RIGHTS AND DUTIES UNDER SARS-COV-2

Presented by Richard Spoor Inc. Attorneys ("RSI")

George Kahn – Senior Associate

George@rsinc.co.za

Tankiso Moeketsi – Candidate Attorney

Tankiso@rsinc.co.za

Godknows Mudimu – candidate attorney

Godknows@rsinc.co.za

OUTLINE

Introduction

- Presenters (the Who)
- Agenda (the What)
- Sources of Law (the Where)

Prelude and Context

Content

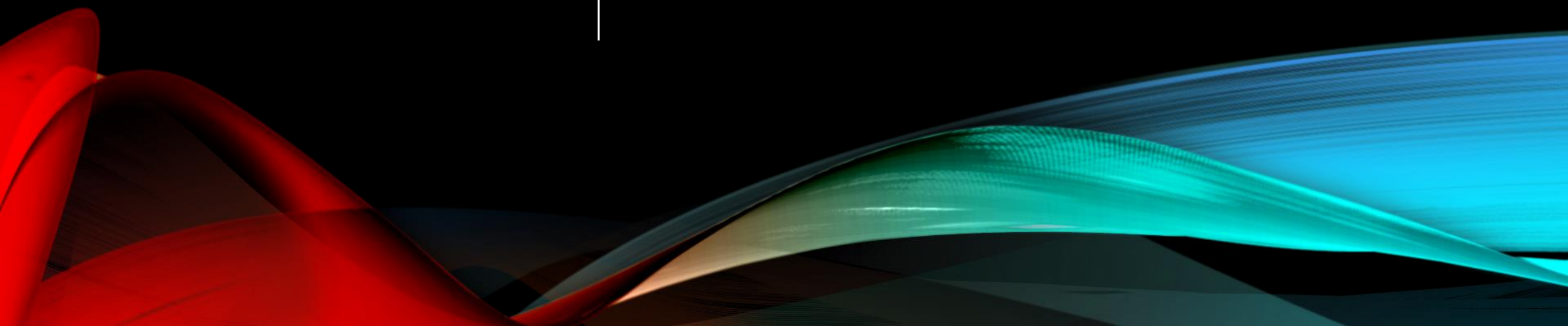
- Right to Refuse to Dangerous Work / Duty to Avoid Creating Dangerous Situations
- Right to be Kept Safe at Work / Duty of Care to People at Work
- Right to Labour Benefits / Duty to not unfairly discriminate
- Right to Social Security / Duty to Compensate Occupational Diseases

Brief Conclusion

Q&A

KNOW WHO YOU ARE LISTENING TO AND ASK IS THIS PERSON AN EXPERT

LESSON 1:



INTRODUCTIONS: PRESENTERS

- RSI is a public-interest law firm that specialises in human rights relating to occupational health and safety, and their related compensation aspects.
- RSI is perhaps best known for its landmark class actions against the gold mining industries for causing mineworkers to develop the occupational diseases Silicosis and PTB, *Nkala and Others v Harmony Gold and Others*.
- RSI is also more recently known for its work in the review application of *AMCU v Minister of Minerals and Others*, which forced the Department of Minerals to do more to safeguard mineworkers from SARS-CoV-2 and Covid19. Resulting in the Guidelines.
- RSI has been involved in numerous other precedent setting and important cases over the last decade, i.e. strict liability under OHSA, listeriosis outbreaks, purpose of workplace enquiries, and the development of workmen's' compensation jurisprudence.
- RSI has Offices in Johannesburg and White River.
- RSI frequently acts on contingency and *pro bono* basis – from former South African Presidents to struggling widows – but is also frequently instructed by companies and government departments to assist them in matters relating to human rights.

PRESENTERS CONTINUED

- **George Ivor Butela Kahn – Senior Associate**

Kahn has practiced law for more than a decade, specialising in health and safety, and its related compensation aspects, constitutional and administrative law, complex litigation, and has been directly or indirectly involved in numerous important judgments over the years.

Kahn read for his science degree at UCT (almost following his father Dr Rhett S. Kahn (DOH) into medicine) and then further read for his humanities and law degrees at Rhodes (instead following the late Prof Ellison Kahn and CCMA Director Nerine Kahn into law). Kahn has further read postgrad advanced administrative law, information law and human rights in business at Wits. Kahn has majors in Law, Philosophy, Politics, Psychology and Molecular Biology, with minors in Economics, Sociology, History, and a variety of other science and medical subjects. Kahn was taught virology by Prof Ed Rybicki of the UCT Bio Pharming Research Unit (Prof Rybicki lectured him on coronaviruses and vaccinations).

Kahn grew up in the Goldfields, Welkom & Virginia, FS, where his father is a well known occupational medical practitioner and certified independent medical examiner.

Kahn is assisting Prof Paul Benjamin in updating the Commentary on the Occupational Health and Safety Act and Compensation of Occupational Injuries and Diseases Act.

PRESENTERS CONTINUED

- **Tankiso Moeketsi - CA**

Moeketsi is a 1st year candidate attorney at RSI. Before joining RSI, he read his LLB and LLM in Labour Law degrees at NWU.

Moeketsi has a special interest in Labour Law, Health and Safety Law and its related compensation aspects.

Moeketsi was born in Klerksdorp and spent his formative years in the small Free State town of Parys. A teacher at Parys High School who had happened to have left the practice of law, sparked Moeketsi's interest in becoming a lawyer by explaining to him what the practice of law entailed.

In his spare time, Moeketsi avidly reads history books that span the histories of SADC countries.

- **Godknows Mudimu - CA**

Mudimu is a 1st year candidate attorney at RSI, having read his social science and law degrees at Rhodes.

Mudimu holds a Masters in Law and will be conferred with his PhD in Health and Safety Law later this year from UCT. Mudimu holds a special interest in health and safety law and is a member of the South African Institute of Occupational Safety and Health.

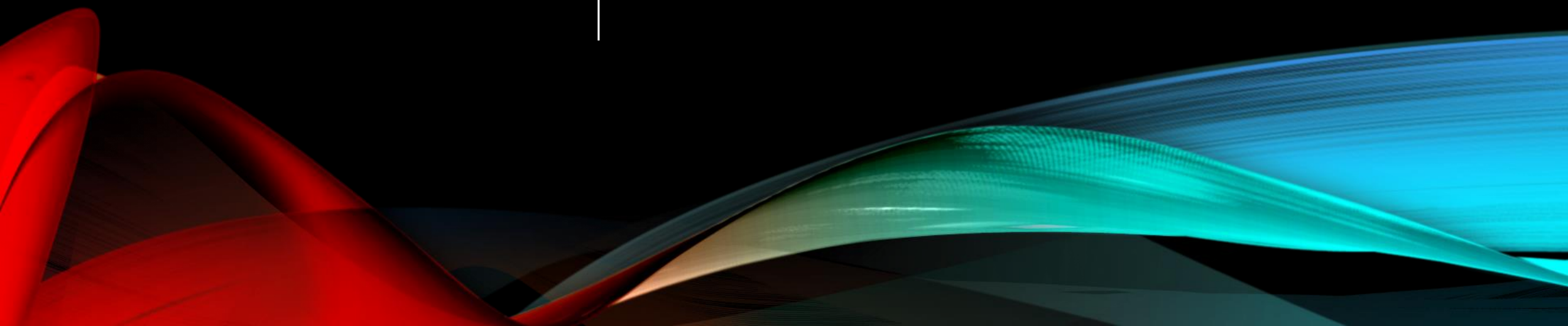
Mudimu grew up in his hometown of Murewa, Zimbabwe.

INTRODUCTION: AGENDA

- Presenters
- Sources of Law
- Prelude and Context:
  - Positioning SARS-CoV-2 and Covid19 into South African Law: Labour Law?
  - Positioning SARS-CoV-2 and Covid19 into Medical Jurisprudence: Public vs Occupational Health?
- Employees:
  - The Right to Refuse Dangerous Work
  - The Duty not to create Dangerous Situations
  - The Right to Pay when unable to perform employment services
  - The Duty to Cooperate with the Employer under a Pandemic
- Fellow Employees and Non-Employees:
  - The Duty to Protect oneself and others from health risks: PPE and other related instruments (vaccinations).
  - The Strict(?) Duty to Protect Non-Employees from Harm.
- Workmen's Compensation for Covid19 and Medical Appeals of Unfitness if Vulnerable to severe cases of Covid19

KNOW WHERE TO LOOK FOR THE LAW ON YOUR RIGHTS AND DUTIES

LESSON 2:



SOURCES OF LAW: COVID19

Constitution of the Republic of South Africa, 1996

Occupational Health and Safety Act, Act 85 of 1993 ("OHSA")

- Regulations for Hazardous Biological Agents, 2001
- Environmental Regulations for Workplaces, 1987: clause 5 (ventilation and/or face masks)
- Health and Safety of Children at work regulations and BCEA regulations on hazardous work by children, 2010: clause 4 (children may not perform work where adult is required to wear face masks for)
- Ergonomics Regulations, 2018 (equipment required to eliminate/reduce/mitigate adverse health effects of SARS-CoV-2, i.e. desk shields)
- General Safety Regulations, 1986 (Alcohol at work and working in confined spaces)
- Etc.

SOURCES OF LAW CONTINUED

Mine Health and Safety Act, Act 29 of 1996 ("MHSA")

- Mine Health and Safety Regulations, 1997: clause 11.1 (appeal regarding finding of unfitness to perform work, i.e. vulnerable persons?)
- Guideline for a Mandatory Code of Practice on the Minimum Standards of Fitness to Perform Work on a Mine, 2016 (note this is a guideline from the Chief Inspector and not a regulation gazetted by the Minister)
- Guideline for a Mandatory Code of Practice on the Right to Refuse Dangerous Work and Leave Dangerous Working Places, 2016 (this deals with the statutory right to refuse dangerous work that is narrower than the persisting common law right)(see slides below)
- Guideline for the Compilation of a Mandatory Code of Practice for the Management of Working in Confined Spaces at Mines, 2020: clauses 8.8, 8.10 – 8.19 (SARS-CoV-2, incombustible vapor and airborne contaminants underground)
- Guidelines for a Mandatory Code of Practice on the Mitigation and Management of the COVID-19 Outbreak, 2020 (DMR compelled by the Labour Court to issue, and requires modifications of other related Codes of Practices).

SOURCES OF LAW CONTINUED

Compensation of Occupational Injuries and Diseases Act, Act 130 of 1993 ("COIDA")

- Item 1.3.1 of Schedule 3 of the Act, read with section 66, presumes that diseases caused by infectious agents (including viruses), and in occupations at particular high risk of contamination, are occupational and under the Act, unless otherwise rebutted.
- Directive on Compensation for Workplace-Acquired Novel Corona Virus Disease (Covid19) – clauses 3.3.1 (very high exposure risk) – 3.3.2 (high exposure risk) are important by see also DMRE Guideline on Covid19 Table 1: Very High Risk and High Risk (suggests Directive fails to adequately appreciate underground miners' risk)

Occupational Diseases in Mines and Works Act, Act 73 of 1973 ("ODMWA") is NOT APPLICABLE to COVID19, but mineworkers retain their statutory right to an autopsy to establish cause of death, the presence of occupational lung diseases and medical assistance for ODMWA diseases diagnosed at the mine, i.e. Covid19 comorbidities like PTB or Pneumoconiosis.

Unemployment Insurance Act, Act 63 of 2001 ("UIF"): illness and maternity benefits

Basic Conditions of Employment Act, Act 75 of 1997 ("BCEA"): sick leave is not deducted if an occupational disease under COIDA or ODMWA (s24)

SOURCES OF LAW CONTINUED

Disaster Management Act, Act 57 of 2002

- Covid19 Lockdown regulations and notices from 15 March 2020
- Regulations to address, prevent and combat the spread of Coronavirus COVID-19: Adjusted alert level 1, as amended on 22 April 2021
- Coronavirus COVID-19 Temporary Employee/Employer Relief Scheme (TERS) benefits for certain categories of employees, dated 20 April 2021
- Consolidated Coronavirus COVID-19 Direction on Occupational Health and Safety Measures in Certain Workplaces, dated 4 June 2020
- The numerous sector directions, i.e. public transport, forestry, personal care services, courts, sport, etc.
- Previous regulations, notices, directions, guidelines and circulars under this Act.

SOURCES OF LAW CONTINUED

Common Law (IMPORTANT TO NEVER FORGET)

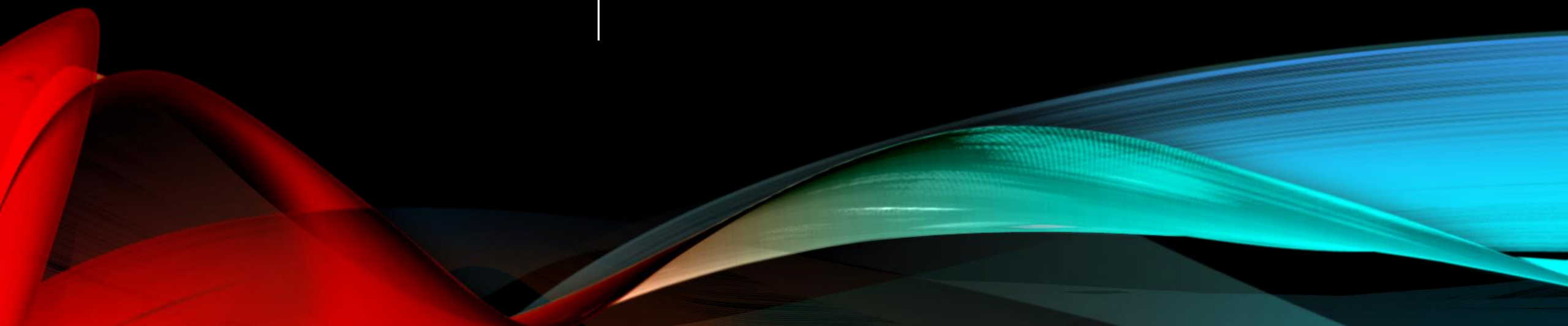
- Hybrid of Roman-Dutch and English Law
- The Right to Refuse Dangerous Work and the Duty of Care towards Workers

The OHSA and MHSA do not replace the common law, but augment and supplement it rather, i.e. OHSA does not include a statutory right to RRDW but the right persists under the common law duty of care towards both miners and non-miners by their employers. The common law right to Right to Refuse Dangerous Work is broader than the statutory right to RRDW under the MHSA for miners.

The COIDA's section 35 also does not bar workers employed under labour brokers from suing their broker's client, the principal, since they are not the workers' contractual employer and the common law is then applicable for these occupational diseases' claims.

ITS NOT ABOUT YOU AND TODAY NECESSARILY, ITS ABOUT THE PUBLIC GOOD AND TOMMORROW

LESSON 3:



PRELUDE AND CONTEXT

- Covid19 and SARS-CoV-2 are novel occupational health and safety concerns that are not without legal frameworks, some existing (i.e. the HBA regulations, others brought about through emergency powers (i.e. Disaster Act Covid19 Regulations) and still others 'clarify' the Covid19 situation (i.e. Directive on Covid19 as an occupational issues, read with Schedule 3 of COIDA).
- Rights always have a corresponding and auxiliary Duty – a two-way street (i.e. section 34 of the Bill of Rights ensures Right of Access to Courts; Duty not to exercise Self-Help)
- Liberal Rights vs Social Democratic Duties (A fundamentally public and occupational health matter vs absolute individual freedoms)
- Employee Rights are understood through an Objective Lens (Rational and Evidenced Based – ask the experts), and not Subjective Opinion (i.e. Facebook comments or Antivaxxer suggestions – don't ignore the experts).

POSITIONING SARS-COV-2 AND COVID19 INTO SA LAW

- There is a general and vague overlap between Labour Law, usually involving strikes, picketing, minimum wages, working hours, etc., and Health and Safety Law, including the employer's duty to take all reasonably practicable measures to safeguard its employees and non-employees. Health and Safety legal practitioners are not all expert labour lawyers, and Labour legal practitioners are not all expert Health and Safety lawyers. Check the expertise of your lawyer before acting on their advice – because you would not necessarily want your ENT performing brain surgery on you instead of a neurosurgeon.
- The Labour Relations Act ("LRA") may not possess the correct (or complete) tools to approach the problem of employment safety (a Philips screwdriver for a flat screw), when the correct tool resides in the Mine Health and Safety Act ("MHSA") or the Occupational Health and Safety Act ("OHSA").
- Our existing pre-2020 law has numerous aspects that already deal with hazards like SARS-CoV-2 and its Covid19. Some 2001 regulations even expressly mention "Coronaviridae" (coronavirus), and other maintained Schedules have refenced infectious diseases (including viruses) for decades.
- The current pandemic provides an opportunity to consider our existing law through a novel lens and identify the lacuna (gaps in the law) in preparation if / when there is another pandemic / outbreak.
- The problem is that SA law and safety experts frequently react rather than proactively act to the 'invisible' threats: i.e. dust (pneumoconiosis), mental stressors (PTSD) and now a virus (SARS-CoV-2).

POSITIONING SARS-COV-2 AND COVID19 INTO MEDICAL JURISPRUDENCE

- Occupational Medicine overlaps with Public Health, and this has been now affirmed and recognised by van Niekerk J in the matter of *AMCU v Minister of Mineral Resources and Energy and Others* (J427/2020) [2020] ZALCJHB 68; (2020) 41 ILJ 1705 (LC); [2020] 9 BLLR 929 (LC) (4 May 2020):

"[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"

Your subjective and YouTube-researched Facebook opinion does not count against evidence-based and rational objective understandings.

LESSON 4:

OBJECTIVE RISK ASSESSMENT

- Employees cannot always identify the extent of the risk and its dimensions, they must often rely upon the Employer, their Unions and the State for guidance – see *National Union of Mineworkers & Others v Driefontein Consolidated Ltd* 1984 5 ILJ 101 (IC)

  > "…novices are not in a position to recognize portents of danger from rockfall in any sense"

- However it is the Employee that must prove there is an objective danger when exercising their right to refuse dangerous work – See *NUM & others v Chrober Slate (Pty) Ltd* [2008] 3 BLLR 287 (LC)

  > "[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 [employees] 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 [counsel for the employees] argued that the onus is on the [employer] on this aspect. I agree with [counsel for the employer] that the onus rests on the [employees]."

You have the Right to Refuse Dangerous Work

LESSON 5:

THE RIGHT TO REFUSE DANGEROUS WORK (RRDW)

- Derived from the Common Law Duty of Care for an Employee – See UK cases *Horton v London Graving Dock Company Ltd* [1950] 1 All ER 180 (CA) at 190; *O"Reilly v Imperial Chemical Industries Ltd* [1955] 3 All ER 382 (CA) at 382, *Media 24 Ltd and Another v Grobler 2005* (6) SA 328 (SCA) par 65 and our Grogan:

  > "Where the employer fails to meet this obligation [to provide safe working conditions], affected employees will not be considered to be in breach of contract if they refuse to work until the dangerous situation is corrected."

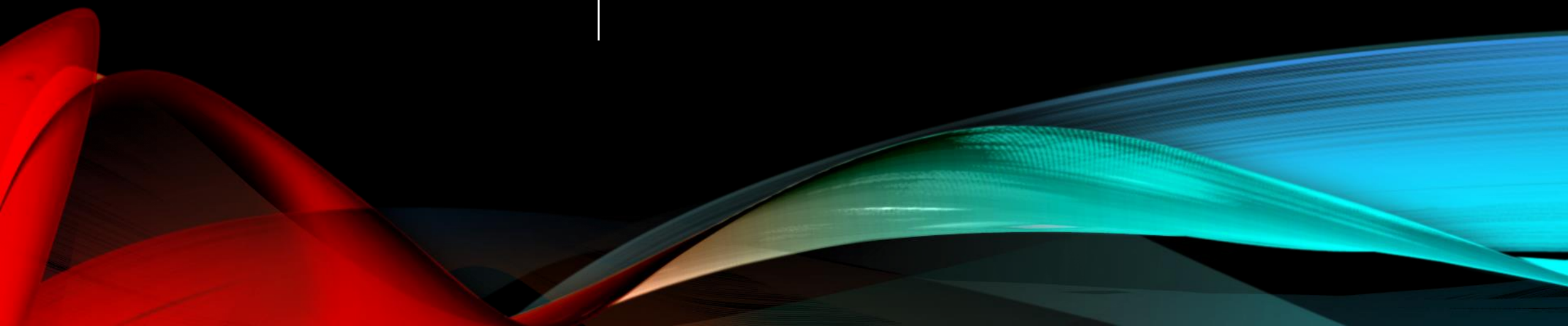
- Today this right is augmented (although not eclipsed) by the MHSA's section 23 Right to Leave a Dangerous Workplace (RLDW):

  > "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."

- Reasonable justification is an objective test as mentioned earlier – see *NUM & others v Chrober Slate (Pty) Ltd* [2008] 3 BLLR 287 (LC). (There is a debate to be had when considering the onus with invisible risks)
- Non-miners must still rely upon the common law right, because the OHSA does not contain a codified right. However, so can miners because the common law right is broader than section 23 of the MHSA. Covid19 may not fall under section 23 of MHSA and the common law right should be invoked to be safe.
- The right is now also bolstered by Section 24(1)(a) of the Bill of Rights - Everyone has the right to an environment that is not harmful to their health or well-being. The Bill of Rights has horizonal application between an employer and employee.

You don’t have the Right to risk creating a Dangerous Workplace for others

LESSON 6:



THE DUTY NOT TO CREATE DANGEROUS SITUATIONS

- However, employees also have a duty to ensure they do not contribute to creating dangers or increasing the risk for harm to occur at work. This extents to their fellow co-employees, clients, customers, contractors and other non-employees.
- A failure to fulfil this duty may result in a disciplinary dismissal as happened in:
  - *DETAWU obo Jacobs v Quality Express* [2021] 5 BALR 443 (NBCRFLI) (where an employee was dismissed for coming into work during his quarantine period and before knowing his Covid19 test results); and,
  - *Eskort Limited v Stuurman Mogotsi and Others* (JR1644/20) [2021] ZALCJHB 53 (28 March 2021) (where a Covid19 positive employee attended to work without a mask and hugged numerous co-employees with comorbidities).
- The employer may also be vicariously liable to non-employees if an employee fails to comply with regulations and/or binding directions in this regard.
- The employer may even end up being strictly liable for its misbehaving and unsafe employees' conduct – see *Joubert v Buscor Proprietary Limited* (2013/13116) [2016] ZAGPPHC 1024 (9 December 2016) where an employer may be found strictly liable under OHSA for failures to abide by regulations.

The employer must accept the employee's health and safety always comes first

LESSON 7:

THE RIGHT TO A SAFE WORKING ENVIRONMENT

- All employees and non-employees (customers, clients, contractors, etc.) have a right that the employer (the owner of the mine in mining terms) must take all "Reasonably Practicable" measures to safeguard them. This is duty on the employer is codified in both the OHSA (s8) and MHSA (s5).
- In other more developed jurisdictions this duty creates a reverse onus upon the employer in questions of liability - See *Edwards v National Coal Board* [1949] 1 KB 704; [1949] 1 All ER 743: (the principal English Law precedent on the concept)

"Reasonably practicable is a narrower term than 'physically possible' and seems to me to imply that a computation must be made by the [employer] 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 – <u>the [employer] discharge the onus on them</u>."

— Lord Justice Asquith

- This right is a constitutional right that cannot be alienated, ceded or compromised.

THE RIGHT TO A SAFE WORKING ENVIRONMENT CONTINUED

- Employees may not be dismissed for insisting upon an objectively safe working environment.
- Employees may not be dismissed for refusing to come into the objectively unsafe workplace – see, for example, the cases of:
  - *October v Teleperformance SA (Pty) Ltd* [2021] 4 BALR 426 (CCMA) (an employee was reinstated after a dismissal for refusing to come back into work after a colleague tested positive for Covid19)
  - *Beck v Parmalat SA (Pty) Ltd* [2021] 2 BALR 131 (CCMA) (an employee was reinstated after a dismissal for going AWOL due to a disclosed danger the virus may objectively pose to her family of vulnerable persons, i.e. asthma)

The Employee must accept that they still have a fiduciary duty towards their employer and co-employees

LESSON 8:

THE DUTY TO COOPERATE WITH THE EMPLOYER UNDER A PANDEMIC

- Employees must cooperate with Employers when trying to eliminate, reduce or mitigate dangers caused by the SARS-CoV-2, i.e. regular screening, face masks, desk shields, e-meetings, working from home where possible.
- But this does not mean the employers can unilaterally change the employee benefits, i.e. salary rates, without prior consultations and agreements under Covid19 – see *Macsteel Service Centres SA (Pty) Ltd v National Union of Metal Workers of South Africa and Others* (J483/20) [2020] ZALCJHB 129; [2020] 8 BLLR 772 (LC) ; (2020) 41 ILJ 2670 (LC) (3 June 2020).
- Employees may be lawfully removed / dismissed from the workplace if they refuse to use PPE or other Health and Safety instruments. But this must be reasonable and consistently applied – see *SACCAWU obo Mgcina v Seton Auto Leather (Pty) Ltd* (unreported CCMA Award dated 16 April 2021)(Case No. GAEK14749-20)(where an employee was reinstated after being dismissed for briefly removing his mask to talk during a meeting when his senior also did so but was not disciplined).
- **There is a debate around whether an employer can insist an employee gets vaccinated – and the Law will likely have a different answer in particular cases (nurse vs remote IT) depending on their factual circumstances until we have a general law of mandatory vaccination.**
- It is RSI's view that we support everyone being vaccinated (barring exceptions based on registered medical practitioner's written objections), just as all mineworkers are required to wear their helmets underground, and for the safety of their colleagues that rely upon them. Provided the vaccination is provided free of charge or at the employer's expense. Proper consent must be recorded and the vaccination administered by a registered and qualified health practitioner.

LESSON 9:

The Employer cannot escape Wages by announcing the Workplace is on Fire when it is their responsibility to keep it safe from Fire or the Employee is prone to being burnt more badly than others

RIGHT TO LABOUR BENEFITS

- The right to remuneration stems from the employee making themselves available for performance of their contractual duties, not the actual performance of those duties due to potentially unforeseen circumstances that may render them impossible, i.e. load shedding, computer virus, non-delivery by suppliers, etc.
- It is best to understand the current pandemic situation through consideration of other health and safety risks at the workplace:
  - What if the Labour Department shut down the office because of asbestos dangers?
  - What if the Minerals Department shut down the shaft because of insufficient ventilation?
  - What if the factory was literally on fire?
- These events do not curtail the employer's ordinary duty to pay employees if the employees still make themselves available to render their services even if at an alternative site. The employer must rather consider operational dismissals and retrenchment packages.

RIGHT TO LABOUR BENEFITS

- See *Matshazi v Mezepoli Melrose Arch (Pty) Ltd and Another; Nyoni v Mezepoli Nicolway (Pty) Ltd and Another; Moto v Plaka Eastgate Restaurant and Another; Mohsen and Another v Brand Kitchen Hospitality (Pty) Ltd and Another* (2020/10556; 2020/10555; 2020/10955; 2020/10956;) [2020] ZAGPJHC 136; (2021) 42 ILJ 600 (GJ)
  - Restaurants, at the time, were barred from hosting sit-in customers. However, they were permitted to serve take-aways and to deliver food to customers. The restaurant employers however elected not to trade at all.
  - The High Court ruled that the duty to pay and the right to remuneration arose from the tendering of one's services and not from actual performance. Because the employees were available to tender their services but could not because the restaurants had decided not to trade, the no work no pay principle could not be applied to them.

RIGHT TO LABOUR BENEFITS

- If an employee in a high risk occupation is diagnosed positive with Covid19, this does not come out of their sick leave entitlement unless the employer can prove to the satisfaction of the Compensation Fund that it is not occupational in its source – see section 24 of the BCEA read with section 66 of COIDA.
- Vulnerable employees may not be unfairly discriminated against, and any discrimination based on pregnancy, age or disability is automatically unfair, and thus unconstitutional, unless it is established it is fair, i.e. 10-year old drivers. Dismissals based on these grounds alone are automatically unfair dismissals and may be subject to up to 24 months compensation awards.
- Employees with particular medical conditions may also not be unfairly discriminated against because of blanket policies, i.e. no over 60s – see for example *IMATU and Murdoch v City of Cape Town* [2005] ZALC (10) (where a diabetic firefighter was disqualified from working because of his comorbidity, but the court acknowledged he was in exceptional condition and the blanket theory against diabetics was unfair)
- Mine workers are entitled to appeal their findings of fitness (not restricted to permanent unfitness) to the Medical Inspector of Mines, ito section 20 of MHSA, if they believe the finding was incorrect, i.e. unable to perform underground work, etc. This appeal is available for covid19 vulnerable persons, who want to work and their employer won't let them like in the diabetic case mentioned above.
- It is however important that workers educate themselves through their occupational medical practitioners and specialists, and discuss the issue fully with them. Where the doctor cannot say for certain that the medical concern will result in a serious likelihood of health risk, the ultimate election to continue or cease working resides with the worker.

Employees are entitled to Social Security when they get ‘burned’ from Work

LESSON 10:

RIGHT TO SOCIAL SECURITY

- Employees are entitled to social security under the COIDA if they are diagnosed with occupational Covid19. This is a constitutional right under section 27 of the Bill of Rights.
- This happens when:
  - The medical practitioners confirm that the disease stems from the employee's conduct in their scope and course of their ordinary employment, i.e. dealing with potentially infected customers in the busy mall, in medium to low risk occupations.
  - The lab confirms a positive test result of Covid19 in an occupation that is very high to high risk for Covid19 infection, unless the employer can rebut this presumption of an occupational source. (Note that the boundary between medium risk and high risk is different in mining, and employers should follow the DMRE Guideline on Covid19 in those cases – i.e. underground miners are high risk)
- The employer may not refuse to report the case, regardless of their strong views on it and its merits. It is presently a criminal offence for an employer to refuse reporting it.
- In future, when research is more crystallised, "Long-Covid19" may carry survivors' permanent disability compensation and even a pension if higher than 30% PD. It is recommended that specialists or the NIOH be consulted if this is a strong possibility according to GPs, and all test results and scans must be kept safe.

RIGHT TO SOCIAL SECURITY

- Mineworkers with diagnosed Occupational Disease in Mines and Works Act compensable lung disease comorbidities, i.e. pneumoconiosis, PTB, COPD, etc., are entitled to constitutional statutory medical assistance for these diseases from their mine employers under section 36A of the ODMWA, if their comorbidity disease was diseased while still working at the mine.
- This may assist them in reducing their likelihood of suffering from severe Covid19 complications if their second mining lung disease is well controlled. These individuals should have their medical doctors contact the mine health centres to arrange these benefits that are based on a reimbursement system.
- Miners that die are entitled to a statutory medical autopsy to assess whether they are entitled to further benefits under ODMWA, but this may also assist with a COIDA claim if the cause of death is confirmed to be occupational Covid19.
- It is important to utilise the ODMWA autopsy benefit regardless of whether you think Covid19 is a factor or not, and this should be communicated to all miners' partners.

CONCLUSION

- The current law has numerous instruments for dealing with Covid19 in the workplace, but there is a need for clarity and further development.
- Employers and Employees have multiple rights and duties towards one another under various statutes, principally the OHSA and MHSA, and the Common Law, but also have (strict?) responsibilities to members of the public.
- The Employer is foremost responsible for the safe working environment, but the Employees have a part to play there as well.
- The Health and Safety of the Business's Employees is never overshadowed by the Health and Safety of the Business's Profits – the Duty to take all Reasonably Practicable measures.
- Employees that tender their services and cooperation with their Employers may not have their benefits unilaterally removed by the Employer.
- There is a delicate balance needed between medical health and economic health that all parties need to frankly discuss and plot a path forward on.

QUESTIONS

Thank you