to that employee to pose a serious danger to the health or safety of that employee or if the health and safety representative responsible for that working place directs that employee to leave that working place. The fact that section 23 does not mention the **RRDW** does not mean employees do not have that right. This guideline will cover both these rights.

1.5 This Guideline was informed by two studies conducted by the Centre for Sustainability in Mining and Industry (CSMI) of the University of the Witwatersrand, i.e. International Legislative Review “The Right to Refuse Dangerous Work” (August 2013) and a Sector Wide “Quantitative and Qualitative Study on The Right to Refuse Dangerous Work” (September 2013).

1.6 Section 23(2) of the **MHSA** requires the employer, after consulting the health and safety committee at the mine, to determine effective procedures for the general

exercise of the rights granted by section 23(1). The purpose of this guideline is to assist the employer in drawing up its **COP** so that it contains such effective procedures for the general exercise of the **RRDW** and the **RLDWP** and that the employer complies with section 23(2).

2. LEGAL STATUS OF GUIDELINES AND CODES OF PRACTICE

In accordance with section 9(2) of the **MHSA** an employer must prepare and implement a **COP** on any matter affecting the health or safety of employees and other persons who may be directly affected by activities at the mine if the Chief Inspector of Mines requires it. These **COP**s must comply with the relevant guideline issued by the Chief Inspector of Mines (section 9(3)). Failure by the employer to prepare or implement a **COP** in compliance with this Guideline is a breach of the **MHSA**.

3. OBJECTIVE OF THE GUIDELINE

3.1 The objective of this guideline is to assist the employer, in consultation with the health and safety committee at the mine, with the drafting of a **COP** including a procedure to be followed by the employees, health and safety representatives, and employers in the exercise of the **RRDW** and **RLDWP**.

3.2 It provides guidance of a general nature on the required format and contents for the **COP** and details sufficient information to enable the employer at the mine to prepare a comprehensive and practical procedure for the exercise of the **RRDW** and **RLDWP**.

4. DEFINITIONS AND ACRONYMS

In this guideline for a **COP** or any amendment thereof, unless the context otherwise indicates:

"COP" means Code of Practice

"DMR" means Department of Mineral Resources

"**EMPLOYEE"** means any person who is employed or working at a mine

"MHSA" means Mine Health and Safety Act, 1996 (Act No. 29 of 1996), as amended

"MHSC" means the Mine Health and Safety Council

"MRAC" means the Mining Regulation Advisory Committee

"OHS" means occupational health and safety

"**RLDWP"** means the right to leave a dangerous working place

"RRDW" means the right of refusal to do dangerous work

"Reasonable justification" means that the employee has some objective information that makes him or her believe there are unsafe conditions at the working place or the work to be done is unsafe to the extent that there is an imminent and serious danger to the health or safety of person at that working place. The employee does not have to be correct in his or her knowledge or belief, but such belief should be reasonable given the information of the employee. These principles apply to both the **RRDW** and **RLDWP**

5. SCOPE

This mandatory guideline covers the legislative background to and procedures for exercising of the **RRDW** and **RLDWP**.

6. TASK GROUP MEMBERSHIPS

The members of the Task Group involved in the preparation of this guideline were:

State
(a) Anthony Coutinho
(b) Maelula Ramabulana
(c) Shimanyana Kgosiemang
(d) Kevin Hewitson

Employers
(a) Anton van Achterbergh
(b) Duncan Scott

Labour
(a) Paul Mardon
(b) Martha Llale

Consultant
(a) Noel Williams

PART B: AUTHOR'S GUIDE

1.1 The **COP** must, where possible, follow the sequence laid out in Part C "*Format and Content of the **COP***". The pages as well as the chapters and sections must be numbered to facilitate cross-reference. Wording must be unambiguous and concise.

1.2 It should be indicated in the **COP** and on each annexure to the **COP** whether:

1.2.1 The annexure forms part of the **COP** and must be incorporated in the **COP** or whether aspects thereof must be incorporated in the **COP**; or

1.2.2 The annexure is merely attached as information for consideration in the preparation of the **COP**.

1.3 When annexures are used the numbering should be preceded by the letter allocated to that particular annexure and the numbering should start at one (1) again. (e.g. 1, 2, 3, A1, A2, A3, …).

1.4 Whenever possible illustrations, tables, graphs and the like should be used to avoid long descriptions and/or explanations.

1.5 When reference has been made in the text to publications or reports, references to these sources must be included in the text as footnotes or sidenotes as well as in a separate bibliography.

PART C: FORMAT AND CONTENT OF THE MANDATORY CODE OF PRACTICE

1. TITLE PAGE

The **COP** should have a title page reflecting at least the following:

1.1 The name of mine;

1.2 The Heading: "Mandatory Code of Practice on the Right to Refuse Dangerous Work and Leave a Dangerous Working Place";

1.3 A statement to the effect that the **COP** was drawn up in accordance with Guideline **DMR** Reference Number **DMR** 16/3/2/1-A6 issued by the Chief Inspector of Mines;

1.4 The mine reference number for the **COP**;

1.5 Effective date; and

1.6 Revision dates (if applicable).

2. TABLE OF CONTENTS

The **COP** must have a comprehensive table of contents.

3. STATUS OF MANDATORY COP

This section must contain statements to the effect that:

3.1 The mandatory **COP** was drawn up in accordance with Guideline **DMR** Reference Number: **DMR** 16/3/2/1-A6 issued by the Chief Inspector of Mines;

3.2 This is a mandatory **COP** in terms of sections 9(2) and 9(3) of the **MHSA**;

3.3 The **COP** may be used in an accident investigation/inquiry to ascertain compliance and also to establish whether the **COP** is effective and fit for purpose;

3.4 The **COP** supersedes all previous relevant **COP**s; and

3.5 All managerial instructions or recommended procedures (Voluntary **COP**s) and standards on the relevant topics must comply with the **COP** and must be reviewed to ensure compliance.

4. MEMBERS OF DRAFTING COMMITTEE

4.1 In terms of section 9(4) of the **MHSA** the employer must consult with the Health and Safety Committee on the preparation, implementation or revision of any **COP**.

4.2 It is recommended that the employer should, after consultation with the employees in terms of the **MHSA**, appoint a committee responsible for the drafting of the **COP**.

4.3 The members of the drafting committee assisting the employer in drafting the **COP** should be listed giving their full names, designations, affiliations and experience. This committee should include competent persons sufficient in number effectively to draft the **COP**.

5. GENERAL INFORMATION

General relevant information relating to the mine must be stated in this paragraph. The following minimum information must be provided:

5.1 A brief description of the mine and its location;

5.2 The commodities produced;

5.3 The mining methods or combination of methods used at the mine must be listed and their particular risks associated with these methods;

5.4 The unique features of the mine that have a bearing on this **COP** must be set out and cross-referenced to the risk assessment conducted; and

5.5 Other relevant **COP**s.

6. TERMS AND DEFINITIONS

Any word, phrase or term of which the meaning is not absolutely clear or which will have a specific meaning assigned to it in the **COP**, must be clearly defined. Existing and/or known definitions should be used as far as possible. The drafting committee should avoid jargon and abbreviations that are not in common use or that have not been defined. The definitions section should also include acronyms and technical terms used.

7. RISK MANAGEMENT

Section 11 of the **MHSA** requires the employer to identify hazards, assess the health and safety risks to which employees may be exposed while they are at work, record the significant hazards identified and risks assessed. Other related **COP**s must

address how the significant risks identified in the risk assessment process must be dealt with, having regard to the requirements of section 11(2) and 11(3) that, as far as reasonably practicable, attempts should first be made to eliminate the risk, thereafter to control the risk at source, thereafter to minimise the risk and thereafter, insofar as the risk remains, provide personal protective equipment and to institute a programme to monitor the risk. Where despite these controls a significant imminent risk arises, employees may need to exercise the **RRDW** or the **RLDWP**.

8. ASPECTS TO BE ADDRESSED IN THE COP

While the main purpose of the **COP** should be to set out an effective mine specific procedure for employees to exercise their **RRDW** and **RLDWP**, it is important for that procedure to be put in context, so that employees and management understand and are in agreement how it fits into the overall risk management process at the mine. It is therefore recommended that the **COP** should include the aspects set out below.

8.1 Legislative background

The **COP** should first set out the legislative background relating to the **RRDW** and **RLDWP**. Annexure 1 sets out the common law and most of the relevant **MHSA** provisions. Those provisions of Annexure 1 which are relevant to the circumstances at the mine should be included in the **COP** in a logical sequence and in simple language which the persons at the mine would clearly understand. Annexure 1 is attached for information purposes and should be consulted in the preparation of the **COP**.

8.2 Summary of major health and safety hazards

The **COP** should set out a table of the major health and safety hazards identified in terms of the mine's risk assessment which may give rise to employees having to exercise the **RRDW** or **RLDWP**. This table should also identify the major dangers associated with each such identified hazard. The table should be reviewed and updated on a regular basis and therefore it may be preferred to attach it as an annexure to the **COP**. Annexure 2 is an example of how this could be done. This is by no means an exhaustive list, but a list of some commonplace hazards. The hazards in Annexure 2 may not be relevant to the mine and are given for illustrative purposes only. Annexure 2 is attached for information purposes in the preparation of the **COP**.

8.3 Procedure for employees to exercise their RRDW and RLDWP

8.3.1 The **COP** should set out an effective mine specific procedure for employees to exercise their **RRDW** and **RLDWP** having regard to the minimum requirements of

what must be included in the procedure as contained in section 23(2)(a) - (e) of the **MHSA**.

8.3.2 The aim of the procedure should be to ensure that the circumstances giving rise to any employee exercising the **RRDW** or **RLDWP** are addressed, and any disputes about them, are resolved as expeditiously as possible at the lowest possible level of the organizational structure, but with the matter being capable of being elevated, if it remains unresolved, to appropriate more senior levels until it is resolved at the highest level at the mine or by the employer.

8.3.3 In the case of small or smaller mines, the levels of organizational structures will differ and in some instances, there may only be one. In such cases more than one appeal level would be inappropriate. Procedures appropriate to the organizational levels at the mine should be determined, having regard to the aforesaid principal that disputes should be resolved as expeditiously as possible, but be capable of being elevated to the highest level of management.

8.3.4 The different steps of the procedure should also contain strict time limits within which those steps should be taken.

8.3.5 The persons potentially involved in each step of the procedure should be clearly identified (with names and occupations, where appropriate) and the functions and powers of each person clearly set out.

8.3.6 Where appropriate, the procedure could describe how certain steps should be performed (e.g. what employees must do when they exercise the **RRDW** or **RLDWP**; how a workplace should be barricaded off; etc.).

Annexure 3 sets out an example of a procedure for employees to exercise their **RRDW** and **RLDWP.** This annexure is for information purposes and should be consulted in drafting the **COP**.

8.4 Training

The **COP** should identify all the persons who could be involved in any of the steps of the procedure to exercise the **RRDW** or **RLDWP,** from the employees, health and safety representatives, supervisors, etc. to the highest level of management, and set out:

8.4.1 The different training requirements for each of these persons or groups of persons;

8.4.2 What the training should cover, which could include the following:

8.4.2.1 The major health and safety hazards, their identification and controls thereof;

8.4.2.2 The **RRDW** and **RLDWP**;

8.4.2.3 When the **RRDW** and **RLDWP** can be exercised and by whom;

8.4.2.4 The procedure for exercising the **RRDW** and **RLDWP**;

8.4.2.5 The interface between the **RRDW** and **RLDWP** and other risk management processes at the mine;

8.4.2.6 How employees can raise a complaint in the event of any obstruction to them exercising or wanting to exercise the **RRDW** or **RLDWP**; and

8.4.2.7 Previous occurrences where employees have exercised the **RRDW** or **RLDWP** and lessons learnt.

8.4.3 How often the training should be given / refreshed;

8.4.4 Who will be doing the training; and

8.4.5 Measures to ensure, measure and monitor the effectiveness of the training.

8.5 Communication

The **COP** should set out a communication strategy that highlights management's support for employees to exercise the **RRDW** and **RLDWP** under appropriate circumstances and that reinforces awareness amongst employees of this aspect of risk management. The communication strategy should identify the different target audiences, the appropriate language to be used for each and could cover the following:

8.5.1 Regular communication bulletins and newsletters;

8.5.2 Regular awareness activities, which could include the following:

8.5.2.1 Print media: posters and pamphlets;

8.5.2.2 Electronic, audio--visual and new media: DVD clips at the shaft bank, sms messages, email and digital media;

8.5.2.3 Promotional media: T-shirts, caps, helmet stickers and cards; and

8.5.2.4 Face to face: tool box talks and drama.

8.5.3 Visible felt leadership, involving management:

8.5.3.1 Complying with health and safety rules;

8.5.3.2 Regular discussions with all levels of employees;

8.5.3.3 Support for employees who have exercised the **RRDW** or **RLDWP**; and

8.5.3.4 Support for health and safety representatives who have requested employees to exercise the **RRDW** or **RLDWP**.

PART D: IMPLEMENTATION

1. IMPLEMENTATION PLAN

1.1 The employer must prepare an implementation plan for its **COP** that makes provision for issues such as organisational structures, responsibilities of functionaries and programmes and schedules for this **COP** that will enable proper implementation of the **COP**. (A summary of/and a reference to, a comprehensive implementation plan may be included.)

1.2 Information may be graphically represented to facilitate easy interpretation of the data and to highlight trends for the purpose of risk assessment.

2. COMPLIANCE WITH THE COP

The employer must institute measures for monitoring and ensuring compliance with the **COP**.

3. ACCESS TO THE COP AND RELATED DOCUMENTS

3.1 The employer must ensure that a complete **COP** and related documents are kept readily available at the mine for examination by any affected person.

3.2 A registered trade union with members at the mine or where there is no such union, a health and safety representative on the mine, or if there is no health and safety representative, an employee representing the employees on the mine, must be provided with a copy of the **COP** on delivery of a written request to the employer. A register must be kept of such persons or institutions with copies to facilitate updating of such copies.

3.3 The employer must ensure that all employees are fully conversant with those sections of the **COP** relevant to their respective areas of responsibility.

ANNEXURE 1: The legislative background relating to the **RRDW** and **RLDWP**

1. The common law

1.1 Employers are required to provide and maintain a work environment that is safe and without risk to the health or safety of employees.

1.2 Arising from this entitlement to a safe working environment, employees have the **RRDW** under common law. (There are certain exceptions, e.g. policemen, firemen, security guards, etc. who are specifically employed to do certain dangerous work.) This right entails not only that the employee is entitled to leave a working place where he has reason to belief that the working place is unsafe (the **RLDWP**), but also that an employee is entitled to refuse to do work in a working place that is safe, but in which there is any equipment, machine, device or thing the employee is required to use or operate which is likely to endanger himself/herself or any other employee (the **RRDW**). Put differently, the **RRDW** can be exercised either by refusing to do the required work but remaining in the working place, or by refusing to do the required work and leaving the working place.

2. The MHSA

2.1 Section 2:

(1) The *employer* of every *mine* that is being worked must:

(a) Ensure, as far as *reasonably practicable*, that the *mine* is designed, constructed and equipped:
(i) To provide conditions for safe operation and a *healthy* working environment; and
(ii) With a communication system and with electrical, mechanical and other equipment as necessary to achieve those conditions.

(b) Ensure, as far as *reasonably practicable*, that the *mine* is commissioned, operated, maintained and decommissioned in such a way that *employees* can perform their work without endangering the *health* and *safety* of themselves or of any other person.

2.2 Section 6:

(1) Every *employer* must:

(a) Supply all necessary *health and safety equipment* and *health* and *safety* facilities to each *employee*; and

(b) Maintain, as far as *reasonably practicable*, that equipment and those facilities in a serviceable and hygienic condition.

(2) Every *employer* must ensure that sufficient quantities of all necessary personal protective equipment are available so that every *employee* who is required to use that equipment is able to do so.

(3) Every *employer* must take reasonable steps to ensure that all *employees* who are required to use personal protective equipment are instructed in the proper use, the limitations and the appropriate maintenance of that equipment.

2.3 Section 10:

(1) As far as *reasonably practicable*, every *employer* must:

(a) Provide *employees* with any information, instruction, training or supervision that is necessary to enable them to perform their work safely and without *risk* to *health*; and

(b) Ensure that every *employee* becomes familiar with work-related *hazards* and *risks* and the measures that must be taken to eliminate, control and minimise those *hazards* and *risks*.

(2) As far as *reasonably practicable*, every *employer* must ensure that every *employee* is properly trained:

(a) To deal with every *risk* to the *employee's health* or *safety* that:
(i) Is associated with any work that the *employee* has to perform; and
(ii) Has been recorded in terms of section 11.

(b) In the measures necessary to eliminate, control and minimise those *risks* to *health* or *safety*;

(c) In the procedures to be followed to perform that *employee's* work; and

(d) In relevant emergency procedures.

2.4 Section 11:

(1) Every *employer* must:

(a) Identify the *hazards* to *health* or *safety* to which *employees* may be exposed while they are at work;

(b) *A*ssess the *risks* to *health* or *safety* to which *employees* may be exposed while they are at work;

(c) Record the significant *hazards* identified and *risks* assessed; and

(d) Make those *records* available for inspection by *employees*.

(2) Every *employer*, after consulting the *health and safety committee* at the *mine*, must determine all measures, including changing the organisation of work and the design of safe systems of work, necessary to:

(a) Eliminate any recorded *risk;*

(b) Control the *risk* at source;

(c) Minimise the *risk*; and

(d) In so far as the *risk* remains:
(i) Provide for personal protective equipment; and
(ii) Institute a programme to monitor the *risk* to which *employees* may be exposed

(3) Every *employer* must, as far as *reasonably practicable*, implement the measures determined necessary in terms of subsection (2) in the order in which the measures are listed in the paragraphs of that subsection.

(4) Every *employer* must:

(a) Periodically review the *hazards* identified and *risks* assessed, including the results of *occupational hygiene* measurements and *medical surveillance,* to determine whether further elimination, control and minimisation of *risk* is possible; and

(b*)* Consult with the *health and safety committee* on the review.

2.5 Section 22:

Every *employee* at a *mine*, while at that *mine*, must:

(a) Take reasonable care to protect their own *health* and *safety*;

(b) Take reasonable care to protect the *health* and *safety* of other persons who may be affected by any act or omission of that *employee*;

(c) ……

(d) Report promptly to their immediate supervisor any situation which the *employee* believes presents a *risk* to the *health* or *safety* of that *employee* or any other person, and with which the *employee* cannot properly deal;

(e) Co-operate with any person to permit compliance with the duties and responsibilities placed on that person in terms of *this Act*; and

(f) ……..

2.6 Section 23:

(1) The *employee* has the right to leave any *working place* whenever:

(a) Circumstances arise at that *working place* which, with reasonable justification, appear to that *employee* to pose a serious danger to the *health* or *safety* of that *employee*; or

(b) The *health and safety representative* responsible for that *working place* directs that *employee* to leave that *working place*.

(2) Every *employer*, after consulting the *health and safety committee* at the *mine*, must determine effective procedures for the general exercise of the rights granted by subsection (1), and those procedures must provide for:

(a) Notification of supervisors and *health and safety representatives* of dangers which have been perceived and responded to in terms of subsection (1);

(b) Participation by representatives of employer and representatives of the *employees* in endeavouring to resolve any issue that may arise from the exercise of the right referred to in subsection (1);

(c) Participation, where necessary, by an *inspector* or technical adviser to assist in resolving any issue that may arise from the exercise of the right referred to in subsection (1);

(d) Where appropriate, the assignment to suitable alternative work of any *employee* who left, or refuses to work in, a *working place* contemplated in subsection (1); and

(e) Notification to any *employee* who has to perform work or is requested to perform work in a *working place* contemplated in subsection (1) of the fact

that another *employee* has refused to work there and of the reason for that refusal.

(3) If there is no *health and safety committee* at a *mine*, the consultation required in subsection (2) must be held with:

(a) The *health and safety representatives*; or

(b) If there is no *health and safety representative* at the *mine*, with the *employees*.

(4) The *Minister*, by notice in the *Gazette*, must determine minimum requirements for the procedures contemplated in subsection (2).

2.7 Section 30:

(1) A *health and safety representative* may:

(a) Represent *employees* on all aspects of *health* and *safety*;

(b) Direct any *employee* to leave any *working place* whenever circumstances arise at that *working place* which, with reasonable justification, appears to the *health and safety representative* to pose a serious danger to the *health* or *safety* of that *employee*;

(c) Assist any *employee* who has left a *working place* in terms of section 23;

(d) Identify potential *hazards* and *risks* to *health* or *safety*;

(e) Make representations or recommendations to the *employer* or to a *health and safety committee* on any matter affecting the *health* or *safety* of *employees*;

(f) Inspect any relevant document which must be kept in terms of *this Act*;

(g) Request relevant information and reports from an *inspector*;

(h) With the approval of the *employer*, be assisted by or consult an adviser or technical expert who may be either another *employee* or any other person;

(i) Attend any meeting of a *health and safety committee:*
(i) Of which that representative is a member; or
(ii) Which will consider a representation or recommendation made by that representative.

(j) Request:
(i) An *inspector* to conduct an investigation in terms of section 60; or
(ii) The *Chief Inspector of Mines* to conduct an inquiry in terms of section 65.

(k) Participate in consultations on *health* and *safety* with:
(i) The *employer* or person acting on behalf of the *manager*; or
(ii) An *inspector*.

(l) Participate in any *health* and *safety* inspection by:
(i) The *employer* or person acting on behalf of an *employer*; or
(ii) An *inspector*.

(m) Inspect *working places* with regard to the *health* and *safety* of *employees* at intervals agreed with the *employer*;

(n) Participate in any internal *health* or *safety* audit;

(o) Investigate complaints by any *employee* relating to *health* and *safety* at work;

(p) Examine the causes of accidents and other dangerous occurrences in collaboration with the *employer* or person acting on behalf of the *manager*;

(q) Visit the site of an accident or dangerous occurrence at any reasonable time;

(r) Attend a post-accident inspection;

(s) Co-operate with the *employer* in the conducting of investigations in terms of section 11 (5);

(t) Participate in an inquiry held in terms of section 65; and

(u) Perform the functions:
(i) Agreed by the *health and safety committee*; or
(ii) *Prescribed*.

(2) The rights and powers referred to in subsection (1) apply to *health and safety representatives* referred to in section 25 (1) only in respect of the *working places* for which they are responsible.

2.8 Section 31:

(1) ……

(2) ……

(3) The *employer* must provide *health and safety representatives* with:

(a) The facilities and assistance reasonably necessary to perform their functions;

(b) Training that is reasonably required to enable them to perform their functions; and

(c) Time off from work, without loss of remuneration, to attend any training course that is agreed or *prescribed*.

2.9 Section 32:

Every *employer* must notify the *health and safety representatives* concerned and, if there is a *health and safety committee*, the *employee* co-chairperson of that *committee*:

(a) In good time, of inspections, investigations or inquiries of which an *inspector* has notified the *employer*; and
(b) As soon as practicable, of any accident, *serious illness* or *health-threatening occurrence*, or other dangerous event.

2.10 Section 83:

(1) No person may discriminate against any *employee* for:

(a) Exercising a right in terms of *this Act* or in terms of a collective agreement contemplated in *this Act*;

(b) Doing anything that the *employee* is entitled to do in terms of *this Act* or in terms of a collective agreement contemplated in *this Act*;

(c) Refusing to do anything that the *employee* is entitled to refuse to do in terms of *this Act* or in terms of a collective agreement contemplated in *this Act*;

(d) Refusing to do anything that the *employee* is prohibited from doing in terms of *this Act* or in terms of a collective agreement contemplated in *this Act*; and

(e) Standing for election, or performing any function, as a *health and safety representative* or a member of a *health and safety committee*.

2.11 Section 91:

(1) Any person, including an *employer*, who contravenes, or fails to comply with, any:

(a) Provision of *this Act*;

(b) *Regulation*; or

(c) ……., commits an offence and is liable to a fine or imprisonment as may be *prescribed*.

3. Comment

3.1 The requirement under the common law and the **MHSA** for the employer to provide employees with safe and healthy working environment demands of employers to prepare and implement comprehensive hazard identification and risk management system. This is specifically reflected in section 11 of the **MHSA**.

3.2 The control measures implemented by the employer to address the significant identified hazards and risks should under normal circumstances be appropriate to protect employees from those identified significant hazards and risks.

3.3 It is only if the control measures fail, or if new unexpected significant hazards and risks arise for which the control measures are inadequate, and there is no other effective way of protecting the health or safety of endangered employees, that the **RRDW** or the **RLDWP** may be exercised.

3.4 Section 23(1)(a) of the **MHSA** gives an employee the right to leave a *working place* if circumstances arise at that *working place* which, with **reasonable justification**, appear to that *employee* to pose a serious danger to the *health* or *safety* of that *employee. "**Reasonable justification**"* is not defined in the **MHSA**, but means that the employee has some objective information that makes him or her believe there are unsafe conditions at the working place or the work to be done is unsafe to the extent that there is an imminent and serious danger to the health or safety of person at that working place. The employee does not have to be correct in his or her knowledge or belief, but such belief should be reasonable given the information of the employee. These principles apply to both the **RRDW** and **RLDWP.**

ANNEXURE 2: Example of a Table of the Major Health and Safety Hazards Identified in terms of a Mine's Risk Assessment which may give rise to Employees having to Exercise the **RRDW** or **RLDWP**.

*(The hazards and associated dangers in the Table below are by no means an exhaustive list, but a list of some commonplace hazards and associated dangers. The hazards and dangers in Annexure 2 may not be relevant to the mine, and are given for illustrative purposes only. Annexure 2 is attached for information purposes in the preparation of the **COP**.)*

Hazard	Dangers associated with the hazard
Hanging wall / roof / sidewall / rib side.	• Working places that have not first been examined and made safe as required by regulation 14.1 (FOG regulations). • Working places where safety pillars have been removed or do not adhere to the minimum safety pillar dimensions. • Missing or blasted out support. • Rock bursts.
Winches and rigging.	• Winch not anchored or incorrectly anchored. • Missing guard. • Open electrical connections. • Snatch blocks not anchored correctly. • No signalling arrangements. • No illumination.
Ventilation and temperatures.	• Dust levels in the atmosphere exceed the specified maximum. • Airflow has been restricted. • Temperatures exceed the maximum allowable or have increased considerably. • Breakdown of main fan.
Gas accumulations and fumes.	• The presence of flammable and/or noxious gasses which exceed the maximum permissible limits.
Water accumulations, flow of water.	• Any abnormal water flows from strata or drilled holes. • Any major water flows from ore passes and box holes. • Any accumulation of water of unknown depth.

Flow of broken rock, mud or slimes.	• Uncontrolled flow of rock, mud from ore passes or box holes. • Any imminent or initiated flow of mud from the top or side of mine tailings facilities.
Misfires, explosives.	• Any misfired hole with which the crew cannot deal. • Any accumulation of explosives, especially old explosives.
Fires and explosions.	• Any fire or explosion in other parts of the mine which could affect the working place. • Any working place which constitutes a “hazardous location” (as defined in **MHSA** regulations chapter 10 dealing with hazardous locations) and in which apparatus is used that is not “explosion protected apparatus”, as defined in the regulations.
Defective equipment and vehicles.	• Equipment and vehicles which prove to have defects during pre-service examination. • Equipment and vehicles which become defective or inoperative during the shift.
Power failure.	• Power failure, local or general, which may affect the operation of fans and other critical equipment.
Dangerous electrical equipment and installations.	• Open connections, frayed cables, etc.
Lack of illumination.	• No or ineffective illumination at equipment and machinery, where moving parts can endanger safety.
Inadequate personal protective equipment (PPE).	• Non-availability of PPE. • Damaged or worn PPE not replaced. • Inappropriate selection/below standard PPE.
Inadequate training	• Inadequate training to perform a task safely (including basic, induction, refresher training). • Inadequate training on the major hazards (including basic, induction, refresher training).
Unacceptable and dangerous behaviour of colleagues.	• Including substance abuse at work. • Aggressive or violent behaviour. • Inadequate training, experience or licencing for the job.

Noise	• Noise levels not to exceed the specified maximum. • Engineering interventions to be introduced to restrict levels at source. • Noise levels that cannot be limited to have correct identified PPE provided.

ANNEXURE 3: Example of a procedure for employees to exercise their **RRDW** and **RLDWP**

1. Notification by employee

1.1 Any employee who, with **reasonable justification**, exercises the **RRDW** or **RLDWP** must immediately:

1.1.1 Notify that employee's immediate supervisor and the health and safety representative for the working place, if they are present at or near the workplace, of his/her actions and the reasons for it; and

1.1.2 Notify other employees if there may be a serious danger to their health or safety.

1.2 If the immediate supervisor is not present, the employee must notify, as soon as possible and at least before the end of that shift, the supervisor of that immediate supervisor, or another easily contactable mine official of at least equivalent rank.

1.3 If the health and safety representative for that workplace is not present, the employee must notify another workplace health and safety representative or a full time health and safety representative.

2. Notification by workplace health and safety representative

2.1 If a workplace health and safety representative directs employees to stop work and/or leave a working place, that representative must:

2.1.1 Immediately notify the supervisor of that working place or, if he / she is not present, notify another supervisor or management official of at least equivalent rank;

2.1.2 Notify any full time health and safety representative.

3. Notification to health and safety department or manager

3.1 The **COP** should set out a procedure to ensure that a notification of any incident reaches the health and safety department at the mine as soon as practicable, or where there is no health and safety department, the mine manager.

4. Evaluation of danger and steps to be taken

4.1 The supervisor or any other mine official present (contemplated in 1.1.1, 1.2 or 2.1.1) and the health and safety representative (contemplated in 1.1.1 or 1.3) must meet as soon as practicable to evaluate whether there is any danger to the health or safety of employees which is serious and, if so, to determine what steps, if any, should be taken to safely remove the danger to health or safety. If any such steps are determined:

4.1.1 The supervisor must ensure that the necessary steps are taken to make the work and/or working place healthy and safe;

4.1.2 The supervisor must take reasonable precautions to prevent unauthorised entry to any unsafe working place; and

4.1.3 Once these steps have been taken, the supervisor and the workplace health and safety representative must jointly advise the employees accordingly, where after the employee/s must return to the workplace immediately and/or start work immediately.

4.2 If, however, it is agreed that no serious danger to the health or safety of the employee/s prevails, the employee/s will be required to return to the workplace immediately and/or start work immediately.

4.3 If the persons contemplated in 4.1 are unable to agree on whether or not there is a serious danger and/or on the steps that need to be taken to remove any serious danger:

4.3.1 The supervisor must notify a manager with responsibility for the section of the mine concerned; and

4.3.2 The representative must notify the full time health and safety representative, and may request the assistance of a technical adviser (see 4.17 below).

4.4 Thereafter, a meeting must be held involving the persons referred to in 4.3.1 and 4.3.2, to seek to resolve the issue that led to the refusal to work and/or employees leaving the working place.

4.5 If agreement is still not reached on whether there is a serious danger and/or the steps that must be taken to remove any serious danger, management must arrange for the involvement of an appropriate technical adviser to assist the parties. Should agreement still not be reached following the involvement of such technical adviser the employer must make a final decision on all issues on which there is disagreement after consultation with such technical adviser. Such decision must be in writing and must record the reasons for the decisions, highlighting the reasons where any employer decisions deviate from any recommendations by the technical adviser.

4.6 When agreement is reached on the steps that must be taken to remove the danger, or the employer has taken a final decision as contemplated in 4.4, the supervisor and the health and safety representative must:

4.6.1 Ensure that the necessary steps are taken to make the work and/or working place health and safe;

4.6.2 Jointly advise the employees of the steps that are being taken; and

4.6.3 Once the steps have been taken, jointly advise the employees accordingly, where after the employees must return to the workplace immediately and/or start work immediately.

5. Re-assignment and protection

5.1 Employees who have refused to work or have withdrawn from a working place:

5.1.1 Must remain in the nearest safe place to that working place, unless directed otherwise by mine management; and

5.1.2 May not be disciplined for exercising their right to refuse dangerous work and/or leave a dangerous working place unless they acted in bad faith or refuse immediately to return to work once the work and/or working place is safe.

5.2 The management of the mine may require an employee who has refused to work and/or withdrawn, or who was instructed to stop work and/or withdraw from a working place, to perform suitable alternative work if the employee is competent and qualified to perform the work concerned.

5.3 Management may request another employee to do the work or to work in the working place, but if any employee is requested to do the work and/or work in the working place before the matter has been resolved, management must notify the employee:

5.3.1 That another employee has refused to do the work and/or work there;

5.3.2 Of the reason(s) for the refusal;

5.3.3 Of the reason(s) why the employee is requested to do the work and/or work in that working place, given the other employee's refusal; and

5.3.4 That the employee has the same right to refuse as the first employee.

6. Participation by technical advisers

6.1 If a workplace health and safety representative requests that a technical adviser participates in the resolution of the issue:

6.1.1 Management must not unreasonably withhold the approval required;

6.1.2 Management must give reasonable assistance necessary to enable participation by the technical adviser; and

6.1.3 Access by any technical adviser will be in terms of existing recognition and procedural agreements between the parties and existing mine policies and procedures.

7. Report

7.1 The supervisor and the workplace health and safety representative must each prepare a report, or may prepare a joint report, setting out:

7.1.1 The circumstances which arose that posed a serious danger to the health or safety of an employee; and

7.1.2 The steps taken to resolve that problem.

7.2 The report/s must be placed before the next meeting of the mine's health and safety committee, which committee should monitor all instances of withdrawals.