

The application of section 54 of the Mine, Health and Safety Act and reasonableness

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Isaiah 40:31 They that wait upon the Lord shall renew their strength!

Nne Ndau, Mukololo wa Negota ndiri ndia livhuwa, Aa!

ABSTRACT

Health and safety issues in the mining sector are problematic. For many years the disregard of mine health and safety compliance led to fatal injuries and a rise in death tolls. Section 54 of the *Mine Health and Safety Act* 29 of 1996 (MHSA) was introduced to combat the death toll and injuries in the mining sector. The mine inspector needs to issue notices in terms of section 54 of the MHSA as an enforcement tool to ensure compliance with mine health and safety issues, but in the process may also halt mine operations if there is a reasonable believe that the risk would endanger the lives of mineworkers. The halting of mine operations has resulted in economic loss and job losses. There is a need for mine inspectors to apply their mind to the matter before issuing a section 54 order (also referred to as stoppage orders). In the unreported case of *AngloGold Ashanti Limited v Xolile Mbonambi* (Case number J2459/2016 of 04 November 2016), the court stressed the importance of reasonableness in decision-making in relation to a section 54 of the MHSA order. The aim of this study is to determine the content, criteria or yardstick of reasonableness that should be applied when a mine inspector makes a decision in terms of section 54 of the MHSA.

The decision of the mine inspectors in relation to halting mine operations have been met with mixed views. Some view section 54 of the MHSA as a draconian enforcement tool affecting the economic aspect of the mines, whereas others view it as an important tool to combat fatal incidents in the mining industry.

Key words: Mine health and safety, reasonableness, rationality and proportionality, stoppage orders, section 54 of the *Mine Health and Safety Act* 29 of 1996

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LIST OF ABBREVIATIONS

A	Appellate
Art	Article
CC	Constitutional Court
CCR	Constitutional Court Review
COIDA	Compensation of Occupational Injuries and Diseases Act
CTF	Culture Transformation Framework
DA	Democratic Alliance
DMR	Department of Mineral Resources
DMRE	Department of Mineral Resources and Energy
ECA	Electronic Communications Act
Ed	Edition
FSE	Federation for Sustainable Environment
GDP	Gross domestic product
ILO	International Labour Organisation
ILR	International Law Review
JHB	Johannesburg
JIL	Journal of International Law
JSAIMM	Journal of the Southern African Institute of Mining and Metallurgy
KZN	KwaZulu Natal
LR	Law Review
LRA	Labour Relations Act
Ltd	Limited

MCSA	Mineral Council of South Africa
MHSA	Mine Health and Safety Act
MHSI	Mine Health and Safety Inspectorate
MOSH	Mining Industry Occupational Safety and Health
MPRDA	Mineral Petroleum Resources Development Act
NDP	National Development Plan
NEMA	National Environmental Management Act
NEMAQA	National Environmental Management: Air Quality Act
NEMWA	National Environmental Management: Waste Act
No	Number
NCLR	North Carolina Law Review
ODMWA	Occupational Diseases in Mine Works Act
OHSA	Occupational Health and Safety Act
P	Page
PAIA	Promotion of Access to Information Act
PAJA	Promotion of Administrative Justice Act
Para	Paragraph
PELJ	Potchefstroom Electronic Law Journal
Pty	Proprietary
SA	South Africa
SADC	Southern African Development Community
SADJ	South African Dental Journal
SAFLII	Southern African Legal Information Institute
SAJHR	South African Journal on Human Rights
SAJIP	SA Journal of Industrial Psychology
SALJ	South African Law Journal

SAPL	South African Public Law Journal
SIMRAC	Safety in Mines and Research Advisory Committee
SLR	Stellenbosch Law Review
TB	Tuberculosis
UN	United Nations
UNEP	United Nations Environment Programme
Vol	Volume

Chapter 1: Introduction

1.1 Background and problem statement

South Africa is "characterised by a deeply divided society characterised by conflict, untold suffering, strife and gross injustice" which contravened basic human rights, transgressed humanitarian ethos which perpetrated a legacy of violence, hatred, fear, vengeance and guilt.¹ The division within the South African society is exacerbated by the apartheid system.

Apartheid system was a tool that was used by the white regime to define and physically separate various race groups; to provide a legal framework for administrative and political control over black population movements and concomitant land rights; to create and control a black unskilled labour market; and to ensure through spatial-political separation that universal suffrage does not result in black majority rule.²

The dawning of democracy brought significant changes to South Africa which led to the first democratic elections in 1994. The new dispensation of democracy led to the promulgation of the *Constitution of the Republic of South Africa, 1996* (Constitution) which embodied the Bill of Rights. The metaphor of "the bridge" developed by Mureinik in connoting the Bill of Rights, has dominated administrative law in South Africa. The Bill of Rights embodies the culture of authority whereby respect was no longer going to be accorded to decisions simply because of the institutional or "societal position of the decision maker", but "to ensure a culture of justification whereby the exercise of power would only be respected if it could be justified on the basis of reasons" advanced.³

South Africa has many types of minerals which makes mining the biggest contributor the country's economy.⁴ Mining "has to promote employment and advance the social and economic welfare of all South Africans".⁵ Mining plays a pivotal role in the growth of the economy of South Africa. Many people in South Africa are employed in the mining sector,⁶ which assists in poverty alleviation and the reduction of the unemployment rate. Statistics South Africa recorded that in 2016 local and foreign mineral sales amounted to

¹ Pillay 2005 *SALJ* 429.

² Meyer 2020 *PELJ* 23.

³ Klaaren 2014 *Journal of African Studies* 138.

⁴ Garside 2021 <https://www.statista.com>.

⁵ Section 2(f) and the Preamble of the *Mineral and Petroleum Resources Development Act 28 of 2002* (MPRDA).

⁶ Moraka and Van Rensburg 2015 *JSAIM* 669.

approximately R424 billion.⁷ Mining is central to economic development although it is prone to the depletion of minerals and natural resources as well as environmental degradation. Mining has been a major source of employment in South Africa dating back to the 1900s, although safety compliance remains a hurdle yet to be overcome.⁸ Mining has suffered significantly in recent years and its contribution towards the South African gross domestic product (GDP) has fluctuated.⁹ Notably, mining poses major risks to employees due to hazardous conditions employees are exposed to on a daily basis. In 2015 a staggering amount of R320 billion was made from mining exports.¹⁰

In 2016 mining contributed 8% towards GDP.¹¹ In 2017, 7.3% or an amount of R356 billion. In the same year, mining "contributed R93 billion to fixed investment, which constituted 17% of private sector fixed investment and 10.3% of the country's total fixed investment" spending. Furthermore, the mining industry paid R22 billion in taxes which was proved to be 16% higher year on year. A total amount of R7.6 billion was paid in royalties which were 31% higher than in 2017.¹² In 2019, mining contributed approximately R226.2 billion to South Africa's GDP.¹³ In the first quarter of 2020, the contribution was R214 791 and R96 million in the fourth quarter. Minister Gwede Mantashe indicated that in the first quarter of 2021, mining already recorded the highest growth rate,¹⁴ contributing R223 968.40 million to the tax revenue base.

Mining therefore significantly contributes to the South African economy. Nonetheless, the mining sector has always had major challenges to combat death tolls, injuries and occupational diseases due to workers being exposed to harmful or dangerous working conditions. The *Mines and Works Act*¹⁵ initially regulated health and safety in the mining sector.¹⁶ Section 3(2) of the *Mines and Works Act* also empowered the mine inspector to issue a notice in a situation where there was non-compliance in relation to health and safety regulations.¹⁷ Section 3 formed the foundation for section 54 of the Mine Health

⁷ Anon 10 February 2018 <https://www.fse.org.za>.

⁸ Masia and Pienaar 2011 *SAJIP* 1.

⁹ Anon 10 February 2018 <https://www.fse.org.za>.

¹⁰ Anon 10 February 2018 <https://www.fse.org.za>.

¹¹ Statistics South Africa 2021 <https://www.statssa.gov.za>.

¹² Jansen Van Vuuren 2021 <https://www.miningreview.com>.

¹³ Galal 03 September 2020 <https://www.statista.com>.

¹⁴ Mantashe 08 June 2021 <https://www.dmre.gov.za>

¹⁵ 27 of 1956 (hereinafter referred to as the *Mines and Works Act*).

¹⁶ For a discussion of the history see Chapter 2.

¹⁷ Section 3(2) of the *Mines and Works Act* provided that when "inspector visits the mine or work place and "finds at any mine or works that" anything "or practice in any way connected therewith, or the

and Safety Act¹⁸ (MHSA). The difference with the *Mines and Works Act* was that it also bestowed powers upon the mine inspectors to prosecute those who contravened the health and safety regulations.¹⁹ The *Mines and Works Act* also made provisions for appeal should a party not be satisfied with the decision of the mine inspector.²⁰ Any person aggrieved by the decision of the mine inspector under section 3(1) of the *Mines and Works Act*, could lodge an appeal in terms of sections 3(3).

The *Mines and Works Act* was repealed by the *Minerals Act*.²¹ A mining committee was established in terms of section 26 of the *Minerals Act*, but it failed to address the mine and health issues effectively. The *Minerals Act's* inadequacy to effectively and efficiently address the plight of mining accidents led to the appointment of the Leon Commission of Inquiry in the 1990s (Leon Commission).²² The Leon Commission released its report in 1995.²³ Volume 1 of the Report indicated that:

In the first 93 years of the century 69 000 mineworkers have been seriously injured. It is also alleged that a worker who spend 20 years underground faces a 1 in 30 chances of being injured or killed in gold mines. In 1993, 578 mineworkers died in accidents and approximately 8 532 mineworkers were seriously injured. However, those are only speculations in that there are no reliable statistics available for diseases caused by exposure to mine working conditions. Tuberculosis commonly known as TB is said to be at 58% chances of infection after 15 years of exposure. 40% to 80% of workers involved in drilling operations are prone to suffer from hearing problems after being exposed for almost 10 years.

The Leon Commission prompted the promulgation of the MHSA. Injuries in the mining sector remains a significant problem ranging from trivial to fatal injuries. The common cause of injuries is exacerbated by rock falls, mobile equipment accidents, entrapments, fires, explosions, fall from heights and electrocutions.²⁴ These types of accidents are

absence of any thing or practice, is calculated to cause bodily injury to, or be injurious to the health of, any person, or to cause damage to any property, and no provision exists in any law or in any special rule made under section thirteen requiring any such thing or practice or prohibiting any such thing or practice, he shall give notice in writing to the manager of the mine or works stating the particular thing, or practice which he requires to be done, or not to be done, or observed" or discontinued, and "may give such instructions relative thereto as he may deem expedient".

¹⁸ Act 29 of 1996 (Hereinafter referred to as the MHSA).

¹⁹ Section 4 (1) of the *Mines and Works Act*.

²⁰ Section 3 (3) of the *Mines and Works Act*.

²¹ 50 of 1991 (hereinafter referred to as the *Minerals Act*).

²² The main aim of the inquiry was to investigate all aspects of "the legal regulation of health and safety in the mining industry as defined in the *Minerals Act*.

²³ Stanton "Commission of Inquiry into Safety and Health in the Mining Industry / The South African OHS Commissions – Leon" (1995) (hereinafter referred to as the Leon Commission).

²⁴ Donoghue 2004 *Occupational Medicine* 283.

commonly associated with human error caused by fatigue and the pressure to meet production targets.²⁵

The main objective of the MHSAs is to provide for the "protection of the health and safety of employees" and "of other persons at mines and for that purpose promote a culture of health and safety", and to further provide for "enforcement and safety measures".²⁶ The MHSAs are promulgated in furtherance of the environmental right as enshrined in the Constitution. Section 24(a) of the Constitution provides that "everyone has the right to an environment that is not harmful to their health or well-being".²⁷ A section 54 of the MHSAs instruction is attributed to the promotion of health and safety practices to ensure compliance in the mining sector.²⁸ The regular mine visitation by mine inspectors is also viewed as the promotion of health and safety in the workplace.²⁹

The MHSAs provide "for the enforcement of health and safety measures" and institute "appropriate systems of employee, employer and state participation" in the mine's health and safety sector. The enactment of the MHSAs further led to the establishment of the mine health safety inspectorate (MHSI), whose mandate includes, among others, to facilitate and monitor health and safety standards in order to combat the rates of fatalities and injuries in South African mines.³⁰ The MHSI reports to the Department of Mineral Resources and Energy (DMRE)³¹ that is entrusted to serve as a watchdog for the mining industry. According to section 11 of the MHSAs, the employer must "identify hazards, assess the health and safety risks to which employees may be exposed" to "while they are at work, and record the significant hazards identified" and risks assessed. Section 11(2) and (3) further provide that "the employer must as far as reasonably practicable, attempt to eliminate the risks, control the risks, source of the risks, minimise the risks and insofar

²⁵ Donoghue 2004 *Occupational Medicine* 283.

²⁶ Preamble of the MHSAs.

²⁷ *AMCU v Minister of the DMRE* (Unreported) case number ILJ2158/2021 of 23 July 2021 para 38.

²⁸ Section 2(f) of the MHSAs.

²⁹ Ndiweni *The impact of section 54 of the MHSAs* 87.

³⁰ Section 47 of the MHSAs established the inspectorate whose duties are not only limited to sections 49 and 50 of MHSAs but also to the furtherance of the objectives of the Act as stated in section 1 of the Act. The objectives include *inter alia* "to protect the health and safety of persons at mines, to require employers and employees to identify hazards and eliminate, control, minimise the risks relating to health and safety to give effect to public international law obligation of the Republic that concerns health and safety at mines, to provide effective monitoring of health and safety conditions at mines and also to provide for enforcements of health and safety measures at mines".

³¹ Previously referred to as the Department of Minerals Resources (DMR) and the Department of Minerals and Energy (DMRE). These departmental names will be used interchangeably depending on the timeline.

as the risk remain, provide personal protective equipment and to institute a programme to monitor the risk".

The use of technology in mining operations limited the number and severity of mining accidents.³² However, new technological methods of mining also tend to attract new occupational hazards. Fatality rate was reduced by 88% between 1993 and 2016.³³ Although there was a decrease in fatalities and injuries, the subsequent rise in numbers is a major concern. The 2017 fatality rate was at 86 miners as opposed to 73 deaths which occurred in 2016. The stakeholders in the mining industry targeted 2020 to achieve a zero-harm goal among mine workers. However, it proved otherwise. The death toll in South African mines rose by 18%. The rise was exacerbated by the Covid-19 pandemic which probably affected production as it was deemed to be 2.8% below the level prior to the onset of the Covid-19 pandemic.³⁴ The COVID-19 pandemic also brought the issue of mine health and safety into the spotlight. In *Association of Mines and Construction Union (AMCU) v Minister of DMRE*,³⁵ AMCU lodged an application to compel the minister and the mine inspectorate to protect the mineworkers against the COVID-19 pandemic.³⁶ In their application, AMCU wanted the minister together with the designated mine inspectors to declare the mining area a health hazard in terms of section 76(1)³⁷ of the MHS Act. It was argued that the Minister either failed to decide whether to exercise his power to declare a "health hazard" and issued the necessary measures to protect mineworkers, or has decided not to. Similarly, the Inspector had failed to exercise his power to issue guidelines and make them binding on mining companies.³⁸ Given the nature of mining operations, mineworkers are particularly at risk of contracting COVID-19 at their workplace.³⁹

The mine inspectors under the umbrella of the DMRE have been afforded a prerogative in terms of section 54 of the MHS Act to stop mining operations if there is reasonable belief that the lives of mineworkers are endangered by the mine's activities or a mining accident. Section 54(1)(a) specifically provides that:

³² Donoghue 2004 *Occupational Medicine* 283.

³³ Mergence Report 2017 3 <https://www.mergence.co.za>.

³⁴ McKay 26 November 2020 <https://www.miningmx.com>.

³⁵ 2020 9 BLLR 929 (LC).

³⁶ *AMCU v Minister of DMRE* para 6.

³⁷ Section 76(1) of the MHS Act provides that "the Minister may by notice in the Gazette, declare that an environmental condition or a substance present at a mine is a health hazard to employees who are or may be exposed to that condition".

³⁸ *AMCU v Minister of DMRE* para 7.

³⁹ *AMCU v Minister of DMRE* para 19.

If the inspector believes that any occurrence, practice or condition at a mine endangers or may endanger the health or safety of any person at the mine, the inspector may give any instruction necessary to protect the health or safety of persons including but not limited to an instruction that operation at the mine or part of the mine be halted.

Mine owners as employers have the duty to ensure that workers' conditions are safe in order to avoid a culmination of operation stoppages.⁴⁰ In terms of section 2(1) of the MSHA, the owner of an operating mine "must ensure, as far as reasonably practicable, that the mine is designed, constructed and equipped to provide conditions for safe operation of the mine and a healthy working environment". Mine managers are also given a mandate to ensure safe working conditions.⁴¹ The MSHA confers rights upon employees that are enforceable. An employee "has the right, within reasonable justification, to leave any workplace when it appears to that employee that the place of work poses a serious danger to the health or safety of that employee".⁴² There must be sufficient information available in order for an employee to enforce that right in order to prevent employees from enforcing the right haphazardly.

Mine closures resulted in a R13.6 billion loss in revenue, excluding the losses incurred in re-starting of mines in 2017.⁴³ Mine closures not only affect the mine owners but mine employees as well as their immediate family members who are dependent on them for provision. Most mineworkers are breadwinners in their homes as well as to extended families. Closing the mines due to health and safety compliances not only results in loss of income for the affected employees, but loss of revenue which has adverse effects on the economy.⁴⁴ The reality is if there is no income,⁴⁴ mine employees cannot provide for their families.

The use of section 54 stoppage orders has attracted a great debate due to the inconsistency in terms of enforcement.⁴⁵ The issuing of a stoppage order was challenged in *AngloGold Ashanti Limited v Mbonambi (AngloGold case)*.⁴⁶ The applicant, AngloGold Ashanti mine, felt adversely affected by the respondents' administrative action of halting its mine operations in terms of section 54 of the MSHA. On 17 October 2016, the senior

⁴⁰ Section 2(1)(a) of the MSHA.

⁴¹ Section 11 of the MSHA.

⁴² Section 23 (1) of the MSHA.

⁴³ Ndiweni *The impact of section 54 of the MSHA* 21.

⁴⁴ McKay 15 January 2017 www.miningmx.com.

⁴⁵ Gloy *The use of section 54 stoppage orders* 2.

⁴⁶ *AngloGold Ashanti Limited v Mbonambi* (Unreported) case number J2459/2016 of 04 November 2016 (hereinafter referred to as the *AngloGold case*) para 5.

mine inspector⁴⁷ (third respondent) "conducted an inspection at level 44 of section 12 of the applicant's Kopanong mine." He issued instructions in terms of section 54(1) of MSHA. The "instructions had the effect of prohibiting the use of explosives and underground tramming throughout the entire mine". The mine "was closed from 17 October 2016 to 24 October 2016 at a loss of R9.5 million per day totalling to a loss of approximately R76 million". The mine closure was a result of "43 explosive cartridges not used for charging up" that were not "placed in the explosive box" at level 44. The respondents believed the conduct to be negligent and posing a health risk to the mine workers. The applicant argued that this action was unreasonable as no other specific "circumstances existed on level 44 which rendered the whole mining area unsafe".

On 18 October, the applicant made representations to the principal inspector⁴⁸ (second respondent) "in an attempt to set aside certain" instructions. "The second respondent refused the request and issued additional" instructions.⁴⁹ The applicant appealed to the acting chief inspector⁵⁰ (hereinafter referred to as the first respondent) against the instructions of the third and second respondents on 19 October 2016. On 21 "October the first respondent dismissed the appeal and confirmed the instructions issued by the third and second respondent respectively". The applicant took the matter to the Labour Court to appeal the first respondent's decision in terms of section 58 of the MSHA. The court set aside the instructions of the respondents to halt mine operations and further ordered that mine operations resume immediately except for level 44⁵¹ of the mine, which was the only section of the mine that was affected.⁵²

It will be argued that the inspector's prerogative in terms of section 54 of the MSHA falls within the ambit of administrative action, as regulated by the *Promotion of Administrative Justice Act 3 of 2000 (PAJA)*.⁵³ The decision of the official to halt mining operations

⁴⁷ Petrus Nthongoa is a senior mine inspector for the North West region on mine health and safety inspectorate.

⁴⁸ Thabo Ngwenya is the principal inspector of mines for the North West region of mine health and safety inspectorate.

⁴⁹ *AngloGold* case para 6.

⁵⁰ Xolile Mbonambi is the acting chief inspector of the mines of the mine health and safety inspectorate of the then Department of Minerals and Resources.

⁵¹ Level 44 constituted only 2% of the mine population.

⁵² Paragraph 7 of the *AngloGold* case.

⁵³ The case is discussed in more detail in chapters 3 and 4. The Act was promulgated in terms of section 33 of the *Constitution of the Republic of South Africa, 1996* (Constitution) which emphasises the need to a just administrative action and procedural fairness and that anyone affected by an administrative action should be given written reasons. Section 1 of PAJA defines an "administrative action" as "any decision taken or, any failure to take a decision by an organ of State when exercising a power in terms

therefore has to be reasonable. What constitutes reasonable action within the context of mine health and safety may be problematic when section 54 of the MHS Act is applied. In terms of section 33 of the Constitution, an administrative action must be reasonable. It would, therefore, be necessary to draw a distinction between reasonableness and unreasonableness. It is clear from numerous court decisions that one of the greatest challenges the courts have had to face was to give proper and significance meaning to the ground of reasonableness.⁵⁴

A decision will be perceived to be rational if it is "supported by the evidence and information before the administrator" as well as the reasons provided for the decision.⁵⁵ The main purpose of proportionality is "to avoid an imbalance between the adverse effects of an action and to encourage the administrator to consider both the need for the action and the possible use of less drastic or oppressive means to accomplish the desired" outcome.⁵⁶ In essence the decisions of the mine inspectors should incorporate the two elements in order to be regarded as reasonable. Recently the courts have been inundated by cases to challenge the decisions of the mine inspectors to be set aside in terms of the PAJA.⁵⁷

Section 6(2)(h) of the PAJA provides that:

A court or tribunal has the power to judicially review an administrative action if the exercise of the power or the performance or the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function.

The provisions of section 6(2)(h) entails that the administrative action which is taken by an authorised person within his or her scope of powers must be measured against the degree of a reasonable person test where a person's conduct is measured against a hypothetical person colloquially known as a reasonable man. The determination becomes, should a reasonable man find him or herself under the same circumstances as to how

of the constitution or a natural or juristic person, other than an organ of State, when exercising a public power or performing a public function in terms of the empowering provision, which adversely affects the rights of any person and which has a direct, external legal effects." In terms of section 3(1) of the PAJA, "any administrative action which materially and adversely affect the rights or legitimate expectation of any person must be procedurally fair." Section 3(2)(a) further provides that "fair administrative procedure depends on the circumstances of each case".

⁵⁴ Hoexter *Administrative Law* 328.

⁵⁵ Hoexter *Administrative Law* 340.

⁵⁶ Hoexter *Administrative Law* 344.

⁵⁷ See para 2.6 below.

would he or she handle the situation at hand? The finding on the reasonable man test will then determine whether one acted as reasonably expected or failed to act reasonably. In *Bato Star Fishing Pty (Ltd) v Minister of Environmental Affairs*,⁵⁸ it was held that section 6(2)(h) of the PAJA must be read in conformity with section 33 of the Constitution as it is a foundation to the promulgation of the PAJA.

As stated above, mining is crucial to South Africa's economy. Due to COVID-19 and the subsequent economic recovery that is needed, South Africa cannot afford further job losses. Section 54 stoppage orders may result in severe financial loss especially if the mine inspectors act outside the boundaries of reasonableness. The mine inspector making the decision really has to apply his or her mind before issuing a section 54 of the MHSA order or if the decision is to issue the order, it would be necessary to determine the extent of the order, as has been seen in the *AngloGold* case. The *AngloGold* case also brought the concept of reasonableness to the fore, in that PAJA applies to such decisions. The research question is therefore, what is the content, criteria or yardstick of reasonableness that should be applied when a mine inspector applies section 54 of the MHSA?

1.2 Aim of the study

The aim of this study is to determine the content, criteria or yardstick of reasonableness that should be applied when a mine inspector makes a decision in terms of section 54 of the MHSA. The following objectives support the main aim, namely to:

- Provide a historical background to mine health and safety governance;
- Determine how section 54 of the MHSA is interpreted;
- Discuss the content of reasonableness under the PAJA and its application to section 54 of the MHSA; and
- Identify gaps or challenges in the application of reasonableness in section 54 decisions and provide recommendations for future applications.

⁵⁸ 2004 4 SA 490 (CC).

1.3 Research methodology

The study is based on a literature survey of primary sources such as legislation, government policies and cases. This study is supplemented by secondary materials such as journal articles, chapters in books, textbooks, reports and internet sources. Use is made of literature from other sciences to assist in illustrating the implications of mine health and safety in the workplace.

1.4 Study outline

Chapter 2 provides a historical background to mine health and safety governance, while Chapter 3 deals with the concept of reasonableness under PAJA. Chapter 4 concludes by identifying gaps or challenges in relation to the application of section 54 and the content of reasonableness. Recommendations as to how section 54 should be applied in light of reasonableness are in the concluding chapter.

Chapter 2 Background to and prevailing mine health and safety governance

2.1 Introduction

The aim of the chapter is to discuss the historical background of the health and safety issues in the mining sector and how the governance structures evolved. This chapter further indicates the role players that are important in addressing mine health and safety issues. The international and regional measures pertaining to mine health and safety will be provided to ultimately determine whether section 54 of the MHS Act is aligned with those international and regional health and safety measures to combat fatalities and injuries in the mining sector. The contribution of mining to the economy and the adjacent communities is also referred to.

2. Historical background

Kofi Anan, the then General Secretary of the United Nations, said in 2002 that "safe work is not only sound economic policy; it is a basic human right".⁵⁹ As indicated in chapter 1 above, serious accidents occurred in South African mines necessitating the need to eradicate the risks that could cause fatal incidents in the mining industry. As a result, the Leon Commission was appointed with the purpose of investigating the regulation of health and safety in the mining industry. The prevalence notion that mining is inherently dangerous must be eradicated.⁶⁰ The *Mines and Works Act* initially regulated health and safety in the mining sector. Section 3(1) of the *Mines and Works Act* provided that:

Any inspector of mines, machinery or explosives and General powers any other officer referred to in section 2 may at any hour of the day or night enter any mine or works over which he exercises supervision in terms of the directions of the Government Mining Engineer and inspect or examine such mine or works or any part thereof or any machinery thereat, provided he does not impede or obstruct the working of the mine or the carrying on of the works.

As indicated above, the historical accidents which occurred in South African mines instigated the aim to eradicate the risks that could cause fatal incidents in the mining industry by bestowing powers upon the role players such as the MHSI to issue notices in

⁵⁹ Kofi Annan <https://www.fanews.co.za>. He was the then General Secretary of UN - speech delivered in New York on the occasion of Workers Memorial day 28 April 2002.

⁶⁰ Patekile Holomisa <https://www.dmr.gov.za>. Speech delivered by the then deputy minister of DMR at the MHSC Tripartite occupational health and safety summit 18 November 2014.

terms of section 54 of the MHS Act. Subsequent to the high fatality and injury rate in South Africa, the Leon Commission was launched for the purpose of investigating aspects of regulations of health and safety in the mining industry.

The Leon Commission had to make recommendations to the then State President⁶¹ on how the existing legislation could be improved and implemented to correspond to the prevailing conditions in the mining industry in correlation with the international standards. The Commission found that the existing legislation and enforcement agencies did not control occupational diseases or included stringent health and safety measures.⁶² Radical steps were accordingly "required to deal with the serious occupational health problems" in the mining industry.⁶³ The Leon Commission recommended the establishment of the following structures to ensure effective health and safety enforcement in the mining industry, namely, a Mine Health and Safety Council (MHSC),⁶⁴ a Mine Health and Safety Inspectorate (MHSI)⁶⁵ and a Safety in Mines Research Advisory Committee (SIMRAC).⁶⁶ Subsequently the MHS Act was introduced.

Most of the accidents happen underground whereby mineworkers get trapped for example, due to soil or mud slides.⁶⁷ In 1986, 177 mineworkers were trapped underground at Kinross gold mine in Evander, Mpumalanga, and their bodies were never recovered.⁶⁸ Sibanye Stillwater is amongst other mines which were under the spotlight for deaths of employees. In 2018, 13 mineworkers were trapped underground and died due to injuries sustained at Masakhane mine at Driefontein operations.⁶⁹ Another incident that was in the spotlight was the 2018 Phalaborwa Mine Company (PMC) when six miners died due to temperature rising that led to the eruption of fire.⁷⁰ On 22 October 2021 two Harmony Gold employees were killed due to fall of ground at Kusasaletu mine near Carletonville, in Gauteng. The Lily mine incident was in the spotlight on 02 November

⁶¹ The late former President FW de Klerk.

⁶² Executive summary of the review of mine health and safety, post-Leon Commission: emphasis on the challenges facing the MHSI 2003 3 <https://www.dmr.gov.za>.

⁶³ Leon Commission 1 1.

⁶⁴ Leon Commission 2 11.

⁶⁵ Leon Commission 2 11-12.

⁶⁶ Leon Commission 2 40.

⁶⁷ Stoddard *Daily Maverick* (30 November 2021).

⁶⁸ Mathebula *Ridgetimes* (29 September 2014).

⁶⁹ Haywood 2018 <https://www.wsws.org>.

⁷⁰ Sibuyi *Letaba Herald* (19 July 2018).

2021, in relation to the three bodies of employees which were never recovered after a shipping container fell into a sinkhole on 5 February 2016.⁷¹

The unions as the representatives of mine employees are concerned with rise of the number fatalities. Joseph Mthunjwa from AMCU appealed to government for stringent enforcement in order to protect mine workers.⁷² Mthunjwa further emphasised that mining companies should be held accountable for deaths of workers while on duty. The MHSC has invested R150 million to conduct research pertaining to accidents caused by fog. R250 million had already been "spent on research into seismicity associated with deep level mines".⁷³ An additional R40 million has been spent "on fundamental and applied research and technology transfer".⁷⁴ Acknowledgement should be afforded to the government in doing its part in relation to improving the health and safety measures in the mining sector, although many challenges remain.

In the following paragraph the current role players in mine health and safety are identified.

2.3 National role players

The mining industry is a challenging environment for mine employees, mining companies, and trade unions alike and even more so where health and safety issues come to the fore. The main role players for the purposes of this study include: (a) the DMRE; (b) MCSA and (c) trade unions. The key role players are the Minister of Mineral Resources and Energy supported by the Mine Health and Safety Council (MHSC) that advises the minister on health and safety matters.⁷⁵ The Minister may, for example "prohibit or restrict work by publishing a notice in a Government Gazette if any person is exposed to a substance or an environmental condition".⁷⁶ Section 76(1) allows the Minister to declare working conditions in the mine a health hazard to the employees. As indicated previously, in *AMCU v Minister of DMRE*, AMCU lodged an application to compel the Minister and the mine inspectorate to protect the mineworkers against the COVID- 19 pandemic.⁷⁷ In their application, AMCU wanted the Minister, together with the designated mine inspectors, to

⁷¹ Anon *Bhartex Express* (2 November 2021).

⁷² Sibuyi *Letaba Herald* (19 July 2018).

⁷³ Sokutu *The Citizen* (20 August 2018).

⁷⁴ Sibuyi *Letaba Herald* (19 July 2018).

⁷⁵ Section 43 of the MHSA.

⁷⁶ Section 75(1) of the MHSA.

⁷⁷ *AMCU v Minister of DMRE* para 6.

declare the mining area a health hazard in terms of section 76(1)⁷⁸ of the MSHA. It was argued that the Minister has failed to decide whether to exercise his power to declare a "health hazard" and accordingly to issue the necessary measures to protect mineworkers. The court found that both the minister and the chief mine inspector took the necessary steps in terms of section 76 (1) of the MSHA to address the COVID-19 pandemic.

A zero-harm initiative was implemented through the MHSC tripartite summit in 2014 which focused on ensuring that every day employees return home unharmed from work.⁷⁹ The initiative is to eliminate any cause of injuries and death in the mines to a point where workers are not harmed during the course of work. The Minister has been entrusted with the responsibility and a duty to ensure mineworkers' safety by holding mining companies to act in the best interest of their mineworkers.⁸⁰ The Minister does not operate unilaterally, there are various committees that the Minister must consult in order to make informed decisions in respect of health and safety in the mining industry. They include the Mine Health and Safety Council (MHSC), Safety in Mines Research Advisory Committee (SIMRAC) and the MHSI.

The MCSA, formerly known as the Chamber of Mines, represents mining companies and is one of the stakeholders in mine health and safety matters. The MCSA serves the interests of the employers by integrating this interest with interests of the employees. The MCSA as mining industry employer's organisation, has as its primary function to promote and support its members (mining companies).⁸¹

The MHSI is the law enforcement agent in health and safety matters⁸² and they can decide at any time to conduct their monitoring without a warrant.⁸³ The MHSI functions through their inspectors.⁸⁴ The MSHA places the duty on the employer to ensure mine health and safety measures that entail, amongst others, "to provide conditions for safe operation and a healthy working environment; and (b) with a communication system and with electrical, mechanical and other equipment as necessary to achieve those

⁷⁸ Section 76(1) of the MSHA provides that "the Minister may by notice in the Gazette, declare that an environmental condition or a substance present at a mine is a health hazard to employees who are or may be exposed to that substance".

⁷⁹ Patekile Holomisa, the then deputy minister of DMR <https://www.dmr.gov.za>. Speech delivered at the MHSC Tripartite Occupational Health and Safety Summit 18 November 2014.

⁸⁰ *AMCU v Minister of DMRE* para 22.

⁸¹ MCSA purpose and vision available at <https://www.mineralscouncilsouthafrica.org.za>.

⁸² Established in terms of section 47 of the MSHA.

⁸³ Section 54(1)(a) of the MSHA.

⁸⁴ Section 50 of the MSHA. See 2.5 below.

conditions".⁸⁵ A mine with more than 20 employees must also appoint a health and safety representative in terms of section 25(1) of the MSHA and those with more than a 100 employees must appoint more than one health and safety representative. The appointment of such a representative must be negotiated with trade unions.⁸⁶

Trade unions are membership-based organisations comprising of workers whose aim is to come together for a common goal to regulate relations between employers and employees.⁸⁷ The objective of trade unions is to advance workers' welfare.⁸⁸ During the apartheid era, trade unions were instrumental in the fight for democracy in South Africa, but now its focus is on safety and health issues, amongst others.⁸⁹ Employees have the right to form and join a trade union of their choice, and to embark on a strike.⁹⁰ Unions also organise and facilitate worker strikes in order for its members to showcase their grievances in form of petitions.⁹¹ In the case of the MSHA, trade unions must conclude a collective agreement with the employer in relation to the designation of working places,⁹² the number of health and safety representatives, their terms of office and the manner in "which health and safety representatives must perform their functions in terms of this Act".⁹³ The safety and health representatives serve not only as the representatives of the employees, but they may also direct employees to leave their place of work should any health hazard or dangerous situation arise.⁹⁴ They may also identify risks and hazards to health and safety.⁹⁵ They may further approach a mine inspector to conduct investigations or ask the Chief Inspector of Mines to hold an inquiry.⁹⁶ They may also accompany the inspector during his or her investigation.⁹⁷

⁸⁵ Section 2(1)(a) of the MSHA.

⁸⁶ Section 26 of the MSHA.

⁸⁷ Section 213 of the *Labour Relations Act* 66 of 1985.

⁸⁸ Rasila 2021 <https://www.linkedin.com>.

⁸⁹ Anon 12 October 2012 <https://www.polity.org.za>.

⁹⁰ Section 23(2)(a) and (c) of the Constitution and section 4(a) and (b) of the *Labour Relations Act* 66 of 1995 provide that "every employee has the right to participate in forming a trade union or federation of trade unions and to join a trade union".

⁹¹ Anon 12 October 2012 <https://www.polity.org.za>. In 2012, the South African mining industry came into the spotlight when 34 London Mine (commonly known as Lonmin) mineworkers were gunned down during a clash with the police. The mineworkers were petitioning for a salary increment but it ended in bloodshed. The incident became known as the Marikana massacre.

⁹² Section 26(1)(a) read with section 27 of the MSHA.

⁹³ Section 26(1)(b)-(m) lists further matters that should form part of the collective agreement in relation to safety and health officials.

⁹⁴ Section 30(1)(a)-(b) of the MSHA.

⁹⁵ Section 30(1)(d).

⁹⁶ Section 30(1)(j) read with section 60 and 65 of the MSHA.

⁹⁷ Section 30(1)(l) of the MSHA.

The stakeholders, mentioned above, work collectively to ensure the improvement of health and safety in the mining industry. The employees are allowed to petition their grievances in a form of strike or industrial action. However, the strike must be perceived to be lawful. In *Harmony Gold v National Union of Metalworkers of South Africa (NUMSA)*⁹⁸ (hereinafter referred to as *Harmony Gold v NUMSA* case), the "court declared the strike action which the second and further respondents intended to embark upon an unlawful work stoppage, alternatively as unlawful and unprotected industrial action". The demand of the unprotected strikers was that "the applicant should stop the use of the 'conveyor belt as a mode of transport for man riding'" or alternatively introduce buses to transport employees as opposed to belt riding.⁹⁹ The mine argued that the employees were not allowed to strike because it is incorporated in their contract under terms and conditions of service that employees would use the conveyor belt system as their mode of transport.¹⁰⁰ NUMSA alleged that the belt riding was not safe and that proper consideration in respect of the belt riding has not been taken into account in terms of assessing the likelihood of work related injuries posed by the belt riding.¹⁰¹ According to the court, the mine made a compelling case in relation to the belt riding which was explicitly stated in the terms and conditions of the workers' employment contracts. The rule *nisi* was confirmed, declaring that the strike or industrial action was unlawful and unprotected.¹⁰²

It is clear from case mentioned above, that the safety and health of mine employees is still a major concern in the mining sector. The designated stakeholders have to work collectively to achieve the zero-harm goal, otherwise the ambition to achieve the zero-harm will not materialise for as long as the stakeholders do not operate in one accord in order to achieve their common vision. In the theme of this research, the Minister of Mineral Resources and Energy and the MHSC are responsible to ensure that measures are in place to address mine health and safety issues. Whereas the mines as employers must provide employees with a safe and healthy environment. Trade unions play a role in health and safety committees and therefore should ensure the safeguarding of employees' health and safety. The employees are also responsible for their own health and safety, as

⁹⁸ (Unreported) case number J367/2012 of 14 March 2012.

⁹⁹ *Harmony Gold v NUMSA* para 2.

¹⁰⁰ *Harmony Gold v NUMSA* para 7.

¹⁰¹ *Harmony Gold v NUMSA* para 9.

¹⁰² *Harmony Gold v NUMSA* para 27.

is apparent from the *Harmony Gold v NUMSA* case that they should take personal responsibility in adhering to the rules and codes of conduct of the mine.

2.4 International role players

Health and safety in the mining industry is a global issue and South Africa has adopted health and safety standards from the International Labour Organization¹⁰³ and South African Development Community (SADC).¹⁰⁴ The MSHA obliges government to give effect to its international obligations in relation to mine health and safety.¹⁰⁵ Article 24 of the *ILO Convention Safety and Health in Mines* 176 of 1995 (1995 ILO Convention) provides that a competent authority should ensure that the enforcement of its national laws and regulations should take place without compromise, through an adequate and appropriate system of inspection. Seventeen countries ratified the 1995 ILO Convention which brings about a meagre solution to the vast problem of safety concerns.¹⁰⁶

Article 9 of the SADC *Mining Protocol* provides that member states should co-operate "in improving the practices and standards of occupational health and safety in the region's mining sector". The Protocol further encourages "the sharing of training and any promotional facilities related to occupational health and safety in the region". The specifics of how this should be done, are not spelled out. However, unreasonable mine stoppages that impact on the socio-economic environment may not contribute to the aims of the Protocol.

If the ILO Conventions and the *Mining Protocol* provisions are interpreted, it is clear that there should be stringent enforcement of section 54. However, the stringent enforcement

¹⁰³ ILO Convention 176 of 1995. In 1919 South Africa became a founder member of the *International Labour Organisation (ILO) Convention* and ratified the first convention in 1921. Since then, South Africa has ratified 20 ILO instruments. The ILO has been actively involved in the aspects of mining for over 70 years. The ILO has been a specialised agency of the United Nations (UN) since 194 date is incomplete *ILO Convention* 176 of 1995 deals with health and safety standards for the mining industry. "This instrument regulates the safety and health issues unique to work on mines, and includes inspection, special work devices, and personal protective equipment (PPE). It also prescribes the requirements related to mine rescue." South Africa ratified this Convention in 2003 and as such has to uphold the objectives pertaining to the health and safety of employees.

¹⁰⁴ South Africa is a member of the South African Development Community (SADC) and also ratified the *SADC Protocol on Mining* in 1997 (hereafter *Mining Protocol*). The *Mining Protocol* has as its aim "to ensure through co-operation and collaboration to develop the region's abundant mineral resources to improve the living standards for people throughout the SADC region." The Protocol promotes "economic and social development and integration of the economies with the view of achieving competitiveness and increasing the markets share in international markets."

¹⁰⁵ Section 1(c) of the MSHA.

¹⁰⁶ South Africa ratified *ILO Convention* 176 of 1995 in 2003.

should not result in the mine inspectors usurping their powers. There is a need for skills development in order to ensure health and safety compliance. The *Mining Protocol* stresses the need for capacity building.¹⁰⁷ Employees must also be actively involved in decision-making in respect of health and safety implementations. In most cases, mining companies view the issuing of section 54 orders with negativity. According to the study by Coaltech, the implementation of safety bonuses and penalties have improved compliance in the mining sector.¹⁰⁸ Skills development should be implemented in order to provide employees and mine managers sufficient information in relation to health and safety standards, in order to comply with the ILO Convention and the *Mining Protocol*.¹⁰⁹

2.5 Interpreting legislation and section 54 of the MHS Act

The interpretation of statutes is a process the courts use to determine the meaning of the legislation within the intended purpose of the legislature.¹¹⁰ It is imperative to unpack the dimensions of legislation and its fundamental concepts of interpretation in dissecting section 54 of the MHS Act. One cannot apply the provisions of a particular Act without attaching the appropriate meaning. It seems that the courts move towards interpreting the purpose, goal or intention of an Act rather than merely the literal interpretation. The MHS Act includes definitions, but does not shed light on the interpretation of the provisions of the Act. Section 82 of the MHS Act provides that "the Labour Court has exclusive jurisdiction to determine any dispute about the interpretation or application of any provision of this Act except where this Act provides otherwise". The interpretation of section 54 of the MHS Act will therefore be subject to the Labour Court's interpretation thereof. The court will have to make use of the *Interpretation of Statutes Act*.¹¹¹ In its preamble, the *Interpretation of Statutes Act* states that:

The provisions of this Act shall apply to the interpretation of every law in force, at or after the commencement of this Act, in the Union or in any portion thereof, and to the interpretation of all by-laws, rules, regulations or orders made under the authority of any such law, unless there is something in the language or context of the law, by-law, rule,

¹⁰⁷ Article 2(5) read with article 9.

¹⁰⁸ Mpanza, Nelwamondo and Ndiweni *The impact of section 54 stoppages on staff morale* 3.

¹⁰⁹ During stakeholder's conference held on 25 November 2021, the MCSA committed R140 million over the next five years to health and safety measures. R6 million has been earmarked for skills development. It was further emphasised during the conference that the measures and commitments made should be implemented and monitored to ensure that the deterioration in health and safety does not continue, with aim of achieving the zero-harm goal.

¹¹⁰ Singh *The impact of the constitution on transforming the process of statutory interpretation* 4.

¹¹¹ 33 of 1957 (hereinafter the *Interpretation of Statutes Act*).

regulation or order repugnant to such provisions or unless the contrary intention appears therein.

This Act came into effect in 1957, and does not address the post-Constitutional dispensation. The Constitution provides guidelines in relation to interpretation. In terms of section 39(2) of the Constitution "when interpreting any legislation, and developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the bill of rights". Section 24 of the Constitution includes the environmental right, as stated in Chapter 1. The provisions of section 24 of the Constitution must further be promoted and upheld. The environmental legislation such as the *National Environmental Management Act* 107 of 1998 (NEMA), as well as the MPRDA and the MHSA, among others, were promulgated in order to advance the provisions of section 24 which forms an integral part of the Bill of Rights. It is envisaged in the Constitution that:

When applying a provision of the Bill of Rights to a natural person or juristic persons the court in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 39(1) of the Constitution.

It is important to understand that the courts may have to determine the actual intention of the legislature in order to give effect to the provisions of the legislation concerned, and applying it to the situation at hand. The court's interpretation of legislation is underlined by the Latin maxim *Judicis est ius dicere non facere*¹¹². Section 233 of the Constitution further provides "that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law" (that will be the ILO Conventions and the *Mining Protocol* amongst others). Section 233 of the Constitution provides that a reasonable interpretation should be congruent with international law. International law is the governing of relations between various states predominately regulated by treaties that are concluded between such states. Section 231 of the Constitution deals with the ratification and accession of international agreements by setting out the requirements. The standard that is used to interpret treaties should be adopted into interpreting domestic legislation. This means that when the Labour Court interprets section 54 of the MHSA, it may refer to the ILO Conventions and the SADC

¹¹² Translated in English simply means that Judges do not make the law, they apply the law.

Mining Protocol, mentioned above in order to determine the underlying meaning of the provisions of the MHSA.

There are various traditional interpretation approaches preferred by the South African courts.¹¹³ Those traditional forms of interpretation include the literal theory, contextual theory, purposive theory, intention theory, objective theory and judicial theory.¹¹⁴ In terms of the literal theory, the meaning must primarily be deduced from the language used. In the case of the intention theory, inference should be drawn from "the intention of the legislature in order to" give effect to its proper interpretation. Contextual theory means that interpretation should be drawn from the context within which the words were used. Purposive theory on the other hand entails that the "purpose for which the legislation was designed to achieve" should be considered. The objective theory may be regarded as an antidote to the subjective intention of the legislature. Du Plessis¹¹⁵ advocates for the constitutional theory, where all legislation should be in conformity with the Constitution.

One cannot apply the provisions of a particular Act without attaching the appropriate interpretation. By interpreting the provision of the Act, one can easily attach the meaning thereof. As stated above, the MHSA has an interpretation clause, however, it does not bring much needed aid to the interpretation of the provisions of the MHSA. Section 82 of the MHSA provides that "the Labour Court has exclusive jurisdiction to determine any dispute about the interpretation or application of any provision of this Act except where this Act provides otherwise". Section 101(1) of the MHSA states that the provisions of the MHSA bind the State except when criminal liability is concerned. It is clear from the section that there is no inclusion or guideline relative to interpretation of the Act. The *Interpretation of Statutes Act* does not proffer aid in resolving the conundrum encountered by the judiciary in interpreting and applying the true meaning of legislation.

The interpretation of statutes should be based on the Bill of Rights.¹¹⁶ "The contextual approach to statutory interpretation pays a particular attention to the context in the construction of statutes."¹¹⁷ The "context is not limited to the language" used in the

¹¹³ Singh *The impact of the constitution on transforming the process of statutory interpretation* 17.

¹¹⁴ Du Plessis 2015 *PELJ* 1334-1338.

¹¹⁵ Du Plessis 2015 *PELJ* 7.

¹¹⁶ Section 39 of the Constitution.

¹¹⁷ *Mineral Council of South Africa v Minister of Mineral Resources and Energy* 2020 4 All SA 150 (GP) para 20.

statutes but it also extent to the scope and purposes of the statute and its background.¹¹⁸ A contextual approach must be applied when reading statutes in order to give effect to the actual words in the statute.¹¹⁹

In terms of section 54 of the MHSA, the inspector of mines "must have reason to believe that certain circumstances exist before the inspector is entitled to exercise his or her power". This provision creates a conundrum as to whether the prerequisite to exercise power must be construed objectively in order for the courts to determine the reasonableness of the inspector's belief or within a subjective form of interpretation. The exercise of power by the mine inspector should be in relation "to the general principles of administrative law" whereby the power conferred "may not be exercised in an arbitrary manner". Arbitrary in the sense that the mine inspectors should not disregard the applicable law. There must be an objective fact which serves as a justification of the exercise of such powers.¹²⁰ The factual circumstances which may justify the exercise of any administrative power may be subject to judicial review. It is not enough to just say that the mine inspector thinks that there is a "reason to believe". In fact, a reasonable case must exist. The concept of reasonableness and its content will determine the application of reasonableness within the ambit of section 54 of the MHSA. This is discussed in more detail in Chapter 3.

The MHSA serves as an enforcement tool in relation to health and safety standards in the mining sector. The enforcement of section 54 begins with a duty that is placed upon the employer in terms of section 11 of the MHSA.¹²¹ The employer has a duty to provide employees with a safe and healthy working environment. Although the employees are afforded a right to refuse to work in an environment which is not safe, it proves difficult for the employees to enforce that right which may be the cause of some injuries and fatalities.¹²² The MHSA is also applicable in the adjacent areas of mining operations. In *Assmang (Pty) Ltd v Chief Inspector of Mines*,¹²³ a security guard employed by a mine was fatally injured when a heavy-duty truck collided with him at an intersection leading to the

¹¹⁸ *Mineral Council South Africa v Minister of Minerals Resources and Energy and Others* 2020 4 All 150 (GP) para 20.

¹¹⁹ *Mineral Council South Africa v Minister of Minerals Resources and Energy and Others* 2020 4 SA All 150 (GP) para 20.

¹²⁰ See, for example, the article of Courtis 2011 *CCR* 35.

¹²¹ Section 11 of the MHSA.

¹²² Section 11 of the MHSA.

¹²³ (Unreported) case number J764/2015 of 22 February 2019.

respondent's mining operations. The MHSI invoked the provisions of the MHSAs for enforcement purposes.

Proper implementation and enforcement of section 54 of the MHSAs in health and safety standards will improve the working conditions and simultaneously protect the lives of workers whose lives are susceptible to operational risks. There has been an ongoing discourse in respect of section 54 stoppages as to whether it is achieving the purpose for which it was designed to achieve which is improving health and safety in the mining sector.¹²⁴ Section 50(1) of the MHSAs sets out the powers of the inspectors relative to regulating health safety measures in the mining sector. The MHSI is empowered to enter the mine at any given time for the purposes of monitoring or enforcing the provisions of the MHSAs.¹²⁵ If subsequent to entering the mine for monitoring the mine inspector has:

A reason to believe that any occurrence, practice or condition at a mine endangers or may endanger the health or safety of any person at the mine, the inspector may give any instruction necessary to protect the health or safety of persons at the mine, including but not limited to an instruction that; operations at the mine or a part of the mine be halted, the performance of any act or practice at the mine or a part of the mine be suspended or halted, and may place conditions on the performance of that act or practice, the employer must take the steps set out in the instruction, within the specified period, to rectify the occurrence, practice or condition; or all affected persons, other than those who are required to assist in taking steps referred to in paragraph, be moved to safety.¹²⁶

As the mine inspectors are law enforcement agents in health and safety matters in the mining sector, they can decide at any time to conduct the monitoring and they need not to obtain a warrant to execute their duties. However, the MHSI must exercise their powers within the ambit of the law and promote the rule of law.

2.6 Judicial interpretation of section 54 of the MHSAs

In the unreported case of *International Ferro Metals South Africa (Pty) Ltd v Minister of Minerals Resources*¹²⁷ the section 54 notice was set aside by the court on the ground of invalidity. *In casu*, the inspector issued "instructions in terms of section 54(1)(a) of the MHSAs that operations at the ferrochrome smelter had to be halted by" 26 July 2013. The instructions "required the employer to withdraw all employees from the designated areas

¹²⁴ Gloy *The use of section 54 mine stoppages* 17.

¹²⁵ Section 50(1)(a) provides that an inspector may for the purposes of monitoring or enforcing compliance with the MHSAs enter any mine at any time without warrant or notice.

¹²⁶ Section 54(1) of the MHSAs.

¹²⁷ (Unreported) case number JR1673/2013 of 21 January 2015.

which allegedly had high carbon monoxide levels until such time as those were brought within the legal limit".¹²⁸ Ferrochrome contended that the instructions issued by the inspector were invalid. It argued that the guidelines on health and safety compliance with the purpose of halting mining operations, allowed the mine inspectors to take into consideration historical data in terms of compliance "in determining the section 54 instruction, thereby taking away the inspector's discretion in deciding whether to halt the operation or not".¹²⁹

Section 49(6) of the MHS Act provides that the Chief Inspector of Mines must publish guidelines in the *Government Gazette*. Ferrochrome "approached the Labour Court to challenge the issuance of the notice and the validity of the guidelines" on health and safety compliance "issued by the inspector which had to be adhered to when an inspector sought" to be exercising his powers when issuing section 54 notice. The guideline was set aside by the court on the basis that it did not comply with section 49 of the MHS Act in which the functions of the MHSI are envisaged.

In *Bert's Bricks (Pty) Ltd v The Chief Inspector of Mines: North-West Region*¹³⁰ (*Bert Bricks* case) it was held that "objectively a state of affairs must exist which would lead a reasonable man to believe that it may endanger the health or safety of any person at the" time.¹³¹ The court lambasted the mine inspectors on the basis that they did not apply their minds.¹³² It was alleged that there was a gross abuse of power by the mine inspectors when exercising their discretion and enforcing the provisions of section 54 of the MHS Act. However, the extent of the alleged abuse of power had to be tested in order to be construed as such. The mine inspectors should exercise their decision-making that it can be construed as based in reasonable practicality; therefore, the common law reasonable man/person must step into the picture.¹³³ "The hypothetical reasonable person provides an objective by which the conduct of others is judged."¹³⁴ If the conduct of a person failed to pass the threshold on reasonableness provided by the reasonable man test, the conduct is perceived negligent. In light of the exercise of power by the MHSI, it will constitute unreasonableness.

¹²⁸ *International Ferro Metals South Africa (Pty) Ltd v Minister of Minerals Resources* para 18.

¹²⁹ *International Ferro Metals South Africa (Pty) Ltd v Minister of Minerals Resources* para 23.

¹³⁰ (Unreported) case number 15347/2011 of 09 February 2012.

¹³¹ *Bert's Bricks* para 15.

¹³² *Bert's Bricks* case para 12.

¹³³ Sykes, Evans and Bullabh SADJ 430.

¹³⁴ Sykes, Evans and Bullabh SADJ 430.

The prerequisite of a reasonable man test involves the duty of care which entails that one must foresee harm and must act reasonably to prevent such harm.¹³⁵ In conformity with section 54 of the MSHA, the reasonable person test entails that the mine inspector must foresee the harm, and in order to prevent such harm, the mine inspector must take necessary measures to prevent the harm from occurring. In other words, the mine inspector should measure the extent of the foreseen harm against the safety and health of the miners. Admittedly, striking the balance between the two could be cumbersome.

The provision of section 54 the MSHA refers to "reason to believe". It can be interpreted from the provisions of section 54 that the intention of the legislature must have been that the mine inspector should exercise discretion, however, such discretion should not be abused. When one exercises discretion, rationality should be a fundamental core of the decision-making. Rationality entails that the decision taken must be supported by information and evidence. Furthermore, reasons must be advanced for such decision. The principle of rationality aligns with section 5 of the PAJA, which provides that:

Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date the person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.

Section 54 of the MSHA makes provisions for mine operations to be suspended or halted if there is a reason to believe that employees' lives are in danger. In the *AngloGold Ashanti* case the applicant submitted that the affected area, which was level 44, comprised only 2% of the entire mine. The 91 employees were stationed there as opposed to 4218 employees who worked at the rest of the mine. "No specific circumstances existed on level 44 which rendered the whole mine unsafe warranting mine operations to be halted."¹³⁶

There are many different understandings of and nuances to reasonableness. When the court interprets the rights contained in the Constitution should promote the values which underlie an open and democratic society. The fact that one believes that they have a reasonable ground to believe, merely because he or she believes that there is a reasonable case to believe does not mean that is the case.¹³⁷

¹³⁵ Sykes, Evans and Bullabh SADJ 431.

¹³⁶ *AngloGold Ashanti* para 16.

¹³⁷ See Chapter 3.

2.7 Conclusion

In conclusion Chapter 2 tackled the importance of mining to the economy of South Africa and the communities as a whole. The chapter indicated the challenges for the economy and possible job losses if mines are closed for a period. This may be as a result of section 54 stoppage orders. The origin and development of the health and safety regulations from the introduction of the *Mines and Works Act* and the enactment of the MHSAs following on the Leon Commission were highlighted. South Africa has also responsibilities to adhere to ILO and SADC instruments and this is reiterated in the MHSAs.

There is no clear definition of the concept of "reason to believe" which forms the core decision-making instrument that inspectors use upon which to base their decision to halt a mine's operations, amongst others. This link to reasonableness in decision making will be discussed in Chapter 3.

The different role-players in health and safety governance include the Minister of Mineral Resources and Energy, MHSI, employers, trade unions and employees. The MHSAs describe the roles and functions of each of these role players. It can be argued that these role and functions (should they not properly exercised) may inform the inspector's "reason to believe" that circumstances exist at mine which pose a risk to the health and safety of employees and which could necessitate the enforcement of section 54 of the MHSAs. However, in interpreting what section 54 entails, different theories of interpretation of statutes can be applied, such as the purposive theory which deals with the purpose for which the legislation was enacted and the intention theory which requires that the intention of the legislature be established. The Constitutional Court tends to favour the purposive interpretation as will be indicated in Chapter 3.

Section 54 of the MHSAs has been judicially considered in many court cases. In other cases, the court dealt with the validity of the decision of the mine inspector, while in other cases the focus fell on determining whether the exercise of power by the mine inspectors constituted administrative action. In the *AngloGold Ashanti* case, the court dealt with the issue of a mine inspector's powers and whether such powers constitute administrative action as defined by the PAJA. An administrative action entails that the decision taken should be measured against the yardstick of reasonableness. Establishing a clear definition of reasonableness within the context of section 54 of the MHSAs may assist the mine

inspectors in exercising their powers when there is "reason to believe" that circumstances exist which might endanger the health and safety of the employees. In the following chapter the content of reasonableness under PAJA and its application to section 54 of the MHSAs decisions are discussed.

Chapter 3: Reasonableness under PAJA and its application to section 54 of the MHA decisions

3.1 Introduction and brief historical background

This chapter deals with the courts' interpretation of the concept of reasonableness when an administrator exercises a power and, in this case, mine inspectors in particular. The two components of reasonableness will be discussed in detail, namely rationality and proportionality. The chapter then focuses on how the courts have dealt with cases of mine closure when applying the concept of reasonableness within the ambit of section 54 of the MHA. The *AngloGold* case will be used to illustrate reasonableness in the application of section 54. However, before doing so the discussion considers the place of administrative law on decisions pertaining to mine health and safety decisions, particularly the role of reasonableness as a standard of review, is considered.

Prior to the democratic dispensation the common law regulated the administrative process in South Africa. This was until the introduction of the *Interim Constitution*¹³⁸ in 1993 ended the reign of parliamentary sovereignty practiced in South Africa, which was derived from the English law during colonialism. The doctrine of parliamentary sovereignty was perceived as "a fundamental constraint of powers of the courts in the pre-democratic era" in South Africa.¹³⁹ Although the courts had the power to review the legality of administrative decisions, parliament was free to decide what counted as lawful and did not. In other words, parliament authorised administrative officials to interfere with people's rights by conferring wide discretionary powers to the administrative officials that it would be difficult for the courts to fault the exercise of their powers.¹⁴⁰ The introduction of the *Interim Constitution* and subsequently, the 1996 Constitution revolutionised the South African administrative law and its concept of administrative justice.

3.2 The Constitution and PAJA

The 1996 "Constitution is the supreme law of the Republic of South Africa and any law or conduct inconsistent with it is invalid".¹⁴¹ This means that all law and conduct should be measured against the Constitution in order for it to be considered valid. The Constitution

¹³⁸ *Constitution of the Republic of South Africa* 200 of 1993 (referred to as the *Interim Constitution*).

¹³⁹ Hoexter *Administrative Law* 14.

¹⁴⁰ Hoexter *Administrative Law* 15.

¹⁴¹ Section 2 of the Constitution.

also envisaged the significance of the *trias politica*¹⁴² better known as separation of powers together with the checks and balances systems. The checks and balances system curb the abuse of power and ensures that each governmental body acts lawfully and fairly within their statutory mandate.¹⁴³ The reason being that the importance of the health and safety of mineworkers and the severe consequences such as loss of life due to non-enforcement.¹⁴⁴ The legislature makes the law, the executive executes the law, and the judiciary interpret, applies and enforces the law.¹⁴⁵

The Constitution also ensures that fairness and lawfulness serve as mechanisms to regulate the interaction of public institutions and the people of South Africa. In essence, "justice should not only be done but must also be seen to be done."¹⁴⁶ Justice requires eliminating any arbitrary distinctions and establishing a practice whereby a balance is struck between competing interests and claims.¹⁴⁷ The Constitutional Court serves as the guardian of the Constitution and must protect the values and principles of the Constitution.¹⁴⁸ Section 33 of the Constitution¹⁴⁹ which deals with the right to just administrative action is given effect to via the PAJA.¹⁵⁰ Therefore when interpreting the PAJA the purposive interpretation that links to constitutional rights and values must be applied. Acknowledgement should be afforded that the legislature could not have been exact when drafting in order to anticipate all eventualities.¹⁵¹

¹⁴² Nwanazia 17 March 2021. <https://www.dutchreview.com>. The French philosopher and political theorist Charles Montesquieu was the founder of the *Trias Politica*, and his work *l'Esprit des Lois* (The Spirit of Laws), in 1748 Montesquieu concluded that there are three powers that must be separated. Those powers were legislative, the executive and the judiciary. Also see Kohn 2013 *SALJ* 814 footnote 82.

¹⁴³ *Glencore Operations South Africa v Minister of Minerals and Resources and Others* (Unreported) case number JR 91/2014 of 03 February 2016 para 143.

¹⁴⁴ *Glencore Operations South Africa v Minister of Minerals and Resources and Others* (Unreported) case number JR 91/2014 of 03 February 2016 para 142.

¹⁴⁵ Kohn 2013 *SALJ* 814-815.

¹⁴⁶ *Glencore Operations South Africa v Minister of Minerals and Resources and Others* (Unreported) case number JR 91/2014 of 03 February 2016 para 86.

¹⁴⁷ Amed *The explicit and implicit influence of reasonableness* 15.

¹⁴⁸ Daniels and Brickhill 2006 *Penn State ILR* 371-404.

¹⁴⁹ Section 33(1) of the constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

¹⁵⁰ Preamble of the PAJA which provides "to give effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action as contemplated in section 33 of the Constitution of the Republic of South Africa, 1996; and to provide for matters incidental thereto." Also see, *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC). The purpose of PAJA is "to give effect to section 33 of the Constitution, matters relating to the interpretation and application of PAJA will of course be constitutional matters".

¹⁵¹ Currie and Klaaren *Benchbook* 13.

Section 33 of the Constitution and PAJA are the foundation and pillars of administrative law review in South Africa. Section 33 of the Constitution confers the right to just administrative action whereas PAJA detailed this right by defining what constitutes administrative action, the procedures to be employed, substantive conditions to be met, and available remedies at one's disposal whenever such right is contravened. It is important to determine whether there was an infringement of a right, and if yes, was such infringement justified within the law.¹⁵² This mechanism is synonymous with the weighing of competing interests in order to determine which supersede the other. In the judicial realm, weighing of interests is the order of the day in the advancing solutions to legal disputes.¹⁵³ Any administrative action which adversely affects a person is reviewable in terms of the PAJA, unless another pathway to administrative justice applies. It is important to first determine whether the exercise of power falls within the ambit of the definition of administrative action as envisaged in section 1 of the PAJA. If the exercise of power does not fall within the ambit of the definition of administrative action then review under the principle of legality will apply.¹⁵⁴

3.3 Internal remedies and the legal status of section 54 decisions prior to judicial review

"Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action."¹⁵⁵ An administrative action is when an administrator in a form of an organ of state exercises power in terms of the empowering legislation.¹⁵⁶ However, prior to approaching the court for relief, the affected party must exhaust all internal remedies. What the internal process entails in respect to mine, health and safety, is that the affected party or the mine should lodge an appeal with the Chief Inspector in terms of section 57(1) of the MHSA. Section 7(2) of the PAJA makes provision for the affected party to exhaust internal remedies prior to approaching the court for appropriate relief. When invoking the provisions of section 7(2) of the PAJA, the appeal of the impugned decision of the mine inspector has to be lodged internally with the Chief Mine Inspector.

¹⁵² *S v Zuma* 1995 4 BCLR 401 (CC) 419, para 21.

¹⁵³ Rautenbach 2014 *PELJ* 2232.

¹⁵⁴ Grieve and Rodrigues 26 August 2020 <https://www.financialinstitutionslegalsnapshot.com>.

¹⁵⁵ Section 6 (1) of the PAJA.

¹⁵⁶ See s 1 of the PAJA.

Pragmatically, it will often be difficult for the outcome of the appeal to contradict the former decision. When a person has an interest in a case, it is hard to exercise impartiality and fairness in their dealings. The likelihood in the appeal outcome is that the Chief Mine Inspector would confirm the decision of the mine inspector who issued the section 54 instruction or notice even though there may not be adequate information to justify the total closure of mine operations due to the alleged contravention.

A judicial review will only follow if all internal remedies are exhausted as a procedural rule of administrative law. However, this duty to exhaust internal remedies is not stringent in that the court may condone failure to exhaust internal remedies where the available remedy is considered inadequate or illusory. The main objective of exhaustion of internal remedies is to ensure that disputes that are eligible to be settled out of court should be dealt with without approaching the courts, as section 34 of the Constitution provides that "everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum".

If the affected party is not satisfied with the outcome of the appeal to the Chief Inspector then such an affected party may resort to invoking the provisions of section 58¹⁵⁷ of the MHSAs and approach the Labour Court. As stated before, the Labour Court has exclusive jurisdiction to entertain applications emanating from the provisions of the MHSAs.¹⁵⁸ The Labour Court has the power to confirm, set aside or vary the decision of the Chief Inspector.¹⁵⁹ However, until the decision of the MHSI is set aside by the court, it remains in force.¹⁶⁰ This is because "an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside".¹⁶¹ This principle was developed in the case of *Oudekraal Estates (Pty) Ltd v The City of Cape Town (Oudekraal Estates case)*,¹⁶² hence it became known as the *Oudekraal* principle.

¹⁵⁷ "Any person adversely affected by a decision of the Chief Inspector of Mines, either in terms of section 57(3) or in the exercise of any power under the MHSAs, may appeal against the decision to the Labour Court."

¹⁵⁸ Section 82 of the MHSAs provides that the "Labour Court has exclusive jurisdiction to determine any dispute about the interpretation or application of any provision of the MHSAs except where the said Act provides otherwise".

¹⁵⁹ Section 58(3) of the MHSAs.

¹⁶⁰ Section 59(1) An appeal against a decision, under either sections 57, 57A or 58, does not suspend the decision.

¹⁶¹ *Oudekraal Estates (Pty) Ltd v The City of Cape Town* 2010 1 SA 333 (SCA) para 26.

¹⁶² 2010 1 SA 333 (SCA).

The *Oudekraal* principle has been perceived as a tool used to defend administrative decisions pending judicial review.¹⁶³ The *Oudekraal* principle was developed in order to determine whether an unlawful administrative action should remain valid. There had been questions relative to the *Oudekraal* principle as to whether a person affected by the impugned administrative action should be bound by it and whether that person should treat the impugned decision "as valid and binding unless it is declared invalid and set aside on judicial review".¹⁶⁴

There are circumstances in which a subject is entitled to disregard prima facie unlawful administrative action and, if it were to be enforced against the subject to challenge its validity reactively. As a general proposition and absent statutory indications to the contrary, the author of the impugned decision may not disregard that decision despite its apparent legal pitfalls. It is noteworthy that other organs of state are bound by the defective administrative action unless the defective administrative action is set aside on review. Organs of state should not ignore the impugned decision even though such decision is defective from the face of it.¹⁶⁵

In *MEC for Health, Eastern Cape v Kirland Investments*¹⁶⁶ it was held that permitting an organ of state to disregard an impugned decision would create uncertainty and open a flood gate of abuse of power. On the other hand, allowing the implicated administration to decide on its impugned decision will amount to contravention of the *trias politica* by way of usurping judicial functions.¹⁶⁷ Pretorius argues that "the *Oudekraal* principle is subject to qualification just like any other administrative rule". Pretorius further argues that "the *Oudekraal* principle does not provide authority for universal rule that carry administrative act, even if palpably flawed and remains binding until set aside".¹⁶⁸ According to Pretorius, the *Oudekraal* principle is construed "as authority for a blanket proposition that ostensibly invalid administrative decisions should and must be regarded as valid or effective until set aside on judicial review".¹⁶⁹ Paradoxically, the Constitutional Court has grappled with the *Oudekraal* principle for years. The courts have adopted a broader interpretation of the *Oudekraal* principle to extend beyond cases involving vivid illegalities. In *Fose v Minister of*

¹⁶³ Pretorius 2020 *SLR* 15-17.

¹⁶⁴ Pretorius 2020 *SLR* 4.

¹⁶⁵ Pretorius 2020 *SLR* 3.

¹⁶⁶ 2014 3 SA 219 (SCA).

¹⁶⁷ Pretorius 2020 *SLR* (31) 1 5.

¹⁶⁸ Pretorius 2020 *SLR* (31) 1 9.

¹⁶⁹ Pretorius 2020 *SLR* (31) 113.

Safety and Security,¹⁷⁰ it was held that unconstitutional conduct is a nullity even prior to the Court pronouncing on its invalidity.

In *Merafong City v AngloGold Ashanti Ltd*,¹⁷¹ which dealt with the validity of administrative action and the collateral challenge defence,¹⁷² it was held that the collateral challenge cannot be invoked by an organ of state.¹⁷³ The court held that "collateral challenge to the validity of an administrative action is a remedy available only to an individual threatened by a public authority with coercive action". In *V & A Waterfront Properties (Pty) Ltd v Helicopter & Marine Services (Pty) Ltd*¹⁷⁴ a collateral challenge was raised successfully as a defence. Collateral challenge is a non-compliance with a perceived unlawful administrative action by simply ignoring an administrative action. It is important to understand that the "legal consequences may follow from the mere fact of an administrative" action "for as long as it is not set aside".

Applied to the theme of this dissertation, the mine has the obligation to abide by the instructions of the mine inspectors, issued in the advancement of the provisions of the MSHA. If a mine does not comply, its action constitutes an offence and is punishable by law.¹⁷⁵ It should be acknowledged that the mine inspectors have been mandated by law to regulate mine health and safety matters. This mandate cannot be overlooked based on the errors previously committed by the mine inspectors. The accidents and incidents that have been hampering the mining industry cannot be disregarded. The lives that were lost matters and that should be addressed.

As indicated previously, "an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside". The balance between mine closure and exhaustion of internal remedies in terms of section 7 of the PAJA comes into the spot light. According to the *Oudekraal* principle, the decision of the administrator remains in force until it is set aside by the court of law. If the *Oudekraal* principle is invoked one should consider the affected party (the mine), especially when section 54 of the MSHA is enforced resulting in total stoppage of mine operations. Whilst the mine complies with the provisions of section 7 of the PAJA to exhaust internal remedies prior to

¹⁷⁰ 1997 3 SA 786 (CC).

¹⁷¹ 2017 2 SA 211 (CC) paras 34 and 36.

¹⁷² *Merafong City v AngloGold Ashanti* case para 34.

¹⁷³ *Merafong City v AngloGold Ashanti* case para 15.

¹⁷⁴ 2006 3 All SA 523.

¹⁷⁵ Section 91 of the MSHA.

resorting to the court of law for relief, the mine continues to suffer losses in millions and billions of revenues as witnessed in the *AngloGold* case.¹⁷⁶ The process that the mine as the affected party has to follow, directly involves the administrators who exercised their powers which in return adversely affected the mine. The administrators who took an impugned decision to close the mine are expected to reconsider and arrive at a different outcome whereas the likelihood is that the decision would still remain the same.

Taking cognisance of the *Oudekraal* principle, it clashes with section 7 of the PAJA which advocates that internal remedies should be exhausted prior to resorting to court to have the decision of the administrator set aside. The duty to exhaust internal remedies is to curtail the excessive use of courts in matters that could be resolved out of court but the parties involved. There is an exception to the general rule of exhausting internal remedies. In *Koyabe v Minister of Home Affairs*,¹⁷⁷ it was held that what "constitutes exceptional circumstances" depend on the facts of the case and the nature of the administrative action. The court must consider the "availability, effectiveness and adequacy" of the existing remedies, and where an internal remedy would not be affective "or where the pursuit would be futile a court may permit litigant to approach the court directly".¹⁷⁸

In *Bon Accord Environmental Forum (BAEF) v Department of Minerals and Resources: Chief Inspector of Mines (Gauteng Region)*,¹⁷⁹ the BAEF lodged an internal appeal on 18 December 2017 against the decision of the Chief Inspector "granting permission to conduct blasting operations" and further applied for condonation for late filing.¹⁸⁰ "On 6 June 2018, the Chief Inspector issued a decision" to dismiss the appeal and to refuse condonation of late filing on the basis that valid grounds of appeal were not provided.¹⁸¹ If one was to consider the issue of dates, the Chief Inspector took a long time to decide the matter and only to issue a negative outcome. To take it further, the judgement of the Labour Court was only delivered in 2021. That is a noticeable challenge which the adversely affected party has to go through at times when internal remedies have to be exhausted prior to approaching the court for an appropriate relief.

¹⁷⁶ See 1.1 above.

¹⁷⁷ 2010 4 SA 327 para 34.

¹⁷⁸ Hoexter *Administrative Law* 542.

¹⁷⁹ (Unreported) case number JR1948/2018 of 13 January 2021 (hereinafter referred to as the Bon Accord case).

¹⁸⁰ *Bon Accord* case para 5.

¹⁸¹ *Bon Accord* case para 5.

In the *Bon Accord* case, the court erred in making a finding that the Labour Court does not have jurisdiction in health and safety matters on the basis that the Labour Court was designed to entertain employment related cases. The provision entitling a party to approach the Labour Court is envisaged in the MHSAs.¹⁸² The learned Judge referred to the *AMCU* case, which differed materially with the *Bon Accord* case. In *AMCU* internal remedies were not exhausted and AMCU disregarded all the opportunities that were presented to resolve the matter out of court. Whereas in the *Bon Accord* case, internal remedies were exhausted and the Chief Inspector made a decision which entitled the Bon Accord Environmental to approach the Labour Court. The reasoning of the learned Judge was very short-sighted and misleading in stating that:

The MHSAs are a legislation to which the Minister of Minerals and Energy is responsible. Clearly section 157(2) does not afford the Labour Court jurisdiction in the PAJA review. This much was intimated by my brother Van Niekerk J in the *AMCU* matter. The conclusion to reach is that the Labour Court lacks jurisdiction to entertain a section 6 (1) of PAJA review application.

The remarks of the learned Judge are erroneous and if that was to be enacted as a precedent, parties affected by the decisions of mine inspector will struggle to obtain relief for their legal challenges in terms of the MHSAs. It is unfortunate that these remarks were made approximately five years after the *AngloGold Ashanti* case which transformed the atmosphere in relation to enforcement matters under the MHSAs. The remarks of the learned Judge should be viewed in serious light bearing in mind the work that was built on the foundation of the *AngloGold Ashanti* case from 2016.

3.4 Reviewing the administrative action in court

Judicial review is when the court decides on the exercise of power by an administrative body. The "the basic justification of judicial review of administrative action originates in

¹⁸² *Bon Accord Environmental* case para 42. The learned Judge said:
The conclusion I reach is that a judicial review is not about interpretation and application of the MHSAs as such the Labour Court does not attract exclusive jurisdiction under section 82 of the MHSAs. In my view the argument that section 82 contemplates a review under PAJA is convoluted and circuitous in nature. It seems illogical for a PAJA review, which stems from section 33 of the Constitution to be housed in another legislation other than PAJA. The MHSAs are enacted to provide for the protection and promotion of health and safety of persons at Mines. Whilst PAJA is enacted to give effect to the fundamental rights in section 33 of the Constitution. The two pieces of legislation serve diametrically opposed purposes as it were. The MHSAs are a legislation to which the Minister of Minerals and Energy is responsible. Clearly section 157 (2) does not afford the Labour Court jurisdiction in the PAJA review. This much was intimated by my brother Van Niekerk J in the *AMCU* matter. The conclusion to reach is that the Labour Court lacks jurisdiction to entertain a section 6 (1) of PAJA review application.

the Constitution".¹⁸³ Therefore all public power must comply with the Constitution as the supreme law of the Republic."¹⁸⁴ In light of the above, the public power should not be exercised arbitrarily.¹⁸⁵ The decision by the administrative body must be taken for the reason that is authorised by the empowering legislation.¹⁸⁶ The administrative body exercising power must do so within the ambit of the law.¹⁸⁷ When dealing with review under the PAJA, one has to determine whether the decision of the administrator falls within the ambit of administrative action. As indicated above, legality review may be employed where PAJA does not apply.

3.4.1 Whether section 54 decisions amount to administrative action under PAJA

The mandate conferred upon the MHSI falls within the ambit of administrative action and PAJA plays a pivotal role in the decisions of the mine inspectors. Section 54 of the MHSA is exercised by the mine inspectors, a creature of statute under the auspices of the DMRE, and as such is an organ of state.¹⁸⁸ The mine inspectors exercise a public function as mandated in terms of the MHSA. The exercise of power by the mine inspectors in terms of section 54 of the MHSA falls under the ambit of administrative action as defined by the PAJA.

3.4.2 Reviewing administrative action

An administrative action is reviewable in terms of section 6(1) of the PAJA. When reviewing an administrative action, reasonableness serves as an element to be considered as opposed to reviewing executive action, which is measured by the principle of legality. The standard of review entails rationality and reasonableness.¹⁸⁹ Hoexter made a finding that rationality is one of the elements used to measure reasonableness.¹⁹⁰

¹⁸³ *Pharmaceutical Manufacturers of South Africa in re: President of the Republic of South Africa* 2000 2 SA 674 (CC) (hereinafter referred to as the *Pharmaceutical manufacturers case*) para 39.

¹⁸⁴ *Pharmaceutical manufacturers case* para 20.

¹⁸⁵ *Pharmaceutical manufacturers case* para 87.

¹⁸⁶ Mulder *The critical analysis of administrative action* 17.

¹⁸⁷ *Bon Accord Environmental Forum case* para 29.

¹⁸⁸ Section 239 of the Constitution defines an organ of state as "any department of state or administration in the national, provincial or local sphere of government; or any functionary or institution exercising power or performing a function in terms of any legislation, but does not include a court or judicial officer".

¹⁸⁹ Pillay 2005 *SALJ* 419.

¹⁹⁰ Hoexter *Administrative Law* 340-344.

In *Carephone v Marcus NO and Others* it was held that reasonableness can also be understood to mean that administrative action must be justified by the reasons given for it.¹⁹¹ Justifiability " entails providing reasons for the decision taken to promote transparency.¹⁹² Furthermore, the merits of each case will have to be considered.¹⁹³ Factors to be considered when justifying a decision as stipulated in the *Bato star* case include whether:

... the decision-maker has considered all the serious objections to the decision taken, and has answers which plausibly meet them, the decision-maker has considered all the serious alternatives to the decision taken, and has discarded them for plausible reasons; there is a rational connection between premises and conclusion between the information (evidence and argument) before the decision-maker and the decision that is reached.¹⁹⁴

In the interim Constitution, "justifiability was used as a synonym for reasonableness".¹⁹⁵ Section 33(1) of the Constitution provides that "everyone has a right to administrative action that is lawful, reasonable and procedurally fair". Mureinik¹⁹⁶ indicated that rationality and proportionality are "included as requirements for justifiable administrative action".¹⁹⁷ The courts in South Africa have been vested with the power to judicially review administrative action if the exercise of "the power or performance" authorised by "the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function".¹⁹⁸ The minimum threshold required in terms of the PAJA review is rationality under section 6(2)(f)(ii) and reasonableness under section 6(2)(h) of PAJA.

3.4.3 Rationality

"Rationality entails that the exercise of public power must be rationally" connected with the law and its purpose.¹⁹⁹ Rationality serves as "a minimum threshold requirement applicable to the exercise of public power".²⁰⁰ In holding on rationality, the Constitutional

¹⁹¹ (Unreported) case number JA52/1998 of 1 September 1998. (hereinafter referred to as *Carephone*) para 36.

¹⁹² *Carephone* para 35.

¹⁹³ *Bato star* para 45.

¹⁹⁴ *Bato Star* para 23.

¹⁹⁵ Pillay 2005 *SALJ* 426.

¹⁹⁶ Mureinik 1994 *SAJHR* 39-40.

¹⁹⁷ Also see Craig 2010 *New Zealand LR* 5.

¹⁹⁸ Pillay 2005 *SALJ* 427.

¹⁹⁹ *Pharmaceutical manufacturers* para 85.

²⁰⁰ Pillay 2005 *SALJ* 424.

Court in *Prinsloo v Van der Linde*²⁰¹ said that for as "long as there is a relationship between the method and object, it is irrelevant that the object could have been achieved in a different way."²⁰² The inclusion of rationality as a requirement for reviewing non-administrative action, that is, action that does not involve the making of policy or legislation, implies that ordinary administrative action is susceptible to review on a higher standard".²⁰³ It is actually a converse of arbitrariness which gave the apartheid past an abhorrent constitutional democracy in South Africa.²⁰⁴ Rationality requires the "assessment of the conduct or decision in question" to further "a legitimate government purpose," and that "an assessment of whether the means chosen to achieve" the said "purpose are objectively capable of furthering it based" on the information before the administrator on any reasons provided for the decision.²⁰⁵ For example, the administrator's decision may be considered irrational if it does not take into account the material facts at its disposal.²⁰⁶ The rationality principle serves as a tool to determine "whether there is a rational connection between the means and the purpose". Mogoeng J, emphasised in the *Electronic media* case that:

... rationality is not some supra-constitutional entity or principle that is uncontrollable and that respects or knows no constitutional bounds. The courts must always caution themselves against the temptation to impose their preferences or what they consider to be the best means available, on other arms of the State. The principle of separation of powers forbids such. It is further noted that rationality is not a master key that opens all doors, anytime, anyhow and judicial encroachment is permissible only where it is necessary and unavoidable to do so.²⁰⁷

In *Affordable Medicines Trust v Minister of Health*,²⁰⁸ it was held that rationality is more concerned with the "relationship between the means and the end, not whether the same end could be achieved by less restrictive means".

The role played by the rationality principle in policy-making by the Executive should be viewed "as an indispensable part of a constitutional democracy based on participatory democracy" and as well as "a simple application of rationality in process that provides

²⁰¹ 1997 3 SA 1012 (CC).

²⁰² Pillay 2005 *SALJ* 122 (2) 424.

²⁰³ Pillay 2005 *SALJ* 424.

²⁰⁴ Kohn 2013 *SALJ* 825.

²⁰⁵ *Pharmaceutical Manufacturers* para 86.

²⁰⁶ Bratcher 2019 <https://www.financialinstitutionslegalsnapshot.com>.

²⁰⁷ *Electronic media* case para 85.

²⁰⁸ 2006 3 SA 247 (CC) para 78.

grounds for vitiating" a decision.²⁰⁹ The test of rationality is concerned with the reasons given for the decision that are rationally connected to the end sought.²¹⁰ The furnishing of reasons to the affected party promotes constitutional values in a form of transparency and accountability.²¹¹ Transparency and accountability are fundamental values to the South African Constitution and promote the rule of law in a democratic South Africa.²¹² Any process that falls short of these attributes must be justifiable and be explained. Where there is no justification or explanation, then reason is perceived to be absent. Where there is no reason, then the exercise of such power was done arbitrarily and irrationally.²¹³ The functionary body exercising power must provide reasons for its decision.²¹⁴

As indicated above, the element of rationality requires the mine inspectors to justify their decisions with reasons. The availability of reasons depends on the extent of information at the disposal of the mine inspector. In essence, the mine inspectors are required to assess the situation and the extent of the risks involved before issuing notices in terms of section 54 of the MHSa. Simply put, the mine stoppages should be a last resort when enforcing the provisions of the MHSa. It is only then that the decision of the mine inspectors would be perceived as reasonable.

3.4.4 Reasonableness

Although there is no precise meaning or content attributed to "reasonableness",²¹⁵ reasonableness is determined by the ability to justify the decision taken by the public authority and the sense that such decision must be substantiated by reasons.²¹⁶ The insufficiency in unpacking the content of reasonableness and administrative action has posed concerns in determining whether the decisions by administrators are reasonable.²¹⁷ Mureinik²¹⁸ refers to "the necessity of actions being justified", juxtaposing "an apartheid culture of authority with a democratic one" of persuasion. There are divided perceptions amongst scholars in terms of defining reasonableness. Others believe that reasonableness is

²⁰⁹ *Electronic media* case para 94.

²¹⁰ *Electronic media* case para 96.

²¹¹ *Electronic media* case para 96.

²¹² *Electronic media* case para 96.

²¹³ *Electronic media* case para 98.

²¹⁴ *Wessels* case paras 126 and 127.

²¹⁵ Brynard 2013 <https://www.uir.unisa.ac.za>.

²¹⁶ Klaaren 2014 *Journal of African Studies* 138.

²¹⁷ Raboshakga *The adequacy of the reasonableness approach in public involvement cases* 38.

²¹⁸ Klaaren 2014 *Journal of African Studies* 138.

comprised of two components which are rationality and proportionality,²¹⁹ whereas others believe that the three concepts are totally different and have no association.²²⁰

In *Thebe ya Bophelo Health and Care Administrators (Pty) Ltd v National Bargaining Council for Road Freight Industry*,²²¹ the court indicated that the concepts of reasonableness and rationality are being regarded as one which is utterly incorrect. In *Calibre Clinical Consultancy v National Bargaining Council for Road Freight Industry*,²²² Nugent J unequivocally emphasised that reasonableness and rationality are totally different. Nugent J further indicated that reasonableness and rationality are distinct concepts and rationality is not an element of reasonableness.²²³ The two concepts should on the basis of their uniqueness and difference be treated separate from each other.²²⁴

Undoubtedly, the concept of reasonableness has evolved over time and is still developing as a concept shaping administrative justice jurisprudence. The approach of the courts in the above cases was erroneous. The three concepts are interrelated and the element of justification serves as an underlying element. The concept of reasonableness is an exercise of power within the ambit of the law being empowered by a specific legislation to make sound judgement by assessing the situation at hand and being able to justify the decision taken. Cases such as *Bato Star*, *Carephone*,²²⁵ *Bel Porto*, *Bert Bricks* and the *AngloGold Ashanti* have been building on the concept of reasonableness. The *Bato Star* dealt with the concept of reasonableness. *Carephone* dealt with the element of justification. *Bel Porto* dealt with the element of rationality and both the *Bert Bricks* and *AngloGold Ashanti* cases dealt with the element of proportionality.

The concept of reasonableness promotes "transparency in legal reasoning" because competing values and policy considerations are at stake, and the method of choice made "in weighing them are openly acknowledged and set out in the" reasoning.²²⁶ Judicial review in the context of constitutional rights seeks to reconcile and accommodate

²¹⁹ Hoexter *Administrative Law* 340-344.

²²⁰ *Medirite (Pty) Ltd v South African Pharmacy Council and Another (Medirite case)* (Unreported) case number 50309/2012 of 20 December 2013.

²²¹ 2009 2 SA 201 (W).

²²² 2010 5 SA 457 (SCA).

²²³ *Medirite case* para 29.

²²⁴ *Medirite case* para 30.

²²⁵ *Carephone case*.

²²⁶ Quinot and Liebenberg 2011 *Stell LR* 640.

competing values and rights.²²⁷ There is, however, no definite standard to clearly determine reasonableness.²²⁸ Principles determining reasonableness are determined on a case to case basis by balancing competing interests.²²⁹ Froneman DJCP in *Carephone* indicated that "a requirement of rationality in the merit or outcome of the administrative decision "which goes beyond mere procedural impropriety as a ground for review, or irrationality serves only as evidence of procedural impropriety".²³⁰

The old case of *Kruse v Johnson*²³¹ addressed administrative action that if such "administrative action which in its application produces partiality, inequality or manifest injustice, bad faith or is oppressive or gratuitously interferes with the rights will be unreasonable". The reviewing of the exercise of public power by the judiciary in the constitutional democracy has placed the courts in a cumbersome situation. The judiciary like any other authority is subject to scrutiny in order to determine constitutional justification.²³² Reasonableness is a standard set to review the exercise of public power.²³³ Reasonableness is recognised as an important tool when reviewing the exercise of public power. Undeniably, the reasonableness test is at a developing stage in the South African administrative law, which tend to be vague in its applications. There is ambiguity in relation to elements determining reasonableness in decision making by public authorities.²³⁴ Each case should be decided according to its merits in order for the decision taken to be regarded as reasonable.²³⁵

It is clear from the judicial precedents that the greatest challenge the courts ever had to face was to give proper content to the ground of reasonableness.²³⁶ Caution should be applied when invoking the element of proportionality and some have argued that it should be considered as a last resort. The reason being that one would be dealing with two competing interest and a balance should be struck, failing which the interest that outweighs the other must be considered first. When measuring a decision using the element of proportionality, justification should be the underlying factor. One must be able

²²⁷ Quinot and Liebenberg 2011 *Stell LR* 640.

²²⁸ *S v Makwenyane* para 69.

²²⁹ *S v Makwenyane* para 69.

²³⁰ *Carephone* para 31.

²³¹ 1898 2 QB 91 at 99-100.

²³² Pillay *SALJ* 2005 419.

²³³ Coomans 2005 *Heidelberg JIL* 186.

²³⁴ Coomans 2005 *Heidelberg JIL* 194.

²³⁵ *Bato star* para 45.

²³⁶ Hoexter *Administrative Law* 343-344.

to justify choosing one interest over the other. The general principle in the element of proportionality entails "the avoidance of an imbalance between the adverse and beneficial effects of an action and to encourage the administrator to consider both the need for the action and the possible use of less drastic or oppressive means to accomplish the desired" outcome.²³⁷ However, there are times when the imbalance is inevitable.

Section 6(2)(h) of the PAJA provides that:

A court or tribunal has the power to judicially review an administrative action if the exercise of the power or the performance or the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function.

Section 6(2)(h) entails that the administrative action which is taken by an authorised person within his or her scope of powers must be measured against the degree of the reasonable person test. The reasonable person test is an objective test to determine how a hypothetical person would have acted should he or she find himself or herself in a similar situation. Section 6(2)(h) of the PAJA must be read in conformity with section 33 of the Constitution as a foundation to the promulgation of the PAJA.

In conclusion the courts throughout the years have been building on the evolving concept of reasonableness. Looking at the work achieved by the courts the concept of reasonableness has been established and is comprised of rationality, proportionality and justification. In order for one to proffer a sound judgement, there must be adequate information at their disposal. Justification is relative to the reasons advanced for taking a particular decision. On the aspect of proportionality balancing of competing interest is key.

3.4.5 Proportionality

When assessing reasonableness, the important question should be whether in making the decision the functionary body concerned struck a balance fairly and reasonably.²³⁸ There must be a proper relationship between the action and the object which is sought to be achieved.²³⁹ Proportionality balances competing rights or interests. There must be an avoidance of any imbalance between the adverse and the beneficial effects of the

²³⁷ Hoexter *Administrative Law* 344.

²³⁸ *Calibre* case para 59.

²³⁹ *Medirite* case para 35.

conduct. The balance between the adverse and the beneficial effects of the conduct can be achieved by the use of a method which is least drastic or oppressive.²⁴⁰ The elements of proportionality are balance, necessity and suitability.²⁴¹ Proportionality involves the weighing of interests to determine which interests supersede the other.²⁴² Proportionality is not only relevant in weighing the competing interests, it further enhances justification and accountability for state action.²⁴³

In light of the above discussions, the element of justification appears to be the connecting factor to determine reasonableness of the decisions of administrators. The *Interim Constitution* made explicit reference to the element of justification. PAJA alludes to the element of justification by making provisions of been furnished with written reasons. The *Bato star* case echoed the provisions of Item 3 of the Constitution which resembles section 24 of the *Interim Constitution*. In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the "merits" of the matter in some way or another. As long as the judge determining this issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order. Many formulations have been suggested for this kind of substantive rationality required of administrative decision makers, such as "reasonableness", "rationality", "proportionality".²⁴⁴

3.5 The application of reasonableness to section 54 of the MHSAs decisions

The decisions of the mine inspectors must not be taken haphazardly without conducting proper due diligence. The mine inspector should assess the situation at hand and further consider the extent of the risks involved. These would require the mine inspector to apply their minds cautiously in order to balance the interest affected. In the same light, "a person in charge of health and safety at the mines should as a matter of logic be appropriately qualified on issues of health and safety at the mines".²⁴⁵ In terms of section 49(1)(c) of the MHSAs, "a Chief Inspector is obligated by law to appoint officers with the

²⁴⁰ *Medirite* case para 35.

²⁴¹ Hoexter *Administrative Law* 344.

²⁴² Rautenbach *PELJ* 2231.

²⁴³ Rautenbach *PELJ* 2233.

²⁴⁴ *Carephone* case para 35-37.

²⁴⁵ *Bon Accord Environmental* case para 65.

prescribed qualifications and experience as inspectors". However, training should in a form of refresher courses should be conducted in order to equip the designated mine inspectors with appropriate knowledge. And further to shed light on court decisions affecting their day-to-day functions. There is a concern that the mine inspectors might be overzealous by enforcing section 54 mine stoppages.²⁴⁶

The case of *Bert Bricks* case involved two companies known as Bert Bricks and Explo-Clay. These two companies were owned by the same directors but carried out two different activities. Bert Bricks was mining clay, whilst Explo-Clay was involved in brick manufacturing. The mine inspectors conducted inspections at the vicinity of the two companies and during inspections a damaged forklift was pointed out. The mine inspector issued a section 54 notice. The applicants made representations in that a notice of suspension of the use of trackless mobile machinery should be issued against Bert Bricks as it would otherwise result in total stoppage of Explo-Clay brick manufacturing. The reason being that the activities of the two companies are intertwined. The mine inspector ignored the representations and issued the instruction to suspend the use of all trackless mobile machinery regardless of the site. The stoppage order was effective for two days and resulted in Explo-Clay suffering a loss of R453 292.²⁴⁷ There must be a balance of interests when mine inspectors issue notices in terms of section 54 of the MHSA. The actions by the mine inspectors were perceived as abuse of power and that the stoppage order was unreasonable.²⁴⁸ The competing interests must be weighed up and assessed based on the element of proportionality.

The *AngloGold Ashanti* case, referred to in Chapters 1 and 2, also brought the MHSI in the spotlight. Mining operations were brought to a halt due to a minor area of the mine which was affected by the alleged contravention of the provisions of the MHSA. The mine operations were shut down even after representations by the mine as the affected to offer a refresher training course to the alleged negligent employee who left the explosive cartridges not properly stored as required. Due to the total stoppage, the mine allegedly suffered a significant loss to the total amount of R9.5 million per day. In this instance, balancing of competing interests becomes a major issue, failure to do so could bring catastrophic consequences. The mine inspectors have egregiously failed to apply elements

²⁴⁶ Ndiweni *The impact of section 54 of the MHSA* 93.

²⁴⁷ *Bert's Bricks* case para 7.

²⁴⁸ *Bert's Bricks* case para 12.

of reasonableness in their decisions. The total closure of the mine on the basis that 2% of the entire mine's placed lives at risks due to explosives cartridges which were not placed back into the boxes indicate that both the elements of rationality and proportionality were afforded ill-consideration. The punishment should fit the crime committed. The operations at Level 44 which constituted 2% of the mine should have been halted as a safety measure instead of closing the entire mine's operations. Section 54 of the MSHA makes provision for halting operation at the affected area of the mine. Total stoppage of mining operation should be considered as a last resort as it results in excessive loss of revenue.

3.6 Conclusion

The mine inspectors should exercise their powers within the provisions of the MSHA. Any conduct that is not congruent with the provisions of the MSHA amount to usurpation of power which cannot be justified by law. When the mine inspectors exercise their powers in terms of section 54 of the MSHA, their decision should be supported by evidence and reasons based on the information at their disposal. The MHSI can collect information by way assessing the conditions at the mine in order to make an informed decision.

Furthermore, should the MHSI opt for total closure of the mine operations, that decision should be justifiable with reasons. There may be times when the non-compliance is so dire that total stoppage of mine operations could be the only option available. The element of proportionality plays a crucial role in the determination and balancing of competing interests in form of production and safety of mineworkers. The two components of reasonableness, rationality and proportionality require vigorous assessment may be applied interchangeably or simultaneously based on the situation at hand. It is important to establish at least a rational relationship between the exercise power and the purported objective prior to making a decision. In *Medirite (Pty) Ltd v South African Pharmacy Council* ²⁴⁹case, a test of reasonableness in administrative action was proffered to imply that the test applied should be whether the action taken "is impartial or produces between the same classes any inequality".²⁵⁰ "The courts are mandated to exercise their review power to hold government accountable to the standards set in the Constitution."²⁵¹

²⁴⁹ 2015 ZASCA 27 (Hereinafter referred as the Medirite case).

²⁵⁰ *Medirite* case para 43.

²⁵¹ Kohn 2013 *SALJ* 819.

Chapter 4: Conclusion and recommendations

4.1 Conclusion

The aim of the study was to determine the content, criteria or yardstick of reasonableness that should be applied when a mine inspector applies section 54 of the MHSAs.

Undoubtedly, mining operations result in fatalities and injuries. The mine health and safety systems are sometimes inadequate to prevent this. Nevertheless, section 54 of the MHSAs yielded positive results in terms of reducing fatalities as indicated in the historic overview of this dissertation. It is further acknowledged that mining is a vast contributor to the South African economy which displays its importance, however it also affects the health and safety of mine workers. Mining also serves as a significant tool for poverty alleviation to mine workers and their families as well as in adjacent communities. It should also be emphasised that mine closures do not only adversely affect the mining companies but also the communities and the South African economy. Based on the study survey conducted by Ndiweni, a high number of employees supported the enforcement of section 54 of the MHSAs on the ground that it combats injuries as well as untimely death in the mining industry. However, there were employees who did not support the manner in which section 54 of the MHSAs was enforced.²⁵²

The MHSI was established mainly to serve as custodians to enforce the provisions of the MHSAs and to ensure compliance by the mining companies. The statistics referred to in chapter 1 indicate that the fatality rate is significantly high. On paper, it is statistics, but those are lives lost and predominately breadwinners. Any company carrying out activities of a mine under MPRDA has to comply with the provisions of the MHSAs.

The historical background of the regulatory framework in South Africa indicated that it was only after the Leon Commission's report that mine health and safety issues were considered in a serious light. The recommendations of the Leon Commission resulted in the MHSAs. Various stakeholders are involved in mine health and safety and the MHSAs dictate their roles. The stakeholders include the DMRE, MCSA, trade unions and employees.

²⁵² Ndiweni *The impact of section 54 of the MHSAs* 93-95.

In terms of the interpretation of legislation, section 54 of the MHSAs should be interpreted in light of the purposive theory. That means that the MHSIs must exercise their powers for the purpose intended by the legislation, which is the enforcement of health and safety measures. The courts must also take note of international instruments, as indicated by both the Constitution and the MHSAs, in order to proffer an appropriate meaning to the provisions of the legislation. That implies that the ILO Conventions and the SADC *Mining Protocol* should be adhered to.

Chapter 3 dealt with the application of section 33 of the Constitution and PAJA to decisions made under section 54 of the MHSAs. It further dealt with the concept of reasonableness and its application within the ambit of section 54 of the MHSAs. There is no clear and definite explanation for the concept of reasonableness. This makes it hard to justify the actions taken by mine inspectors in their quest to invoke the provisions of section 54 of the MHSAs.

The PAJA was promulgated in order to serve as a vehicle to improve the quality of services by the South African administration.²⁵³ Section 3 of the PAJA provides that administrative action that adversely affects a person must be procedurally fair. Fairness depends on each case.²⁵⁴ Section 3(2)(b)(ii) of the PAJA in order for an administrative action to be procedurally fair, the affected party must be afforded an opportunity to make representation. In the *AngloGold* case, the mine made representations to the DMR and further recommended that the employee implicated should be offered a refresher course. The PAJA dictates that reasonable administrative action should be used as a ground to measure judicial review.²⁵⁵

In *Begwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd*²⁵⁶ it was held that the decision must be in line with the principles of lawfulness, procedural fairness and reasonableness. In order to arrive at a reasonable decision, the decision maker must familiarise himself or herself with the information available and "reasons that underlie the decision" at hand.²⁵⁷ "The materiality of the information is an important consideration."

²⁵³ Currie and Klaaren *Benchbook* 12.

²⁵⁴ Hoexter *Administrative Law* 366.

²⁵⁵ *Bato Star* para 25.

²⁵⁶ 2011 4 SA 113 (CC) paras 61-74.

²⁵⁷ Hoexter *Administrative Law* 372.

The detail of the required information is dependent "on the seriousness of the case".²⁵⁸ There is no clear-cut definition of the concept of reasonableness and it is clear based on case law, that the judiciary is grappling with developing the reasonableness as a standard of review. In numerous cases, the judiciary opted to pursue Hoexter's methodology to define the concept of reasonableness. She posits that the concept of reasonableness is composed of two elements, rationality and proportionality. The court in *AngloGold Ashanti* case predominately referred to Hoexter's *Administrative Law in South Africa* as authority when delivering judgement. Hoexter is undoubtedly a remarkable author and diligent advocate of administrative law, however, nothing precluded the court from exploring other avenues in order to clarify the concept of reasonableness. The court could have gone to a greater extent in building on the work already done by its predecessors in form of referring to precedents which dealt enormously with the concept of reasonableness. Through caselaw as indicated in this dissertation, the courts perceived decisions to be irrational and invalid on the basis that the administrators failed to take into account proper facts at their disposal. Taking into account proper facts is the embodiment of the element of justification which underlies the elements of rationality and proportionality.

There is however a discourse in respect of the inconsistencies in the application of section 54 of the MSHA. The inconsistency of the application of section 54 MSHA and its impacts were considerably dealt with intensively by Gloy in her 2014 dissertation. The inconsistencies in the application of section 54 of the MSHA led to the formation of a task team assigned to investigate the extent and impact exerted on mines. The task team recommended that the DMRE should promote awareness of section 54 instructions, policies, procedures and enforcement for general mine workers. It was further recommended by the task team that the DMRE should implement continuous training and proper guidance for the mine health and safety inspectorate which would be aligned to enforcement guidelines.²⁵⁹ In solidarity with the common goal of achieving a zero-harm ambition, the mining companies have requested flexible and self-regulation in enforcing section 54 of the MSHA. Mining companies undertook to conduct hazard identification and risk assessment which will have to be carried out to ensure that incidents and accidents do not occur and to avoid people's health being exposed to hazards.²⁶⁰ The MHSI showed

²⁵⁸ Hoexter *Administrative Law* 373.

²⁵⁹ Odendaal 2020 <https://www.miningweekly.com/print-version/dmr-to-implement-section-54-task-team-recommendations-2012-07-20>.

²⁶⁰ Beech 2018 <https://www.golegal.co.za>.

scepticism on the idea of self-regulation citing concerns in relation to self-regulatory measures that it is not effective and to corroborate their reluctance in supporting the idea of self-regulation is statistics on fatality and injuries. Many accidents in the mining sector are attributed to non-compliance. The health and safety of the workers should take absolute priority and the profits cannot supersede health and safety measures.²⁶¹

Following the fatal incident "at Sibanye Stillwater's Masakhane shaft at Driefontein" where "13 miners were trapped underground after an alleged landslide caused by seismic activity",²⁶² the "Trade Union, Solidarity, expressed grave concern" in respect of health and safety in South African mines.²⁶³ Adv. Paul Mardon, the then Deputy General Secretary of Trade Union Solidarity, indicated that "seismic activities in deep-level mines" are major causes of "falls of ground leading to mining fatalities and injuries".²⁶⁴ The notion of zero-harm is widely used through the mining industry with an attempt to caution persons involved in mining operations of the importance of taking health and safety precautionary measures. Health and safety measures are associated with behavioural issues as per individuals affected and that health and safety in mining operations goes beyond merely implementing and enforcing them onsite.²⁶⁵ The ambiguity surrounding the concept of reasonableness makes it harder for stringent enforcement measures to be put in place in order to combat fatalities and injuries in the mining sector. The reasonableness concept could be manipulated to suit an individual's state of affairs regardless of the catastrophic end results that might ensue.

The South African courts have resorted to defining reasonableness with inclusion of the element of proportionality. Hence the notion using a sledgehammer to crack a nut. *S v Manamela*²⁶⁶ introduced this analogy notion and it has dominated the judicial podium. Hoexter stated that reasonableness and rationality are connected in the sense that rationality is an element of reasonableness, at least as its minimum threshold. She also posts that proportionality can be an element of reasonableness, at least as its maximum threshold. I agree partly with Hoexter, on establishing the two elements of reasonableness which are rationality and proportionality. One also has to take account of the element of

²⁶¹ Beech 2018 <https://www.golegal.co.za>.

²⁶² Earl 2017 <https://www.mining.com>.

²⁶³ Earl 2017 <https://www.mining.com>.

²⁶⁴ Earl 2017 <https://www.mining.com>.

²⁶⁵ Earl 2017 <https://www.mining.com>.

²⁶⁶ 2000 3 SA 1 (CC) para 34.

justification. In essence, it is difficult to define reasonableness without incorporating the element of justification. Hence, I believe that reasonableness is comprised of three elements which are rationality, proportionality and justification.

4.2 Recommendations

Section 54 of the MSHA contains the term "reason to believe". A mere sense of believing that there is imminent endangerment of the lives of the mineworkers is not adequately justifiable. The decision of the MHSI must be substantiated by facts and meticulous analysis of the situation. The provision of section 54 of the MSHA also states alternative options to remedy the foreseeable threat as opposed to total mine stoppage. The element of proportionality would be invoked when the mine inspectors weigh the lives of the mine workers *vis-à-vis* their livelihood, the livelihood of adjacent communities as well as the well-being of the South African economy. The element of proportionality is aligned with justification in the sense that there must be compelling reasons to weigh the competing interests and having to choose one over the other based on adverse effects that could be sustained. Admittedly, whichever option the mine inspector employs within the ambit of section 54 the MSHA, there will always be an affected party hence their decision should be based on reasons and should be justified. The *Interim Constitution* incorporated the element of justification in its articulation of the right to administrative justice. This important element remains instructive today under the 1996 Constitution and PAJA. If the mine inspectors fail to exercise their statutory powers accordingly, the lives of the mineworkers will be compromised. Should their powers be exercised excessively, the mine will suffer immense loss and that may impact on adjacent mining communities and the South African economy. Rational decision-making and balancing of competing interests are of utmost importance.

Reasonableness is the ability of having the right quality to make a decision of treating competing interests or rights equally by striking a balance between two or more things, and be able to justify that the decision taken is right and can be substantiated by evidence and sound reasoning. The elements of fairness, proportionality and justification were identified in the *Bel Porto* case. Mine inspectors should be equipped with knowledge to understand that as decision makers whose decision affects the lives of people, livelihood and the economy of South Africa; their decisions should be discharged with perpetuity from a due diligence perspective. Again, consistency in decision-making is an important

component which will increase confidence and integrity in the MHSA as a subsidiary of the DMRE. The mine inspectors have a mammoth task of protecting the lives of mineworkers and balancing the interests of the mining companies. In *AngloGold Ashanti*, a meagre offence resulted in mine operations being halted entirely, despite undertakings by the mining company to redress the problem and comply with the instructions. The conduct of the MHSI in this instance was reckless and caused loss of revenue.

Although it is often highlighted that one death is one too many, there is still a high rate of fatalities and injuries happening in South African mines, despite legislation in place to regulate the health and safety standards. It is acknowledged that the mining industry is a risky business but that does not justify the number of lives being lost due to flaunting of health and safety regulations. The zero-harm goal is an important initiative although the goal has not been achieved thus far. The number of fatalities has decreased compared to before the enactment of the MHSA. The decrease in fatalities is attributed to the introduction of strict safety protective measures, legislation and improved machinery.²⁶⁷

In consideration of the development of the concept of reasonableness, an administrative action cannot qualify as reasonable unless there is adequate reasoning based on information available which led to such a decision to be taken. In essence, the element of justification forms a greater part of reasonable administrative action. The MHSI would then have acted reasonably in issuing mine stoppages notices provided there are adequate reasons that could be advanced to justify the enforcement of section 54 of the MHSA. The MHSI's "reason to believe" must be accompanied by health and safety information at their disposal. According to the reasoning of the courts throughout the years, it can be construed based on precedents that, there are three elements which make up the concept of reasonableness. Those elements are rationality, proportionality and justification. In order for an administrative action, such as the decision in terms of section 54 of the MHSA, to qualify as reasonable it must be measured against these three elements.

²⁶⁷ Anon 2020 <https://www.miningreview.com>.

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