

A single health and safety act for mining and industry in South Africa

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It all starts here TM

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Opsomming

Veiligheid en gesondheid in die werkplek is hoogs gedebatteerde onderwerpe in die afgelope paar jaar aangesien die terme "gesondheid" en "welsyn" ingesluit is in artikel 24 van die *Grondwet van die Republiek van Suid-Afrika*. Elkeen is geregtig op 'n werksomgewing wat nie nadelig is vir hul gesondheid of welsyn nie. Aangesien die *Wet op Beroepsgesondheid- en Veiligheid* die gesondheid en veiligheid in die industrie ondervang, en die *Wet op Gesondheid en Veiligheid in Myne* gesondheid en veiligheid in die mynbou, ontstaan daar soms leemtes en gapings in die reg aangesien die twee wette deur verskillende departemente beheer word – die Departement van Arbeid en die Departement van Minerale en Energiesake. In 2003 is 'n wetsontwerp opgestel wat die integrasie van die twee wette voorgestel het. Dié wetsontwerp het 'n liggaam voorgestel wat gesondheid en veiligheid in sowel die industrie as mynbou sou behartig.

Die studie sal die agtergrond van veiligheid en gesondheidswetgewing bespreek deur te verwys na verskillende definisies wat van toepassing kan wees. Ten einde 'n enkele wet op gesondheid en veiligheid te kan voorstel, sal 'n vergelyking getref word tussen die bepalings van die *Wet op Beroepsgesondheid- en Veiligheid*, *Wet op Gesondheid en Veiligheid in Myne*, asook die geïntegreerde wetsontwerp. Die verskillende rolspelers – werknemer, werkgewer, verteenwoordigers, komitees, gebruikers van masjinerie, en regeringsinstellings – sal in ag geneem word aangesien hul verpligtinge 'n kardinale rol speel in die formulering van 'n voorgestelde wet.

Trefwoorde

Wet op Beroepsgesondheid- en Veiligheid 85 of 1993; *Wet op Gesondheid en Veiligheid in Myne* 29 van 1996; veiligheid en gesondheid, werkgewer, werknemer, veiligheid- en gesondheidsverteenvoorder, veiligheid- en gesondheidskomitee; en 'n enkele gesondheid- en veiligheidswet.

Abstract

Health and safety in the workplace has been a highly debated subject in the past few years as the terms "health" and "well-being" are included in section 24 of the *Constitution of the Republic of South Africa*. Everyone has the right to a working environment that is not detrimental to his or her health and well-being. As the *Occupational Health and Safety Act* governs health and safety in the industry, and the *Mine Health and Safety Act* the health and safety in mining, a gap exists as there are two different departments governing the two pieces of legislation, namely the Department of Labour and the Department of Mineral Resources.

In 2003 a draft integrated policy was compiled – the *National Occupational Health and Safety Integration Bill* which established an authority to govern health and safety in terms of both mining and industry. This study will consider the background of health and safety legislation by referring to the definitions applicable to health and safety. In order to propose a single health and safety act in South Africa a consideration of the duties and responsibilities of employers, employees, health and safety representatives, health and safety committees, suppliers and manufacturers, users of machinery and institutions is necessary. To reach a conclusion as to whether or not the introduction of a single health and safety act is possible in South Africa, it is necessary to compare the different provisions of the MHSA, the OHS Act and the *Integration Bill*.

Keywords

Occupational Health and Safety Act 85 of 1993; *Mine Health and Safety Act* 29 of 1996; *National Occupational Health and Safety Integration Bill* of 2003; health and safety; employers; employees; a single health and safety act.

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List of Abbreviations

CEO	Chief Executive Officer
CIM	Chief Inspector of Mines
GN	General Notice
GG	Government Gazette
HASLAC	Health and Safety Legal Audit Council
HSE	Health and Safety Executive
ILC	International Labour Conference
ILO	International Labour Organisation
MHSA	<i>Mine Health and Safety Act</i>
MHSC	Mine Health and Safety Council
MHSI	Mine Health and Safety Inspectorate
MOSA	<i>Machinery and Occupational Health Act</i>
MOHAC	Mining Occupational Health Advisory Council
MPRDA	<i>Mineral and Petroleum Resources Development Act</i>
MQA	Mining Quality Authority
MRAC	Mining Regulation Advisory Committee
MWA	<i>Mine Works Act</i>
NOHS	National Occupational Health and Safety
NUM	National Union of Mineworkers
OHSA	<i>Occupational Health and Safety Act</i>
SAPS	South African Police Service
SIMRAC	Safety in Mines Research Advisory Committee
WHO	World Health Organization

Chapter 1 Introduction

1.1 Background

Worldwide approximately 6300 people die every day as a result of not being protected in the workplace.¹ There are many risks and hazards in the workplace, which include the possible exposure to hazardous substances, health issues² and the loss of life, to mention a few.³ The promotion of health and safety is very important for the well-being of working individuals as well as the success of companies and South Africa in general.⁴ The legal regulation of health and safety in the workplace is complex.⁵ In South Africa, the common law and statutory provisions regulate occupational health and safety.⁶ The two main acts regulating health and safety are the *Occupational Health and Safety Act* 85 of 1993 (hereafter referred to as OHSA), and the *Mine Health and Safety Act* 29 of 1993 (hereafter referred to as MHSA).

Section 24 of the *Constitution of the Republic of South Africa*, 1996 (hereafter the Constitution) stipulates that everyone has the right to an environment that is not harmful to their health and well-being. "Health" and "well-being" imply that section 24 may also apply to the working environment.⁷ Initially the protection of workers did not always receive the necessary attention.⁸

¹ International Labour Organization 1996-2016 Safety and health at work <http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/occupational-safety-and-health/lang--en/index.htm>. See also SWHIPS International Health Policies <http://archieff.internationalhealthpolicies.org/world-day-safety-health-work-urgent-protect-health-life-work/>.

² Such as the exposure to asbestosis, falling of scaffolding structures.

³ Healthy Working Lives <http://www.healthyworkinglives.com/advice/workplace-hazards>.

⁴ Swanepoel, Van Wyk and Erasmus *Human Resource Management* 582.

⁵ Thompson and Benjamin *South African Labour Law* G1-5.

⁶ Le Roux 2011 *The Journal of the Southern African Institute of Mining and Metallurgy* 550. Such provisions include section 24 of the *Constitution of the Republic of South Africa*, 1996, the *Occupational Health and Safety Act* 85 of 1993 (hereafter the OHSA) and the *Mine Health and Safety Act* 29 of 1996 (hereafter the MHSA).

⁷ Danna and Griffin 1999 *Journal of Management* 357.

⁸ See chapter 1.2.

1.2 History of health and safety

Originally, the health of workers in the workplace was regarded as a separate issue from occupational safety.⁹ A distinction was also made between safety of workers in mines and industry,¹⁰ which caused different development directions in terms of health and safety legislation. The OHS Act applies to all employers and employees in industry,¹¹ while the MHS Act is applicable to all people working in mines as defined in the *Mineral and Petroleum Resources Development Act 28 of 2002*.¹² Both the MHS Act and OHS Act have a rich history¹³ and different departments dealt with the different sectors of the workplace.¹⁴

The health and safety of mineworkers has always been cause for concern, as mines are inherently dangerous.¹⁵ The first act that dealt with health and safety in mines was the *Mines and Works Act 27 of 1956* (hereafter MWA).¹⁶ This Act aimed, *inter alia*, to provide measures for the safety of mineworkers.¹⁷ However, the MWA did not provide equal protection for the different races in South Africa as it had been promulgated during the *Apartheid* era.¹⁸ The distinction between races resulted in many unprotected mineworkers losing their lives and livelihood and over a million experienced serious

⁹ Masilo and Rautenbach *Commentary on Mine Health and Safety* 1-1. See also Thompson and Benjamin *South African Labour Law* G1-1.

¹⁰ Masilo and Rautenbach *Commentary on Mine Health and Safety* 1-1.

¹¹ Excluding those who are protected by the MHS Act and the *Merchant Shipping Act 57 of 1951*, this act will not form part of this study.

¹² The *Mineral and Petroleum Resources Development Act 28 of 2002* defines "mines" in section 1 as "(a)(i) any excavation in the earth, including any portion under the sea or under other water or in any residue deposit, as well as any boreholes, whether being worked or not, made for the purpose of searching for or winning a mineral; (ii) any other place where a mineral resource is being extracted including the mining area and all buildings, structures, machinery, residue stockpiles, access roads or objects situated on such area and which are used or intended to be used in connection with such searching, winning or extraction or processing of such mineral resource, and if it is used as a verb (b) in the mining of any mineral, in or under the earth, water or any residue deposit, whether by underground or open working or otherwise and includes any operation or activity incidental thereto, in, on or under the relevant mining area".

¹³ Thompson and Benjamin *South African Labour Law* G1-1.

¹⁴ Thompson and Benjamin *South African Labour Law* G1-1.

¹⁵ Erasmus ea *Human Resource Management for the Public Sector* 395.

¹⁶ The MHS Act was the result of the *Mines and Works Act 27 of 1956* (hereafter MWA) being repealed. Masilo and Rautenbach *Commentary on Mine Health and Safety* 1-1.

¹⁷ Preamble of the MWA.

¹⁸ Masilo and Rautenbach *Commentary on the Mine Health and Safety* 1-1. The MHS Act differs from the MWA, in the sense that equal protection is provided to employers and employees of all races.

injuries.¹⁹ These statistics caused the National Union of Mineworkers (hereafter referred to as the NUM) to be established in 1980.²⁰ Their²¹ main concern was, amongst others, to become a single labour organisation that could protect the economic and social welfare of mineworkers,²² as well as to address gaps and weaknesses in the legislation dealing with the health and safety of mineworkers.²³ The NUM instigated the drafting of the *Mine Health and Safety Bill* of 1993,²⁴ which led to the MSHA.

The first legislation dealing with health and safety in industry (other than mining) was the *Machinery and Occupational Safety Act* (hereafter referred to as MOSA).²⁵ The MOSA was the first comprehensive legislation on health and safety²⁶ and was regulated by the then Department of Labour.²⁷ The MOSA made provision for the health and safety of people at work and for the mitigation and avoidance of different hazards in the workplace.²⁸ This Act was amended²⁹ once to introduce different duties and rights for the health and safety of workers in industry.³⁰ The OHSA replaced the MOSA in 1993.

The introduction of separate legislation to deal with the safety of workers in the mining sector and industry resulted in fragmentation³¹ as two different government departments enforced the legislation and functioned differently.³² This caused both

¹⁹ Masilo and Rautenbach *Commentary on the Mine Health and Safety* 1-1.

²⁰ Masilo and Rautenbach *Commentary on the Mine Health and Safety* 1-1. This union is also known as the NUM. The NUM consists of different branches which could only exist if there are a 100 members or in the case where there is a Regional Committee which forms a branch with one or more workplace whose members join. It also consists of four different unions, the NUM was more specifically formed in May 1987.

²¹ The NUM.

²² National Union of Mineworkers 2009 <http://num.org.za/About-Us/Constitution>.

²³ Such as the discrimination of different workers, poor legislative implementation, as well as work-related injuries and death. NUMSA 2013 <http://www.numsa.org.za/history/>.

²⁴ *Mine Health and Safety Bill* of 1993. Masilo and Rautenbach *Commentary on the Mine Health and Safety* 1-2.

²⁵ 6 of 1983. Herein after referred to as MOSA. Later replaced by the *Occupational Health and Safety Act* 85 of 1993.

²⁶ Thompson and Benjamin *South African Labour Law* G1-1.

²⁷ Department of Labour 2016 <http://www.labour.gov.za/>.

²⁸ *Machinery and Occupational Safety Act* 6 of 1983.

²⁹ By the *Machinery and Occupational Safety Amendment Act* 40 of 1989.

³⁰ Thompson and Benjamin *South African Labour Law* G1-2.

³¹ Kotzé 2006 *PER* 1.

³² Kotzé 2006 *PER* 1.

institutional³³ and legislative³⁴ fragmentation to occur due to the history and development of the health and safety legislation.³⁵

1.3 MHSa and OHSA: a comparison

The possible institutional and governance fragmentation can also be seen from a comparison of the MHSa and OHSA; they have similarities and differences. The similarities include, for example, the obligation of the employer to protect the health and safety of the employees³⁶ as far as reasonably practicable.³⁷ Both Acts aim to provide measures that will protect the health and safety of workers in the work environment.³⁸ Commentators also allege that the MHSa provides better protection for workers than the OHSA³⁹ and believe the MHSa is a more effective template for a modern approach to health and safety legislation.⁴⁰ The OHSA is administered by the Department of Labour and the MHSa by the Department of Mineral Resources, which results in different interpretations as to what is expected regarding health and safety. The institutions, or functionaries, which are involved with the monitoring of health and safety, differ. The role players include, for example, employers, employees, manufacturers and suppliers, users of machinery and representatives and committees, and finally government institutions. The different rights and duties of the various role players, as well as the rights, duties and functions of the different inspection authorities seem to differ. The enforcement of both acts has apparent similarities, but also present differences.⁴¹

³³ Kotzé 2006 *PER* 3 describes institutional fragmentation as the fragmentation between the different functionaries of the different governmental spheres.

³⁴ Kotzé 2006 *PER* 3 describes legislative fragmentation as the fragmentation between institutional/sectoral and inter-sectoral. This occurs in the instance of the OHSA and MHSa.

³⁵ Kotzé 2006 *PER* 15.

³⁶ See chapter 3.2.1.2.1 and 4.2.2.2.1.

³⁷ Section 1 of the OHSA and section 5 of the MHSa.

³⁸ Mentioned in both section 1 of the MHSa and in the Preamble to the OHSA.

³⁹ Masilo and Rautenbach *Commentary on the Mine Health and Safety* 1-2.

⁴⁰ Thompson and Benjamin *South African Labour Law* G1-45.

⁴¹ These similarities and differences are discussed in chapters 3 to 5.

1.4 Movement towards integration

In the past few years, there have been attempts to integrate the MHSA and the OHSA.⁴² In 1999, Cabinet discussed the integration of the different government agencies concerning health and safety prevention.⁴³ A Draft Policy⁴⁴ was proposed stating, amongst others, that the OHSA should reflect the values of the MHSA.⁴⁵ The Draft Policy was followed in 2003 by the *Integrated Occupational Health and Safety Bill* (hereafter referred to as the *Integrated Bill*) to address fragmentation in occupational health and safety.⁴⁶ The purpose of the *Integrated Bill* is to establish an authority that will be responsible for the implementation and administration of an integrated policy.⁴⁷ This *Integrated Bill* never developed into anything more than just a Bill; the reason for this has never been made known. By the time of writing of this dissertation, no final Bill has been published yet.⁴⁸

It seems that there is a need, at least theoretically, to discuss whether one health and safety act in South Africa can be introduced as this argument arises from time to time.

1.5 Research question and aims

The research question therefore is whether one health and safety act for both mining and industry could be introduced into the South African legal system? The aim of this study is to determine if a single health and safety act can be introduced in South Africa. In order to reach this aim, sub-aims are formulated:

- To provide a background to health and safety legislation in South Africa;
- To define terminology applicable to the health and safety legislation in South Africa;
- To discuss the role players, including their rights and duties, referred to in the health and safety legislation;

⁴² These attempts date back to as far as 2003.

⁴³ Thompson and Benjamin *South African Labour Law* G1-3.

⁴⁴ National Occupational Health and Safety Policy. <http://www.kznhealth.gov.za/occhealth/policy2.pdf>.

⁴⁵ Thompson and Benjamin *South African Labour Law* G1-3.

⁴⁶ Preamble of the *National Occupational Health and Safety Integration Bill* of 2003.

⁴⁷ Clause 2 of the *National Occupational Health and Safety Integration Bill* of 2003.

⁴⁸ At 2 November 2016. The researcher made several attempts to obtain the information from the Department of Labour on the progress of the Bill, but no information was forthcoming.

- To discuss the enforcement measures in the health and safety legislation;
- In order to come to a conclusion and to make recommendations.

The study is a literature-based study of primary sources, namely the OHSA, MHSA, policies and the *Integration Bill*.⁴⁹ The legislation will be compared with regard to the terminology, role players and the enforcement of the legislation. This study is supported by a study of secondary literature, such as textbooks, chapters in books, journal articles and internet sources.

In this dissertation chapter 2 explores the definitions, other than South African definitions of terminology applicable to occupational health and safety and provide a background to health and safety legislation. These definitions are discussed in order to determine as to whether or not the definitions in terms of South African legislation could be broadened. Chapter 3 compares the definitions and institutions in terms of the MHSA, the OHSA and the *Integrated Bill*. Chapter 4 explores the different role players identified and compare their rights and duties in terms of the MHSA, the OHSA and *Integrated Bill*. Chapter 5 discusses the different enforcement measures in the MHSA, OHSA and the *Integrated Bill*. Thereafter chapter 6 will conclude the study and provide recommendations on whether it is possible to introduce a single health and safety Act in South Africa.

⁴⁹ *National Occupational Health and Safety Integration Bill* of 2003. Hereafter the *Integration Bill*.

Chapter 2 Background

2.1 Introduction

In order to have a clear understanding of health and safety, it is necessary to define "health and safety", "workplace", "hygiene", "hazards", "risks" and "reasonable practice". These terms will be defined by considering different secondary literature sources, other than South African legislation, such as academic journal articles, and some reference will be made to case law. After considering these terms, the different role players involved will be identified, thereafter the enforcement of health and safety legislation will be discussed, specifically command and control, and also the different alternative enforcement measures.

2.2 Definitions

It is necessary to determine what is to be understood under "health and safety" in the "workplace". These terms are related to "hygiene", "hazards", "risks" and "reasonable practice". The terms may have different meanings for different people depending on where their work environment. A common understanding of the terminology may provide a better foundation for the integration of terminology used in both mining and industry. Therefore, the aim of this chapter is to provide a background to health and safety legislation in terms of definitions, the applicable role players and the enforcement of such legislation.

2.2.1 Health and safety

In order to define the term "health and safety" it is necessary to establish first what is meant by "health". The *Occupational Health and Safety Convention*⁵⁰ define "health" as "not merely the absence of disease or infirmity, it also includes the physical and mental elements affecting health which are directly related to safety and hygiene⁵¹ at work".⁵² "Health", according to the World Health Organization (WHO), is the complete physical,

⁵⁰ 155 of 1981.

⁵¹ See 2.2.5 for the definition of the term "hygiene".

⁵² A3(e) of the *Occupational Health and Safety Convention* (1981).

social and mental state of well-being. "Health" is therefore not necessarily the absence of a disease only.⁵³ "Well-being" can be seen as a state of being healthy, happy, or even prosperous.⁵⁴ When "health" is considered in the workplace, the term "occupational health" is sometimes used. In 1950 the ILO and WHO defined "occupational health" as the "promotion and maintenance of the highest degree of physical, mental and social well-being of workers in all occupations by preventing departures from health; controlling risks and the adaptation of work to people, and people to their jobs".⁵⁵ "Health" relates to both mental and physical integrity.⁵⁶ Workplace health specifically deals with the well-being of workers, therefore the workplace should be in such a state that workers' well-being is not negatively affected.⁵⁷

According to the Webster Dictionary,⁵⁸ "safety"⁵⁹ is deemed as the "freedom from danger or harm or a state of being safe".⁶⁰ It is also a state where something is not deemed as dangerous or harmful for the individuals involved.⁶¹

"Occupational health and safety" has been defined as the study of hazards arising in the workplace and the analysis, recognition, anticipation and control thereof.⁶² "Occupational health and safety" is certain if the employer does "health and safety management" as mentioned in the *Business Dictionary*.⁶³

⁵³ World Health Organization.

⁵⁴ Merriam-Webster Dictionary <http://www.merriam-webster.com/dictionary/well-being>.

⁵⁵ HEW Agius 2010 <http://www.agius.com/hew.resource/ohsilo.htm>.

⁵⁶ Currie and De Waal *The Bill of Rights Handbook* 526.

⁵⁷ Jilcha, Kitaw and Beshah 2016 *African Journal of Science, Technology, Innovation and Development* 35.

⁵⁸ Merriam-Webster Dictionary <http://www.merriam-webster.com/dictionary/safety>.

⁵⁹ Occupational safety includes the health and well-being of people employed in a work environment. To promote the safety of employees, the law and regulations are enforced by the US Department of Labor to prevent workplace illnesses, accidents, injuries, and fatalities, as seen in the Business Dictionary under occupational safety <http://www.businessdictionary.com/definition/occupational-safety.html>. The reason for mentioning the US Department of Labor is only for definition purposes, no reference will be made to the US legislation for purposes of this dissertation.

⁶⁰ Merriam-Webster Dictionary <http://www.merriam-webster.com/dictionary/safety>.

⁶¹ Cambridge Dictionary definition of safety 2016 <http://dictionary.cambridge.org/dictionary/english/safety>.

⁶² Jilcha, Kitaw and Beshah 2016 *African Journal of Science, Technology, Innovation and Development* 36.

⁶³ According to this dictionary it is deemed as: Organized efforts and procedures for identifying workplace hazards and reducing accidents and exposure to harmful situations and substances. It also includes training of personnel in accident prevention, accident response, emergency

For purposes of this dissertation "occupational health and safety" may be defined as the control, prevention, anticipation and analysis of any hazards which could occur in the workplace and which could cause injury or illness, or which could affect the workplace health and well-being of the employee. If the definitions of "health" and "safety" are considered, it seems that "occupational health" can be defined as "the physical, social and mental elements relating to a worker's well-being in the workplace by ensuring a disease and injury free workplace, a workplace where risks are controlled; where the work is adapted to the people and the people to their work". The reason for considering these definitions with reference to foreign legislation is to see if the South African definitions are up to standard, and also how it compares to foreign definitions.⁶⁴

2.2.2 Workplace

To ensure health and safety in the workplace, it should be a place of innovation.⁶⁵ Before discussing the required innovation, one should understand what the term "workplace" means. According to the *Occupational Health and Safety Convention*,⁶⁶ the "workplace" includes any place where employees need to go to on a direct or indirect instruction of the employer.⁶⁷ It can also be defined as the physical location where the operations or work of an agency is performed.⁶⁸ The OSH profile for Singapore⁶⁹ mentions a few different places that are included in the term "workplace", namely:

- construction worksites;
- shipyards;
- both oil and petrochemical plants;
- semiconductor plants and
- metalworking factories.⁷⁰

preparedness, and the use of protective clothing equipment. Business Dictionary health and safety management <http://www.businessdictionary.com/definition/health-and-safety-management.html>.

⁶⁴ See chapter 3.2.

⁶⁵ Jilcha, Kitaw and Beshah 2016 *African Journal of Science, Technology, Innovation and Development* 34.

⁶⁶ *Occupational Health and Safety Convention* of 1981.

⁶⁷ A 3 of the *Occupational Health and Safety Convention* of 1981.

⁶⁸ United States Department of Labour

https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARS&p_id=11264.

Regulation 1960.2(t).

⁶⁹ Reference made to this is only for example purposes, the Singapore legislation will not be discussed in this dissertation.

⁷⁰ *Occupational Safety and Health Profile for Singapore* 16.

These places seem to be examples as they do not refer to mines and may exclude certain workplaces, for example abattoirs. "Workplace" has also been defined as "an establishment or facility at a particular location, one or more work area".⁷¹ It is not clear whether "workplace" would include driving to and from the workplace, or if it includes the "course of employment". According to the *Business Dictionary*,⁷² the "course of employment" can be defined as follows:

Regular activities through which an employee carries out (or is supposed to carry out) the orders of his/her employer. A wrong is considered committed during the course of employment only if what the employee was doing (at the time the wrong happened) falls within the scope of those activities.⁷³

On interpretation of the definition, it seems as if the "workplace" would include driving to and from the workplace. In *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others*,⁷⁴ the court interpreted the term "workplace". This court discussed the term as defined in section 213 of the *Labour Relations Act*.⁷⁵ One of the disputes was based on whether or not different mines are deemed as separate workplaces.⁷⁶ In this case the term was defined as "the place or places where the employees of an employer work". The court states that, "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 the employees work in connection with each independent operation constitutes the workplace for that operation".⁷⁷ The court *a quo* mentioned that a "workplace" is "effectively, an independent operation with regard to its size, function or organisation".⁷⁸ The court *a quo* found that mines are not independent operations⁷⁹ as all mines are operated under a central head

⁷¹ Business Dictionary 2016 <http://www.businessdictionary.com/definition/workplace.html>.

⁷² Business Dictionary 2016 <http://www.businessdictionary.com>.

⁷³ Business Dictionary 2016 <http://www,businessdictionary.com/definition/course-of-employment.html>.

⁷⁴ (JA103/2014) [2016] ZALAC 11.

⁷⁵ *Labour Relations Act* 66 of 1995.

⁷⁶ *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others* (JA103/2014) [2016] ZALAC 11.

⁷⁷ *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others* (JA103/2014) [2016] ZALAC 11 para 49.

⁷⁸ *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others* (JA103/2014) [2016] ZALAC 11 para 52.

⁷⁹ *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others* (JA103/2014) [2016] ZALAC 11 para 53.

office where they are managed financially.⁸⁰ Individual mines cannot be deemed as employers, as the overhead mining company is the employer.⁸¹ The appeal court concurred with the opinion of the court *a quo*.⁸²

For purposes of this dissertation a "workplace" can be defined as every independent premises or place or operation with regards to size, function or organisation where an employee acts on instruction of the employer including driving to and driving from the workplace, and may include one or more places, managed by one central head office.

In a workplace a worker can be exposed to risks⁸³ and hazards⁸⁴ that could include, for example, the employee's exposure to unhygienic circumstances. The term "hygiene" will be discussed first.

2.2.3 Hygiene

According to the WHO "hygiene" includes those conditions and practices that are deemed as a helping aid in maintaining the health of workers as well as the prevention of diseases being spread.⁸⁵ "Occupational hygiene" refers to the anticipation, evaluation, recognition and control of conditions in the workplace that might lead to illness or any health effects.⁸⁶ If a workplace is not hygienic, it cannot be deemed safe for an employee.⁸⁷ The hygienic levels of the workplace is monitored through biological testing, for example the taking of urine samples and the testing thereof.⁸⁸ The medical

⁸⁰ *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others* (JA103/2014) [2016] ZALAC 11 para 55.

⁸¹ *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others* (JA103/2014) [2016] ZALAC 11 para 57.

⁸² *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others* (JA103/2014) [2016] ZALAC 11 para 86.

⁸³ See 2.2.5.

⁸⁴ See 2.2.4.

⁸⁵ There are different types of hygiene. It is necessary to consider this as in the workplace both hand hygiene and medical hygiene are applicable. WHO <http://www.who.int/topics/hygiene/en/>. While in the workplace one's hands are exposed to unhygienic circumstances, it is necessary to determine what amount of dirt exposure is deemed as safe for the employee.

⁸⁶ Thompson and Benjamin *South African Labour Law* G1-17.

⁸⁷ Thompson and Benjamin *South African Labour Law* G1-26.

⁸⁸ Thompson and Benjamin *South African Labour Law* G1-26.

practitioners of the workplace conduct these tests.⁸⁹ In order to ensure occupational hygiene employers may appoint occupational hygienists who then assist them in understanding and minimising the hazards.⁹⁰ Occupational hygienists come from many different backgrounds such as chemists, doctors, nurses, engineers and others that specialize in the exposure to hazards in the workplace.⁹¹ The reason why occupational hygiene is important is that, if the workplace is hygienic, chances are that unexpected illnesses may not occur.⁹²

2.2.4 Hazards

The responsible authorities should ensure that "hazards" do not occur.⁹³ A "hazard" can be defined as having the potential to cause harm.⁹⁴ "Hazards" are classified into different categories namely ergonomic, physical, biological and chemical hazards.⁹⁵ Some examples of work-related hazards include the use of electricity that may lead to fire or explosions, the inhalation of or exposure to hazardous substances.⁹⁶ Hazards can affect both the physical and mental health of the employees;⁹⁷ therefore it is important to ensure that a working environment is as hazard-free as possible. A hazard-free working environment has a beneficial impact on the economy of the workplace.⁹⁸

To ensure a hazard-free working environment, employers should take note of the precautionary principle.⁹⁹ Here the important principle is that one should rather avoid certain circumstances, if one cannot make a good scientific-based decision.¹⁰⁰ This ensures that employers do not take steps that could be hazardous to employees. For the purpose of this study a "hazard" can be defined as "any circumstance which has the

⁸⁹ Thompson and Benjamin South African Labour Law G1-26.

⁹⁰ IPM Safety <http://www.ipmsafety.com.au/safety/what-is-occupational-hygiene>.

⁹¹ IPM Safety <http://www.ipmsafety.com.au/safety/what-is-occupational-hygiene>.

⁹² IPM Safety <http://www.ipmsafety.com.au/safety/what-is-occupational-hygiene>.

⁹³ A 11(a) of the *Occupational Health and Safety Convention* of 1981.

⁹⁴ HEW Agius 2010 <http://www.agius.com/hew/resource/ohsilo.htm>.

⁹⁵ Take one step <http://www.takeonestep.org/Pages/yoursafety/safenotsorry/workplacehazards.aspx>.

⁹⁶ The South African Labour Guide 2016 <http://www.labourguide.co.za/health-and-safety/1504-sources-of-hazards>.

⁹⁷ Burton *WHO Healthy Workplace Framework and Model* 33.

⁹⁸ Burton *WHO Healthy Workplace Framework and Model* 34.

⁹⁹ Burton *WHO Healthy Workplace Framework and Model* 34.

¹⁰⁰ Burton *WHO Healthy Workplace Framework and Model* 34.

potential to cause harm or exposure to danger". Hazards may also be associated with "risks".

2.2.5 Risks

It is important to distinguish between a "hazard" and a "risk".¹⁰¹ A "risk" is a measure of the possibility of a specified harmful effect in specified circumstances.¹⁰² According to the ILO Code of Practice¹⁰³ a "risk" is defined as:

A combination of the likelihood of an occurrence of a hazardous event and the severity of injury or damage to the health of workers caused by this event.¹⁰⁴

A "hazard" is something that can cause harm,¹⁰⁵ and a "risk" is the chance or possibility that a hazard will, for example, cause harm.¹⁰⁶ In other words, a "hazard" is the "potential source of harm"¹⁰⁷ and a "risk" is the likelihood of someone being harmed or of a hazard occurring.¹⁰⁸

Employers have to undertake "risk assessments".¹⁰⁹ The meaning of a "risk assessment" is the "process of evaluating the risks to safety and health arising from hazards at work".¹¹⁰ According to the ILO "risks" should be analysed by using the following procedure:

- a) the factors should be identified which could affect hazards and also the severity of the potential consequences;
- b) by the evaluation of the existing controls and the effectiveness thereof (of the control measures);
- c) by estimating the possible consequences and the likelihood of the consequence, this estimation will be done in terms of the levels of exposure or hazards;

¹⁰¹ HEW Agius 2010 <http://agius.com/hew.resource/ohsilo.htm>.

¹⁰² HEW Agius 2010 <http://agius.com/hew.resource/oshilo.htm>.

¹⁰³ ILO Code of Practice *Safety and health in the use of machinery* 10.

¹⁰⁴ ILO Code of Practice *Safety and health in the use of machinery* 10.

¹⁰⁵ TUC workSMART 2016 "What is the difference between a 'hazard' and a 'risk'?" <https://worksmart.org.uk/health-advice/health-and-safety/hazards-and-risks/what-difference-between-hazard-and-risk>.

¹⁰⁶ TUC workSMART 2016 "What is the difference between a 'hazard' and a 'risk'?" <https://worksmart.org.uk/health-advice/health-and-safety/hazards-and-risks/what-difference-between-hazard-and-risk>.

¹⁰⁷ Health and Safety Authority Hazard and Risk 2016 <http://www.hsa.ie/eng/Topics/Hazards/>.

¹⁰⁸ Health and Safety Authority Hazard and Risk 2016 <http://www.hsa.ie/eng/Topics/Hazards/>.

¹⁰⁹ European Agency for Safety and Health at Work <https://osha.europa.eu/en/tools-and-publications/publications/factsheets/80>.

¹¹⁰ ILO Code of Practice *Safety and health in the use of machinery* 10.

d) a whole combination of all of the above to ensure the best evaluation is done and that the prioritization of risk actions.¹¹¹

The employer will have to consider the severity and scope of the hazards or risks applicable, the available knowledge, if it would have been possible to mitigate such hazard or risk, and the cost and benefits of mitigating the hazard or risk.¹¹² For purposes of this dissertation, "risks" can be defined as the likelihood of an incident/ occurrence of hazardous situations that could cause severe injury or illness, as assessed in terms of "risk assessments".¹¹³

2.3 Role players

There are different role players involved in health and safety in the workplace, each with its own responsibilities with regarding health and safety. International labour standards define the rights and duties of the role players involved.¹¹⁴ The different role players include, amongst others, the employers, employees, managers, committees, representatives, users of machinery, designers and manufacturers, and government institutions.

"Employer" is defined as "any physical or legal person that employs one or more workers".¹¹⁵ Primarily, an employer's main duty is to ensure the health and safety of his or her employees and anyone who enters the workplace.¹¹⁶ The employers must, for example, ensure that the installation of machinery is inspected.¹¹⁷ A competent person must do inspection regularly.¹¹⁸ Periodical risk assessment of machinery must be done, especially when modifications are undertaken.¹¹⁹ The appropriate measures must be used in terms of the identified risks.¹²⁰ Records and documentation should be compiled regarding operating procedures, job safety analysis, safe work-method statements and

¹¹¹ ILO Code of Practice *Safety and health in the use of machinery* 27.

¹¹² Ellerbeck 2013 *Without Prejudice* 41.

¹¹³ See also chapter 3.6.

¹¹⁴ ILO *Building modern and effective labour inspection systems* 15.

¹¹⁵ ILO Code of Practice *Safety and health in the use of machinery* 10.

¹¹⁶ Department of Labour 2016 <http://www.labour.gov.za/DOL/legislation/acts/basic-guides/basic-guide-to-the-health-and-safety-duties-of-employers>.

¹¹⁷ ILO Code of Practice *Safety and health in the use of machinery* 24.

¹¹⁸ ILO Code of Practice *Safety and health in the use of machinery* 24.

¹¹⁹ ILO Code of Practice *Safety and health in the use of machinery* 32.

¹²⁰ ILO Code of Practice *Safety and health in the use of machinery* 32.

working instructions.¹²¹ The employers are responsible for the training¹²² of competent employees.¹²³ The employer has to liaise with the relevant government departments and unions on the matter of the OHS.¹²⁴

Safety and health committees are to be established. These committees consist of safety and health representatives¹²⁵ and employer representatives. They function in accordance with the local legislation, regulations and code of practice.¹²⁶ The health and safety representatives are responsible to monitor the effectiveness of the health and safety measures.¹²⁷ Health and safety committees are constituted when there are more than two representatives.¹²⁸

Workers are defined as "any person who performs duties, either regularly or temporarily, for an employer".¹²⁹ The workers are entitled to certain rights but they also have different duties, such as safe working methods.¹³⁰ The workers should also cooperate with the employers.¹³¹ The workers should use the personal protective equipment (PPE) provided to them and should not misuse any safety provisions.¹³² The workers have to participate in health and safety training.¹³³ They have to be consulted. Workers also have to undergo training on all relevant national legislation and practice.¹³⁴ Workers' rights include the right to participate in the review and application process of new OHS measures.¹³⁵

¹²¹ ILO Code of Practice *Safety and health in the use of machinery* 34.

¹²² This training should be provided in terms of the requirements of the national law and the practice thereof. The information is seen in the ILO Code of Practice *Safety and health in the use of machinery* 38.

¹²³ ILO Code of Practice *Safety and health in the use of machinery* 35.

¹²⁴ Department of Labour 2016 <http://www.labour.gov.za/DOL/legislation/acts/basic-guides/basic-guide-to-the-health-and-safety-duties-of-employers>.

¹²⁵ Representatives of the employees.

¹²⁶ ILO Code of Practice *Safety and health in the use of machinery* 10.

¹²⁷ Thompson and Benjamin *South African Labour Law* G1-36.

¹²⁸ Thompson and Benjamin *South African Labour Law* G1-39.

¹²⁹ As defined earlier in the paragraph.

¹³⁰ Business Dictionary 2016 <http://www.businessdictionary.com/definition/duties-of-employees.html>.

¹³¹ ILO Code of Practice *Safety and health in the use of machinery* 39.

¹³² ILO Code of Practice *Safety and health in the use of machinery* 40.

¹³³ ILO Code of Practice *Safety and health in the use of machinery* 40.

¹³⁴ ILO Code of Practice *Safety and health in the use of machinery* 40.

¹³⁵ Department of Labour 2016 <http://www.labour.gov.za/DOL/find-more-info/all-about-employees>.

Other role players are the manufacturers and designers.¹³⁶ Article 12 of the *Occupational Health and Safety Convention*¹³⁷ places the responsibility on manufacturers, designers and importers to utilise the principle of prevention. Therefore, the correct measures should be used to prevent any danger or risk.¹³⁸ Designers and manufacturers¹³⁹ should design machinery to ensure that hazards are eliminated as far as possible.¹⁴⁰ They are responsible to ensure that the machinery complies with the safety requirements. This, for example, should provide the correct certification and documents¹⁴¹ as required by the relevant laws and regulations.¹⁴² The correct instructions should be provided to the employer, employee and user of machinery to avoid any risks and hazards.¹⁴³ The designers and manufacturers have the duty to complete a risk assessment in relation to the machinery/equipment that have to include:

- a) the determination of all of the uses the machinery might be used for, including both misuses and intended uses;
- b) the identification of both hazards and hazardous situations, which might occur with use and misuse;
- c) the most reasonably practicable elimination of any hazards;
- d) the estimation of risks, which include the taking into account the possible severity of injuries, health damage and also the probability of the occurrence thereof;
- e) to evaluate the adequate control of the risk levels with a view to the required reduction of risks;
- f) the reduction of risks identified by the application of measures for protection.¹⁴⁴

The government creates institutions that are responsible for occupational health and safety.¹⁴⁵ Governments have the responsibility for the dialogue between the different parties or role players.¹⁴⁶ In terms of tripartite relationships (between the government, employers and trade unions; in the instance where there is no union present, the

¹³⁶ Thompson and Benjamin *South African Labour Law* G1-53.

¹³⁷ Article 12 of the *Occupational Health and Safety Convention* 155 of 1981.

¹³⁸ ILO 2009 *Promoting a safe and healthy working environment* 51.

¹³⁹ As identified by the ILO Code of Practice.

¹⁴⁰ ILO Code of Practice *Safety and health in the use of machinery* 14.

¹⁴¹ ILO Code of Practice *Safety and health in the use of machinery* 14.

¹⁴² ILO Code of Practice *Safety and health in the use of machinery* 14.

¹⁴³ ILO Code of Practice *Safety and health in the use of machinery* 15.

¹⁴⁴ ILO Code of Practice *Safety and health in the use of machinery* 15-16.

¹⁴⁵ ILO 2008 *International Labour Conference* 3.

¹⁴⁶ ILO 2008 *International Labour Conference* 10.

relationship is directly with the employee). Correct utilisation of these public-private partnerships is expected from the government.¹⁴⁷

2.4 Enforcement

According to section 24 of the *Constitution*, it is necessary to make use of "reasonable legislative and other measures" to ensure an environment that is not detrimental to any individual's health and well-being.¹⁴⁸ These measures could include enforcement instruments. There are various enforcement instruments that can be used such as command-and-control instruments,¹⁴⁹ alternative instruments and economic instruments.

2.4.1 Command and control instruments

Enforcement instruments are known as command-and-control instruments.¹⁵⁰ Command and control instruments include measures where the government has the duty to prescribe certain requirements that are to be promoted and enforced.¹⁵¹ These instruments include, for example, the issuing of authorisation licences and permits. Command-and-control instruments have both advantages¹⁵² and disadvantages.¹⁵³ Command and control includes the "do's and don'ts" of health and safety enforcement.¹⁵⁴ Australia's enforcement strategy is, for example, pro-active.¹⁵⁵ The Australian approach includes inspections and surveys that ensure workplace safety and compliance with duties.¹⁵⁶ This more structured and evidence-based approach is followed to avoid accidents.¹⁵⁷ Ideally, compliance should be measured by incident

¹⁴⁷ ILO 2008 *International Labour Conference* 16.

¹⁴⁸ Section 24 of the *Constitution*.

¹⁴⁹ Paterson and Kotzé *Environmental Compliance and Enforcement* 375. Including criminal measures and administrative measures.

¹⁵⁰ UNEP *Manual on compliance with and enforcement of multilateral environmental agreements* 300 and Nel and Wessels 2010 *PER* 48.

¹⁵¹ UNEP *Manual on compliance with and enforcement of multilateral environmental agreements* 300.

¹⁵² Which includes dependability, as it is a solid guideline, clarity and easy detectability of non-compliance. See Nel and Wessels 2010 *PER* 52-53.

¹⁵³ Which includes ineffective policy choice deliveries, the information sensitivity which could cause problems, inflexibility and difficulty to perform. See Nel and Wessels 2010 *PER* 52-53.

¹⁵⁴ UNEP *Manual on compliance with and enforcement of multilateral environmental agreements* 300.

¹⁵⁵ ILO 2009 *Promoting a safe and healthy working environment* 35.

¹⁵⁶ ILO 2009 *Promoting a safe and healthy working environment* 35.

¹⁵⁷ ILO 2009 *Promoting a safe and healthy working environment* 35.

reporting, which entails that companies are required to report any work-related accidents.¹⁵⁸ The OHSa, amongst others,¹⁵⁹ makes provision for criminal prosecution of any non-complying party

There are different bodies responsible for compliance in terms of health and safety legislation, specifically inspectorates.¹⁶⁰ It is ideal to have a regulatory body that reacts to fatalities and accidents, identifying whether health and safety management was lacking.¹⁶¹ Such a body should have clear authority to collect implementation information and be allowed to access different facilities to monitor compliance.¹⁶² Enforcement can be ensured by inspection¹⁶³ and penalties.¹⁶⁴ Labour inspectorates are the main source of advice and guidance in terms of the regulation and enforcement and laws.¹⁶⁵ Article 5(d) of the *Convention* makes provision for communication in terms of enforcement.¹⁶⁶

Administrative measures, for example, include the issuance of compliance notices, directives, abatement notices and the suspension and withdrawal of authorisations.¹⁶⁷ One of the measures includes the issuing of a notice, which requires the wrongdoer to take reasonable steps to correct the non-compliance. If the wrongdoer fails to comply with the prescriptions of the notice, the administrator may take further legal action,¹⁶⁸ for example criminal prosecution as set out above.

¹⁵⁸ Occupational Safety and Health Profile for Singapore 19.

¹⁵⁹ Thompson and Benjamin *South African Labour Law* G1-9.

¹⁶⁰ These are examples taken from the OSH Profile for Singapore 21.

¹⁶¹ Occupational Safety and Health Profile for Singapore 17.

¹⁶² UNEP *Manual on compliance with and enforcement of multilateral environmental agreements* 405.

¹⁶³ A 9(1) of the *Occupational Health and Safety Convention* of 1981. The inspection can be done in terms of a case management approach. Where a team commits to drafting a new strategy to avoid accident occurrence. See the *Occupational Safety and Health Profile for Singapore* 17.

¹⁶⁴ A 9(2) of the *Occupational Health and Safety Convention* of 1981.

¹⁶⁵ ILO 2009 *Promoting a safe and healthy working environment* 36.

¹⁶⁶ ILO 2009 *Promoting a safe and healthy working environment* 36.

¹⁶⁷ In South Africa the rules of the *Promotion of Administrative Justice Act* 3 of 2000 will be applicable here.

¹⁶⁸ Section 6 of the PAJA.

2.4.2 Other instruments

Alternative measures include both incentive-based measures and voluntary measures.¹⁶⁹ Incentives schemes¹⁷⁰ include a reward and encouragement system, which imply that complying parties are awarded.¹⁷¹ These measures could, for example, include tax benefits, deposit-refund systems and subsidies. Different categories of awards are available such as workplace safety and health best practice awards,¹⁷² safety and health performance awards,¹⁷³ safety and health award recognition for projects,¹⁷⁴ developer awards,¹⁷⁵ innovation awards¹⁷⁶ and workplace safety health officer¹⁷⁷ awards.¹⁷⁸ Voluntary measures are aimed at voluntary self-regulation. This measure specifically relies on the education of the employer and the employee, which could lead to negotiations in the instance of non-compliance.¹⁷⁹ Examples of these measures include for example the OHSAS 18001,¹⁸⁰ corporate social responsibility programmes, labelling schemes, public participation and training programmes, and auditing processes. According to Vosko and others international standard-setting organizations (hereafter

¹⁶⁹ Nel and Wessels 2010 *PER* 53.

¹⁷⁰ Incentive schemes can be defined as "A program implemented by an organization deliberately intended to induce or encourage a specific action by using incentives." It is used to motivate parties to comply with the prescribed health and safety provisions. See also Investor Words 2016 http://www.investorwords.com/19095/incentive_scheme.html.

¹⁷¹ Investor Words 2016 http://www.investorwords.com/19095/incentive_scheme.html.

¹⁷² Where companies are awarded for the elimination and control of health and safety hazards in the workplace. *Occupational Safety and Health Profile for Singapore* 21.

¹⁷³ *Occupational Safety and Health Profile for Singapore* 21.

¹⁷⁴ The recognition in the instance where companies implemented the health and safety systems in an impressive manner. *Occupational Safety and Health Profile for Singapore* 21.

¹⁷⁵ Where companies are awarded for new projects which achieved good safety and health results through good implementation and management. *Occupational Safety and Health Profile for Singapore* 21.

¹⁷⁶ This is an award for developers who play an active role in ensuring good OSH practices among the contractors. *Occupational Safety and Health Profile for Singapore* 21.

¹⁷⁷ The team with the most innovative solution for health and safety gaps and issues is awarded. *Occupational Safety and Health Profile for Singapore* 21.

¹⁷⁸ Awards WSHO's who help in the creation of safe and healthy workplace. *Occupational Safety and Health Profile for Singapore* 21.

¹⁷⁹ Vosko *et al* 2011 "New approaches to Enforcement and Compliance" 6, see also <http://www.lco-cdo.org/vulnerable-workers-commissioned-papers-vosko-tucker-thomas-gellatly.pdf>.

¹⁸⁰ Known as Occupational Health and Safety management systems.

the ISO) have not developed a health and safety standard on the same level as the ISO 14000 standard.¹⁸¹

Agreement or commitment-based instruments speak for themselves as it is based on the agreement between parties holding parties accountable.¹⁸² Commitment is a voluntary tool that internalises the process of enforcement in the entities that hold themselves accountable.¹⁸³ In terms of the agreement-based enforcement instruments, one that would be specifically applicable to health and safety is the tripartite agreements or relationships. "Tripartite relationships" help in creating a framework for labour inspection, which is very important for health and safety.¹⁸⁴ According to De Silva,¹⁸⁵ tripartite relationships can be defined as:

The cooperation process whereby governments:

- Consult and involve representatives of employers and workers in the formulation of socio-economic policies at the national and industry levels and, in particular, on the legal framework of labour relations and labour-related policy;¹⁸⁶
- Ensure that the social partners' views and concerns are reflected in the policies and laws formulated;¹⁸⁷
- Provide the social partners with opportunities to contribute to socio-economic progress, and thereby enable them to fulfil a wider role than one of only providing direct services to their members in relation to matters covered by the employment relationship.¹⁸⁸

"Tripartite relationships" create a certain responsibility on the government regarding health and safety.¹⁸⁹ In terms of a tripartite relationship there are six elements¹⁹⁰ applicable. The elements include the following: the right to work, the right to associate, the right to collective bargaining, the right to withhold labour, the right to protection and the right to be trained.¹⁹¹ The right to work includes a right to equal opportunities in the workplace, the freedom of performing a work of choice, as well as the right to

¹⁸¹ Vosko *et al* 2011 "New approaches to Enforcement and Compliance" 97. Law Commission of Ontario 2009 <http://www.lco-cdo.org/vulnerable-workers-commissioned-papers-vosko-tucker-thomas-gellaty.pdf>.

¹⁸² Nel and Wessels 2010 *PER* 48.

¹⁸³ Nel and Wessels 2010 *PER* 48.

¹⁸⁴ ILO 2010 *Building modern and effective labour inspection systems* 18.

¹⁸⁵ De Silva *ILO Publications* 2.

¹⁸⁶ De Silva *ILO Publications* 1.

¹⁸⁷ De Silva *ILO Publications* 1.

¹⁸⁸ De Silva *ILO Publications* 2.

¹⁸⁹ ILO 2008 *International Labour Conference* Preface.

¹⁹⁰ UFS <https://lms.tuit.co.za/courses/107/pages/the-elements-of-the-tripartite-relationship>.

¹⁹¹ UFS <https://lms.tuit.co.za/courses/107/pages/the-elements-of-the-tripartite-relationship>.

work freely whether or not work union is present.¹⁹² All of these different rights are the responsibility of the government and the employers. The state can only ensure these rights by making use of a legislative framework that stipulates that the employer should comply with these rights.¹⁹³ A problem that crops up is the fact that there is no definite framework or guideline to go by in terms of tripartite relationships, as every country has different needs and legal frameworks.¹⁹⁴

2.5 Conclusion

The term "occupational health and safety" can, for purposes of this study, be defined as the control, prevention, anticipation and analysis of any hazards which could occur in the workplace and which could cause injury or illness, or which could affect the health and well-being of the employee in the workplace".¹⁹⁵ A "workplace" can be defined as every independent premises, place, or operation regarding size, function or organisation where an employee acts on instruction of the employer. This includes driving to and driving from the workplace, and may include one or more places managed by one central head office, for example where mines are many single areas managed by one overhead company.¹⁹⁶ "Hygiene" is an important aspect as unhygienic circumstances influence the health and safety of employees.¹⁹⁷ A "hazard" can be defined as any circumstance that has the potential to cause harm. Hazards may also be associated with "risks". The term "risks" can be defined as the likelihood of an incident/ occurrence of a hazardous situation, which could cause severe injury or illness. These would be assessed in terms of the risk assessments.

There are different role players¹⁹⁸ involved in occupational health and safety in the workplace: the employer, employees, health and safety committees and representatives, suppliers and manufacturers, users of machinery and government institutions. These role players have different rights and duties important for the

¹⁹² UFS <https://lms.tuit.co.za/courses/107/pages/the-elements-of-the-tripartite-relationship>.

¹⁹³ UFS <https://lms.tuit.co.za/courses/107/pages/the-elements-of-the-tripartite-relationship>.

¹⁹⁴ De Silva *ILO Publications 2*.

¹⁹⁵ See chapter 3.2 for reference to South African definition.

¹⁹⁶ See chapter 3.4 for reference to South African definition.

¹⁹⁷ See chapter 3.5 for reference to South African definition.

¹⁹⁸ The role players are discussed in chapter 4 of the dissertation.

health and safety regime. The government departments' responsibilities include the policymaking process and the giving of advice to the Minister. These departments are also responsible for the enforcement of health and safety legislation. The enforcement of health and safety legislation can be ensured in terms of the different enforcement tools. These tools include command and control instruments and other enforcement tools¹⁹⁹, which will be discussed under chapter 5.

¹⁹⁹ These will be discussed in chapter 5.

Chapter 3 Definitions

3.1 Introduction

In this chapter, the definitions in the MHSA, the OHSA and the *Integrated Bill* will be compared. In this section the definitions of "health and safety", "workplace", "occupational hygiene", "hazards and risks", "incidents" and "reasonable practice" in the MHSA, OHSA and the *Integrated Bill* (where applicable) will be compared. The definitions will also be compared with the definitions referred to in chapter 2.

3.2 Health and safety

The MHSA did not define "health and safety". "Health" is referred to as the "occupational health in mines".²⁰⁰ The MHSA also refers to the term "healthy" which means to be illness or injury free from any occupational occurrence.²⁰¹ Reference is also made to a health and safety standard to promote health and safety in mines.²⁰²

The MOSA does not mention "health", but the OHSA includes both "health and safety" in its title.²⁰³ An employee is deemed "healthy" if he or she is free from illness or injury,²⁰⁴ which could occur because of occupational causes.²⁰⁵

The *National Occupational Health and Safety Integration Bill*²⁰⁶ defines "occupational health and safety" as all those activities that are connected with:

- a) the promotion of health and safe work practices and working environments and conditions;
- b) the prevention of work-related accidents and diseases;
- c) the provision of medical assistance to persons who are injured in work-related accidents or who contract work-related diseases; and
- d) the provision of medical aid, compensation, rehabilitation and other benefits to persons who are injured in work-related accidents, or who contract work-related diseases, including the dependants of persons who die as a result of these causes.²⁰⁷

²⁰⁰ Section 102 of the MHSA.

²⁰¹ Section 102 of the MHSA.

²⁰² Section 102 of the MHSA.

²⁰³ Thompson and Benjamin *South African Labour Law* G1-16. As mentioned before, the mining industry is not covered by the OHSA.

²⁰⁴ Thompson and Benjamin *South African Labour Law* G1-16.

²⁰⁵ Section 1 of the OHSA.

²⁰⁶ *Integration Bill* of 2003.

Both the MHSA and the OHSA refer to "health" or "healthy" to mean that employees are free from illness and injury caused during their occupation. The *Integrated Bill* provides a more comprehensive definition and includes not only the prevention from illness and injury, but also the promotion of health and safety practices, the provision of medical assistance, medical aid and rehabilitation. The definitions in chapter 2 also refer to well-being and to the steps that need to be taken to ensure physical, emotional and social well-being. When comparing "health and safety" with the definition in chapter 2,²⁰⁸ it is important to note that "occupational health" may also include the promotion of very high degrees of well-being. "Health and safety" may include the steps taken to ensure that no hazards occur in the workplace. When compared with the definition of "health and safety" in chapter 2 – which is defined as "the physical, social and mental elements relating to a worker's well-being in the workplace by ensuring a disease and injury free workplace, a workplace where risks are controlled and where the work is adapted to the people and the people to their work",²⁰⁹ it seems clear that the definition of the *Integration Bill* is the more comprehensive term and should therefore be used with the addition of the physical, social and mental elements of well-being.

3.3 Workplace

As health and safety relates to the workplace, it is necessary to clarify the definition of the term "workplace". The MHSA defines "working place" as "any place at a mine²¹⁰ where employees travel and work".²¹¹ In the MHSA, "works" are also defined as:

- 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;
- (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.²¹²

²⁰⁷ Clause 1 of the *Integration Bill* of 2003.

²⁰⁸ See chapter 2.2.1.

²⁰⁹ See chapter 2.2.1.

²¹⁰ See the footnote on the definition of mines on page 2.

²¹¹ Section 102 of the MHSA.

The OHSA defines "workplace" as "any premises or place where a person performs work in the course of his employment".²¹³ The *Integration Bill* does not mention the workplace. The OHSA definition is more comprehensive as it includes the words "course of employment". The definition corresponds to the OHS Convention's definition²¹⁴, which states that the workplace would include the area where an employee acts on either direct or indirect instruction.²¹⁵ A definition in a single health and safety act would therefore have to include a definition that refers to the work premises or an area where the employee acts under an instruction of an employer, or act in the course of his or her employment. Such a definition implies that a health and safety act could also apply externally to the actual premises of the mine or industry. When comparing the definitions of South African legislation, one should consider the definition as in chapter 2. There "workplace" is defined as "every independent premises or place or operation with regards to size, function or organisation where an employee acts on instruction of the employer. This includes driving to and driving from the workplace, and may include one or more place managed by one central head office".²¹⁶ In this instance the definition of chapter 2 will be the definition to follow but adding all the examples of a workplace such as mines, industry, abattoirs, excluding aviation.

3.4 Hygiene

According to the MHSA "occupational hygiene" means the "anticipation, recognition, evaluation and control of conditions at the mine that may cause illness or adverse health effects to persons".²¹⁷ The OHSA defines "occupational hygiene" as the "anticipation, recognition, evaluation and control of conditions arising in or from the workplace, which may cause illness or adverse health effects to persons".²¹⁸ The *Integration Bill* does not define "occupational hygiene". Hygiene is necessary to ensure health in the workplace. For purposes of an integrated health and safety act, and for this dissertation, "occupational hygiene" could therefore be defined as the "anticipation,

²¹² Section 102 of the MHSA.

²¹³ Section 1 of the OHSA.

²¹⁴ See chapter 2.2.2.

²¹⁵ *Occupational Health and Safety Convention* of 1981.

²¹⁶ See chapter 2.2.2.

²¹⁷ Section 102 of the MHSA.

²¹⁸ Section 1 of the OHSA.

recognition, evaluation and control of conditions arising in or from the workplace (including mines) which may cause illness or adverse health effects to persons". This definition should be mentioned in a single health and safety act.

3.5 Hazards and risks

According to the MHSa a "hazard" can be defined as "a source of or exposure to danger".²¹⁹ The OHSa has a similar definition in section 1. The MHSa defines "health hazard" as "any physical, chemical or biological hazard to health" or that the minister has declared as such.²²⁰ There is no definition of the term "hazard" in the *Integration Bill*. The definition concurs with the definition in chapter 2 which is "any circumstance which has the potential to cause harm".²²¹ The definition in terms of chapter 2 of "hazards" is "any circumstance which has the potential to cause harm".²²²

According to the MHSa and OHSa a "risk" is the probability of any harm or occupational injury that may occur to any person involved in the workplace.²²³ This is something that the employer, or anyone involved, should avoid or mitigate as far as reasonably possible and practicable.²²⁴ The *Integration Bill* does not refer to "risk". The term "risk" should concur with the definition as mentioned in chapter 2, which is the "likelihood of someone being harmed or a hazard occurring".²²⁵ Hazards and risks relate to "incidents".

3.6 Incidents

The OHSa does not define an "incident", but it refers to section 24 of the Act.²²⁶ Section 24 categorises incidents as those where a) a person dies or is likely to die or loses a body part or becomes unconscious as a result of workplace activities,²²⁷ b) or is injured

²¹⁹ Section 102 of the MHSa.

²²⁰ Section 102 of the MHSa, section 1 of the OHSa.

²²¹ See chapter 2.2.4.

²²² See chapter 2.2.4.

²²³ Section 102 of the MHSa.

²²⁴ This term will be discussed in the paragraph to follow.

²²⁵ See chapter 2.2.5.

²²⁶ Section 24 of the OHSa

²²⁷ Thompson and Benjamin *South African Labour Law* G1-52.

to such an extent that work is impossible for at least 14 days,²²⁸ c) major incidents which should be reported to the inspector,²²⁹ and d) incidents which need not be reported. The OHSA defines "major incidents" as:

an occurrence of catastrophic proportions, resulting from the use of plant or machinery, or from activities at a work place.²³⁰

These occurrences are deemed to have the potential to cause extensive harm.²³¹ Another category necessary to report include those incidents that might endanger the health and safety of anyone.²³² These "incidents" include the spilling of dangerous substances, machinery failing and machinery running out of control.²³³ There are also "incidents" which are not necessary to be reported to the inspector, namely traffic accidents,²³⁴ incidents in private households,²³⁵ as well as aviation accidents.²³⁶ The *Integrated Bill* does not define this term either.

3.7 Reasonably practicable

The MHSa and the OHSA define "reasonably practicable" as practice that considers:²³⁷

- 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.²³⁸

Reasonable steps should be taken to avoid any hazards or risks. It is the responsibility of both the employer and employee to ensure that hazards and risks do not occur. The *Integration Bill* does not mention the term "reasonably practicable". It is proposed that

²²⁸ Section 24(1)(a) of the OHSA.

²²⁹ Thompson and Benjamin *South African Labour Law* G1-52.

²³⁰ Section 1 of the OHSA.

²³¹ Thompson and Benjamin *South African Labour Law* G1-52.

²³² Thompson and Benjamin *South African Labour Law* G1-52.

²³³ Section 24(1)(c) of the OHSA.

²³⁴ Section 24(3)(a) of the OHSA.

²³⁵ Section 24(3)(b) of the OHSA. When an incident occurs in the household, the house owner should report the incident to SAPS.

²³⁶ Section 24(3)(c) of the OHSA.

²³⁷ Section 102 of the MHSa and s 1 of the OHSA.

²³⁸ Section 102 of the MHSa.

in a single health and safety act, this term should be considered as a measuring point to ensure every step is taken to ensure health and safety.

Reasonable practicability is mentioned in terms of the following issues: the identification of hazards,²³⁹ the evaluation of work-associated risks and the identification and evaluation of the steps necessary to avoid these risks and hazards.²⁴⁰

3.8 Conclusion

The MHSA and OHSA does not include a comprehensive definition of the term "health and safety". The *Integration Bill* identifies the different activities, which include the promotion of a healthy and safe workplace, the prevention of accident and disease, as well as the provision of medical assistance.²⁴¹ When compared with the definition of "health and safety" in chapter 2, which is defined as "the physical, social and mental elements relating to a worker's well-being in the workplace by ensuring a disease and injury free workplace, a workplace where risks are controlled and where the work is adapted to the people and the people to their work", it should also include references to the physical, social and mental elements of the workers' well-being.²⁴² The *Integration Bill's* definition is a very comprehensive definition of "occupational health and safety". "Workplace" is defined as "the work premises or an area where the employee acts to an instruction of an employer, or act in the course of his or her employment".²⁴³ "Hazards" and "risks" occur because of unwanted incidents, where "hazards" include "any physical, chemical or biological hazard to health". The definition in terms of chapter 2 of "hazards" is "any circumstance which has the potential to cause harm".²⁴⁴ Therefore, "hazards" are "any physical, chemical or biological change in circumstances which could cause harm". "Risks" include the "probability of any harm or occupational injury to occur to any person involved in the workplace".²⁴⁵ The term "risk" should concur with the definition as mentioned in chapter 2, which is the "likelihood of

²³⁹ This is a duty of the employer- the rest of the duties will be discussed in chapter 4.

²⁴⁰ Section 12 of the OHSA.

²⁴¹ See chapter 3.1.1.

²⁴² See chapter 2.2.1.

²⁴³ See chapter 3.1.2.

²⁴⁴ See chapter 2.2.4.

²⁴⁵ See chapter 3.1.3.

someone being harmed or a hazard occurring".²⁴⁶ Hazards and risks will include the occurrence of different incidents. "Incidents" consists of different categories.²⁴⁷ In order to avoid incidents employers should follow reasonable practice to ensure the health and safety of the employees, and the employees should take every reasonable step to ensure health and safety of the employees. As seen earlier, there is no comprehensive definition of the term "incident", which should therefore be written into a single health and safety act in order to avoid ambiguity. In order to avoid incidents from occurring, the employer should take the "reasonably practicable" steps to ensure health and safety. Both the MHSA and the OHSA discuss this term. Steps include the determination of the severity and scope of the hazard or risk, the state of knowledge reasonably available, availability and suitability of removal and mitigation means, and the costs and benefits thereof.²⁴⁸

In the following chapter, the different role players applicable to health and safety will be discussed with reference to the MHSA, the OHSA and the *Integration Bill* where applicable.

²⁴⁶ See chapter 2.2.5.

²⁴⁷ See chapter 3.1.4.

²⁴⁸ Section 102 of the MHSA.

Chapter 4 Role players and their rights and duties

Even though certain workplaces are perilous, a general responsibility in terms of common law is placed on employers for ensuring safe working conditions.²⁴⁹ The role players have been identified as employers, employees, contractors, users of machinery, government institutions, and suppliers and manufacturers.²⁵⁰ In the paragraphs that follow a discussion takes place on role players, as well as their different rights and duties in terms of the OHSA, MHSA and the *Integrated Bill*, where applicable.

4.1 Duties of different role players

Health and safety legislation places a duty on the different role players to maintain a healthy and safe workplace for those affected. In the paragraph to follow the duties of the employer,²⁵¹ employee,²⁵² institutions,²⁵³ health and safety representatives,²⁵⁴ suppliers and manufacturers,²⁵⁵ and users of machinery²⁵⁶ will be discussed.

4.1.1 Employers

The duties and responsibilities of employers in terms of the MHSA, OHSA and the *Integration Bill* will now be discussed.

4.1.1.1 MHSA

The employer has a number of duties and responsibilities in terms of the MHSA. One of the most important duties of the employer is to ensure and maintain a healthy and safe environment on the mine.²⁵⁷ The employer must also provide training for the safe operation of machinery.²⁵⁸ There are also other general duties that the employer should

²⁴⁹ Erasmus *et al Human Resource Management for the Public* 394.

²⁵⁰ See chapter 2.3.

²⁵¹ See chapter 4.1.1

²⁵² See chapter 4.1.2.

²⁵³ See chapter 4.1.6.

²⁵⁴ See chapter 4.1.3.

²⁵⁵ See chapter 4.1.4.

²⁵⁶ See chapter 4.1.5.

²⁵⁷ Section 5(1) of the MHSA.

²⁵⁸ Section 2(1)(a)(i)-(ii) of the MHSA.

comply with, namely the undertaking of risk assessments²⁵⁹ and the provision of information²⁶⁰ on health and safety issues.²⁶¹ The employer should both eliminate and control risks²⁶² as quickly as possible. The employer must make use of incident reports in order to conduct health surveillance in the workplace.²⁶³ To ensure that employees are safe, employers are obliged to provide PPE to them.²⁶⁴ This equipment should be provided along with training to showing the employees how it is correctly used.²⁶⁵

It is one of the duties of the employer to take reasonably practicable steps to ensure a safe and healthy working space.²⁶⁶ In the *Pike River*²⁶⁷ case, which originated in New Zealand,²⁶⁸ there was a methane explosion causing the death of many workers. The explosion was viewed as gross negligence on the employer's part.²⁶⁹ In this case, the employer was found guilty because the hazard was not mitigated because the employer failed to manage a methane explosion or the air circulation.²⁷⁰ There are lessons to be learnt from this case such as that it is really important to take reasonable steps to avoid any hazards by making use of mitigation mechanisms and various control measures.²⁷¹

The duties of the employer, as stipulated in terms of the MHSA, promote a proactive approach, as they oblige the employer to take definite steps to protect his or her workers. If an employer does not take the steps as mentioned here, it could lead to health and safety disasters. An example applicable from a South African disaster is the one that took place in Merriespruit,²⁷² where the collapse of a gold mine's slime dam caused both death in and huge damage to the town nearby.²⁷³ In terms of the rights of

²⁵⁹ Section 11(1), (2), (4), (5) of the MHSA

²⁶⁰ To both employees and members of the public. Section 19(1) of the MHSA.

²⁶¹ Section 19(1) of the MHSA.

²⁶² Section 11(2) and (4) of the MHSA.

²⁶³ Section 13(1)-(3) of the MHSA.

²⁶⁴ Section 6(2)-(3) of the MHSA.

²⁶⁵ Section 6(2) and section 10(1)(a) of the MHSA.

²⁶⁶ Section 2 of the MHSA.

²⁶⁷ *The Department of Labour v Pike River Coal Limited* CRN 11018500202/202,211.

²⁶⁸ Royal Commission 2010 <http://pikeriver.royalcommission.govt.nz/>.

²⁶⁹ Ellerbeck 2013 *Without Prejudice* 41.

²⁷⁰ Ellerbeck 2013 *Without Prejudice* 41.

²⁷¹ Ellerbeck 2013 *Without Prejudice* 42.

²⁷² Free State Gold Areas Ltd v Merriespruit (OFS) Gold Mining Co Ltd 1961 (2) SA 505 (W).

²⁷³ Zarine Roodt 2016 <http://www.zarineroodt.com/afrikaans/merriespruit-a-mining-disaster-1994/>.

the employer, the MHSa does not explicitly mention the rights of the employer, but the duties of the employer are discussed more in depth.²⁷⁴

4.1.1.2 OHSA

The employer is an important role player in the OHSA, which defines the "employer" as:

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.²⁷⁵

The definition of employers is wide and it differs from the MOSA definition, which included any individual who assisted employers in their business.²⁷⁶ The employer should ensure the health and safety of every person on site.²⁷⁷ This will include persons who are contractors or any other person who enters the workplace,²⁷⁸ or any other person who enters the workplace.²⁷⁹ Employers are responsible for the health and safety of those who could directly be affected by anything happening in the workplace.²⁸⁰ The employer will always be held responsible for safety.²⁸¹ The employer²⁸² must prevent people working under the influence of alcohol, drugs or both.²⁸³ The employer is obliged to consider not only the employee's health and safety, but also the employee's rights and well-being.²⁸⁴ This duty implies that employers have to develop a strategy in terms of employee wellness.²⁸⁵

The employer has different duties that include the provision and maintenance of a risk free, safe and healthy workplace.²⁸⁶ These should be ensured in the production, the

²⁷⁴ As per ss 2, 3-8, 10-15 of the MHSa.

²⁷⁵ Section 1 of the OHSA.

²⁷⁶ Thompson and Benjamin *South African Labour Law* G1-14.

²⁷⁷ Section 9 of the OHSA, see Van Onselen 2006 *Risk Management* 5.

²⁷⁸ See paragraph c.

²⁷⁹ Union Carbide Corporation <http://www.bhopal.com/>.

²⁸⁰ Sieberhagen, Rothman and Pienaar 2009 *South African Journal of Human Resource Management* 5.

²⁸¹ Van Onselen 2006 *Risk Management* 6.

²⁸² Many of the employer's duties are derived from foreign legislation, as it is done to comply with international standards. As an example one can consider the duty to consult with the committees; this duty is based on the British legislation of 1974. In terms of exemption, the employer should notify safety representatives thereof.

²⁸³ Browne 2005 *Risk Management* 13.

²⁸⁴ Erasmus *et al Human Resource Management for the Public Sector* 400.

²⁸⁵ Erasmus *et al Human Resource Management for the Public Sector* 400.

²⁸⁶ Sieberhagen, Rothman and Pienaar 2009 *South African Journal of Human Resource Management* 5.

processing, storage and transport of substances.²⁸⁷ The duty to maintain a safe and healthy workplace can only be fulfilled if effective monitoring systems are applied and where any shortcomings are detected to fix them.²⁸⁸

Employers are obliged to do risk assessments²⁸⁹, which include hazard exposure.²⁹⁰ Such risk assessments include the following steps:²⁹¹ the identification of the possible hazards, to assess these hazards as to which effect it would have on the employee, and lastly to take steps to eliminate or mitigate these hazards.²⁹² In the instance where an accident has occurred, the employer is obliged to keep record thereof as well as report said instance to the inspector.²⁹³ The assessment of risk should cover all types of workers such as office staff, maintenance staff and night cleaners.²⁹⁴ This duty is both preventative and precautionary.²⁹⁵

The employer is obliged to provide PPE²⁹⁶ to employees.²⁹⁷ The provision of PPE should be made in the instance where the work is listed²⁹⁸ in the *Government Gazette*. Employers are obliged to take certain measures to ensure the safety and health of the employees.²⁹⁹ This duty includes, for example, eliminating or mitigating pollution.³⁰⁰

If an employer does not take the necessary steps to ensure health and safety, it could happen that disasters occur. An example to consider is the incident in Bhopal³⁰¹ where

²⁸⁷ Thompson and Benjamin *South African Labour Law* G1-22.

²⁸⁸ Thompson and Benjamin *South African Labour Law* G1-22.

²⁸⁹ See section 12(1)(a)-(c) of the OHSA

²⁹⁰ Sieberhagen, Rothman and Pienaarr 2009 *South African Journal of Human Resource Management* 5.

²⁹¹ Section 8(2)(d) of the OHSA.

²⁹² Thompson and Benjamin *South African Labour Law* G1-22.

²⁹³ Sieberhagen, Rothman and Pienaar 2009 *South African Journal of Human Resource Management* 5.

²⁹⁴ Thompson and Benjamin *South African Labour Law* G1-23.

²⁹⁵ Section 8(2)(f) of the OHSA, this duty is both preventative and precautionary as the employer is liable for enforcing safety measures in the workplace. This can for example be done by appointing supervisors to overlook the safety in the workplace.

²⁹⁶ Section 8(2)(g) of the OHSA.

²⁹⁷ Section 12 of the OHSA.

²⁹⁸ Thompson and Benjamin *South African Labour Law* G1-24.

²⁹⁹ Sieberhagen, Rothman and Pienaar 2009 *South African Journal of Human Resource Management* 5.

³⁰⁰ Union Carbide Corporation <http://www.bhopal.com/>.

³⁰¹ The Atlantic Taylor 2014 <http://www.theatlantic.com/photo/2014/12/bhopal-the-worlds-worst-industrial-disaster-30-years-later/100864/>.

approximately 2000 people were killed and almost a thousand injured because of an atmospheric release of the chemical, methyl isocyanate.³⁰²

The employer has the duty to consult with unions, committees and representatives in terms of health and safety issues.³⁰³ The employer is obliged to appoint representatives³⁰⁴ when there are more than twenty employees.³⁰⁵ Another responsibility on the employer is to consult with the representative³⁰⁶ on a matter such as the appointment of employer's assistants and the providing of information.³⁰⁷ It is the duty of the employer to consult with the health and safety committees on health and safety measures.³⁰⁸

Investigations, reporting and inquiries into incidents are important duties of employers. When an occupational disease occurs, the medical practitioner is obliged to report the disease if he or she believes that it arose from work duties.³⁰⁹ Employers have the right to refuse employees the right to representatives although this should only occur in very rare cases.³¹⁰

4.1.2 Employees

The duties and responsibilities of employees in terms of the MHSA, OHSA and the *Integration Bill* (where applicable) will now be discussed.

4.1.2.1 MHSA

The employee is obliged to take reasonable care to ensure his or her own health and safety³¹¹ and the health and safety of others.³¹² This is done by, for example, wearing the correct protective clothing, showing up for the prescribed training and complying

³⁰² Union Carbide Corporation 2001-2016 <http://www.bhopal.com/>.

³⁰³ Sieberhagen, Rothman and Pienaar 2009 *South African Journal on Human Resource Management* 5.

³⁰⁴ Section 17(1) of the OHSA.

³⁰⁵ Thompson and Benjamin *South African Labour Law* G1-33.

³⁰⁶ Section 17(2) of the OHSA.

³⁰⁷ Thompson and Benjamin *South African Labour Law* G1-45.

³⁰⁸ Venter and Levy *Labour Relations in South Africa* 39.

³⁰⁹ Section 25 of the OHSA.

³¹⁰ Sieberhagen, Rothman and Pienaar 2009 *South African Journal on Human Resource Management* 5. The employee however still has the right to report the refusal.

³¹¹ Section 22(a) of the MHSA.

³¹² Section 22(b) of the MHSA.

with the standards of health and safety.³¹³ When a dangerous incident occurs, the employee must report this incident to the supervisor.³¹⁴ There is a statutory duty on employees to report anything that could potentially risk their health and safety.³¹⁵

An employee has the right to elect a representative in terms of health and safety, which enables him or her to take part in health and safety matters.³¹⁶ Employees have the right to receive adequate training in terms of health and safety to ensure that the correct procedures are followed in emergencies.³¹⁷ Employees also have the right to leave a working place that could be deemed as dangerous.³¹⁸

4.1.2.2 OHSA

As the right to a healthy and safe workplace is a reciprocal right, employees need to fulfil the general duties.³¹⁹ The employee has the duty to take care of his/her own health and safety and of the health and safety of others³²⁰ to ensure a safe workplace.³²¹ This can only be done if the employee complies with his or her contractual obligations; also by ensuring that any act done in the workplace does not endanger anyone else.³²² In the case where an employer obliges the employee to fulfil a duty, the employee is bound to complete said task with due diligence, always considering the health and safety provisions.³²³

Employees should evaluate their actions and check as to whether or not they comply with the different standards.³²⁴ In the instance where the employee detects any unsafe circumstances or conditions, he or she is obliged to report to the situation³²⁵ to the

³¹³ Section 22(c) of the MHSA.

³¹⁴ Section 22(d) of the MHSA.

³¹⁵ Masilo and Rautenbach *Commentary on the Mine Health and Safety* 1-25.

³¹⁶ Plimmer 1997 *Indicator SA* 42.

³¹⁷ Plimmer 1997 *Indicator SA* 42.

³¹⁸ Section 23(1) of the MHSA.

³¹⁹ Section 14 of the MHSA.

³²⁰ Section 14(a) of the OHSA.

³²¹ Erasmus *et al Human Resource Management for the Public Sector* 396.

³²² Thompson and Benjamin *South African Labour Law* G1-30.

³²³ Erasmus *et al Human Resource Management for the Public Sector* 396.

³²⁴ Thompson and Benjamin *South African Labour Law* G1-30.

³²⁵ Section 14(d) of the OHSA.

inspection authorities.³²⁶ The employee is obliged to report accidents, for example, in the instance where the unsafe conditions has escalated to such an extent that he or she was injured in the course of employment.³²⁷ Employees are obliged to act in such a way that is deemed as safe.³²⁸ The employee should comply with the procedures and rules³²⁹ stipulated by the employer.³³⁰

Employees should be protected in the workplace, but they are not allowed to be harassed or victimised in terms of the monitoring of safety.³³¹ Full-time employees are entitled to have representatives,³³² even if the employee is not literate or qualified.³³³ The compensation of the employee may not be deducted if it could negatively influence the employees' safety.³³⁴ The reason why the compensation is mentioned is that, if anything prohibits the employee from acquiring the correct PPE,³³⁵ it is deemed as unlawful.³³⁶ The employee is entitled to be protected in the workplace.

4.1.3 Health and safety representatives and committees

The duties and responsibilities of health and safety representatives and committees, in terms of the MHSA, OHSA and the *Integration Bill* (where applicable), will now be discussed.

4.1.3.1 MHSA

Health and safety representatives and committees must be appointed when the employees reach a certain number.³³⁷ There should be representatives available for

³²⁶ Erasmus *et al Human Resource Management for the Public Sector* 396.

³²⁷ Section 14(d) of the OHSA see also Erasmus *et al Human Resource Management for the Public Sector* 396.

³²⁸ Thompson and Benjamin *South African Labour Law* G1-18.

³²⁹ Section 14(c) of the OHSA.

³³⁰ Thompson and Benjamin *South African Labour Law* G1-31.

³³¹ Thompson and Benjamin *South African Labour Law* G1-26.

³³² Sieberhagen, Rothman and Pienaar 2009 *South African Journal on Human Resource Management* 5.

³³³ Thompson and Benjamin *South African Labour Law* G1-34.

³³⁴ Section 23 of the OHSA.

³³⁵ Section 24 of the MHSA.

³³⁶ Article 21 of the *Convention* 155 of 1981.

³³⁷ Section 25 of the MHSA. When 20 or more employees are appointed, the employer must appoint representatives. When a mine has more than 100 employees, a committee is compulsory.

each shift in the workplace.³³⁸ Representatives and committees cannot incur any civil liability.³³⁹ What this means is that, when they exercise powers in terms of the Act, they cannot be sued or punished for the omission of an act.³⁴⁰ The employer should appoint and elect the representatives.³⁴¹ The employer should consult with the representative trade union to reach a collective agreement in terms of a few important issues, for example, how many full-time representatives should be present at the workplace,³⁴² how to fill representative vacancies,³⁴³ and how the functions should be exercised,³⁴⁴ to mention a few.³⁴⁵ When there is no representative trade union involved the employer should consult with registered trade unions,³⁴⁶ or employees,³⁴⁷ to discuss the issues connected with health and safety representatives.

For a person to qualify as a representative, he or she must be a full-time employee at the workplace³⁴⁸ and know the working conditions;³⁴⁹ and to qualify as a full-time representative he or she must be appointed as a full-time employee³⁵⁰ and comply with any other agreed³⁵¹ or prescribed qualification.³⁵² A representative may either be appointed³⁵³ or elected.³⁵⁴ Representatives have different rights and responsibilities which include, amongst others, to direct the employee to leave the workplace if circumstances look dangerous,³⁵⁵ identify hazards and risks,³⁵⁶ make recommendations on matters affecting employees,³⁵⁷ inspect any document,³⁵⁸ request information from

³³⁸ Section 25(1) of the MHSA.

³³⁹ Section 25(3) of the MHSA.

³⁴⁰ Masilo and Rautenbach *Commentary on the Mine Health and Safety* 1-32.

³⁴¹ Section 29(1) of the MHSA.

³⁴² Section 26(1)(b) of the MHSA.

³⁴³ Section 26(1)(e) of the MHSA.

³⁴⁴ Section 26(1)(f) of the MHSA.

³⁴⁵ See section 26(1)(a)-(m) of the MHSA for the other subjects of consultation.

³⁴⁶ Section 26(6)(a) of the MHSA.

³⁴⁷ Section 26(7)(a) of the MHSA.

³⁴⁸ Section 28(1)(a) of the MHSA.

³⁴⁹ Section 28(1)(b) of the MHSA.

³⁵⁰ Section 28(2)(a) of the MHSA.

³⁵¹ Section 28(2)(b)(i) of the MHSA.

³⁵² Section 28(2)(b)(ii) of the MHSA.

³⁵³ By the employer. See section 29(4) of the MHSA.

³⁵⁴ Amongst the employees. See ss29(1)-(3) of the MHSA.

³⁵⁵ Section 30(1)(b) of the MHSA.

³⁵⁶ Section 30(1)(d) of the MHSA.

³⁵⁷ These recommendations are made to the employer or the health and safety committee, see section 30(1)(e) of the MHSA.

³⁵⁸ Section 30(1)(f) of the MHSA.

the inspector,³⁵⁹ and be assisted by an advisor.³⁶⁰ The rights include amongst others to attend any health and safety committee meeting of which the representative is a member,³⁶¹ or where recommendations will be made;³⁶² also to take part in consultations,³⁶³ inquiries³⁶⁴ and audits,³⁶⁵ inspect the workplace³⁶⁶ and visit accident sites.³⁶⁷ When the representative inspects the workplace, the employer should be allowed to take part in the inspection.³⁶⁸ The representative has the right to receive training.³⁶⁹ Representatives are entitled to compensation for work done.³⁷⁰ Representatives are all entitled to be informed of inspections, inquiries, investigations³⁷¹ or accidents.³⁷²

Committees are also established during negotiation and consultation with the relevant representative trade union.³⁷³ The consultation will include the following subjects: amongst others the number of representatives that should be on the committee,³⁷⁴ how the committee members will be appointed or elected,³⁷⁵ the terms such as the removal of members,³⁷⁶ how vacancies will be filled,³⁷⁷ what type of assistance will be provided³⁷⁸ and how disputes will be resolved.³⁷⁹ Committees should hold regular meetings.³⁸⁰ The committee has rights and powers, which include amongst others to represent employees,³⁸¹ take part in consultations,³⁸² request information,³⁸³ agree on the

³⁵⁹ Section 30(1)(g) of the MHSA.

³⁶⁰ Section 30(1)(h) of the MHSA.

³⁶¹ Section 30(1)(i)(i) of the MHSA.

³⁶² Section 30(1)(i)(ii) of the MHSA.

³⁶³ Section 30(1)(k) of the MHSA.

³⁶⁴ Section 30(1)(t) of the MHSA.

³⁶⁵ Section 30(1)(n) of the MHSA.

³⁶⁶ Section 30(1)(m) of the MHSA.

³⁶⁷ Section 30(1)(q) of the MHSA.

³⁶⁸ Section 30(5)(b) of the MHSA.

³⁶⁹ Section 30(6) of the MHSA, this training should occur during normal working hours.

³⁷⁰ See section 31 of the MHSA.

³⁷¹ Section 32(1)(a) of the MHSA.

³⁷² Section 32(1)(b) of the MHSA.

³⁷³ Section 33 of the MHSA.

³⁷⁴ Section 33(1)(b) of the MHSA.

³⁷⁵ Section 33(1)(c) of the MHSA.

³⁷⁶ Section 33(1)(d) of the MHSA.

³⁷⁷ Section 33(1)(e) of the MHSA.

³⁷⁸ There are certain facilities that should be provided, see s 33(1)(g) of the MHSA.

³⁷⁹ Section 33(1)(h) of the MHSA.

³⁸⁰ Section 35 of the MHSA.

³⁸¹ Section 36(1)(a) of the MHSA.

³⁸² Section 36(1)(b) of the MHSA.

additional qualifications of representatives³⁸⁴ and report on meetings held.³⁸⁵ The committee is entitled to receive support from the employer in terms of facilities³⁸⁶ and annual reports.³⁸⁷

4.1.3.2 OHSA

Safety representatives and committees are established to monitor and regulate workplace health and safety.³⁸⁸ When an employer has more than twenty employees, he must appoint health and safety representatives.³⁸⁹ This ensures that unilateral actions do not occur and forces the employer to consult with others before making a decision.³⁹⁰ There should be one representative per every fifty employees³⁹¹ unless an inspector decides differently.³⁹²

Section 18 of the OHSA stipulates the functions and duties of the representatives.³⁹³ The main purpose of these representatives is to ensure that the health and safety measures are effectively exercised,³⁹⁴ and to check whether employees are exposed to hazards.³⁹⁵ This purpose will only be attained if the representative is allowed to examine any cause of harm or injury.³⁹⁶ The site of the incident is therefore open to the representative to investigate at all times.³⁹⁷ The representative may represent the employees to either the employer or health and safety committees.³⁹⁸ The broad duty of the representative is to monitor the effectiveness of health and safety measures, identify different potential hazards and to investigate when incidents occur.³⁹⁹

³⁸³ Section 36(1)(d) of the MHSA.

³⁸⁴ Section 36(1)(e) of the MHSA.

³⁸⁵ Section 36(1)(i) of the MHSA.

³⁸⁶ Section 37(a) of the MHSA.

³⁸⁷ Section 37(b) of the MHSA.

³⁸⁸ Thompson and Benjamin *South African Labour Law* G1-33.

³⁸⁹ Section 17(1) of the OHSA.

³⁹⁰ Thompson and Benjamin *South African Labour Law* G1-33.

³⁹¹ Section 17(5) of the OHSA.

³⁹² Thompson and Benjamin *South African Labour Law* G1-36.

³⁹³ Section 18 of the OHSA.

³⁹⁴ Section 18(2) of the OHSA.

³⁹⁵ Section 18(1)(a)-(j) of the OHSA see also Thompson and Benjamin *South African Labour Law* G1-37.

³⁹⁶ Section 18(1)(c) of the OHSA.

³⁹⁷ Section 18(2)(a) of the OHSA.

³⁹⁸ Section 18(2)(b) of the OHSA.

³⁹⁹ Venter and Levy *Labour Relations in South Africa* 289.

Where there are more than two representatives in the workplace,⁴⁰⁰ the employer should appoint a health and safety committee.⁴⁰¹ This committee is obliged to meet as often as possible.⁴⁰² There are no specific procedures for the meetings;⁴⁰³ it is in the hands of the committee to determine.⁴⁰⁴ When an incident occurs, the committee is obliged to discuss the incident,⁴⁰⁵ and to report to the inspector.⁴⁰⁶ The committee should therefore be very active in the incident and accident analysis process, to stay informed.⁴⁰⁷ Committee members are obliged to keep the employees' best interests at heart.⁴⁰⁸

In the case where the representative has a suspicion that there might be health and safety issues in the workplace, he or she is entitled to conduct an inspection on any item that he/she deems unsafe.⁴⁰⁹ The representative has the right to be part of any consultations completed by the inspector, as this leads to better relationships between the representative and the inspector.⁴¹⁰ The representatives are entitled to have a technical advisor accompanying them during the inspection process.⁴¹¹ If the representative is part of a health and safety committee, he/she has the right to attend any meeting held by said committee.⁴¹² The representative is entitled to join in any internal health audit.⁴¹³ This can be seen as in section 18(1) where the rights are stipulated with the term "may". Training courses are to be modified in order to cover all of the needs that representatives may have.⁴¹⁴

⁴⁰⁰ Section 19(1) of the OHSA.

⁴⁰¹ Sieberhagen, Rothman and Pienaar 2009 *South African Journal of Human Resource Management* 5.

⁴⁰² Section 19(4) of the OHSA.

⁴⁰³ Section 19(5) of the OHSA.

⁴⁰⁴ Thompson and Benjamin *South African Labour Law* G1-39

⁴⁰⁵ Thompson and Benjamin *South African Labour Law* G1-41.

⁴⁰⁶ Section 20(1)(b) of the OHSA.

⁴⁰⁷ Thompson and Benjamin *South African Labour Law* G1-41.

⁴⁰⁸ Thompson and Benjamin *South African Labour Law* G1-41.

⁴⁰⁹ Section 18(1)(g) of the OHSA.

⁴¹⁰ Section 18(1)(h) of the OHSA.

⁴¹¹ Section 18(1)(i) of the OHSA.

⁴¹² Section 18(1)(j) of the OHSA.

⁴¹³ Section 18(2)(f) of the OHSA.

⁴¹⁴ Thompson and Benjamin *South African Labour Law* G1-36.

The committee is allowed to make certain recommendations in terms of health and safety issues.⁴¹⁵ If these issues cannot be resolved, the committee is entitled to approach the inspector to monitor the related issues.⁴¹⁶ The committee may write a report based on an incident to the inspectorate.⁴¹⁷

4.1.4 Suppliers and manufacturers

The duties and responsibilities of suppliers and manufacturers, in terms of the MHSA, OHS Act and the *Integration Bill* (where applicable) will now be discussed.

4.1.4.1 MHSA

Manufacturers and suppliers include anyone who:

- (a) designs, manufactures, repairs, imports, or supplies any article for use at a mine and who 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 articles 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.⁴¹⁸

They are faced with the duty to ensure that the designed article is safe and not detrimental to the health of the users.⁴¹⁹ This duty will be fulfilled by ensuring that the correct information⁴²⁰ is supplied to those using the article or machine.⁴²¹

4.1.4.2 OHS Act

To ensure the health and safety in the workplace, suppliers and manufacturers have the main duty to ensure that the items provided by them are safe. This means that it

⁴¹⁵ Section 20(1)(a) of the *OHS Act*.

⁴¹⁶ Venter and Levy *Labour Relations in South Africa* 289.

⁴¹⁷ Thompson and Benjamin *South African Labour Law* G1-45.

⁴¹⁸ Section 21(1)(a)-(c) of the MHSA.

⁴¹⁹ Section 21(3) of the MHSA.

⁴²⁰ Correct information includes the mention of health and safety risks (s 21(4)(b)(ii)), any use restriction (s 21(4)(b)(iii)), any precautions necessary (s 21(4)(b)(iv)) and the emergency procedure (s 21(4)(b)(v)).

⁴²¹ Section 21(4)(a) of the MHSA.

should be in such a condition that it is safe to use,⁴²² not perilous to the employee's health and safety.⁴²³ If the equipment does not comply with the different standards, they will be held liable to modify it as stipulated in section 10.⁴²⁴

Another duty is the provision and disclosure of information. The information should include whether or not any dangerous substances will be released, as well as whether the health and safety of others will be affected.⁴²⁵ Those responsible for the installation of machinery or articles⁴²⁶ have the duty to ensure that the machinery or articles are not detrimental to the health and safety of anyone affected.⁴²⁷

4.1.5 Users of machinery

The duties and responsibilities of users of machinery, in terms of the OHSA, will now be discussed. The OHSA is the only Act referring to users of machinery. The MHSA and *Integration Bill* are therefore not referred to.

4.1.5.1 OHSA

A user of machinery is a role player who is in control of their own machinery or who uses machinery for their own benefit.⁴²⁸ Users of machinery are burdened with many different duties, such as keeping record of any incident that could occur or have already occurred in the workplace.⁴²⁹ This record should be open and available to both the inspectorate⁴³⁰ and health and safety representatives at all times.⁴³¹

4.1.6 Institutions

The duties and responsibilities of the government institutions involved, in terms of the MHSA, OHSA and the *Integration Bill* (where applicable), will now be discussed.

⁴²² Section 10(1) of the OHSA.

⁴²³ Erasmus *et al Human Resource Management for the Public Sector* 396.

⁴²⁴ Section 10 of the OHSA.

⁴²⁵ Section 10(1) of the OHSA.

⁴²⁶ Section 10(2) of the OHSA.

⁴²⁷ Section 10 of the OHSA.

⁴²⁸ Thompson and Benjamin *South African Labour Law* G1-15.

⁴²⁹ Thompson and Benjamin *South African Labour Law* G1-53.

⁴³⁰ Reg 10(1) in GN R929 in GG 25129 of 25 June 2003.

⁴³¹ Thompson and Benjamin *South African Labour Law* G1-53.

4.1.6.1 MHSA

From a governance perspective, the Ministry of Mineral Resources and the Department of Mineral Resources are the main institutions involved in mine health and safety. The MHSA, however, also establishes other institutions, to assist the Minister and Department in their work. These institutions include the Mine Health and Safety Council (hereafter the MHSA),⁴³² the Mining Regulation Advisory Committee (hereafter the MRAC),⁴³³ a Mining Occupational Health Advisory Council (hereafter referred to as MOHAC)⁴³⁴ and a Safety in Mines Research Advisory Committee.⁴³⁵ The MHSA also provides for the establishment of a Mining Qualifications Authority (hereafter the MQA).⁴³⁶

The Minister has certain roles and responsibilities in terms of the MHSA, for example, the prohibition or restriction of work.⁴³⁷ This restriction or prohibition may only be done if the Minister has consulted with the Council,⁴³⁸ unless the Minister is of belief that the immediate prohibition or restriction is in the public interest.⁴³⁹ The Minister is entitled to declare health hazards in the *Government Gazette*.⁴⁴⁰ Prohibitions, restrictions and declarations are issued in terms of notices.⁴⁴¹ The Minister may apply other legislation to the mine, for example the OHS Act.⁴⁴²

The MHSC consists of employer's representatives,⁴⁴³ employee representatives,⁴⁴⁴ state department members,⁴⁴⁵ and the Chief Inspector of Mines.⁴⁴⁶ The Minister must appoint Council members⁴⁴⁷ and committee members.⁴⁴⁸ The Council must advise the Minister on

⁴³² Section 41(1) of the OHS Act.

⁴³³ Section 41(2)(a) of the OHS Act.

⁴³⁴ Section 41(2)(b) of the OHS Act.

⁴³⁵ Section 41(2)(c) of the MHSA.

⁴³⁶ Section 41(3) of the MHSA.

⁴³⁷ Section 75 of the MHSA.

⁴³⁸ Section 75(1)(a) of the MHSA. See paragraph below.

⁴³⁹ Section 75(1)(b) of the MHSA.

⁴⁴⁰ Section 76(1) of the MHSA.

⁴⁴¹ Section 77 of the MHSA.

⁴⁴² Section 80(1) of the MHSA.

⁴⁴³ Section 42(1)(a) of the MHSA (five members).

⁴⁴⁴ Section 42(1)(b) of the MHSA (five members).

⁴⁴⁵ Section 42(1)(c) of the MHSA (four members).

⁴⁴⁶ Section 42(1)(d) of the MHSA - the Chief Inspector chairs the Council.

⁴⁴⁷ Section 42(2) of the MHSA.

health and safety issues.⁴⁴⁹ It is the duty of the Council to co-ordinate activities of the committees and liaise with the MQA,⁴⁵⁰ as well as statutory bodies.⁴⁵¹ The Council must promote health and safety in the mining industry.⁴⁵² It is also the responsibility of the Council to arrange a tripartite summit to review as to whether or not the health and safety is up to standard in the mining industry.⁴⁵³ It is also the duty of the MHSC to advise the Minister annually on relevant research.⁴⁵⁴ The MRAC is responsible for advising the Council on legislation, standards and guidelines.⁴⁵⁵ The MOHAC is the committee responsible for advising the Council on occupational health and the issues thereof.⁴⁵⁶ Another Committee worth mentioning is the Safety in Mines Research Advisory Committee (hereafter referred to as SIMRAC) who is the committee responsible for advising the Council on research undertaken on health and safety.⁴⁵⁷

MQA functions include the generation of education and training standards.⁴⁵⁸ It is their responsibility to seek accreditation in terms of the *South African Qualifications Act*⁴⁵⁹ and to be the responsible monitoring and auditing body.⁴⁶⁰

The Mine Health and Safety Inspectorate (hereafter referred to as the MHSI) is responsible for the enforcement of health and safety legislation.⁴⁶¹

"Tripartite relationships" are not defined explicitly. What tripartite relationships entails, is a three-way relationship between the government, the employer and the employee. A

⁴⁴⁸ Section 42(2A) of the MSHA.

⁴⁴⁹ Section 43(a) of the MSHA.

⁴⁵⁰ Section 43(b) of the MSHA.

⁴⁵¹ Section 43(c) of the MSHA.

⁴⁵² Section 43(d) of the MSHA.

⁴⁵³ Section 43(e) of the MSHA. See chapter 2.4.

⁴⁵⁴ MHSC Council Structure <http://www.mhsc.org.za/about-mhsc/council-structure-0>.

⁴⁵⁵ MHSC Council Structure <http://www.mhsc.org.za/about-mhsc/council-structure-0>.

⁴⁵⁶ MHSC Council Structure <http://www.mhsc.org.za/about-mhsc/council-structure-0>.

⁴⁵⁷ MHSC Council Structure <http://www.mhsc.org.za/about-mhsc/council-structure-0>.

⁴⁵⁸ Section 46(1)(a) of the MSHA.

⁴⁵⁹ 58 of 1995.

⁴⁶⁰ Section 46(1)(b) of the MSHA.

⁴⁶¹ See chapter 5.1.1.

tripartite arrangement was established in June 1997,⁴⁶² with the aim to promote the national policies in terms of regulation, monitoring, auditing and inspection of mines.⁴⁶³

4.1.6.2 OHSA

From a governance perspective the Ministry of Labour and the Department of Labour are the main institutions involved in occupational health and safety. The OHSA, however, also establishes other institutions to assist the Minister and the Department in their work, such as the Advisory Council on Occupational Health and Safety.

The Minister has the following role and functions. The Minister should designate inspectors.⁴⁶⁴ The Minister may by notice in the *Government Gazette* issue general prohibitions on the employer.⁴⁶⁵ The Minister⁴⁶⁶ is empowered to prohibit any activity which threatens, or which has the potential to threaten, the safety of employees.⁴⁶⁷ These prohibitions include amongst others the prohibition of permitting employees to participate in work that threatens their health or safety⁴⁶⁸ and the prohibition and the notice thereof, subject to amendments.⁴⁶⁹ The Minister should also designate the person who will be the chief inspector.⁴⁷⁰ The Minister may make regulations in terms of any matter of this Act.⁴⁷¹ The Advisory Council on Occupational Health and Safety⁴⁷² is a council consisting of government members, different organisations, unions, employers and experts.⁴⁷³ This Council has a duty to advise the Minister in terms of all matters regarding occupational health and safety.⁴⁷⁴ The Council is entitled to help in the policy making process.⁴⁷⁵

⁴⁶² Masilo and Rautenbach *Commentary on the Mine Health and Safety* 1-50.

⁴⁶³ Masilo and Rautenbach *Commentary on the Mine Health and Safety* 1-50.

⁴⁶⁴ Section 28(1) of the OHSA.

⁴⁶⁵ Section 21(1) of the OHSA.

⁴⁶⁶ As per the definition of the OHSA (s 1 of the OHSA).

⁴⁶⁷ Section 21(1) of the OHSA.

⁴⁶⁸ Section 21(1)(a) of the OHSA.

⁴⁶⁹ Section 40(1) of the OHSA.

⁴⁷⁰ Section 27(1) of the OHSA, see also chapter 5.1.2.

⁴⁷¹ Section 43 of the OHSA.

⁴⁷² The Council is established in terms of section 2 of the OHSA.

⁴⁷³ Section 4 of the OHSA. These are also the role players who are a part of the health and safety legislation.

⁴⁷⁴ Section 4 of the OHSA.

⁴⁷⁵ Section 3(1)(b) of the OHSA, see also Thompson and Benjamin *South African Labour Law* G1-17.

There are also technical committees, which are responsible for advice in terms of the Council's performance.⁴⁷⁶ The Department of Labour is entitled to receive advice on the formulation and publication of different standards and specifications.⁴⁷⁷

4.1.6.3 Integration Bill

The *Integration Bill* has the aim to establish an authority that will handle all issues in terms of health and safety. This authority will be a combined force of members of the Department of Labour, the Department of Health and the Department of Mineral Resources. The "to be" established National Occupational Health and Safety Authority will have a board, which will consist of

- a CEO;
- a Department of Labour representative;⁴⁷⁸
- a Department of Minerals and Energy representative;⁴⁷⁹
- a Department of Health representative;
- four trade union members;⁴⁸⁰ and
- four employer's organisation⁴⁸¹ members.⁴⁸²

The Minister of Labour⁴⁸³ will be head of this authority.⁴⁸⁴ The Authority will act in accordance with the Minister's directions.⁴⁸⁵ Any provision made by the Minister is deemed as binding on all the members responsible for health and safety.⁴⁸⁶ The Authority is responsible for the implementation and administration of an integrated policy.⁴⁸⁷

The Executive of the Authority is the CEO,⁴⁸⁸ the staff appointed by the CEO⁴⁸⁹ and staff seconded to the executive.⁴⁹⁰ The Executive is responsible for the development of an

⁴⁷⁶ Section 6 of the OHSA.

⁴⁷⁷ Thompson and Benjamin *South African Labour Law* G1-17.

⁴⁷⁸ As designated by the Director-General of the Department of Labour.

⁴⁷⁹ As designated by the Director-General of the Department of Minerals and Energy.

⁴⁸⁰ As nominated by the Minister.

⁴⁸¹ As nominated by the Minister.

⁴⁸² Clause 7(1)(a)-(f) of the *Integration Bill* of 2003.

⁴⁸³ Who is responsible of the publishing of the policy as well as to direct the Authority on its functions.

⁴⁸⁴ Clause 1 of the *Integration Bill*.

⁴⁸⁵ Clause 3(1)(b) of the *Integration Bill*.

⁴⁸⁶ Clause 3(2) of the *Integration Bill*.

⁴⁸⁷ Clause 5 of the *Integration Bill*.

⁴⁸⁸ Clause 15(a) of the *Integration Bill*.

⁴⁸⁹ Clause 15(b) of the *Integration Bill*.

⁴⁹⁰ Clause 15(c) of the *Integration Bill*.

implementation plan to establish an integrated occupational health and safety system.⁴⁹¹ The Executive may, where necessary, do research,⁴⁹² consult with relevant stakeholders,⁴⁹³ perform legal acts on behalf of the Authority as well as defend any legal action.⁴⁹⁴

The board of the executive holds office for a prescribed period of four years⁴⁹⁵ until replaced by other representatives designated by the Director-General of Labour.⁴⁹⁶ In the instance where the Minister deems a board member as not fit, he or she may remove them;⁴⁹⁷ also when a member was absent from three consecutive meetings without permission.⁴⁹⁸ The removal of a board member may only occur when the Minister has consulted with the trade union federations⁴⁹⁹ and the employer's organisations.⁵⁰⁰ When appointing the members of the Board, remuneration of the members should always be considered⁵⁰¹ unless the member is part of an organ of state.⁵⁰² Those appointed by the organs of state will be reimbursed out of the expenses of the Authority.⁵⁰³

The Board must give advice to the Minister on any issue concerning health and safety in the workplace, specifically in terms of the way in which the Minister gives directions to the Executive in the exercise of his or her powers.⁵⁰⁴ The Board should also advise the Minister on effective ways to ensure that a culture of health and safety is promoted amongst both employers and employees.⁵⁰⁵ The Board is responsible for ensuring that South African legislation complies with the international standards.⁵⁰⁶ The Board should

⁴⁹¹ Clause 16(a) of the *Integration Bill*.

⁴⁹² Clause 16(3)(a) of the *Integration Bill*.

⁴⁹³ Clause 16(3)(b) of the *Integration Bill*.

⁴⁹⁴ Clause 16(3)(g)-(h) of the *Integration Bill*.

⁴⁹⁵ Clause 8(2)(a) of the *Integration Bill*.

⁴⁹⁶ Clause 8(1) of the *Integration Bill*.

⁴⁹⁷ Clause 9(1)(b) of the *Integration Bill*.

⁴⁹⁸ Clause 9(1)(a) of the *Integration Bill*.

⁴⁹⁹ If the person was appointed in terms of clause 6(e) of the *Integration Bill*.

⁵⁰⁰ If appointed in terms of clause 6(f), this provision was made clause 9(2) of the *Integration Bill*.

⁵⁰¹ Clause 11(2) of the *Integration Bill*.

⁵⁰² Clause 11(3) of the *Integration Bill*.

⁵⁰³ Clause 11(3) of the *Integration Bill*.

⁵⁰⁴ Clause 12(1)(a)(ii) of the *Integration Bill*.

⁵⁰⁵ Clause 12(1)(a)(iv) of the *Integration Bill*.

⁵⁰⁶ Clause 12(2) of the *Integration Bill*.

conduct research on all subjects that could affect health and safety.⁵⁰⁷ Whilst conducting this research the board should retrieve information⁵⁰⁸ and make use of experts to ensure that the correct steps are taken.⁵⁰⁹ The Board should meet at the very least twice a year,⁵¹⁰ the where and when decided by the chairperson.⁵¹¹ During these meetings it is required to keep minutes of the proceedings and different decisions made in the meeting.⁵¹²

The Executive is responsible for the drafting of an implementation plan for an integrated health and safety system;⁵¹³ as well as the development of a reporting system.⁵¹⁴ Logistical support should be provided for the Board.⁵¹⁵ It is a duty of the Executive to promote a culture of safety and health amongst workers, employers and other stakeholders.⁵¹⁶ It is important to note that co-operative governance is a very necessary principle in this instance,⁵¹⁷ as there are many different organs of state that responsibilities in terms of health and safety.⁵¹⁸ The *Integration Bill* does not necessarily deal with employers and employees as such,⁵¹⁹ as it only establishes an Authority that will deal with the implementation and administration of the health and safety policy.⁵²⁰ When considering a single health and safety act in South Africa, this could be deemed as the starting point; if an authority is then established, the legislation can evolve from there onwards.

4.2 Conclusion

When comparing the duties of employers and employees in terms of both the MHSA and the OHSA it is clear that there is a shared responsibility between employers and

⁵⁰⁷ Clause 13(a) of the *Integration Bill*.

⁵⁰⁸ Clause 13(b) of the *Integration Bill*.

⁵⁰⁹ Clause 13(d) of the *Integration Bill*.

⁵¹⁰ Clause 14(1) of the *Integration Bill*.

⁵¹¹ Clause 14(2) of the *Integration Bill*.

⁵¹² Clause 14(6) of the *Integration Bill*.

⁵¹³ Clause 16(a) of the *Integration Bill*.

⁵¹⁴ Clause 16(b) of the *Integration Bill*.

⁵¹⁵ Clause 16(e) of the *Integration Bill*.

⁵¹⁶ Clause 16(g) of the *Integration Bill*.

⁵¹⁷ Clause 16(2) of the *Integration Bill* of 2003.

⁵¹⁸ For example the departments of: Mineral Resources, Health and Labour. Cooperative governance made its origin in Chapter 3 of the *Constitution*.

⁵¹⁹ See 4.1.1 and 4.1.2.

⁵²⁰ *Integration Bill*.

employees to ensure the health and safety in the working environment.⁵²¹ The MHSA also deems contractors as employees, where the OHSA deems them as independent employers. In a single health and safety act, it is proposed that contractors be deemed as employees, as he will be held responsible in terms of the act. It is clear that the main duty of an employer is to ensure health and safety for the employees.⁵²² Employers are also responsible for ensuring the health and safety of those who enter the workplace.⁵²³ Employers should also undertake risk assessments to ensure that no unwanted risks are present in the workplace.⁵²⁴ Reasonable practicability⁵²⁵ is an important measure that is mentioned in both the OHSA and the MHSA.⁵²⁶ In terms of employees, it is clear that they also have duties in terms of the OHSA and the MHSA. These duties includes participation in training, as well as utilising the prescribed PPE, and in the instance where a dangerous or perilous situation occurs, the employee is obliged to report such a situation to inspectors.⁵²⁷ The employees are also responsible to ensure that their own health and safety is not threatened.⁵²⁸ Suppliers and manufacturers are role players who design any necessary articles for the workplace; they are obliged to ensure the safety of those who use the articles.⁵²⁹ They have to take reasonable steps to ensure the health and safety of the users of the machinery and articles necessary in the workplace.⁵³⁰ In terms of both the OHSA and the MHSA they are responsible for providing information on the safety of their articles supplied.⁵³¹ The role players, who are responsible to ensure that health and safety occurs in the workplace, are known as representatives and committees. In terms of both the MHSA and the OHSA employers are obliged to appoint representatives when they have more than 20 employees.⁵³² In addition, when representatives exceed the number of two

⁵²¹ Evan 2015 *IMIESA* 71.

⁵²² See chapter 4.1.1.1 and 4.1.2.1.

⁵²³ See chapter 4.1.1.2.

⁵²⁴ See chapter 4.1.1.1 and 4.1.1.2.

⁵²⁵ See chapter 3.6.

⁵²⁶ See chapter 4.1.1.1 and 4.1.1.2.

⁵²⁷ See chapter 4.1.2.1 and 4.1.2.2.

⁵²⁸ See chapter 4.1.2.1.

⁵²⁹ See chapter 4.1.4.1 and 4.1.4.2.

⁵³⁰ See chapter 4.1.4.1 and 4.1.4.2.

⁵³¹ See chapter 4.1.4.1 and 4.1.4.2.

⁵³² Section 25(1) of the MHSA and s 17(1) of the OHSA.

representatives, it is necessary to establish a health and safety committee.⁵³³ The committees are responsible to hold meetings in terms of health and safety issues. The MHSA and the OHSA both provide that the employer should consult with representative trade unions on issues regarding both the committees and the representatives, these issues include amongst others the appointment and election of the representatives and committee members, the removal of members and their functions and powers.⁵³⁴ Regarding users of machinery, no provision is made for these role players in terms of the MHSA; the OHSA covers their duties, which include recordkeeping of incidents that occur in the workplace.⁵³⁵ The institutions of government are responsible for policy making as well as the enforcement of the health and safety legislation. The MHSA is managed by the Ministry of Mineral Resources and the Department of Mineral Resources, but it needs institutions to assist in their work that include the MHSC, MQA, MRAC, MOHAC and the SIMRAC.⁵³⁶ The Minister is responsible for different aspects, some of which include prohibition of work in dangerous situations.⁵³⁷ The MHSC is the Council responsible for tripartite meetings, whilst the MRAC, MOHAC, and SIMRAC are responsible for advising the Council on different issues regarding health and safety in mines.⁵³⁸ The MQA is the committee responsible for training and education standards.⁵³⁹ In terms of government institutions it seems clear that the OHSA is less comprehensive than the MHSA, as there are not as many committees and councils involved.⁵⁴⁰ The Minister is responsible for different aspects including prohibitions of work, which concurs with the duties as in the MHSA.⁵⁴¹ The *Integration Bill* does refer to employers, employees, users of machinery, health and safety representatives and committees, or suppliers and manufacturers. It only establishes an authority responsible for the administration and implementation of the integrated health and safety policy.

⁵³³ Section 34 of the MHSA and s 19(1) of the OHSA.

⁵³⁴ See chapter 4.1.3.1 and 4.1.3.2.

⁵³⁵ See chapter 4.1.5.1.

⁵³⁶ See chapter 4.1.6.1.

⁵³⁷ See chapter 4.1.6.1.

⁵³⁸ See chapter 4.1.6.1.

⁵³⁹ See chapter 4.1.6.1.

⁵⁴⁰ See chapter 4.1.6.2.

⁵⁴¹ See chapter 4.1.6.1 and 4.1.6.2.

Chapter 5 Enforcement

The problem with occupational health and safety legislation is that it is inadequately enforced. This is the result of lacking a policy-making capacity and enforcement resources.⁵⁴² In this chapter, the enforcement of health and safety legislation will be discussed with specific reference to the MHSA and the OHSA. Where applicable the legislation, as well as enforcement, will be compared in terms of the *Integration Bill*.

5.1.1 MHSA

According to the MHSA, the MHSI, MQA and MHSC are responsible for the enforcement of the Act. The MHSI, an established juristic person,⁵⁴³ hosted by the Department of Mineral Resources, ensures the enforcement of the mine health and safety legislation.⁵⁴⁴ The MHSI is entitled to inspect a mine or a workplace to check its safety and health status.⁵⁴⁵ The MHSI has a wide discretion⁵⁴⁶ that entitles it to call anyone for an appearance before the Inspectorate for questioning⁵⁴⁷ if the MHSI suspects unhealthy and unsafe conditions.⁵⁴⁸ The MHSI is an independent juristic person.⁵⁴⁹ The Inspectorate ought to be insured by the Chief Inspector of Mines (hereafter referred to as CIM) against loss, damage, liability or risk.⁵⁵⁰

The Minister is empowered to appoint the CIM who must have the necessary qualifications and experience.⁵⁵¹ The CIM has different duties,⁵⁵² amongst others to ensure that the provisions of the MHSA are complied⁵⁵³ with and enforced.⁵⁵⁴ It should

⁵⁴² The *National Occupational Health and Safety Policy* of 23 July 2003.

⁵⁴³ Gloy *The use of Section 54 stoppage orders in terms of the Mine Health and Safety Act 20*, as well as section 47(1) of the MHSA

⁵⁴⁴ Gloy *The use of Section 54 stoppage orders in terms of the Mine Health and Safety Act 20*.

⁵⁴⁵ Gloy *The use of Section 54 stoppage orders in terms of the Mine Health and Safety Act 22*.

⁵⁴⁶ Section 50(2) of the MHSA.

⁵⁴⁷ Section 50(2)(b) of the MHSA.

⁵⁴⁸ Gloy *The use of Section 54 stoppage orders in terms of the Mine Health and Safety Act 21*.

⁵⁴⁹ Section 47 of the MHSA.

⁵⁵⁰ Section 49(6) of the MHSA.

⁵⁵¹ Section 48 of the MHSA.

⁵⁵² These are stipulated in section 49 of the MHSA.

⁵⁵³ The steps to take when non-compliance occurs will be discussed in chapter 5.4.

⁵⁵⁴ Section 49(1)(a) of the MHSA. The CIM oversees the organisation thereof and determines and implements health and safety promotion policies.

also ensure that all mines have a health and safety, as well as a hazard⁵⁵⁵ management system available for implementation when a risk or a hazard occurs.⁵⁵⁶ The CIM should collaborate with different bodies and institutions⁵⁵⁷ and control facilities.⁵⁵⁸ The CIM has the right to enter into agreements with other persons;⁵⁵⁹ also to authorise a competent independent person to perform the inspectors' duties.⁵⁶⁰ To ensure that enforcement of legislation is enacted, it is a duty of the CIM to publish different guidelines in the *Government Gazette* to keep those in mining informed.⁵⁶¹ The CIM is responsible for the appointment of inspectors.

The inspector is empowered to monitor and enforce the provisions of this Act.⁵⁶² This can be done by entering mines⁵⁶³ at any time without any notice or warrant.⁵⁶⁴ Any other place can be entered with the correct warrant⁵⁶⁵ whilst using any vehicle or equipment necessary.⁵⁶⁶ The inspector is entitled to question anyone on any Act-related matter,⁵⁶⁷ require custody of any necessary document,⁵⁶⁸ require any explanations,⁵⁶⁹ examine documents⁵⁷⁰ and inspect any article, work or condition.⁵⁷¹ The inspector is also empowered to deal with dangerous conditions.⁵⁷² In an instance where the inspector deals with dangerous conditions, he or she is empowered to instruct the complete halt of mining operations⁵⁷³ or any act or practice.⁵⁷⁴ This inspector should have the

⁵⁵⁵ Section 49(4)(d) of the MHSA.

⁵⁵⁶ Section 49(4)(i) of the MHSA.

⁵⁵⁷ Be it governmental, educational or scientific, see also section 49(4)(h) of the MHSA.

⁵⁵⁸ Section 49(4)(j) of the MHSA.

⁵⁵⁹ Section 49(4)(b) of the MHSA.

⁵⁶⁰ Section 49(4)(c) of the MHSA.

⁵⁶¹ Section 49B of the MHSA.

⁵⁶² Section 50(1) of the MHSA.

⁵⁶³ The inspector is allowed to be accompanied by anyone who could assist him in the inspection process. As stipulated in s 51 of the MHSA.

⁵⁶⁴ Section 50(1)(a) of the MHSA.

⁵⁶⁵ Section 50(1)(b) of the MHSA.

⁵⁶⁶ Section 50(1)(c) of the MHSA.

⁵⁶⁷ Section 50(2)(a) of the MHSA.

⁵⁶⁸ Section 50(2)(b) of the MHSA.

⁵⁶⁹ Section 50(2)(c) of the MHSA.

⁵⁷⁰ Section 50(2)(d) of the MHSA.

⁵⁷¹ Section 50(2)(e)(i)-(iii) of the MHSA.

⁵⁷² Section 54 of the MHSA.

⁵⁷³ Section 54(1)(a) of the MHSA.

⁵⁷⁴ Section 54(1)(b) of the MHSA.

prescribed qualifications and experience.⁵⁷⁵ The inspection officer's appointment is done by the CIM in terms of section 49(1)(b).⁵⁷⁶

Enforcement will not be possible if good governance⁵⁷⁷ does not occur; thus it is the duty of the CIM to ensure that the different organs of state co-ordinate in terms of the promotion and regulation of occupational health and safety⁵⁷⁸ as well as environmental legislation.⁵⁷⁹ This means that it is the duty of the CIM to ensure that the different organs of state and the role players involved co-ordinate and co-operate in such a manner that co-operative governance is ensured.⁵⁸⁰

5.1.2 OHSA

The Department of Labour is responsible for the implementation of the OHSA and the enforcement thereof.⁵⁸¹ The enforcement should be done by different inspection authorities.⁵⁸² In terms of OHSA an inspection authority can be defined as:

Any person who with the aid of specialized knowledge or equipment or after such investigations, test, 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.⁵⁸³

The inspection authority or the Inspectorate⁵⁸⁴ ensures that the provisions of the Act are complied with.⁵⁸⁵ The Inspectorate is responsible for continuous monitoring as to

⁵⁷⁵ Section 49(1)(c) of the MHSA.

⁵⁷⁶ Section 49(1)(b) of the MHSA.

⁵⁷⁷ Governance means the whole process of decision-making and the implementation of said decisions. United Nations <http://www.unescap.org/sites/default/files/good-governance.pdf>.

⁵⁷⁸ United Nations <http://www.unescap.org/sites/default/files/good-governance.pdf>.

⁵⁷⁹ For example s 31BB of the *National Environmental Management Act* 107 of 1998, the Minister of Mineral Resources in terms of environmental legislation designates inspectors.

⁵⁸⁰ Section 49A of the MHSA.

⁵⁸¹ Swanepoel, Van Wyk and Erasmus *Human Resource Management* 582.

⁵⁸² Thompson and Benjamin *South African Labour Law* G1-41.

⁵⁸³ Section 1 of the OHSA.

⁵⁸⁴ Section 28 of the OHSA.

whether compliance in terms of health and safety provisions is ensured.⁵⁸⁶ The Inspectorate consists of different inspectors. An inspector has the right to prosecute non-complying parties if he/she deems it necessary.⁵⁸⁷ Inspectors have the discretion to make use of the necessary resources to ensure maximum compliance with the safety standards.⁵⁸⁸

The inspector has the duty to carry his/her certification.⁵⁸⁹ The reason for this is that, where the inspector is exercising his/her duties, those subject to the inspection are entitled to request identification.⁵⁹⁰ It is part of the inspectors' power to conduct inspections, to question parties,⁵⁹¹ to request documents for examination⁵⁹² from the employer, as well as any other article which can be deemed as evidence.⁵⁹³ Any article used for inspection, may be removed by the inspector to complete further inspections.⁵⁹⁴ The inspector is entitled to enter any workplace⁵⁹⁵ occupied by an employer. As language might be a barrier in certain instances, the inspector is entitled to have an interpreter accompanying him during the inspection period.⁵⁹⁶ The inspector may stop or close any activity which is deemed as unsafe in the workplace.⁵⁹⁷ This prohibition is made *via* a notice.⁵⁹⁸ The inspector can monitor incidents by means of investigations, which are undertaken prior to the decision as to whether or not formal inquiries are necessary.⁵⁹⁹

⁵⁸⁵ Venter and Levy *Labour Relations in South Africa* 289.

⁵⁸⁶ Swanepoel, Van Wyk and Erasmus *Human Resource Management* 583.

⁵⁸⁷ Le Roux 2011 *The Journal of Southern African Institute of Mining and Metallurgy* 543.

⁵⁸⁸ Le Roux 2011 *The Journal of Southern African Institute of Mining and Metallurgy* 543.

⁵⁸⁹ Section 28(2) of the OHSA.

⁵⁹⁰ Thompson and Benjamin *South African Labour Law* G1-46.

⁵⁹¹ Section 29(1)(b) of the OHSA.

⁵⁹² Section 29(1)(c) of the OHSA.

⁵⁹³ Thompson and Benjamin *South African Labour Law* G1-47.

⁵⁹⁴ Section 29(1)(g) of the OHSA. These items can specifically be removed as pieces of evidence in a criminal case.

⁵⁹⁵ Section 29(1)(a) of the OHSA.

⁵⁹⁶ Section 29(2) of the *OHSA*. He is entitled to have an assistant or a member of the police accompany him.

⁵⁹⁷ Le Roux 2011 *The Journal of Southern African Institute of Mining and Metallurgy* 543.

⁵⁹⁸ Which can be withdrawn if the employer has acted in a satisfactory manner to ensure health and safety.

⁵⁹⁹ Section 31(1) of the OHSA.

It is important to note that inspectors may make a decision where after the decision may be subject to appeal.⁶⁰⁰ The Chief Inspector is entitled to make the decision as to whether or not a formal inquiry should be held.⁶⁰¹ A formal inquiry can be held where any person has been injured, suffered illness or dies in the workplace, due to a duty fulfilled in the workplace.⁶⁰² The purpose of the inquiry is as follows: To determine whether or not the employer was liable, as well as to prevent any further incidents.⁶⁰³ Any decision made by the Chief Inspector based on formal inquiries is subject to appeal.⁶⁰⁴

5.1.3 *Integration Bill*

According to the *Integration Bill* the Authority will be established in terms of Part 2⁶⁰⁵ and deemed an organ of state.⁶⁰⁶ The Authority will consist of a Board⁶⁰⁷ and an Executive.⁶⁰⁸ The Board will be responsible to advise the Minister on issues relating to health and safety,⁶⁰⁹ whereas the Executive⁶¹⁰ will be responsible for any function that the Minister entrusts to him or her.⁶¹¹ The Authority has to ensure the implementation and administration of the *Integration Bill*.⁶¹² The Ministers and their departments will be the enforcers, as the monitoring of the efficacy of the implementation and enforcement of the national policy will be the Minister's responsibility.⁶¹³ The National Occupational Health and Safety Authority will be responsible for the implementation and administration of the policy.⁶¹⁴ The Authority's Executive will consist of a Chief Executive Officer⁶¹⁵ who appoints staff members.⁶¹⁶ The Executive has duties, functions and

⁶⁰⁰ Thompson and Benjamin *South African Labour Law* G1-46.

⁶⁰¹ Section 32(1) of the OHSA.

⁶⁰² Thompson and Benjamin *South African Labour Law* G1-55.

⁶⁰³ *National Union of Mineworkers & Others v Government Mining Engineer & Others* (1990) 11 *ILJ* 313 (W).

⁶⁰⁴ Section 35 of the OHSA.

⁶⁰⁵ Clause 4(1) of the *Integration Bill* of 2003.

⁶⁰⁶ Clause 4(2) of the *Integration Bill* of 2003.

⁶⁰⁷ Clause 4(3)(a) of the *Integration Bill* of 2003.

⁶⁰⁸ Clause 4(3)(b) of the *Integration Bill* of 2003.

⁶⁰⁹ Clause 4(3)(a) of the *Integration Bill* of 2003.

⁶¹⁰ The Executive is regulated by Part 4, clause 15 of the *Integration Bill*.

⁶¹¹ Clause 4(3)(b) of the *Integration Bill* of 2003.

⁶¹² Clause 5 of the *Integration Bill* of 2003.

⁶¹³ Clause 3(3) of the *Integration Bill* of 2003.

⁶¹⁴ Clause of the *Integration Bill* of 2003.

⁶¹⁵ Clause 15(a) of the *Integration Bill*.

powers⁶¹⁷ which include, amongst others, an implementation plan to establish an integrated health and safety system,⁶¹⁸ to administer and implement the system,⁶¹⁹ to develop databases and reporting systems,⁶²⁰ to prepare a draft which stipulates the compensation legislation which will apply to all sectors of the economy,⁶²¹ support the Board,⁶²² and to promote the culture of health and safety.⁶²³ The functions of the Executive will have to co-ordinate with those of other organs of state⁶²⁴ and must promote co-operative governance.

It seems that the proposed Authority will have a coordination role rather than an enforcement role. This seems to be a missed opportunity. An independent body that can enforce health and safety in both the industry and mining could have ensured an integrated approach to health and safety in South Africa.

5.2 Enforcement instruments

After discussing the enforcers of health and safety, it is necessary to discuss the enforcement instruments in terms of the MHSA, the OHSA and the *Integration Bill*, where applicable.

5.2.1 MHSA

The MHSA relies mostly on command and control measures to enforce mine health and safety, for example, according to the MHSA both employers⁶²⁵ and employees can be held liable⁶²⁶ if they do not comply with the instructions of the provisions of the Act.⁶²⁷ According to the MHSA non-compliance occurs where any person fails to comply with:

- (a) a provision of this Act;

⁶¹⁶ Clause 15(b) of the *Integration Bill*.

⁶¹⁷ Clause 16 of the *Integration Bill*.

⁶¹⁸ Clause 16(1)(a) of the *Integration Bill*.

⁶¹⁹ Clause 16(1)(b) of the *Integration Bill*.

⁶²⁰ Clause 16(1)(c) of the *Integration Bill*.

⁶²¹ Clause 16(1)(d) of the *Integration Bill*.

⁶²² Clause 16(1)(e) of the *Integration Bill*.

⁶²³ Clause 16(1)(g) of the *Integration Bill*.

⁶²⁴ Clause 16(2) of the *Integration Bill*.

⁶²⁵ Section 91 of the MHSA.

⁶²⁶ For fines as in section 91(1B) of the MHSA.

⁶²⁷ Masilo and Rautenbach *Commentary on the Mine Health and Safety Act 1-65*.

- (b) a regulation;
- (c) a 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 96.⁶²⁸

The MHSA identifies different offences including the discrimination,⁶²⁹ interference with safety equipment,⁶³⁰ juvenile employment,⁶³¹ negligence,⁶³² breach of confidence,⁶³³ hindering the administration,⁶³⁴ falsifying documents,⁶³⁵ failure to attend when summoned,⁶³⁶ and failure to comply with this Act.⁶³⁷ In the instance where non-compliance can be proved, certain instruments are to be used, for example penalties. If one is convicted of any offence, one may be sentenced to a fine, imprisonment or any suitable penalty as determined by the court.⁶³⁸ The penalties include fines or imprisonment, or even the withdrawal or suspension of a mining authorisation.⁶³⁹

An inspector has the power to order compliance⁶⁴⁰ in the instance where the employer does not comply with the provisions.⁶⁴¹ This will be done in terms of instructions with prescribed time periods.⁶⁴² The inspector can also recommend a fine in writing.⁶⁴³ These fines must be supplied in duplicate to the health and safety representatives and committees.⁶⁴⁴ Even though the inspector has the right to impose fines and instructions, those who are affected have the right to appeal these decisions.⁶⁴⁵ The appeal does not

⁶²⁸ Section 91 (1)(a)-(c) of the MHSA.

⁶²⁹ As in s 83 of the MHSA

⁶³⁰ As in s 84 of the MHSA.

⁶³¹ As in s 85 of the MHSA.

⁶³² As in s 86 of the MHSA.

⁶³³ As in s 87 of the MHSA.

⁶³⁴ As in s 88 of the MHSA.

⁶³⁵ As in s 89 of the MHSA.

⁶³⁶ As in s 90 of the MHSA.

⁶³⁷ As in s 91 of the MHSA.

⁶³⁸ Section 92 of the MHSA.

⁶³⁹ Section 92 of the MHSA.

⁶⁴⁰ Section 55 of the MHSA.

⁶⁴¹ Section 55(1) of the MHSA.

⁶⁴² Section 55(1) of the MHSA.

⁶⁴³ Section 55A of the MHSA.

⁶⁴⁴ Section 56(a)(i)-(ii) of the MHSA.

⁶⁴⁵ Section 57 of the MHSA.

necessarily suspend these decisions;⁶⁴⁶ suspension of decisions only occurs when the Labour Court decides so.⁶⁴⁷ The Labour Court has exclusive jurisdiction on disputes arising out of this Act,⁶⁴⁸ but not in terms of offences in terms of this Act.⁶⁴⁹ The penalties for any offences in terms of this Act are either fines or imprisonment.⁶⁵⁰

5.2.2 OHSA

It is the responsibility of the employer to ensure compliance in the workplace.⁶⁵¹ The employer or the body corporate will be held liable for any damages that occurred due to non-compliance.⁶⁵² Similarly, the OHSA also relies mostly on command and control to enforce occupational health and safety. Section 38 of the OHSA stipulates when an act or omission is deemed a criminal offence; this should be used as a guideline to prevent the non-compliance from occurring. Where non-compliance occurs the Act prescribes the necessary steps to be taken, whether it be imprisonment or a fine.⁶⁵³ The magistrates' court has jurisdiction.⁶⁵⁴ The approach regarding non-compliance was borrowed from foreign legislation.⁶⁵⁵

Non-compliance with the provisions of the OHSA is a criminal offence, and for example includes the following:

- Failure to co-operate with the duties and questions of the inspectorate;⁶⁵⁶
- Tampering with safety equipment as well as the misuse thereof;⁶⁵⁷
- Reckless interference with anything provided in the interest of health and safety;⁶⁵⁸
- Not using the safety equipment as provided;⁶⁵⁹ and
- To act recklessly in the workplace, and to decide consciously to act in such a manner.⁶⁶⁰

⁶⁴⁶ Section 59 of the MHSa.

⁶⁴⁷ Section 59(2)(b) of the MHSa.

⁶⁴⁸ Section 82(1) of the MHSa.

⁶⁴⁹ Section 82(2) of the MHSa.

⁶⁵⁰ Section 92 of the MHSa.

⁶⁵¹ Sieberhagen, Rothman and Pienaar 2009 *South African Journal of Human Resource Management* 5.

⁶⁵² Thompson and Benjamin *South African Labour Law* G1-28.

⁶⁵³ Thompson and Benjamin *South African Labour Law* G1-63.

⁶⁵⁴ Section 46(a) of the OHSA.

⁶⁵⁵ One can specifically refer to *R v Cotton Felts Ltd* (1982) 2 CCC (3d) (OntCA)

⁶⁵⁶ Section 38(1)(e) of the OHSA.

⁶⁵⁷ Section 38(1)(n) of the OHSA.

⁶⁵⁸ Section 15 of the OHSA.

⁶⁵⁹ Section 38(1)(o) of the OHSA.

⁶⁶⁰ Section 38(1)(p) of the OHSA.

Steps against employees who deliberately act recklessly or refuse to comply, may lead to the dismissal of the employee.⁶⁶¹ In the instance where an inspectorate issues a written notice prohibiting dangerous activities and parties fail to comply with it, it is deemed a criminal offence.⁶⁶² When a person obstructs, refuses or fails in assisting an inspector in the investigation process, it is deemed a criminal offence.⁶⁶³

When a witness is present on the stand, he or she may refuse to answer incriminating questions.⁶⁶⁴ In preparing for a court case, any evidence retrieved from an inquiry must be recorded in a written report.⁶⁶⁵ An inspector cannot be held liable for any information mentioned in his report.⁶⁶⁶

It is under the courts' discretion as to what sanction to deliver onto to wrongdoer, for example: when an employer deducts an amount from the compensation of an employee, the order can be made that the employer pays back the money proportionally.⁶⁶⁷ The court could also order the wrongdoer to take the necessary steps to comply with the provisions of the Act within a certain timeframe.⁶⁶⁸ If the wrongdoer does not take these steps, he or she will be punished for the breach of the provisions as well as contempt of the court.⁶⁶⁹ The court combines command and control with economic instruments. For example, any person who fails to comply with the provisions of the OHSA,⁶⁷⁰ shall be deemed as guilty of an offence and will be held liable to a fine of no more than R50 000 or imprisonment no longer than one year, or both depending on the offence.⁶⁷¹ In terms of the OHSA there is no maximum fine prescribed by the regulations, the maximum imprisonment time is limited to one year. If the offences

⁶⁶¹ Thompson and Benjamin *South African Labour Law* G1-31.

⁶⁶² Section 38(1)(b) of the OHSA.

⁶⁶³ Section 34 of the OHSA.

⁶⁶⁴ *S v Ramaligela* 1983 (2) SA 424 (V) para 430H.

⁶⁶⁵ Thompson and Benjamin *South African Labour Law* G1-59.

⁶⁶⁶ Section 32(10) of the OHSA.

⁶⁶⁷ Thompson and Benjamin *South African Labour Law* G1-62.

⁶⁶⁸ Section 38(3) of the OHSA.

⁶⁶⁹ Thompson and Benjamin *South African Labour Law* G1-63.

⁶⁷⁰ Section 38(1)(a)-(p) of the OHSA.

⁶⁷¹ Section 38(1)(a)-(p) of the OHSA.

occur for a continuous period and it keeps recurring, it is allowed in terms of the regulations to add an additional R200 for each day the offence continues.⁶⁷²

It is the responsibility of the employer⁶⁷³ to prove⁶⁷⁴ that the employee acted without the necessary permission, the employee did not have the authority to complete an action, or that steps⁶⁷⁵ were taken to prevent these actions.⁶⁷⁶

5.2.3 Integrated Bill

The Bill creates new offences including, amongst others, corporate homicide.⁶⁷⁷ The homicide is to be dealt with in accordance with the *Criminal Procedure Act*⁶⁷⁸ but may also be dealt with in terms of the Bill.⁶⁷⁹ "Corporate homicide" is defined as:

The causing of the death of a person as a result of the failure by the employer to comply with its legal duties, or where the employer failed to take the necessary steps to control the causative risk, or failed to implement an health and safety management system.⁶⁸⁰

The duty will rest on the employer to ensure that this offence does not occur. However, in the instance where corporate homicide does occur, a penalty of R1 million or ten years' imprisonment⁶⁸¹ can be imposed.

5.3 Conclusion

The MHSA and the OHSA use mainly command and control instruments to enforce the legislation. In terms of command and control, the employer and employee can be held liable in the instance where non-compliance with the OHSA or MHSA occurs.⁶⁸² Non-compliance comes down to an offence, which is punishable by either fines or

⁶⁷² Section 43(4) of the OHSA.

⁶⁷³ Or the user of machinery.

⁶⁷⁴ The employer must prove all of these to ensure that he or she is not held liable for the action.

⁶⁷⁵ Section 37 of the OHSA stipulates these steps.

⁶⁷⁶ Section 37(1)(a)-(c) of the OHSA.

⁶⁷⁷ Botha 2008 *Occupational Risk Management* 10.

⁶⁷⁸ The *Criminal Procedure Act* 51 of 1977.

⁶⁷⁹ Botha 2008 *Occupational Risk Management* 10.

⁶⁸⁰ Botha 2008 *Occupational Risk Management* 10.

⁶⁸¹ Botha 2008 *Occupational Risk Management* 10.

⁶⁸² See chapter 5.2.1 and 5.2.2.

imprisonment.⁶⁸³ The Labour Court will have jurisdiction to hear cases based on the OHSA, but not in terms of offences in terms of the MHSA.⁶⁸⁴ The *Integration Bill* also creates new offences including, amongst others, "corporate homicide", which is not mentioned in the MHSA and OHSA. Both the MHSA and the OHSA makes provision for administrative measures that need to be taken before a person is prosecuted or fined. The Acts strive toward corrective actions first rather than punitive action as a first point of departure. The *Integration Bill* does not prescribe any enforcement measures but it creates new offences. Both Acts make provision for an Inspectorate, in a single health and safety act, it would be proposed the inspector be an independent juristic person. This independent juristic person will then be appointed by the Department of Labour. In a single health and safety act in South Africa, it is proposed that command and control instruments still be used in terms of health and safety enforcement. A gap exists in terms of health and safety legislation enforcement as there is no apparent mention of other enforcement measures.⁶⁸⁵ In a single health and safety act, this gap should be filled with alternative measures.

⁶⁸³ See chapter 5.2.1 and 5.2.2.

⁶⁸⁴ See chapter 5.2.1 and 5.2.2.

⁶⁸⁵ See chapter 5.2.1 and 5.2.2. See also chapter 2.5.

Chapter 6 Conclusion

6.1 Introduction

The aim of this dissertation was to determine if a single health and safety act could be introduced in South Africa. Currently the MHSA regulates mine health and safety in the mining industry, while the OHSA regulates occupational health and safety in other industries. These two pieces of legislation have undergone various changes through history.⁶⁸⁶ As indicated commentators argued that the MHSA provides a better framework for the protection of workers' occupational health and safety than the OHSA. There have been attempts to integrate the MHSA and OHSA. In 2003, a draft *Integration Bill* was published but it did not really achieve an integration of the two pieces of legislation but established an Authority and created offences.⁶⁸⁷ As the argument arises from time to time whether a single health and safety act can be introduced in South Africa, it was necessary to discuss the possibility thereof. Primary sources, such as the OHSA, MHSA and the *Integration Bill*, were used to see as to whether or not integration was possible. If a single health and safety act is introduced in South Africa, it is proposed that these three primary sources should be used as a framework for a single health and safety act for South Africa.

6.2 Definitions

The term "occupational health and safety" was for purposes of this dissertation defined as the "control, prevention, anticipation and analysis of any hazards which could occur in the workplace and which could cause injury or illness, or which could affect the health and well-being of the employee in the workplace."⁶⁸⁸ The MHSA defines "health" as "occupational health in mines"⁶⁸⁹ and "safety" is not mentioned in the MHSA. OHSA deems someone as "healthy" if he or she is "free from illness or any injury";⁶⁹⁰ the *Integration Bill* deems "occupational health and safety" as any activities that promote

⁶⁸⁶ See chapter 1.2.

⁶⁸⁷ See 5.2.3.

⁶⁸⁸ See chapter 2.2.1.

⁶⁸⁹ Section 102 of the MHSA.

⁶⁹⁰ Section 1 of the OHSA.

healthy and safe work practice, the prevention of accidents and diseases in the workplace, medical assistance provision and aid provision and any compensation.⁶⁹¹ It is necessary to consider foreign definitions, in order to determine if the South African definitions are up to standard internationally⁶⁹². The MHSA is not very comprehensive in terms of the term health and safety, whilst the OHSA covers health and safety in terms of different employment relationships. The *Integration Bill* identifies the different activities, which include the promotion of health and safe workspaces, accident and disease prevention, as well as the provision of medical assistance.⁶⁹³ As the *Integration Bill* is very comprehensive in terms of "occupational health and safety", it is proposed that this definition will be used, but adding reference to the physical, social and mental elements of well-being. Therefore the proposed definition of "occupational health and safety" will include all those activities connected to: a) the promotion of health and safe work practices and working environments and conditions; b) the prevention of work-related accidents and diseases; c) the provision of medical assistance to persons who are injured in work-related accidents or who contract work-related diseases; d) the provision of medical aid, compensation, rehabilitation and other benefits to persons who are injured in work-related accidents or who contract work-related diseases, including the dependants of persons who die as a result of these causes.⁶⁹⁴ One should always consider the foreign definitions to compare the standards internationally.

A "workplace" was defined as every independent premises or place or operation with regards to size, function or organisation where an employee acts on instruction of the employer, including driving to and driving from workplace, and may include one or more places managed by one central head office. The MHSA refers to the term "works" as any that excludes mines where any person transmits, distributes supplies, trains, repairs or operates in any way that is necessary in mines.⁶⁹⁵ The OHSA deems a "workplace" as "any premises or place where a person performs work in the course of his employment".⁶⁹⁶ The *Integration Bill* however is silent on this definition.⁶⁹⁷ The

⁶⁹¹ See 3.1.1. see also clause 1 of the *Integration Bill*.

⁶⁹² See chapter 2.

⁶⁹³ See chapter 3.1.1.

⁶⁹⁴ See chapter 3.1.1.

⁶⁹⁵ See chapter 3.1.2 and also s 102 of the MHSA.

⁶⁹⁶ S 1 of the OHSA.

reason for referring to foreign definitions, is to build a foundation on which to build the South African definition.

According to the MHSA "occupational hygiene" means the "anticipation, recognition, evaluation and control of conditions at the mine that may cause illness or adverse health effects to persons".⁶⁹⁸ The OHSA defines "occupational hygiene" as the "anticipation, recognition, evaluation and control of conditions arising in or from the workplace, which may cause illness or adverse health effects to persons".⁶⁹⁹ The *Integration Bill* does not define "occupational hygiene". Hygiene is necessary to ensure health in the workplace.⁷⁰⁰ For purposes of a single health and safety act in South Africa the definition for "occupational hygiene" is proposed to be anticipation, recognition, evaluation and control of conditions arising in or from the workplace (including mines), which may cause illness or adverse health effects to persons".⁷⁰¹

A "hazard" can be defined as any circumstance that has the potential to cause harm. The MHSA defines a "hazard" as "a source or exposure to danger";⁷⁰² the OHSA defines it as "a source of or exposure to danger"⁷⁰³ but the *Integration Bill* is silent on the subject.⁷⁰⁴ In chapter 2, the definition for purposes of this dissertation for the term "hazard" is "any circumstance which has the potential to cause harm or exposure to danger".⁷⁰⁵ It is proposed that, in a single health and safety act, the definition should then be "any circumstance which has the potential to cause harm or exposure to danger". Hazards are associated with "risks".⁷⁰⁶ In terms of chapter 2, the term "risk" is defined as "the likelihood of an incident or occurrence of hazardous situations which could cause severe injury or illness". Foreign definitions are considered to compare with South African standards. In terms of the MHSA a "risk" is the "likelihood of occupational injury or harm to persons" and, according to the OHSA, it is defined as "the probability

⁶⁹⁷ See chapter 3.1.2.

⁶⁹⁸ Section 102 of the MHSA.

⁶⁹⁹ Section 1 of the OHSA.

⁷⁰⁰ See chapter 2.2.3 and chapter 3.4.

⁷⁰¹ See chapter 3.4.

⁷⁰² S 102 of the MHSA.

⁷⁰³ S 1 of the OHSA.

⁷⁰⁴ See chapter 3.1.3.

⁷⁰⁵ See chapter 2.2.4.

⁷⁰⁶ See chapter 2.2.5.

that injury or damage will occur". The *Integration Bill* is however silent on this subject. A proposed definition for this term could therefore be the "likelihood of an incident or occurrence of hazardous situations which could cause severe injury or illness". The term incident is not defined in either, and should therefore be added in a single health and safety act.

Risk assessments places the duty of what is reasonably practicable, which is a measure that both the MHSa and the OHSa considers. It is a practice that considers a) the severity and scope of the hazard or risk; b) the state of the knowledge reasonably available; c) the availability and suitability of mitigation or removal; d) the costs and benefits thereof.⁷⁰⁷ Once again, the *Integration Bill* is silent on the concept. The measure of reasonably practicable should definitely be part of a single health and safety act in South Africa as it is a measure with which the employer should act. The abovementioned definitions all have certain differences and similarities; the proposed definitions are mentioned at the end of each discussion.

6.3 Role players

There are various role players involved in occupational health and safety. These role players include employers, employees, manufacturers and suppliers, users of machinery, health and safety representatives, and committees and institutions.⁷⁰⁸ Each has its own responsibilities and duties. The employer is defined as "any physical or legal person that employs one or more workers".⁷⁰⁹ Employers have the duty to ensure health and safety to those in the workplace.⁷¹⁰ The employer should also undertake assessments to ensure that all the conditions are safe and risk free.⁷¹¹ The MHSa and the OHSa both agree with this duty.⁷¹² The training of the employees is also on the duty list of the employer.⁷¹³ In terms of the MHSa the employer has many duties and

⁷⁰⁷ S 102 of the MHSa and s 1 of the OHSa.

⁷⁰⁸ See chapter 2.3.

⁷⁰⁹ See chapter 2.3.

⁷¹⁰ See chapter 2.3.

⁷¹¹ See chapter 2.3.

⁷¹² See chapter 4.1.1.1 and 4.1.1.2.

⁷¹³ See chapter 2.3.

responsibilities, such as ensuring health and safety in the workplace.⁷¹⁴ The employer should provide information (including issues relating to safety and health and incident reports) upon request.⁷¹⁵ The employer should do what is deemed as reasonably practicable to avoid any hazards or risks.⁷¹⁶ This implies a proactive approach on the employer's side to make sure that the necessary steps are taken to ensure health and safety⁷¹⁷ of employees or contractors, and others who enter the workplace.⁷¹⁸ Employers should provide PPE to the employees to ensure their health and safety.⁷¹⁹ According to the health and safety guideline, the employer should provide for policies.⁷²⁰

The employee is defined as "any person who performs, either regularly or temporarily, for an employer" in terms of chapter 2.⁷²¹ A reciprocal right exists in terms of employees, as employees also have a few duties and responsibilities such as ensuring their own health and safety by undergoing training and wearing the provided PPE.⁷²² If the employee does not comply with the provision of the health and safety legislation, it constitutes an offence.⁷²³ The employee has the right to elect a representative who will then represent him or her in health and safety committee meetings.⁷²⁴ In terms of a single health and safety act in South Africa an employee will have the duty to ensure his or her own health and safety by using the provided PPE, participating in the training and reporting unsafe situations. The MHSA deems contractors as employees, where the OHSA deems them as independent employers, it is proposed they be deemed as employees in a single health and safety act.

Health and safety committees and representatives are established to ensure health and safety and to make provision for the correct communication between employers and employees.⁷²⁵ In terms of chapter 2, the representatives are responsible for monitoring

⁷¹⁴ See chapter 4.1.1.1.

⁷¹⁵ See chapter 4.1.1.1 and 4.1.1.2.

⁷¹⁶ See chapter 2.2.6, 3.6, 4.1.1.1 and 4.1.1.2.

⁷¹⁷ See chapter 4.1.1.1.

⁷¹⁸ See chapter 4.1.1.2.

⁷¹⁹ See chapter 2.3, 4.1.1.1 and 4.1.1.2.

⁷²⁰ See chapter 4.1.1.2.

⁷²¹ See chapter 2.3.

⁷²² See chapter 2.3, 4.1.2.1 and 4.1.2.2.

⁷²³ See chapter 4.1.2.1 and 4.1.2.2.

⁷²⁴ See chapter 4.1.2.1 and 4.1.2.2.

⁷²⁵ See chapter 2.3, 4.1.3.1 and 4.1.3.1.

the efficacy of health and safety measures.⁷²⁶ The MHSa and the OHSA both provide for representatives to be elected, or appointed, the moment when there are 20 or more employees appointed.⁷²⁷ The representatives are responsible to make recommendations on issues regarding the health and safety of employees and attendance at committee meetings.⁷²⁸ In a single health and safety act in South Africa, representatives will definitely be necessary; they will also have to act on behalf of employees and participate in committee meetings. In terms of both the MHSa and the OHSA when there are more than two representatives appointed, it is necessary to establish a health and safety committee.⁷²⁹

Manufacturers and suppliers of machinery or articles necessary in the workplace are obliged to prevent danger or risks.⁷³⁰ They are therefore responsible to undertake risk assessments to ensure that the items produced are safe.⁷³¹ The MHSa and the OHSA provides that manufacturers and suppliers are responsible to ensure that their items are not detrimental to the health and safety of those present on the work premises.⁷³² Users of machinery are not discussed in terms of the MHSa, and the OHSA only mentions it briefly.⁷³³ In a single health and safety act, a more in depth discussion of users of machinery should be introduced, as there are user of machinery in both industry and mining.

The government and government institutions are very important, as they are responsible for the national health and safety regime. The institution responsible for mine health and safety is the Department of Mineral Resources and the institution responsible for health and safety in industry is the Department of Labour. Their responsibilities include the policymaking process and the giving of advice to the Minister. The government institutions are responsible for occupational health and safety

⁷²⁶ See chapter 2.3.

⁷²⁷ See chapter 4.1.3.1 and 4.1.3.2.

⁷²⁸ See chapter 4.1.3.1 and 4.1.3.2.

⁷²⁹ See chapter 4.1.3.1 and 4.1.3.2.

⁷³⁰ See chapter 2.3.

⁷³¹ See chapter 2.3.

⁷³² See chapter 4.1.4.1 and 4.1.4.2.

⁷³³ See chapter 4.1.5.

as well as the dialogue between the different role players.⁷³⁴ The MHSA is governed by the Minister of Mineral Resources and the Department of Mineral Resources but they are assisted by the MHSC, the MRAC, the MOHAC and the SIMRAC.⁷³⁵ Each of these committees has a role to assist in the advising of the Minister and the Department on the governing of health and safety legislation.⁷³⁶ The OHSA is governed by the Ministry of Labour and the Department of Labour.⁷³⁷ The provision in terms of the OHSA is not as comprehensive as that of the MHSA. The MHSA is very comprehensive in terms of the government institutions and this should be the proposed framework to build on in terms of a single health and safety act in South Africa. The *Integration Bill* establishes a combined new authority constituted from members of both the Department of Mineral Resources and the Department of Labour, representatives thereof, as well as trade union members.⁷³⁸ This Authority will be known as the National Occupational Health and Safety Authority.⁷³⁹ This Authority will be established to implement and administrate the integrated policy.⁷⁴⁰ It is proposed that the Authority and the establishment thereof should be followed when implementing a single health and safety act in South Africa.

In table 6.1, a summarising comparison will be made on the different role players and their duties and responsibilities in terms of the MHSA, the OHSA and the *Integration Bill* in order to determine what the best description of each would be in a single health and safety act in South Africa.

6.4 Enforcement

The MHSA relies mostly on the measure of command and control to enforce the health and safety legislation.⁷⁴¹ Individuals are guilty of an offence by not complying with the provisions of the MHSA.⁷⁴² The penalties for offences in terms of the MHSA include fines or imprisonment. According to the OHSA the employer can be held responsible for

⁷³⁴ See chapter 2.3.

⁷³⁵ See chapter 4.1.6.1.

⁷³⁶ See chapter 4.1.6.1.

⁷³⁷ See chapter 4.1.6.2.

⁷³⁸ See chapter 4.1.6.3.

⁷³⁹ See chapter 4.1.6.3.

⁷⁴⁰ See chapter 4.1.6.3.

⁷⁴¹ See chapter 5.2.1.

⁷⁴² See chapter 5.2.1.

ensuring compliance in the workplace.⁷⁴³ The OHS Act mostly uses command and control to enforce occupational health and safety.⁷⁴⁴ When an individual is guilty of non-compliance, he or she can be punished with either a fine or imprisonment.⁷⁴⁵ In a single health and safety act in South Africa it would be proposed that not only command and control still be used, but also other measures as there exists a gap in the enforcement of health and safety legislation. The *Integration Bill* introduces new offence known as "corporate homicide"⁷⁴⁶ and this should therefore be introduced into a single health and safety act.

6.5 Recommendations

It is possible to introduce a single health and safety act in South Africa. As there were already attempts to do so, it is clear that a need exists for a single act. It is also clear that the implementation of a single health and safety act will have an impact on the Department of Labour, as it is proposed they be the Department in charge of the regulation of a single health and safety act. When introducing the role players and their duties and responsibilities, the new Authority established by the *Integration Bill* should be used as a starting point as government institutions should be the role players.⁷⁴⁷ When considering the employer, it is proposed to utilise a combination of the duties and responsibilities of both the MHS Act and the OHS Act,⁷⁴⁸ which should include the main duty of ensuring health and safety in the workplace. The employee should also have the responsibility to act in such a manner that his or her health and safety is not jeopardised. In a single health and safety act, it is proposed that the duties and responsibilities of the MHS Act and the OHS Act be combined to provide a more comprehensive description.⁷⁴⁹ It is proposed that health and safety representatives and committees definitely form part of a single health and safety act.⁷⁵⁰ In a single health and safety act, the users of machinery should be described more in depth to ensure

⁷⁴³ See chapter 5.2.2.

⁷⁴⁴ See chapter 5.2.2.

⁷⁴⁵ See chapter 5.2.2.

⁷⁴⁶ See chapter 5.2.3.

⁷⁴⁷ See chapter 4.1.6.3.

⁷⁴⁸ See chapter 4.1.1.1 and 4.1.1.2.

⁷⁴⁹ See chapter 4.1.2.1 and 4.1.2.2.

⁷⁵⁰ See 4.1.3.1 and 4.1.3.2.

that no gap exists regarding their responsibilities and duties.⁷⁵¹ It is proposed that suppliers and manufacturers stay liable, as in the MHSa and OHSA.⁷⁵²

When considering the enforcement of health and safety legislation it seems clear that a gap exists as command and control measures are mostly used, and this provides ground for development.⁷⁵³ In a single health and safety act, a combined or hybrid measure is proposed.

In the end, it seems clear that the introduction of a single health and safety act is possible in South Africa if the correct starting point is utilised.⁷⁵⁴

⁷⁵¹ See 4.1.5.

⁷⁵² See 4.1.4.1 and 4.1.4.2.

⁷⁵³ See chapter 5.

⁷⁵⁴ See chapter 4.1.6.3.

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