

The use of Section 54 stoppage orders in terms of the Mine Health and Safety Act

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I dedicate this dissertation to my late grandfather, Jan Knoetze.

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List of Abbreviations

GN	Government Notice
GG	Government Gazette
HDI	Historically Disadvantaged Individuals
MA	<i>Minerals Act 50 of 1991</i>
MHSA	<i>Mine Health and Safety Act 26 of 1996</i>
MHSI	Mine Health and Safety Inspectorate
MIGDETT	Mining Industry Growth, Development and Employment Task Team
MPRDA	<i>Mineral and Petroleum Resources Development Act 28 of 2002</i>
NECER	National Compliance and Enforcement Report
NEMA	<i>National Environmental Management Act 107 of 1998</i>
OHSA	<i>Occupational Health and Safety Act 85 of 1993</i>
PAJA	<i>Promotion of Administrative Justice Act 3 of 2000</i>
<i>PER</i>	<i>Potchefstroom Electronic Law Journal</i>
SA	South Africa
SLP	Social and Labour Plan
<i>Stell LR</i>	<i>Stellenbosch Law Review</i>
TkS	Transkei Supreme Court
TMM	Trackless Mobile Machinery
UASA	United Association of South Africa
WLD	Witwatersrand Local Division

UITTREKSEL

Die Suid Afrikaanse mynindustrie lewer 'n baie belangrike bydrae tot die Suid Afrikaanse ekonomie. Daarom kan die sluiting van myne, as gevolg van verskeie redes, grootskaalse ekonomiese verlies vir die mynindustrie inhou en gevolglik ook vir die ekonomie. Hierdie studie het ten doel om spesifiek die sluiting van myne deur die reguleringsliggaam naamlik die Department van Minerale Hulpbronne, deur middel van die Mynveiligheids-en Gesondheidsinspektoraat te ondersoek. Die Mynveiligheids-en Gesondheidsinspektoraat het wye diskresionêre magte in terme van artikel 54 van die *Myngesondheids-en Veiligheidswet* wat soms tot gevolg het dat myne nie-konsekwent of verkeerdelik gesluit word wat ekonmiese en ander gevolge tot gevolg mag hê. Die sluiting van in terme van artikel 54 het 'n hewege debat in die industrie ontketen en kontroversie veroorsaak. Die Suid Afrikaanse howe is genader om meer lig veral artikel 54 te interpreteer, maar daar is steeds baie uitdagings wat die industrie in die gesig staar. Hierdie studie vergelyk die afdwining van die *Wet op Gesondheid en Veiligheid in Myne* met die *Wet op Beroepsveiligheid en Gesondheid* en die *Nasionale Omgewingsbestuurswet* in 'n poging om aanbevelings ten aansien van beter afdwining van artikel 54 te maak.

TREFWOORDE

Artikel 54 stoppe, *Wet op Gesondheid en Veiligheid in Myne* Wet 29 van 1996, Mynveiligheids-en Gesondheidsinspektoraat, Toepassingsriglyne, voldoening, diskresionêre magte.

ABSTRACT

The South African mining industry has become known to be an important contributor to the South African economy. Subsequently, the closure of mines due to various reasons has resulted in major economic losses for mines. This study's aim is to investigate the mine closures caused by the regulatory body, namely the Department of Mineral Resources via the enforcement of the Mine Health and Safety Act (MHSA) by the Mine Health and Safety Inspectorate. The Mine Health and Safety Inspectorate has wide discretionary powers that enables them to close a mine or part thereof, often inconsistently or unfounded which may result in economic and other losses. The closure of mines due to compliance issues, known as section 54 stoppages, has caused a fiery debate and controversy within the mining industry due to the inconsistent issuing of such compliance orders. It resulted in the closure of mines for certain periods of times. The South African courts have been approached to interpret section 54, but it appears that there are still challenges remaining. Whilst the legislation in place is based on the duty posed on the employer to provide a workplace that is safe and without risk to the employee, the manner in which the legislative provisions are enforced, specifically the closures of or part of a mine, has to be investigated, the root problem/s identified and addressed. This study compares the enforcement measures of the MHSA with that of the *Occupational Health and Safety Act* and the *National Environmental Management Act* in order to make recommendations the more effective and efficient enforcement of section 54.

KEY WORDS

Section 54 stoppages, *Mine Health and Safety Act* 29 of 1996, Mine Health and Safety Inspectorate, Enforcement Guidelines, compliance, enforcement, discretionary powers.

1. Introduction

Mining in South Africa is the heartbeat of its economy and provides bread on the table for thousands of families.¹ Enforcement of health and safety legislation at mines has been a discussion point in the media and has been in the spotlight for some time now and with good reason.² Mines or parts of it are often closed by the relevant authority responsible for the enforcement of health and safety legislation on South African mines when such a mine or part thereof is considered to be unsafe.³

The South African occupational health and safety legislation is governed by either the *Occupational Health and Safety Act*⁴ (OHSA) or the *Mine Health and Safety Act*⁵ (MHSA). Section 1(3)(a) of the OHSA stipulates that the OHSA will not be applicable to a mine, mining areas or any works as defined in the *Minerals Act* 50 of 1991⁶ (MA),

1 Creamer 2010 www.miningweekly.com; also see Smit 2013 www.sablog.kpmg.co.za.

2 Anon. 'Mine Health and Safety Audits Africa to be heightened' *Reuters* 17 November 2011

3 Baartjes and Gounden *Causes of Mine Decline in South Africa* www.imhc.co.za.

4 85 of 1993.

5 29 of 1996.

6 In terms of Schedule 1 of the MPRDA the whole of the MA has been repealed and replaced, except for the definitions of "precious metals" and "unwrought precious metal" in section 1 and Chapter XVI of the *Mining Rights Act* 21 of 1967 and except the definition of "Sunday" in and section 9 of the *Mines and Works Act* 27 of 1956. The MHSA now makes provision for the definition of a mine as follows:

"mine" means, when

"(a) used as a noun -

(i) any borehole, or excavation, in any tailings or in the earth, including the portion of the earth that is under the sea or other water, made for the purpose of searching for or winning a mineral, whether it is being worked or not; or

(ii) any other place where a mineral deposit is being exploited, including the mining area and all buildings, structures, machinery, mine dumps, access roads or objects situated on or in that area that are used or intended to be used in connection with searching, winning, exploiting or processing of a mineral, or for health and safety purposes. But, if two or more excavations, boreholes or places are being worked in conjunction with one another, they are deemed to comprise one mine, unless the Chief Inspector of Mines notifies their employer in writing that those excavations, boreholes or places comprise two or more mines; or

(iii) a works; and

(b) used as a verb, the making of any excavation or borehole referred to in paragraph (a)(i), or the exploitation of any mineral deposit in any other manner, for the purpose of winning a mineral, including prospecting in connection with the winning of a mineral."

It is interesting to note that section 1 of the MPRDA also defines a "mine" but such definition differs from the one provided by the MHSA:

"mine" means, when-

"(a) used as a noun-

(i) any excavation in the earth, including any portion under the sea or under other water or in any residue deposit, as well as any borehole, whether being worked or not, made for the purpose of searching for or winning a mineral;

(ii) any other place where a mineral resource is being extracted, including the mining area and all buildings, structures, machinery, residue stockpiles, access roads or objects situated on such area and which are used or intended to be used in connection with such searching, winning or extraction or processing of such mineral resource; and

except in so far it provides otherwise. The OHSA, therefore, governs health and safety at all workplaces except at mines. The OHSA provisions are managed and enforced at workplaces by the Department of Labour, as defined in terms of section 1 of the OHSA.⁷ The MHSA governs health and safety at mines and the authority responsible to govern and enforce health and safety legislation on mines is the Department of Mineral Resources, as defined in terms of section 102 of the MHSA.⁸

The overall enforcement of health and safety legislation at workplaces are governed by the regulating bodies responsible for the MHSA and the OHSA respectively, namely either the Department of Mineral Resources (mines) or the Department of Labour (non-mining). Each of these pieces of legislation makes provision for the regulating and enforcement of its provisions which includes the power to close a workplace or part thereof, or mine or part thereof. In this regard, section 54 of the MHSA makes provision for stoppage orders to be executed by the officials of the Department of Mineral Resources whilst the OHSA contains similar provisions regarding closures of unsafe workplaces as will be discussed under paragraph 4.1.⁹

Whilst it is deemed necessary to regulate health and safety and the enforcement thereof in the mining sector, the current enforcement regulating the stopping of activities at mines, by the relevant authority is not deemed efficient as the loss in production and subsequent economic losses are much more than can be allowed for in the current economic climate especially in South Africa, considered to be a developing country. The reason for this is that the closure of mines may have certain health and safety consequences as well as an impact on the economy and the environment. These possible consequences lead to the argument that the closure of mines has to be conducted with the necessary due diligence and exercised responsibly and consistently as the inspector holds a wide discretionary power in his/her hands which may impact on the economy.¹⁰

(b) used as a verb, in the mining of any mineral, in or under the earth, water or any residue deposit, whether by underground or open working or otherwise and includes any operation or activity incidental thereto, in, on or under the relevant mining area."

7 It is worth it to take note that section 1 of the OHSA makes reference to the Department of Manpower (as per 1993), but the Department is now renamed to the Department of Labour.

8 Section 102 of the MHSA refers to the Department of Minerals and Energy, today known as the Department of Mineral Resources.

9 Section 30 of the OHSA.

10 Phiri 2012 www.fasken.com.

Every person has the right to an environment that is not harmful to their health and wellbeing. This right to the environment would include the work environment where the workplace should be safe and without risk to the employee or other persons' health and welfare. Based on this, the third component of importance for this study would be the environmental legislative framework, more specifically the NEMA which provides for pre-directive measures, as discussed in Chapter 5. Section 24(a) of the *Constitution of the Republic of South Africa, 1996* (the *Constitution*) states that everyone, in this case the workers, have a right to a workplace that is not harmful to their health or wellbeing. According to Thoose,¹¹ section 8 of the OHSA is supplementary to this right as it places an obligation on employers to provide a workplace that is safe and without risk to employees and other persons. The same requirement applies in the MHSA where section 5 of the MHSA determines that as far as reasonably practicable, every employer must provide and maintain a working environment that is safe and without risk to the health and of employees.

The aim of the study is to determine whether, and if possible, how, the practice of issuing section 54 stoppages in terms of the MHSA can be aligned with the enforcement of similar provisions in the OHSA and the NEMA to achieve more effective and efficient results. This study will primarily be a literature review. Legislation will, however, form the basis of this study supported by case law and actual reported incidents. Academics and individuals from different industries including the mining sector's viewpoints will be studied as found in journal articles and books.¹² Guidelines issued by the government departments on the enforcement of the OHSA, MHSA and NEMA are also taken onto account to determining the purpose and intention of the powers of the inspectorates.

In this study a background to the consequences of mine closures will be provided first (Chapter 2), then section 54 of the MHSA will be discussed (Chapter 3) after which a comparative study will be conducted and discussed by comparing other legislation, the OHSA and the NEMA as well as alternative enforcement measures (see Chapter 4) in order to reach a conclusion and make recommendations (Chapter 5). Chapter 2

11 Tshoose 2014 *CILSA* 281.

12 It must be stated that not much have been written in this regard and that the author had to rely on the materials that were available at the time of writing the dissertation.

focuses on the economic losses suffered by the mining industry as a result of section 54 orders.

2. Background to the consequences of mine closures

Chapter 2 focuses on the consequences of mining closures and highlights the economic and social affects or impacts caused by section 54 stoppage orders. The chapter's role is to demonstrate the importance of the mining sector to communities and the overall economic development of South Africa and the consequences that will have to be faced when mines have to close or cut back on jobs. This chapter indicates the economic consequences that section 54 stoppages may have as well as the possible impact of the orders on the social development of mining communities and the environment. The economic consequences will be discussed first.

2.1 Economic consequences

A significant moment in South Africa's history was when the first diamond was discovered on the banks of the Orange River in 1867. It was this moment that marked the start of the explosion of mining in South Africa which today plays a vital role in South Africa's economy and social development and made South Africa one of the economic leaders in Africa. South Africa's gold mining sector reached a peak in 1970 when it contributed 68% of the total global production.¹³

The mining sector in South Africa has become a major contributor to the country's Gross Domestic Product (GDP) and contributed 4.9% of South Africa's GDP in 2013.¹⁴ The mining sector earns most of South Africa's foreign exchange and pays nearly double its GDP share in corporate tax.¹⁵ According to the Chamber of Mines' 2014 *Platinum State of the Nation Report*, the mining sector is responsible for about 4.1% of South Africa's GDP and this figure is down from 5.7% in 2011 due to the ongoing strikes and safety stoppages.¹⁶ The platinum and gold mines are mentioned as examples of mines which suffered economic losses due to section 54 stoppage orders.

13 Mining IQ Mining Intelligence Database www.projects iq.co.za/mining-in-south-africa.htm. In 2001 mining in South Africa contributed 51% of the global platinum group metals ever mined. South Africa has established itself amongst one of the leaders in the global mining sector and today South Africa's rich mineral resources are amongst the highest in the world and it holds the largest reserves of gold, platinum, titanium, chromium, manganese and vanadium. South Africa furthermore has the second largest zirconium reserves and also holds substantial reserves of phosphates, antimony, coal and nickel.

14 Stilwel *et al* 2000 *Resources Policy Journal* 20.

15 Facts about South African Mining 2012 www.anglogold.com/NR/rdonlyres/09C55043-3816-4FA8-9371-E83999855261/0/November2012.pdf.

16 Baxter Chamber of Mines January 2014 *Platinum State of the Nation Report* 1.

The picture for 2014 thus far is much bleaker as the economic growth in the first quarter of 2014 has advanced at 1.6% over the previous year due to the strike in the platinum mining sector, recorded to be the longest running of its kind in South African history.¹⁷ The strike in the platinum sector had not only direct impacts but also indirect impacts (the so-called "ripple effects") on the economy.¹⁸ President Zuma stated during his address at the Cosatu National Conference on 17 September 2012 that the total rand value of the losses in the gold and platinum mining sectors due to work stoppages, amounts to R 4.5 billion and losses in the coal mining sector is at R188 million.¹⁹ Engineering News reported that Amplats has experienced a 125% increase in section 54 stoppages from 2010 to 2011.²⁰ The indirect impact of strikes and other stoppages on mining operations are R3.1 billion.²¹ The closure of a mine due to the enforcement of health and safety legislation such as in terms of section 54 of the MHSA, may have similar if not exactly the same effects suffered due to the strikes in the platinum sector. It has been estimated that a total of 750 000oz (approximately 340 000 kg) of production was lost in 2012 due to strike action, but safety stoppages and mine closures resulted in excess of R13 billion lost revenue.²² The platinum production in South Africa has decreased by 3%²³ (120 000 ounces or about 4 233 kg) in 2011 and this loss may mainly be attributed to the section 54 stoppages. Amplat's smaller operations in the western Bushveld²⁴ used to maintain a production output of nearly 1 million but during 2011 it has only managed an output production of 840 000 ounces (about 29 630 kg), the loss being attributed to section 54 stoppages²⁵ and Ernest and Young (2014)²⁶ listed section 54 stoppages as one of the main challenges

17 Trading Economics www.tradingeconomics.com.

18 According to the Platinum Wage Negotiations 2014 the strike has cost the platinum mining sector about R19 billion and around R8.8 billion was lost in wages for mine workers (Mitchley *The Citizen* 2014). This has played a major role in the decrease of the seasonally adjusted real GDP for the first quarter in 2014. Recently there have been speculation of Anglo American, the largest platinum producer in the world, of selling some of its platinum mines in South Africa which will most certainly have an impact and effect on the economy which remains to be seen (Oxford Business Group Economic Update: Changes ahead for South Africa's mining industry www.oxfordbusinessgroup.com).

19 Zuma J Presidential address *COSATU National Conference* 17 September 2012.

20 Creamer 2010 www.engineeringnews.co.za.

21 Zuma J Presidential address *COSATU National Conference* 17 September 2012.

22 Oxford Business Group Economic Update: Changes ahead for South Africa's mining industry www.oxfordbusinessgroup.com.

23 Matthey J 2012 Platinum Today www.platinum.matthey.com; also see Butler J Platinum 2012 www.platinum.matthey.com.

24 Tumela-, Bathopele-, Union- and Kroondal Mines.

25 Butler J Platinum 2012 www.platinum.matthey.com.

26 According to Business Day Live's report on this issue, safety stoppages has been identified together with other factors as a contributing factor to reduced production in the June quarter of

faced by the mining industry. The output of platinum production of platinum has fallen with 19.5% year on year in January 2012. Price Waterhouse Coopers' (PWC) SA Mine Report Publication.²⁷ Ernest and Young (2014) identifies mining stoppages as one of the top risks for mines and confirms that it leads to significant production and other losses. In their first quarter, Production Report of 2012 Lonmin Plc stated that it has lost 177 000 tonnes of production due to these orders. The loss to section 54 stoppages shows a significant increase of tonnes lost in comparison to the previous year where only 21 000 tonnes were lost due to section 54 stoppage orders.²⁸ Lonmin lost about 112 000 tonnes of production in the June 2013 quarter alone.²⁹ In the previous year during the same quarter, the production loss due to safety stoppages amounted to 40 000 tonnes, indicating a steep increase.³⁰

The decline in the iron ore sector was also due to the safety stoppages at Kumba Iron Ore during August 2013.³¹ AngloGold lost³² that 73 000 ounces of gold as a result of section 54 stoppages while the company's All Injury Frequency Rate (AIFR) had actually decreased from 11.50 in 2011 to 9.76 in 2012. However, AngloGold stressed the importance of the regulation of health and safety measures on the mines and confirmed the organisation's commitment to remain aligned with the requirements of the Department of Mineral Resources' requirements.³³

Concerns are raised that even when the health and/or safety issue are localised, the whole mine and not only the identified part is shut down, especially after a fatality. It has become practice for the Department of Mineral Resources to shut down the entire operation of a mine instead of just the affected shaft/s or areas.³⁴ AngloGold has

2013 (Secombe A *Business Day* 25 July 2013); also see *Ernest and Young Cost Control and Margin Protection in the South African Mining and Metals Industry* www.ey.com and Mining Review.Com www.miningreview.com.

27 PWC SA Mine (5th ed) November 2013 'Highlighting trends in the South African mining industry' 18.

28 Lonmin Q1 2012 Production Report & Interim Management Statement 1.

29 Secombe *Business Day* 25 July 2013.

30 Secombe *Business Day* 25 July 2013.

31 PWC SA Mine (5th ed) November 2013 'Highlighting trends in the South African mining industry' 15.

32 Anon. *Reuters* 10 April 2012; also see Filen C 2012 www.mineweb.com; also see AngloGold Ashanti website www.anglogoldashanti.com.

33 AngloGold Ashanti's Kopanang operation located in the Free State, has lost 20 shifts in 2011 and 29 shifts during 2010 due to section 54 stoppage orders. Moab Khotsoang, the newest gold mine in South Africa situated near Orkney showed a 9% decline in production as a result of section 54 stoppages during 2011 (AngloGold Ashanti Annual Report 2011 40).

34 Filen C 2012 www.mineweb.com; also see Ruffini 2010 *Engineering and Mining Journal* 8.

confirmed a loss of 73 000 ounces of gold due to section 54 stoppages.³⁵ From a health and safety perspective, the closure of a mine also poses a danger to the standard of health and safety on a mine. According to Lonmin's *Q1 2012 Production Report* the effect of section 54 can also increase safety risks because the operating momentum is interrupted.³⁶ According to the report, the mine lost 16 shifts during the December quarter as a result of safety stoppages, which amounted to 4 500 ounces of gold. Goldfield's South Deep mine has been affected by safety stoppages as well. The stoppage order issued by the Department of Mineral Resources as well as the company's four month safety review has resulted in a loss of 64 300 ounces of gold which is 16% of the mine's total production of 2013.³⁷

According to Engineering News, the Department of Mineral Resources imposes section 54 stoppages on a broad scope of the mining operations which reached far beyond the area of the safety concern. Furthermore it seems as if the Department of Mineral Resources has increased the time period it takes to successfully retract or withdraw the stoppages, from normally a day or two to nearly five days.³⁸

2.2 Impact of mine closures on social development

The mining sector is South Africa's biggest private employer and it is key to the generation of energy and contributes vastly to the economy. It is due to have an impact on socio-economic development in South Africa.³⁹ Many rural communities in South Africa are heavily dependent on mining as a primary source of "jobs, income and financial security".⁴⁰ The mining industry is one of the principal allies for the fight against poverty.⁴¹ Mining creates economic welfare across South African borders as

35 Filen C 2012 www.mineweb.com. Similarly, the gold mining sector also suffered economic losses due to the safety stoppages in terms of section 54 of the MSHA as enforced by the Department of Mineral Resources. According to Johan Viljoen, the Vice President of the Southern Africa Division at AngloGold Ashanti the major reason for the decline in gold production was due to safety stoppages and Viljoen furthermore stated that it was not due to the company's safety performance which has deteriorated, in fact it improved. Viljoen stated that the decline was rather a result of the way the Department of Mineral Resources has enforced stoppages on routine visits. The Village Main Reef Gold Mine blames their decrease in production at their Tau Lekoa mine on the December seasonal break and safety stoppages (see Ruffini 2010 *Engineering and Mining Journal* 8 and Village Main Reef 2014 www.villagemainreef.co.za).

36 Lonmin Q1 2012 Production Report & Interim Management Statement 3.

37 Bloomberg 2014 www.bloomberg.com.

38 Creamer 2010 www.engineeringnews.co.za.

39 Bester and Cronje 2014 *Journal for Transdisciplinary Research in Southern Africa* 202.

40 Malherbe 2000 www.pmg.org.za.

41 Malherbe 2000 www.pmg.org.za.

it is Africa's best opportunity to achieve and maintain international competitiveness and are often the pioneers in international investment.⁴² The mining industry employs about 500 000 workers who are each providing for 10 dependants.⁴³ The halting of production on mines may result in job losses. An example of a mine having to consider cutting many jobs is the Gold Fields' South Deep mine located near Westonaria. According to Business Day Live, two fatalities in only two weeks on the mine, have caused operations to be largely halted.⁴⁴ As a result of this, the mine is considering shift changes which will result in about 500 job cuts. The platinum sector alone provides about 440 000 jobs throughout South Africa and with a dependency ratio of 10 to1, about 4.4 million people are directly dependant on each platinum sector job for their daily survival-hood.⁴⁵ The economic impact caused by section 54 stoppages as discussed under 2.1 above, may lead to possible job losses and the two aspects cannot be considered in isolation. This becomes evident as First Uranium Corporation (FUM) has confirmed that safety stoppages have cost gold mines between 10% and 30% of their production and⁴⁶ that it had a significant impact on workers as the organisation considers laying off more than half of its workers at its Ezulwini mine after a failure to improve profitability.⁴⁷ In order to sketch an accurate picture that the closure of mines can have on the overall socio-economic development in South Africa, it is important to understand the contribution the mining sector has on such development in the first place. An example where specifically Anlgo American has considered cutting back thousands of jobs in an attempt to up its profits is the case when the organisation considered cutting back as many as 14 000 jobs due to the economic losses it suffered as a result of labour unrest and a steep decline in production. Such a cutback on as many jobs would result in damage to the economy. Many of the workers employed by the mining sector live in small towns or villages near the mine, in remote and often rural areas. Although the Mining Charter specifically instructs mines to put in an effort to develop such communities, the mines are dependent on profit margins to be able to invest in the communities. As such, when job cuts are

42 Malherbe 2000 www.pmg.org.za.

43 Smith 2013 www.sablog.kpmg.co.za.

44 Marais Business *Day* 1.

45 Baxter R Chamber of Mines January 2014 *Platinum State of the Nation Report 2*.

46 Staff Reporter *Mail & Guardian* 21 December 2011.

47 Staff Reporter *Mail & Guardian* 21 December 2011

made, the employees located in these areas, who are often illiterate, will find it very hard to find alternative employment.⁴⁸

Section 54 stoppages may even have an impact on the objectives of the Mining Charter. Section 100 of the *Mineral and Petroleum Resources Development Act*⁴⁹ (MPRDA) governs the transformation of the minerals industry. Section 100(2)(a) of the MPRDA specifically states that in order to address the unfair practices and economic inequalities, the responsible minister has to establish a Mining Charter that will set out the framework put in place to give effect to broad-based socio-economic empowerment and the time tables linked thereto. The aim of the Mining Charter⁵⁰ is to ensure the active participation of historically disadvantaged South Africans⁵¹ and the overall benefit to the citizens of South Africa as a whole.

According to the Mining Charter the mining sector is compelled to comply with the Empowerment Charter for the South African Mining and Minerals Industry (the Mining Charter) as incorporated in the *Broad-Based Black Economic Empowerment Act*.⁵² In terms of the Charter, mining companies have to reach certain objectives in different sectors such as skills development, employment equity, housing and living conditions of mine employees to name a few.⁵³ As such, the mining industry is contributing to the overall socio-economic development of South Africans in general.

48 Anglo American's Iron Ore Sustainable Development Report 2012: *Positive impacting communities with the future in mind* 7-11.

49 28 of 2002.

50 The Mining Charter is available on the Department of Mineral Resources' website: www.dmr.gov.za.

51 "Historically Disadvantaged South Africans" is not defined by the Mining Charter, however, it is worth it to take note of the definition of "Historically Disadvantaged Individuals (HDI)" as provided in the Preferential Procurement Policy Framework available at www.thedti.gov.za:

"A South African citizen

i) who, due to the apartheid policy that had been in place, had no franchise in national elections, prior to the introduction of the Constitution of the Republic of South Africa, 1983 (Act No 110 of 1983) or the Constitution of the Republic of South Africa, 1993 (Act No 200 of 1993) ("the Interim Constitution"); and/or

ii) who is a female; and/or

iii) who has a disability:

Provided that a person who obtained South African citizenship on or after the coming to effect of the Interim Constitution, is deemed not to be an HDI."

52 53 of 2003.

53 Section 2.8.2 of the *Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry* as published in GN 838 in GG 33573 of 20 September 2010.

The Mining Charter identifies enterprise development and procurement as one of the elements set out as the objectives to achieve a certain Black Economic Empowerment (BEE) compliance level. It is expected from mines to procure a minimum of 40% of its capital goods from BEE compliant entities by 2014.⁵⁴ By complying with this objective, the mining sector contributes towards the development of small black-owned businesses. The mining sector has made significant strides in allocating its procurement to assist enterprise development and benefiting historically disadvantaged South Africans.⁵⁵ The closure of mines may have a negative impact on the development of small black-owned businesses and on the owners and their dependants.

The Mining Charter also addresses employment equity⁵⁶ and indicates how mines have to take the necessary steps to ensure workplace diversity on all levels of employment including managerial positions.⁵⁷ Employment equity has as its goal to rectify the injustices of the past which was present in particular in the mining sector having black persons (then classified as black persons, Indians and coloured persons) in unskilled positions and even white women being only allowed in administrative positions.⁵⁸ The Mining Charter does not only set out specific targets which mines have to achieve to be compliant,⁵⁹ but also instructs mines to "fast-track" existing talent pools to create opportunities for historically disadvantaged South Africans in establishing career path programmes. The mining sector has shown good progress towards implementing the targets for employment equity specifically with regards to women in the workplace.⁶⁰ In terms of the Mining Charter, mines have to draft, develop and submit employment equity plans to the Department of Mineral Resources. By transforming the employment diversity in the mining sector, more people, specifically historically disadvantaged South Africans are granted the opportunity to share in the

54 Section 2.2 of the *Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry* as published in GN 838 in GG 33573 of 20 September 2010.

55 Teke 2014 *Business Day Live*.

56 Section 2.4 of the *Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry* as published in GN 838 in GG 33573 of 20 September 2010

57 Teke 2014 *Business Day Live*.

58 Tlhatlosi *An Application of the Employment Equity Act and diversity in the mining industry* 13.

59 "Every mining company must achieve a minimum of 40% HDSA demographic representation at: Executive Management (Board) level by 2014; Senior management (EXCO) level by 2014; Core and Critical skills by 2014; Middle management level by 2014; Junior management level by 2014.

60 Teke 2014 *Business Day Live*.

benefits provided by the mining sector. The closure of mines or the cutting of jobs in the mining sector, as a result of the declining productivity with safety stoppages, may result in the deceleration of the development of employment equity within the mining sector.⁶¹

Skills development has to be regarded as one of the most important earmarks of the Mining Charter. One of the main objectives of the Mining Charter is to develop the existing skills base of historically disadvantaged South Africans.⁶² Mines have to draft and submit Social and Labour Plans (SLP's) in terms of section 23 of the MPRDA, the granting of mining licences is dependent on the mine having submitted their social and labour plans. In terms of the Social and Labour Plans Guidelines for the Mining and Production Industries issued by the former Department of Minerals and Energy (hereinafter referred to as the SLP Guidelines), mines have to compile and implement Skills Development Plans.⁶³

When the mining sector suffers economic setbacks such as these created by section 54 stoppages, it makes it very difficult and virtually impossible to reach the targets as set out in the Mining Charter. This may prevent the mining sector from investing and allocating its procurement towards enterprise development as stipulated by the Mining

61 Anglo American and Impala Platinum are two mining companies that have really committed themselves to reach the targets for employment equity. About 15% of Anglo American's workforce are women and they have undertaken to extend that to 21% by the end of 2014 whereas Impala Plats have set out specific targets to reach their goals in accomplishing employment and gender equality within their organisation (Cornish *Inside Mining Journal* 41).

62 Section 1(c) of the *Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry* as published in GN 838 in GG 33573 of 20 September 2010. The development of core and critical skills is incorporated under the employment equity element in the Mining Charter and the Human Resource Development element specifically states the targets and objectives set to the mining industry. Section 2.5 of the *Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry* as published in GN 838 in GG 33573 of 20 September 2010 stipulates that: "The mining industry is knowledge based and thus hinges on human resource development, constituting an integral part of social transformation at workplace and sustainable growth. To achieve this objective, the mining industry must: "Invest a percentage of annual payroll (as per relevant legislation) in essential skills development activities reflective of the demographics, but excluding the mandatory skills levy, including support for South African based research and development initiatives intended to develop solutions in exploration, mining, processing, technology efficiency (energy and water use in mining), beneficiation as well as environmental conservation and rehabilitation; as follows: Target for 2010 = 3%; Target for 2011 = 3.5%; Target for 2012 = 4%; Target for 2013 = 4.5%; Target for 2014 = 5%."

63 These plans have to set out how the mine or organisation plans to achieve the goals in providing employees with opportunities to participate in learnerships, skills programmes; portable skills and any other training (see the Department of Minerals and Energy Social and Labour Plans Guidelines for the Mining and Production Industries 6).

Charter. The Chamber of Mines indicated that the top mining houses have spent R7.4 billion on the training of artisans and other important skills programmes in 2012 and that the industry has created over a million jobs just in the mining sector in only one year.⁶⁴ This is indicative of the valuable role that the mining sector plays in socio-economic development in South Africa and an excellent example of the mining sector's commitment towards providing sustainable skills training is the De Beers Group of Companies' commitment towards community development⁶⁵ by striving to incorporate the benefits of the mines' presence towards local communities by promoting sustainable economies within these communities.⁶⁶ Through the Mining Qualifications Authority (MQA) skills development projects and programmes have been established within the mining and mineral sector and Adult Basic Education Training has conducted where many historically disadvantaged South Africans have gained skills and training to assist them in the long term.⁶⁷ By providing its employees, especially illiterate employees, with certain training and skills, mines are actually providing long terms and sustainable skills development in the mining community.⁶⁸

The mining sector, being the heartbeat of the South African economy and having the potential to influence so many communities, have the ability to create enormous opportunities to such communities in various areas including the all-important skills development area. Skills development is a long term benefit and one employee's development creates a ripple effect on his/her dependants, creating a more stabilised economy within such communities, which then positively influences many other factors such as providing for education, housing and transport. Section 54 stoppages may hamper this goal of the Mining Charter.

64 Deputy Minister Manamela "Integration of Youth Mining Entrepreneurs and Professionals into the mainstream mining economy for Sustainable Development, Seamless Succession and Value Creation" delivered at the Mining Lekgotla Youth Power Breakfast 14 August 2014.

65 The De Beers Group of Companies have certain programmes in place to ensure local value creation and consult with the community leaders to establish viable programmes to develop skills training, infrastructure development, employment opportunities, promotion of enterprise but to name a few. "Engaging with communities: www.debeersgroup.com.

66 5 Communities De Beers Group of Companies www.debeersgroup.com.

67 ABET website www.abet.co.za

68 In his speech, the deputy minister in the presidency, Manamela during the Mining Lekgotla Youth Power Breakfast, emphasised the important role the mining sector is playing and has to continue to play in creating jobs in South Africa (see Deputy Minister Manamela "Integration of Youth Mining Entrepreneurs and Professionals into the mainstream mining economy for Sustainable Development, Seamless Succession and Value Creation" delivered at the Mining Lekgotla Youth Power Breakfast 14 August 2014).

The Mining Charter places a further obligation on the mining sector to implement certain steps to ensure the development of the mining community:⁶⁹

Mine communities form an integral part of mining development, there has to be meaningful contribution towards community development, both in terms of size and impact, in keeping with the principles of the social license to operate.

The six main objectives of the Mining Charter, set out by the Department of Mineral Resources' Mining Charter Impact Assessment Report⁷⁰ strives towards the aim of benefiting the community. The Mining Charter Impact Assessment Report (2009) indicates that mining operations are often located in "remote and underdeveloped areas" and, therefore, have to contribute to the sustainable development of these communities.⁷¹ In the past, mines have not paid attention to their communities resulting in many towns becoming "ghost towns" when the mining operations closed.⁷² Anglo American emphasised that their long term success in this regard is dependent upon their relationship and partnership with stakeholders. The mining sector will not be able to maintain its efforts in ensuring the sustainable development of mining communities if it is to suffer continuous economic loss, such as those caused by section 54 stoppages. Section 54 stoppages resulting in mine closures may directly impact on the development of the mining community and interrupt the mining sector's momentum in such development.⁷³

The provision made for good standards of housing and living conditions is another element identified by the Mining Charter.⁷⁴ This section of the Mining Charter refer to

69 Section 2.6 of the *Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry* as published in GN 838 in GG 33573 of 20 September 2010.

70 Department of Mineral Resources *Mining Charter Impact Assessment Report* October 2009 3.

71 Department of Mineral Resources *Mining Charter Impact Assessment Report* October 2009 9.

72 The mining sector has therefore committed itself to the triple bottom line principle.⁷² The triple bottom line principle is a business principle which incorporates sustainable development into business decisions and the three so-called pillars identified are people, planet and profit.⁷² A leader on this front who has established itself as one of South Africa's largest private employers, Anglo American has committed themselves towards sustainable community development (see *Anglo American Transformation* www.angloamerican.co.za): Anglo American not only has the legislative responsibility but also the moral obligation to contribute to the transformation of the mining industry and the country as a whole. Our transformation journey is underpinned by Anglo American's values and business principles. As a good corporate citizen, we respect the dignity and human rights of individuals and communities everywhere we operate. We aim to make a lasting contribution to the well-being of these communities while generating strong investor returns.

73 Stoddard 2013 www.reuters.com.

74 Section 2.8.6 of the *Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry* as published in GN 838 in GG 33573 of 20 September 2010.

mine workers' human dignity and their right to privacy⁷⁵ and stipulates that mining companies have to take steps to ensure that hostels are converted to family units by 2014 and to ensure that each room is only occupied by one person. A mine also has to implement measures to facilitate home ownership options to all mine employees. In the past, many (black) mine workers were forced to live in hostels, often up to 10 or 12 persons per room.⁷⁶ The circumstances in these hostels were often substandard and undesirable living conditions often provoked violence between the mine workers who had to live there.⁷⁷ Research done by the Leon Commission⁷⁸ shows that living in hostels has a negative impact on the employees' health and general well-being.⁷⁹ These living conditions in the hostels contributed to the rise of spreading of HIV Aids and tuberculosis.⁸⁰ The closure of mines may prevent this development from happening. Section 54 stoppages, may hinder mines from being able to invest in the promotion of housing of mine workers.

The mining industry therefore plays a vital role in the social development and economic stability of its workers and the community. The closure of mines may have a detrimental impact on these communities who are entirely dependent on the mine. Section 54 stoppages issued irregularly or with the intention of closing the mine operation beyond the unsafe area, causes loss of production and, as such, has to be carefully regulated to minimise its impact on the operations as a whole, whilst at the same time serving its purpose and preventing unsafe acts or operation to continue. In the end, it seems to be a balancing act that has to be achieved.

75 The Mining Charter expressly instructs mines to improve these living conditions and set specific targets on the improving of housing. These hostels were single-sex hostels and as a result the male worker was divided from his wife and family (see Marais and Cloete 2009 *Town-and-Regional Planning* 32). The reference made by the Mining Charter to employees' right to privacy refers to when employees' wives were to visit and these hostels did not make provision for adequate facilities and privacy were totally lacking - see The Nelson Mandela Centre of Memory www.nelsonmandela.org.

76 The Nelson Mandela Centre of Memory www.nelsonmandela.org.

77 Although this part of the Mining Charter has as its aim to rectify the housing situation in the first place created by the mining industry, it is important to understand this in the light of the number of jobs created by the mining industry. In other words, whilst admitting the mining industry has the responsibility to rectify this situation regarding employees' living conditions, the mines are still dependant on economic resources to be able to spend the money to ensure the improvement of its employees' living conditions – section 2.8.2 of the *Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry* as published in GN 838 in GG 33573 of 20 September 2010.

78 Leon (1994) The Commission of Inquiry into violence on three Goldfields Mines.

79 The Nelson Mandela Centre of Memory www.nelsonmandela.org.

80 The Nelson Mandela Centre of Memory www.nelsonmandela.org.

With the background to the closures of mines discussed, Chapter 3 focuses on the provisions of section 54 of the MSHA and the role and functions of the Mine Health and Safety Inspectorate in their capacity as officials tasked with enforcing mine health and safety legislation on mines in South Africa. Chapter 3 discusses the application of section 54 of the MSHA in practice and analyses implementation thereof on South African mines.

To conclude this chapter dealing with the economic and social consequences of mine closures, it can be summarised that the mining industry has suffered great economic losses due to the decline in productivity which is a result of many factors, mainly the labour unrest and section 54 stoppages. The issuing of section 54 stoppages has drastically increased and the mining sector has lost millions as a result. The problems faced by the mining industry with regards to the issuing of section 54 stoppages, is that it is often the case that an entire mine's operations are instructed to halt whereas the unsafe activity or condition was observed in an isolated or single area.⁸¹ Section 54 stoppage orders have been issued due to a first aid box which was left unlocked and this stoppage caused the entire mine's operations to be stopped.⁸² Large mining houses such as Anglo American⁸³ and Lonmin⁸⁴ have voiced their concerns in this regard. Mr Tito Mboweni, AngloGold's chairman and independent non-executive director requested government and mining companies to work together in finding a solution to the regulation of safety stoppages on mines.⁸⁵ From the statistics mentioned, a few pertinent factors stand out which summarises the impact the closure of mines have on the economy. Firstly, it becomes clear that the two biggest areas of concern posing a danger to the frequent closure of mines are labour unrest and the enforcement of section 54 of the MSHA. The closure of a mine in terms of section 54 of the MSHA specifically is in the discretion of the inspectors of the Department of Mineral Resources and the mentioned statistics regarding the economic losses suffered by various mines and the loss caused to the GDP, stresses the importance of the way in which the inspectors deal with the closure of a mine in

81 Phiri and Martineau 2012 www.fasken.com.

82 Phiri and Martineau 2012 www.fasken.com.

83 Anglo American Annual Report 2013.

84 Lonmin 2012 www.lonmin.com.

85 Mining Weekly www.miningweekly.com.

terms of section 54 of the MHSA and in general the way in which section 54 stoppages are ordered.

3. Section 54 of the Mine Health and Safety Act 29 of 1996

3.1 Establishment of the Mine Health and Safety Inspectorate

As mentioned in Chapter 1, mine health and safety legislation is governed and enforced by the Department of Mineral Resources through the officials, namely the Mine Health and Safety Inspectorate (MHSI). Chapter 3 focusses on the establishment of the MHSI and their legislative functions and powers.⁸⁶ This chapter will then subsequently analyse practical examples of the implementation of the MHSI's functions and powers in order to determine the efficiency of the enforcement and the impact it may have on different aspects.⁸⁷

Section 47 of the MHSA determines that the MHSI is established as a juristic person.⁸⁸ The MHSI's powers are listed and addressed in section 50 of the MHSA Section 50(1)⁸⁹ which lists the powers bestowed on the MHSI specifically for purposes of monitoring or enforcing compliance with the provisions of the MHSA. It is worth noting at this study that in terms of the *Draft Mine Health and Safety Bill*⁹⁰ (hereinafter referred to as the *Draft Mine Health and Safety Bill*) it is proposed that the MHSI should no longer be considered an independent juristic person subject to the *Public Finance Management Act*,⁹¹ but will again fall under the domain of the Department of Mineral Resources and under the control of the Minister. When the *Draft Mine Health and Safety Bill* is in force, it will have the effect that all the administrative functions allocated to the MHSI will fall away and it will function as part of the Department of Mineral Resources. Another important proposed change is that to section 54(5) and (6) of the MHSA in that the reference to the Chief Inspector of Mines is replaced with reference to Principal Inspectors which will result in providing the Principal Inspectors with even

86 See Masilo and Rautenbach *Understanding the Mine Health and Safety Act* 87.

87 For an overview on the history of health and legislation on mines in South Africa see Masilo and Rautenbach *Understanding the Mine Health and Safety Act* 1.

88 Section 47(1)(a) of the MHSA.

89 Section 50(1) of the MHSA:

"(1) An inspector may for the purposes of monitoring or enforcing compliance with this Act
(a) enter any mine at any time without warrant or notice;
(b) enter any other place after obtaining the necessary warrant in terms of subsection (7); and
(c) bring into and use at any mine, or at any place referred to in paragraph (b), vehicles, equipment and material as necessary to perform any function in terms of this Act".

90 GN 1103 in GG 37027 of 15 November 2013.

91 1 of 1999.

more discretionary powers. One of the results of the *Draft Mine Health and Safety Bill* when it is in force, is that the Minister will appoint the Principal Inspectors.

The MHSI has the duty to investigate and determine the *status quo* of the safety on the mine. The MHSI provides wide discretionary powers to the MHSI,⁹² for example the MHSI may request any relevant person to appear before the inspector to be questioned and may demand co-operation from any mine employee with regards to general questioning of a person with regards to matters relating to the MHSI; requesting any person to provide the inspector with any other required documentation.⁹³ Section 52 of the MHSI places a duty on the mine's employer⁹⁴ and employees⁹⁵ to assist the MHSI when required to do so. The employer and any employee of the mine is compelled to provide an inspector with any facility he/she may reasonably require and any person questioned by an inspector has to answer the questions to the best of their ability but will not be required to provide self-incriminatory evidence.

Section 50(2)(d) of the MHSI states that the MHSI may examine any document produced and make a copy thereof or take an extract from it. Section 50(2)(g) of the MHSI permits the MHSI to "seize any document, article, substance or machinery or any part or sample thereof" and these sections have to be read together with section 50(6) of MHSI which stipulates that when an inspector may seize any document, the employer of the mine may make a copy of it and section 50(2)(6) furthermore states that the MHSI has to issue a receipt for the specific item to be removed. Section 54 of the MHSI places a duty on any person who is in possession of any document, as

92 Section 50(2) of the MHSI.

93 Section 50(2)(b) of the MHSI specifically states that this "document" can include but is not limited to: "plan, book or record"; also see section 50(3) of the MHSI states that the MHSI may request any relevant person to appear before the inspector to be questioned.

94 Section 102 of the MHSI refers to the definition of an "owner" for the definition of an "employer". The definition of an "owner" is:
"(a) in relation to a mine, means –
(i) the holder of a prospecting permit or mining authorisation issued under the Mineral and Petroleum Resources Development Act;
(ii) if a prospecting permit or mining authorisation does not exist, the person for whom the activities contemplated in paragraph (b) of the definition of "mine" are undertaken, but excluding an independent contractor; or
(iii) if neither (i) or (ii) is applicable, the last person who worked the mine or that person's successor in title; and
(b) in relation to a works, means the person who is undertaking the activities contemplated in the definition of "works", but excluding an independent contractor."

95 Section 102 of the MHSI refers to the definition of an "employee" as meaning "any person who is employed or working at a mine".

contemplated in terms of the MSHA or the MPRDA, to produce such a document upon the inspector's request.

The MHSI is, furthermore, allowed to inspect the mine or workplace and may inspect any article, substance or machinery, any work performed or any condition.⁹⁶ The MHSI may also inspect the medical surveillance programme or arrangements in place.⁹⁷ Section 50(2)(h) of the MSHA allows the MHSI to "perform any other prescribed function" which may be regarded as a safety net to allow him/her to undertake the necessary measures in extraordinary circumstances.⁹⁸

Section 50 of the MSHA grants wide and discretionary powers to the MHSI.⁹⁹ These wide powers may have the potential to cause problems addressing hazard control in a cooperative manner.¹⁰⁰ Section 51 of the MSHA affords the MHSI the right to be accompanied by any person reasonably required to assist him in the execution of his/her duties.

When this section pertaining to the MHSI's powers and functions is critically analysed, it is already an indication of the wide powers granted to this body as one would expect that a search warrant would have to be obtained beforehand.¹⁰¹ Furthermore, it is noted that this section does not state the conditions under which the MHSI are permitted to enter a mine without a warrant, but it simply states that the MHSI are permitted to do so.¹⁰² Badenhorst¹⁰³ is of the opinion that the MHSI's powers to enter a mine without any notice or obtaining a warrant are, "draconic".¹⁰⁴

96 In terms of section 50(2)(e)(i)-(iii) of the MSHA which specifically states that the MHSI.

97 Section 50(2)(f) of the MSHA.

98 It must also be noted that section 50(2)(8) of the MSHA specifically excludes any home and residential quarters located on the mine from the definition of a mine for purposes of section 50.

99 Le Roux and Colyn 2011 *J S Afr I Min Metall* 544.

100 Bakker www.pmg.org.za.

101 Section 50(1)(b) of the MSHA confirms the magistrate's court's jurisdiction in issuing such a warrant.

102 Section 50(1)(a) of the MSHA authorises the inspector to enter a mine at any time without obtaining a warrant or issuing a notice. Section 50(1)(b) of the MSHA stipulates that for an inspector to enter any other place other than a mine, he/she would need to obtain a warrant in terms of section 50(7) of the MSHA. Section 50(7) of the MSHA states that a magistrate may issue a warrant for an inspector to enter any other place than a mine as contemplated in section 50(1)(b) of the MSHA only on written application by an inspector setting out under oath or affirmation the need to enter a place other than a mine to monitor or enforce compliance with the MSHA. The court in *Bert's Bricks (Pty) Ltd and Another v Inspector of Mines, North West Region and Others* 15347/2011 [2012] ZAGPPHC 6 (9 February 2012) confirmed this is the legal position.

103 Badenhorst 2014 *Without Prejudice* 6.

104 Badenhorst 2014 *Without Prejudice* 6.

The Chief Inspector of Mines regulates the MHSI.¹⁰⁵ The Minister appoints a Chief Inspector of Mines in terms of section 48. The Chief Inspector of Mines has certain functions as stipulated in section 49 of the MHSA and he/she is permitted to perform any function of the MHSI. The functions of the Chief Inspector of Mines are comprehensively listed in section 49.

The Chief Inspector of Mines has to ensure overall that the provisions of the Act are complied with and has to determine and implement policies to ensure any persons' health and safety on mines.¹⁰⁶ The Chief Inspector of Mines is also permitted to make certain appointments.¹⁰⁷ The Chief Inspector of Mines is also responsible for the issuing of guidelines and codes of practices,¹⁰⁸ to distribute information regarding health and safety on mines¹⁰⁹ and advise the Minister on health and safety matters arising on mines.¹¹⁰

The next part of this chapter focuses on the provisions of section 54 of the MHSA.¹¹¹

3.2 Section 54 of the Mine Health and Safety Act

Paragraph 3.1 dealt with the general duties and functions of the Chief Inspector of Mines and the MHSI. However, the MHSI are granted specific powers to deal with dangerous conditions in terms of section 54 of the MHSA. This part of the study will

105 It must be noted that section 102 of the MHSA makes provision for another key role player in the enforcement of mine health and safety legislation. The Principal Inspector of Mines is defined as: "the officer appointed by the Chief Inspector of Mines to be in charge of health and safety in any region established in terms of section 47(2)."

106 Section 49(1)(e) of the MHSA.

107 Section 49(1)(b) of the MHSA stipulates that the Chief Inspector of Mines has to appoint a medical inspector. Section 49(1)(c) of the MHSA determines that the Chief Inspector of Mines has to appoint inspectors. The Chief Inspector of Mines is also burdened with the overall administration of the MHSI in terms of section 49(1)(d) of the MHSA.

108 Section 49(1)(f) of the MHSA. It is worth noting that the Chief Inspector of Mines has issued Mine Health and Safety Inspectorate Guidelines, 2011 as will be discussed under paragraph 3.2.

109 Section 49(1)(g) of the MHSA.

110 Section 49(1)(h) of the MHSA.

111 It is necessary to provide a brief background to the meaning of certain terms and bodies which will be used during the course of this study. One of these terms is the tri-partheid institution. The concept of tri-partheid institutions is dealt with in terms of section 41 of the MHSA and the Chief Inspector of Mines bears the responsibility to lead the tri-partheid institutions. The MHSA also makes provision for the establishment of the Mine Health and Safety Council - section 41(1) of the MHSA. Also see section 41(2) of the MHSA which determines who may be part of this council) and Mining Qualifications Authority (section 41(3) of the MHSA). The Chief Inspector of Mines is also the Chairperson of the Boards of the Mine Health and Safety Council and the Mining Qualifications Authority (MQA) (Department of Mineral Resources www.dmr.gov.za); also see Masilo and Rautenbach *Understanding the Mine Health and Safety Act* 79.

focus on these special powers granted to the MHSI by analysing the relevant sections of the MHSA.

Section 54 states that when an inspector has "reason to believe" that certain conditions¹¹² exist on a mine that may endanger the health or safety of any person at the mine, the inspector may issue certain instructions. Before identifying these instructions, it is important to determine what the phrase "reason to believe" means as it is a prerequisite for the inspector to issue the instructions listed.¹¹³ The inspector must have reason to believe that certain circumstances exist prior to issuing any instruction.¹¹⁴ Le Roux¹¹⁵ questions whether this has to be determined from an objective or subjective perspective.¹¹⁶ In *Hurley v Minister of Law and Order*¹¹⁷ the court held that the phrase "reason to believe" means that reasonable grounds have to be determined objectively.¹¹⁸ The court referred to the English case of *Nakkuda Ali v M F De S Jayaratne*¹¹⁹ and held that for "reasonable grounds to believe" to exist, there must be facts which led the observer to have had reason to believe in the certain state of affairs.¹²⁰ The court's exact words were: "It is not sufficient that the official 'honestly thinks that there is a reasonable cause to believe.' A 'reasonable cause' must in fact exist."¹²¹ A reason to believe or reasonable cause to believe as referred to by the court, has to be determined objectively and an official does not have reasonable cause to believe simply when he claim so.¹²² In *Divisional Commissioner of SA Police v SA Associated Newspapers*¹²³ the court, in interpreting what constitutes "reasonable

112 Section 54(1) of the MHSA refers to these "conditions" as "any occurrence, practice or condition."

113 The importance of the meaning of this phrase will be relevant to the MHSI's application of section 54 as discussed later in the study. It is also worth noting that section 55 of the MHSA refers to the inspector having to have "reason to believe", but this section is dealt with later in the study.

114 Section 54 of the MHSA.

115 Le Roux and Colyn 2011 *J S Afr I Min Metall* 544.

116 As mentioned, the relevance of determining the meaning of "reason to believe" and how a court of law would interpret it, will become evident in the discussion of the application of section 54, see paragraph 3.2.

117 1985 2 All SA 559 (D) 559–574 at 569.

118 *Sigaba v Minister of Defence and Police and Another* 1980 3 SA 535 (TK); *Honey and Another v Minister of Police and Others* 1980 3 300 (TK); *Mbane v Minister of Justice and Others* 1982 1 SA 213 (TK).

119 1951 AC 66.

120 *Hurley and Another v Minister of Law and Order and Another* 1985 2 All SA 559 (D) 559–574 at 569.

121 1951 AC 66.

122 *Ndabeni v Minister of Law and Order* 1984 (3) 500 (D) where the court referred to the case of *Watson v Commissioner of Customs and Excise* 1960 (3) SA 212 (N).

123 1966 2 SA 503 (A).

grounds" held that "the power in question was circumscribed by the existence of reasonable grounds and was, therefore, not an unlimited discretion." The learned judge in *United Democratic Front and Another v Acting Chief Magistrate*¹²⁴ agreed with the court in *Sigaba v Minister of Defence and Police and Another*¹²⁵ that the test to determine whether a person had reason to believe certain facts exist, has to be an objective one. When reason to believe is objectively determined, it can be argued that the reasonable man test can come into play. The case of *Kruger v Coetzee*¹²⁶ is the flagship court case where the court interpreted the meaning of the reasonable man.

According to Le Roux and Colyn the inspector's reason to believe in terms of sections 54 of the MHSAs has to be determined objectively in order for a court of law to interpret it and determine whether such a belief is reasonable.¹²⁷ When this approach is followed, the court's argument in *Divisional Commissioner of SA Police v SA Associated Newspapers*¹²⁸ can be applied and that will mean the discretion granted to the MHSI in terms of sections 54 of the MHSAs is not absolute but dependant on the objectively observed facts that existed at the time the decision was made.

Based on this information, it has to be agreed with Le Roux and Colyn when they conclude that "the use of these words: 'reasonable cause' are intended to serve as an objective condition, limiting the exercise of an otherwise subjective arbitrary power."¹²⁹ It can furthermore, be said that the objective determination of facts are the only indicator as to whether the inspector acted reasonably. A subjective belief on the part of the official, in this case the inspector, will therefore not be adequate.

Section 55 of the MHSAs governs the MHSI's powers to order compliance and as such can be viewed as an alternative available to the MHSI as opposed to the issuing of an instruction in terms of section 55 of the MHSAs. Section 55 of the MHSAs stipulates that when an inspector has reason to believe that an employer has failed to comply with any provision of this act, the inspector may issue a written instruction to such an employer to take certain steps to rectify the non-compliance.

Section 55 of the MHSAs reads as follows:

124 1987 1 SA 413 (WLD).
125 1980 3 SA 535 (TK).
126 1966 2 SA 428 (A).
127 Le Roux and Colyn 2011 *J S Afr I Min Metall* 544.
128 1966 2 SA 503 (A).
129 Le Roux and Colyn 2011 *J S Afr I Min Metall* 545.

- (1) If an inspector has reason to believe that an employer has failed to comply with any provision of this Act, the inspector may instruct that employer in writing to take any steps that the inspector -
- (a) considers necessary to comply with the provision
 - (b) specifies in the instruction.
- (2) When issuing an instruction under subsection (1), an inspector must specify the period within which the specified steps must be taken. A period specified in an instruction may be extended by an inspector at any time by giving notice in writing to the person concerned.

Part one of section 55 of the MHPA states that when an inspector has reason to believe that the employer has failed to comply with any of the provisions of the MHPA, he/she can issue the employer with an instruction instructing the employer to take the necessary steps to rectify the non-compliance. Part two of the section stipulates the inspector may determine a time period which such rectification has to be done.¹³⁰ Such an instruction does not imply the closure of the entire mine or part thereof. It merely provides the inspector with the power to enforce compliance by issuing an instruction.¹³¹

The function entrusted to the MHSI in terms of section 54 of the MHPA constitutes an administrative action as defined in the *Promotion of Administrative Justice Act* 3 of 2000 (PAJA)¹³² and therefore all decisions made are subject to the principles of administrative law. Section 1 of the PAJA provides for the definition of "administrative action". The exercising of a power in terms of section 54 seems that a decision is made by an organ of state¹³³ while exercising a public power of performing a public function in terms of legislation such as the MHPA.¹³⁴ When the inspector exercises his/her "reason to believe" objectively the decision also has to be administratively fair.¹³⁵

130 Le Roux and Colyn 2011 *J S Afr I Min Metall* 543.

131 See Forms and Precedents – Health and Safety: *Interpreting the Mine Health and Safety Act* LexisNexis.

132 Le Roux and Colyn 2011 *J S Afr I Min Metall* 545.

133 Section 1(i) of the PAJA.

134 Section 1(i)(a)(ii) of the PAJA.

135 Section 3(1) of the PAJA determines that administrative action which "materially and adversely" affects the rights or legitimate expectations of any person must be procedurally fair and section 3(2)(a) states that a fair administrative procedure depends on the circumstances of each case. Section 3(2)(b) proceeds to set out the requirements for a procedure to be administratively fair and lists the following: (i) adequate notice of the nature and purpose of the proposed administrative action; (ii) a reasonable opportunity to make representations; (iii) a clear statement of the administrative action; (iv) adequate notice of any right of review or internal appeal, where applicable; and (v) adequate notice of the right to request reasons in terms of section 5.

When an inspector has reason to believe that certain conditions exist on the basis of reasonable objective grounds, an instruction in terms of section 54 may include:

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

The MHSI Enforcement Guidelines,¹³⁶ issued by the Chief Inspector of Mines, provide for a criteria for decision-making in enforcement and states that stakeholders have to be informed and educated on a continuous basis and the records of these sessions must be used to support any further enforcement measures when it can be proved that the employer or employee willingly ignored the instructions or advice provided during these information sessions.¹³⁷ Even then the inspector, according to these guidelines, has to provide reasons for his/her instruction and the Guidelines lists examples of such reasons, including but not limited to: failure to comply with terms and conditions of an exemption, permission or approval; repetitive and substantiated complaints relevant to the exemption, permission or approval by mine employees or the public, or dangerous occurrences, accidents or ill-health incidents relating to the exemption. Therefore, the guidelines makes it clear that the inspector ought to first approach and consult with the employer in question to provide guidance and information on health and safety issues (which may have been identified at the mine) and a record has to be kept of these information sessions. It appears that it is the intention of these guidelines that the inspector should, only after such sessions, issue the instruction when it becomes evident that the employer willingly disregarded the advice or instructions provided by the inspector. Therefore, the inspector has to take certain steps prior to issuing a section 54 stoppage order and should not simply proceed with the issuing of a section 54 stoppage order.

The instruction must be issued to an employer or a person designated by the employer or, in their absence, the most senior employee available at the mine to whom the

136 Department of Mineral Resources website: www.dmr.org.za; also see paragraph 3.3 in this regard as well as Chapter 4.

137 MHSI Enforcement Guideline (2011) 9, paragraph 7.2.

instruction can be issued.¹³⁸ Section 54(3) of the MHSA stipulates that an inspector has to issue the instruction in writing or orally, but in the case of an oral instruction, it has to be confirmed in writing and provided to the person at the earliest opportunity.¹³⁹ If the instruction was issued to a person other than the employer, the employer must be provided with a copy of the instruction as soon as possible.¹⁴⁰ An instruction issued by an inspector has to be either confirmed, carried or set aside by the Chief Inspector of Mines as soon as practicable. An instruction will remain valid from the date as determined by the inspector until it is set aside by the Chief Inspector of Mines or until such time as when the mine has complied with the instructions provided by the inspector.¹⁴¹ However, in terms of the *Draft Mine Health and Safety Bill* is that the function of the Chief Inspector to confirm, vary or set aside will be taken away from him and will befall the Principal Inspectors. This creates the impression that the powers of the Principal Inspectors (who operate in different regions and not provinces) will be even wider than it is currently and may result in more inconsistent issuing of section 54 stoppage orders. In other words, it is possible that more autonomy to the Principal Inspectors may lead to more frequent and less consistent execution of section 54 stoppages in the absence of a detailed guideline and a Chief Inspector who fulfil the duty to verify all instructions. The role of the Chief Inspector of Mines can be viewed as a control measure to ensure consistency.

Prior to the amendment of the MHSA in 2009¹⁴² an employer had the right to make representations to the Chief Inspector of Mines prior to the issuing of a section 54 stoppage order to close a mine or a part thereof. In 2009 this right was repealed.¹⁴³ This leaves the employer with only an appeal or review procedure to oppose an instruction. The effect of the 2009 amendment means that the employer is not afforded the opportunity to state his/her case prior to the issuing of the section 54 stoppage order and as such the *audi alteram partem*-rule is infringed. A decision made without having due regard to the *audi alteram partem* rule results in an invalid decision.¹⁴⁴ The

138 Section 54(2) of the MHSA.

139 Section 54(3) of the MHSA.

140 Section 54(4) of the MHSA.

141 Section 54(5)-(6) of the MHSA.

142 The MHSA was amended by the *Mine Health and Safety Amendment Act 74* of 2008 which came into force in 2009 as published in GN 428 in GG 32140 of 17 April 2009.

143 Section 54(9) and 54(10)¹⁴³ of the MHSA were deleted by section 17 of the *Mine Health and Safety Amendment Act 74* of 2008.

144 Malan 2005 SA *Public Law* 76.

court in *Administrator, Cape and Another v Ikapa Town Council*¹⁴⁵ held that the *audi alteram partem* rule is a principle of natural justice which is part of the administrative law and is based on fundamental fairness.¹⁴⁶ In *Everett v Minister of the Interior*¹⁴⁷ held that the legislator intended for the Minister to apply the *audi alteram partem*-rule "unless the clear intention of parliament negates and excludes the implication".¹⁴⁸ Thus, the impression is created that instead of addressing the current enforcement issues faced, the legislator is planning to limit the *audi alteram partem* –rule and that may possibly create more enforcement problems as it may result in more inconsistent issuing of section 54 stoppage orders.

Although the oversight function by the Chief Inspector of Mines is limited to section 54(1)(a)-instructions by an inspector that "operations at a mine be halted", it is not only these instructions that can cause a loss in production. This is best illustrated by an example: for instance, if an inspector was to issue that the use of all trackless mobile machinery (TMM's) on a mine would have to be suspended until all operators of these TMM's have been retrained on the pre-start procedure of such machines, it would also result in a stoppage of production.¹⁴⁹

When the *Draft Mine Health and Safety Bill* becomes effective, the employer will be left with the options of either approaching the Chief Inspector in terms of section 57 of the MSHA or to lodge an appeal in the Labour Court.¹⁵⁰ The employer is limited in the options available to exercise his/her right in terms of the *audi alteram partem* rule.

145 1990 2 SA 882 (AD).

146 1990 2 SA 882 (AD).

147 1981 3 All SA 146 (C).

148 The court also referred to the cases of *Publications Control Board v Central News Agency Ltd* 1970 3 SA 479 (A) at 489D and *Winter and Others v Administrator-in-Executive Committee and Another* 1973 1 SA 873 (A) at 889C).

149 Section 54(1)(b) of the MSHA determines that: "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".

150 Section 58 of the MSHA. It is also worth noting that for all compliance related issues regarding the MSHA the Magistrate's Court has jurisdiction (section 93 of the MSHA) and for all interpretational issues, the Labour Court has jurisdiction (section 58 of the MSHA).

3.3 Implementation of section 54 of the Mine Health and Safety Act 29 of 1996

The economic and social consequences of the implementation of section 54 stoppages have been discussed above.¹⁵¹ The legal consequences will be addressed in this section. The courts have dealt with the practical implementation of section 54 stoppages.

In the case of *Bert's Bricks (Pty) Ltd and Another v Inspector of Mines, North West Region and Others*¹⁵² (the *Bert's Bricks*-case) an application was brought to exclude the applicant's brick-making activities from the scope of the MHSA. Without dealing with the facts in detail, it is important to note that the applicant's business used to include clay mining activities but these activities were separated from the brick-making activities and therefore the applicant was of the opinion that the brick-making business was excluded from the MHSA.¹⁵³ After this restructuring of the business, inspectors from the Department of Mineral Resources visited the brick-making site and issued instructions in terms of section 54 of the MHSA.¹⁵⁴ The applicant, with the assistance of his legal representative made several written representations to the Department of Mineral Resources explaining the restructuring of the business and explaining the reason why the new, isolated brick making business does not fall under the scope of application in terms of the MHSA as it does not fit the definition provided for a "mine."¹⁵⁵ The applicant went so far as to provide the Department of Mineral Resources with a copy of a judgement delivered in the case of *Terra Bricks and Another v Regional Manager, Limpopo Region Department of Minerals and Energy and Others*¹⁵⁶ (the *Terra Bricks*-case) where the court specifically held that the MHSA did not apply to a brickyard as it was not a mine.¹⁵⁷

Nevertheless, inspectors from the Department of Mineral Resources issued Bert's Bricks with instructions in terms of section 54 of the MHSA on various occasions which

151 Chapter 2.

152 15347/2011) [2012] ZAGPPHC 11 (9 February 2012).

153 *Bert's Bricks (Pty) Ltd and Another v Inspector of Mines, North West Region and Others* 15347/2011) [2012] ZAGPPHC 11 (9 February 2012) [3].

154 *Bert's Bricks (Pty) Ltd and Another v Inspector of Mines, North West Region and Others* 15347/2011) [2012] ZAGPPHC 11 (9 February 2012) [10].

155 *Bert's Bricks (Pty) Ltd and Another v Inspector of Mines, North West Region and Others* 15347/2011) [2012] ZAGPPHC 11 (9 February 2012) [7].

156 TPD Case number 5246/05 delivered 12 April 2007.

157 *Bert's Bricks (Pty) Ltd and Another v Inspector of Mines, North West Region and Others* 15347/2011) [2012] ZAGPPHC 11 (9 February 2012) [7].

resulted in the closing of the brick-yard for two days and of course economic loss to the applicant.¹⁵⁸

During one of the visits by the inspectors to the applicant's brick-making business, two inspectors ordered the applicant and his business partner to make representations within one hour as to why all trackless mobile machinery should not be suspended after it was discovered that one of the forklifts' tread was damaged. The applicant again informed the inspectors that the brick-yard is no longer part of the mine and also brought the *Terra Bricks*-case under their attention. The applicant immediately informed the second respondent, the Principal Inspector of Mines, North West Region about the incident by means of a fax. The tread that was noted had also already been fixed.

The inspectors still proceeded and issued a section 54 stoppage in terms of which the operation of all trackless mobile machinery was suspended. The applicant complied with the conditions set out in the section 54 instruction and conducted a comprehensive inspection on the forklift in question as well as a complete audit on all trackless mobile machinery under their use. The results of this audit was communicated to the Chief Inspector of Mines via the applicant's attorney and the fact that the brick-yard was not a mine was mentioned again. The inspectors were requested to withdraw the section 54 stoppage order based on the fact that it was issued incorrectly in the first place. The applicant did not receive an answer in this regard. As a result, the operations of the brick-yard were halted for a period of four days. The court compared the brick-yard's activities to the definitions provided for a "mine" and "mining area" as per the MHSA and concluded that the brick-yard did not fall within the ambit of these definitions and was not a mine.

The court also interpreted what is meant by the fact that an inspector has to have "reason to believe" as contemplated by section 54 of the MHSA and held that it means the following:¹⁵⁹

(1) Objectively, a state of affairs must exist which would lead a reasonable person to believe that it may endanger the health or safety of any person at the mine;

158 *Bert's Bricks (Pty) Ltd and Another v Inspector of Mines, North West Region and Others* 15347/2011) [2012] ZAGPPHC 11 (9 February 2012) [7].

159 *Bert's Bricks (Pty) Ltd and Another v Inspector of Mines, North West Region and Others* 15347/2011) [2012] ZAGPPHC 11 (9 February 2012) [10].

(2) The inspector may only give an instruction which is necessary to protect the health or safety of that person.

The court found that none of these two inspectors applied their minds to the matter in a proper manner and went as far as stating this litigation was an absolute waste of the tax payer's money and the court's time. The court made an order and declared that the provisions of the MHSA do not apply to the operations of the applicant and that the inspectors are liable to pay their legal and all other wasted costs.¹⁶⁰ The judge mentioned that if the applicants had asked for it, he would have granted the cost order against the inspectors in their personal capacity.

The *Bert's Bricks*–case is one of the first cases of its nature in essence brought against the MHSI's abuse of power in terms of section 54 of the MHSA and it is noticeable that the court also interpreted the meaning of "reason to believe". As discussed earlier, it is important to determine the meaning of this phrase and how the courts interpret it as it is the crucial factor to determine whether the inspector has acted reasonably in a particular matter taking into consideration the circumstances that existed during the decision made by him/her. The *Bert's Bricks*–case indicates the court's attitude towards the gross abuse of power of the MHSI in that the judge was willing to grant the cost order against the inspectors in their personal capacity.

Another pioneer case in the court's interpretation of the MHSI's powers in terms of section 54 of the MHSA is that of *Northam Platinum Mine v The Department of Mineral Resources*¹⁶¹ (the *Northam Platinum*–case). The *Northam Platinum*–case was an urgent interdict brought against the Department of Mineral Resources in the Labour Court in order to have as section 54 stoppage order issued to its Zondereinde Mine declared invalid. The court preliminary ruled in Northam Platinum's favour and ordered the Department of Mineral Resources to submit replying affidavits before the 27 March 2012. What makes this ruling so significant is the rarity thereof and emphasises the mining industry's frustration with the irregular issuing of section 54 stoppage orders. The court was not approached again by the Department and the section 54 stoppage order

160 *Bert's Bricks (Pty) Ltd and Another v Inspector of Mines, North West Region and Others* 15347/2011) [2012] ZAGPPHC 11 (9 February 2012) [13].

161 Unreported case – 11 March 2012 Labour Court.

remained withdrawn. It is not clear exactly what the developments were after this preliminary ruling and it appears that the parties have settled this matter outside of court.

The *Northam Platinum*–case was heard in the midst of the Department of Mineral Resources having appointed a task team¹⁶² to investigate the alleged inconsistent application of section 54 stoppage orders on mines in South Africa.¹⁶³ The reason for this is most probably the mining industry's frustration with the slow, if any, progress that has been made with successful and constructive communication to the Department of Mineral Resources in an attempt to find a solution to the issue of section 54 stoppages.¹⁶⁴

A press conference was held on 20 March 2012 following these cases, led by the (previous) Minister of Mineral Resources, Ms Susan Shabangu (hereinafter referred to as "the Minister") to discuss the pressing matter of section 54 stoppages and the issue was raised that the improper application of section 54 stoppages can actually create unsafe situations or undermine safety.¹⁶⁵ The Minister stressed that the provisions of section 54 do not have the intention to render the mining industry unsafe or to cause unsafe conditions on mines.¹⁶⁶

During this conference Mr David Msiza, the Chief Inspector of Mines differentiated between the *Bert's Bricks*–case and the *Northam Platinum*–case and said that the issue of concern in the *Bert's Bricks*–case was one of interpretation of the definition of the term "mine" and, furthermore, added that the Department of Mineral Resources plan to review such definition.¹⁶⁷ This statement raises the question on whether the Department of Mineral Resources is of the opinion that the problem with the *Bert's Bricks*–case is the definition of the term "mine" and not the inspectors' incorrect application of section 54 stoppage which constituted a gross abuse of power. One would think the fact that the court actually considered the award of costs of the case against the said

162 Minister Susan Shabangu appointed a task team consisting of industry, labour and government representatives to investigate the alleged unfair and inconsistent application of section 54 stoppage orders.

163 At the time of the application by Northam Platinum, this task team had not yet completed their investigation and report.

164 Anon 2009 www.miningmx.com.

165 Mining Weekly www.miningweekly.com.

166 Mining Weekly www.miningweekly.com.

167 Mining Weekly www.miningweekly.com.

inspectors in their personal capacity, is indicative of the court's attitude towards the inspectors unacceptable behaviour.

The CEO of the Chamber of Mines, Mr Bheki Sibiyi, stated that the Chamber of Mines fully understood Northam Platinum's position but it preferred to follow the outcome of the investigation by the task team which has been appointed to look into this matter.¹⁶⁸ Not much insight was provided during this conference on the Department of Mineral Resources' action plan or planned steps to either review the provisions of section 54 of the MSHA or the application thereof by the MHSI. Reference was made to the task team which had been established to look into the matter of section 54 stoppages. The minister defended the Department of Mineral Resources' tough action against the mining industry and stated that it has had the results they have hoped for.¹⁶⁹ However, the statistics discussed in Chapter 2 pertaining to economic losses suffered by the mining industry as a result of section 54 stoppage orders, is clearly indicative of a problem with either section 54 of the MSHA or the practical implementation thereof. The Minister admitted that although section 54 of the MSHA has had the desired results, the implementation thereof by the MHSI still raises concerns.¹⁷⁰ As such, it can be agreed with the Minister that the wording of section 54 never had the intention to render the mining industry unsafe as the mere wording thereof has as its goal to improve safety on mines and that it has a positive effect in that it played a role in the declining of deaths on mines. The inconsistency in the application of the orders, however, results in frustration and production loss and may affect the environment, see Chapter 2.

AngloGold Ashanti Chairperson and former South African Reserve Bank Governor, Tito Mboweni, accused the Department of Mineral Resources of following a "sledgehammer approach" with section 54 stoppages and also stated that the department is "regulating the industry to death."¹⁷¹

168 Janse van Rensburg 2012 www.miningmx.com.

169 Janse van Rensburg 2012 www.miningmx.com.

170 Janse van Rensburg 2012 www.miningmx.com.

171 Mining Weekly www.miningweekly.com: "The trade union UASA acknowledges that section 54 of the MSHA has saved many lives in the mining sector, it is too often the case that an entire mine's operations are halted when an unsafe incident occurred at one specific workplace or plant. UASA is the Union Association of South Africa and is a registered at the Department of Labour as a trade union in accordance with the *Labour Relations Act* 66 of 1995 as amended in 2002." A trade union is an organisation that represents the interests of employees. The focal

3.4 Other Mine Health and Safety Act Enforcement Measures and Guidelines

The Department of Mineral Resources issued an Enforcement Guideline¹⁷² (hereinafter referred to as the guideline) which has been in effect since 1 April 2011.¹⁷³ This Guideline has as its goal to provide guidelines to the MHSI with regards the enforcement of health and safety legislation on mines to achieve this balance between enforcing legislation and exercising its discretion in a fair manner. This guideline confirms the importance of enforcement and describes it as a tool to control and regulate activities and ensuring compliance on all mines, but it also emphasises the fact that the practical implementation of enforcement has to be done "on the basis of a careful assessment of circumstances and in line with the department's enforcement approach, as well as that the discretion is used in a fair and reasonable manner."¹⁷⁴ In its introduction, this Guideline emphasises that enforcement is key to health and safety on mines, but the management thereof has to be done in the correct manner. The Guideline lists the principles of enforcement which are applicable during the decision-making process of the MHSI.¹⁷⁵

This first principle, namely that the decision has to be objective, ties in with the argument and discussion earlier on the interpretation of "reason to believe"¹⁷⁶ and provides a clear answer to this possible grey area. The decision made by the MHSI has to be based on "clear outcomes" and has to be made on "reliable evidence". This implies that the set of facts or circumstances that exist, had to guide the inspector to reach a certain conclusion pertaining to the safety compliance level of a certain condition on a mine and lead t to make a decision in terms of the powers vested in him/her. As such, the "reason to believe", specifically referred to in terms of section 54

points of UASA are employment and income, two aspects which cover a very broad area. Equality, solidarity, freedom of speech, justice and sustainability are UASA's core principles www.uasa.co.za.

172 Department of Mineral Resources website: www.dmr.org.za.

173 This Enforcement Guideline is undersigned by the Chief Inspector of Mines, Mr. David Msiza. It is worth it to note that although the Chief Inspector is required in terms of section 49(6) of the MHSa to issue guidelines by notice in the *Government Gazette*, this guideline was not gazetted and is only available on the Department of Mineral Resources' website.

174 Mine Health and Safety Inspectorate: 2011 Enforcement Guideline 2.

175 Mine Health and Safety Inspectorate: 2011 Enforcement Guideline 3.

176 See discussion and court cases as discussed under paragraph 3.2.

of the MHSA, will have to be objectively reasonable to justify any decision made by the inspector.

The second principle listed¹⁷⁷ is that the enforcement action has to be proportional and responsive in relation to the risk and potential impact. As discussed under paragraph 3.3 above, there are instances noted where the MHSI would close down the entire mine's operations when the unsafe incident took place in an isolated area or shaft. In instances such as these, the section 54 stoppage order may not be proportional to the risk or potential impact.

The third principle states¹⁷⁸ that the process followed has to be clear and transparent to all stakeholders and they should understand what steps have to be followed to rectify the situation and become compliant. The fourth principle¹⁷⁹ ties in with this principle and determines that the enforcement action has to be consistent, impartial and non-discriminatory. The enforcement actions should result in similar outcomes under similar conditions. The issuing of section 54 stoppage orders has proved to be inconsistent at times as was also the case in the *Northam Platinum*-case wherein the court actually suspended the section 54 stoppage order temporarily.¹⁸⁰

The fifth principle¹⁸¹ relates to targeting, and states that the enforcement action has to be directed at the parties whose activities cause significant risk or serious harm to health and safety. In this instance, the *Bert's Bricks*-case can be mentioned as an example where a section 54 stoppage order was issued to close the entire brick-making operation for the fact that a singular forklift's treads were damaged.¹⁸² This was other than the fact that the MHSI did not have the authority to issue such an order as the operation is not a mine. This fault noted did not pose a serious or severe harm to the health and safety of the entire operation. When measuring the said principles with the facts of the *Bert's Bricks*-case, it seems clear that the principle of consistency was absent and the inspectors did not have due regard to the Guideline.

The sixth principle¹⁸³ "due process" confirms that the principles of administrative justice are applicable to the enforcement process. This confirms that the decision

177 Mine Health and Safety Inspectorate: 2011 Enforcement Guideline 3.

178 MHSI: 2011 Enforcement Guideline 3.

179 MHSI: 2011 Enforcement Guideline 3.

180 See discussion under paragraph 3.3.

181 MHSI: 2011 Enforcement Guideline 3.

182 See discussion under paragraph 3.3.

183 MHSI: 2011 Enforcement Guideline 3.

made by an inspector constitutes an administrative action and that PAJA applies.¹⁸⁴ The seventh principle¹⁸⁵ is accountability and states that the MHSI is accountable to government and the public for its actions. When considering the significant economic losses suffered as a result of the implementation of section 54 stoppage orders as discussed,¹⁸⁶ the incorrect and inconsistent issuing of such orders affect the broader public and as such the MHSI has to be held accountable to ensure the correct and fair enforcement of health and safety legislation on mines. The eighth and last principle¹⁸⁷ is "policy compatibility" and states that the enforcement has to be compatible with other government policies and statutory requirements.

The Guideline explains the hierarchy of enforcement by means of an illustration which indicates the enforcement steps to be taken.¹⁸⁸ The first step is "information and education" and entails general creating of awareness and to educate employees on the risks posed by their activities and operations and the control measures to be implemented to eliminate or mitigate the risks.¹⁸⁹ The next enforcement level identified is the withdrawal of exemption, permission or approval in terms of the MHSA provided that an exemption was issued in the first place.¹⁹⁰ The next enforcement level is of importance for purposes of this study in identifying alternatives to the issuing of section 54 stoppage orders. This enforcement level is the issuing of notices in terms of section 54 or 55 of the MHSA.¹⁹¹ When comparing the cases as discussed earlier where an entire mine was closed for the content of the first aid box being found faulty, or the facts of the *Bert's Bricks*-case as discussed, the issuing of a section 54 stoppage order in these cases were disproportional to the risk identified. These cases are perfect examples of where a section 55-notice of instruction to comply would have been a viable alternative option to be considered by the inspectors.

The next enforcement level, as indicated by the guideline is an administrative fine followed by prosecution if applicable. Section 55A of the MHSA determines that an inspector has the power to recommend a fine to the employer if such employer has

184 Le Roux and Colyn 2011 *J S Afr I Min Metall* 545.

185 MHSI: 2011 Enforcement Guideline 4.

186 See the discussion under paragraph 2.2.

187 MHSI: 2011 Enforcement Guideline 4.

188 MHSI: 2011 Enforcement Guideline 5.

189 MHSI: 2011 Enforcement Guideline 6.

190 For a discussion on this step refer to the Mine Health and Safety Inspectorate: 2011 Enforcement Guideline 6.

191 Refer to paragraph 3.2 for a discussion on the provisions of section 55 of the MHSA.

failed to comply with any provision of the MHSA.¹⁹² The inspector who considers to issue this fine may make a recommendation to the Principal Inspector that a fine be imposed and then the Principal Inspector, after considering the recommendation and any representations made by the employer, may either impose the fine or refer the matter to the prosecuting authority.¹⁹³ This Guideline however states that section 55G of the MHSA that used to deal with a guideline on the issues of administrative fines was repealed.¹⁹⁴ The last two enforcement levels mentioned in the Guideline is the suspension of a competency certificate and the suspension or cancellation of the mining licence.¹⁹⁵ The Guideline refers to the suspension or cancellation of a mining right and refers to the MPRDA, but does not stipulate whether this action will be taken after prosecution, or as a last resort. Section 51 of the MPRDA addresses optimal mining of mineral resources and stipulates that the Minister may suspend or cancel a mining right if the owner of the right is non-compliant with the mining work programme or when mining is undertaken in a manner which undermines the objectives of the MPRDA as set out in section 2.¹⁹⁶

192 Section 91(1B).

193 These representations by the employer regarding administrative fines to the Principal Inspector must not be confused with the representations made to the Chief Inspector in terms of section 54 stoppages as discussed under paragraph 3.1. Currently an employer can still make representations to the Chief Inspector regarding section 54 stoppages, but in terms of the *Draft Mine Health and Safety Bill*, the planned changes are to replace these representations to be made to the Principal Inspector instead. The representations to the Principal Inspector regarding administrative fines, however, remains the same as the current position and are there currently no planned changes to that in terms of the *Draft Mine Health and Safety Bill*.

194 Section 55G of the MHSA was repealed by section 20 of the *Mine Health and Safety Amendment Act 74* of 2008. For a further discussion on administrative fines in terms of the MHSA refer to Brink Cohen Le Roux 'Administrative fines in terms of the Mine Health and Safety Act No. 29 of 1996' http://bclr.com/admin_fines_mhs.htm.

195 MHSI: 2011 Enforcement Guideline 8.

196 The objectives of the MPRDA as contemplated in section 2 are:

- "(a) recognise the internationally accepted right of the State to exercise sovereignty over all the mineral and petroleum resources within the Republic;
- (b) give effect to the principle of the State's custodianship of the nation's mineral and petroleum resources;
- (c) promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa;
- (d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;
- (e) promote economic growth and mineral and petroleum resources development in the Republic, particularly development of downstream industries through provision of feedstock, and development of mining and petroleum inputs industries;
- (f) promote employment and advance the social and economic welfare of all South Africans;
- (g) provide for security of tenure in respect of prospecting, exploration, mining and production operations;

The importance of the discussion of this model of enforcement levels for purposes of this study lies in the demonstration of the hierarchy of enforcement to indicate that the issuing of section 54 stoppage orders are not the only option available to an inspector who has reason to believe that unsafe conditions exist or a provision of the MHSa has been violated. The fact that the enforcement levels are illustrated by means of a hierarchy shows that different steps have to be considered by the inspector prior to issuing a section 54 stoppage order.

The Guideline, furthermore, explains the criteria the inspector has to consider to reach a conclusion and in order for the inspector to decide which enforcement level is applicable to a specific case. The Guideline specifically states that the inspector ought to make use of his/her powers in terms of section 55 of the MHSa where instances do not pose an immediate danger and he/she has to consider which provisions the mine has not complied with, what remedial steps should be taken and in what period of time these remedial steps have to be undertaken.¹⁹⁷

The Guideline lists the purpose of halting operations on a mine and provides a detailed list which has as its aim to identify the risks by conducting a risk assessment and implementing corrective actions or control measures to mitigate the risks posed to employees.¹⁹⁸ The legislator's intention with the issuing of section 54 stoppage orders is clearly to isolate the areas identified to be unsafe to protect mine employees. As rightfully mentioned by the Minister of Mineral Resources during the media conference on section 54 stoppage orders, it is not the intention of section 54 of the MHSa to render the mines unsafe. It is arguable that it was not the intention to cause the enormous economic losses it has as discussed earlier. Based on this, it can be concluded that the essence of section 54 is to ensure and enforce health and safety on mines by compliance with the relevant legislative provisions. It is however the lack of correct and consistent practical implementation thereof which is to blame for the losses caused and section 54 in itself being blamed for.

(h) give effect to section 24 of the *Constitution* by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development; and
(i) ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating."

197 MHSI: 2011 Enforcement Guideline 10.

198 MHSI: 2011 Enforcement Guideline 11.

The Department of Mineral Resources acknowledged that the industry's concerns carried weight and, therefore, a task team, referred to as the Mining Industry Growth, Development and Employment Task Team (MIGDETT) has been tasked to look into the allegations of the improper and inconsistent application of section 54 stoppages in the mining industry as a result of the many complaints received from various mining companies.¹⁹⁹ This task team consisted of representatives from the South African government, the mining industry and organised labour.²⁰⁰ MIGDETT has completed its investigation and has come up with several recommendations that will be discussed under this paragraph. It was stressed by the Chief Inspector of Mines, David Msiza, that it was not the intention of this task team to change the law²⁰¹ but rather to conduct an investigation on the implementation and application of section 54 of the MHS Act. The Department of Mineral Resources has committed itself to work through MIGDETT²⁰² and the Mine Health and Safety Council to improve the application of section 54 stoppages.²⁰³

MIGDETT completed its investigation and certain recommendations were made to the Minister.²⁰⁴ These recommendations have been incorporated by the Mine Health and Safety Council with the assistance of an independent facilitator.²⁰⁵ The recommendations made by MIGDETT has as its aim to prevent unnecessary production loss due to the issuing of section 54 stoppages and will be discussed under paragraph 3.4.

The former Chief Inspector of Mines, May Hermanus has been appointed as an independent expert to assist in the implementation of MIGDETT's recommendations.²⁰⁶ It has also been agreed that the Mine Health and Safety Council would be responsible to ensure the process of implementation is done.²⁰⁷ No

199 All the major platinum mining groups in South Africa has reported steep production loss due to the sharp increase of section 54 stoppage orders: Mining MX Ryan B 2012 www.miningmx.com.

200 McKay Mining MX 2012 www.miningmx.com.

201 McKay Mining MX 2012 www.miningmx.com.

202 MIGDETT was originally established in 2008 to assist the mining industry to deal with the negative impacts created by the global economic crisis: SabinetLaw 2012 www.sabinetlaw.co.za.

203 Mining Weekly www.miningweekly.com.

204 SabinetLaw 2012 www.sabinetlaw.co.za.

205 Presentation to Parliament Portfolio Committee on Inspectorate 2011/12 Annual Report 7 November 2012 Department of Mineral Resources.

206 Mining MX www.miningmx.com.

207 Mining MX www.miningmx.com.

documented evidence is available to demonstrate the implementation of the recommendations made by MIGDETT in their report.

The recommendations made by MIGDETT include the following:²⁰⁸

- Workshops to be held with the mining industry on the application of the Enforcement Guideline;²⁰⁹
- Enforcement Guideline to be reviewed as agreed at the summit in 2011;²¹⁰
- The Inspectorate to be trained on an ongoing basis to be aligned with revised Enforcement Guideline (when it is reviewed as mentioned in the previous point) – inspectors must be clear on procedures to stop operations;
- A relation-building exercise to be held between managers and regional MHSI officers – initially in the North West, Free State and Gauteng provinces – regional tripartite forums;
- Section 54 instructions to be a standing agenda item at Mine Health and Safety Council Board meetings;
- Joint stakeholders' workshop to be held from time to time in order to determine whether section 54 instructions have been implemented;
- Task team findings to be communicated to the public via media statement by all parties;
- Undertake an awareness campaign of section 54 instructions amongst general mine workers.

4. Possible Solutions

4.1 Occupational Health and Safety Act

The OHSA contains similar provisions than the MHSA regarding the establishment of an inspectorate. Section 28 of the OHSA determines the designation of inspectors by the Minister of Labour and section 29 of the OHSA lists these inspectors' (inspectors in terms of the OHSA tasked to enforce compliance with the OHSA in workplaces other than mines)²¹¹ functions. These sections of the OHSA are similar to section 47 of the MHSA (establishment of the MHSI) and section 50 of the MHSA (powers of the

208 SabinetLaw www.sabinetlaw.co.za and Media Statement issued by the Department of Mineral Resources 9 July 2012 "Department of Mineral Resources (DMR) and MIGDETT Stakeholders adopt recommendations on section 54 notices". This is directly quoted from the Media Statement issued by the Department of Mineral Resources.

209 The Enforcement Guideline mentioned here will be discussed in detail in Chapter 4 of this paper, also refer to paragraph 3.2 in this regard.

210 There are currently no documented evidence available which indicates that the Enforcement Guideline was reviewed.

211 Refer to discussion under paragraph 1 for the differentiation between the MHSA and the OHSA and its applicability.

MHSI).²¹² The OHSA makes provision for the special powers of the inspectorate to deal with any unsafe conditions in a workplace.²¹³ Section 30 of the OHSA is twofold and deals with both the inspectorate's powers to deal with an unsafe situation and with the inspectorate's powers to direct compliance.²¹⁴ The first part of section 30 of the OHSA grants the inspector special powers to deal with dangerous conditions and permits the inspector to prohibit a person from conducting a specific act when in the opinion of the inspector the performance of that act threatens or is likely to threaten the health or safety of any person.²¹⁵ Section 30 of the OHSA also permits the inspector to (a) issue other orders which include a written prohibition notice to prohibit the use of a specific plant or machinery, (b) to prevent a person from exposing other persons to any circumstances that may threaten such a person's health and safety or (c) to block or barricade a specific area identified as unsafe.²¹⁶ Secondly, section 30 of the OHSA deals with the inspector's powers to direct compliance; where the provisions of this part of section 30 of the OHSA is similar to the provisions of section 55 of the MHSI. In terms of these powers to order compliance, the inspector instructs the employer to take certain steps to safeguard a specific situation identified as being unsafe and also to affix a time period wherein such steps have to be taken by the employer.

The Department of Labour has drafted an Enforcement Manual for Inspectors, 2011²¹⁷ (hereinafter referred to as the Enforcement Manual). The goal of this Enforcement Manual is to standardise and simplify the Department of Labour's policy to deal with the issuing of exemptions, complaints received, issuing of notices and special powers of inspectors.²¹⁸

This Enforcement Manual (2011) distinguishes between the prohibition notice, an improvement notice and a contravention notice.²¹⁹ The first type of notice, a prohibition notice can be divided into three types of prohibition notices; in terms of section 30(1)(a) of the OHSA an inspector may issue a prohibition notice regarding acts which threaten the health or safety of a person. The second type of prohibition notice that

212 See paragraph 3.1 in this regard.

213 Section 30 of the OHSA.

214 Le Roux and Colyn 2011 *J S Afr I Min Metall* 543 - 544.

215 Le Roux and Colyn 2011 *J S Afr I Min Metall* 543.

216 Le Roux and Colyn 2011 *J S Afr I Min Metall* 543.

217 Available at the Department of Labour's website: www.dol.gov.za.

218 Department of Labour Enforcement Manual for Inspectors, 2011 82.

219 Department of Labour Enforcement Manual for Inspectors, 2011 84-87.

may be issued is relates to machinery that poses a threat to a person's health or safety who uses the machinery.²²⁰ The third type of prohibition deals with the conditions aimed specifically at protecting the employee.²²¹ A very important remark made under this part of the Enforcement Manual (2011) states that: "Inspectors must not serve prohibition notices lightly and without restriction as prohibition notices can have serious financial implications for the employer or user."²²² This requirement places an obligation on the inspector to consider the situation more carefully before issuing such a prohibition notice. ²²³ This is in stark contrast to the practice of issuing section 54 stoppage orders where closure costs the mining industry economic losses.²²⁴ The Enforcement Manual on the other hand expressively makes provision and urges inspectors to issue prohibition notices in terms of the OHSA with the necessary care. The Enforcement Manual, furthermore, stipulates that the inspector has to be sure that the danger to the health or safety of persons has to be immediate before he/she issues a prohibition notice.²²⁵

An improvement notice²²⁶ should be issued when (a) there is a threat to the health or safety of employees regarding the use of plant or machinery and the employer either refuses or fails to implement adequate steps to ensure the safety of thereof, or (b) there is a directive from head office relating to such a threat. The inspector provides the employer with a time period within which he/she has to comply with the instruction issued by the inspector; whereafter, if the employer fails to comply in time, the inspector must recommend prosecution.²²⁷ The Enforcement Manual states that when the unsafe condition identified by the inspector appears to be so unsafe that an immediate danger exists, then a prohibition notice has to be served instead of an improvement notice.²²⁸

220 Section 30(1)(b) of the OHSA.

221 Section 30(1)(c) of the OHSA.

222 Department of Labour Enforcement Manual for Inspectors, 2011 85.

223 For a discussion on section 54 stoppages refer to paragraph 3.2.

224 See paragraph 2.1 in this regard.

225 Department of Labour Enforcement Manual for Inspectors, 2011 85; also note section 54 stoppage orders have often been issued in the mining industry to situations where no employee's safety or health was at risk or only a part of the mine was affected but the entire mine was closed with a section 54 stoppage order.

226 Section 30(3) of the *Occupational Health and Safety Act* 85 of 1993.

227 Department of Labour Enforcement Manual for Inspectors, 2011 86.

228 Department of Labour Enforcement Manual for Inspectors, 2011 86.

The third and last type of notice that an inspector can issue to enforce compliance with the OHSA is a contravention notice.²²⁹ A contravention notice should be issued to an employer or user of plant or machinery who does not comply with the applicable provision of regulation of the OHSA. The Enforcement Manual provides assistance to the employer and makes provision for a reminder notice to be sent by the inspector in the case where a contravention, or improvement notice has been issued, 60 days after the date that appears on the notice.²³⁰

The intention of the issuing of these different types of notices as dealt with by the Enforcement Manual is to guide and assist the industry to achieve a workplace that is not harmful to employees' health or safety. The main aim and priority of the inspectors is to ensure compliance in the interest of health and safety in the workplace.

The lack of the possibility of the employer to make representations after section 54 stoppage order²³¹ has been issued is in stark contrast to the options available in terms of the OHSA as explained in the Enforcement Manual. This means a limitation is placed on the exercising of the *audi alteram partem*-rule. In this regard, the Enforcement Manual provides guidelines for inspectors to enforce legal compliance in terms of the OHSA and clearly not only has the interest of health and safety of employees at heart, but also to assist the industry and to exercise their powers in such a manner that it does not cause economic harm to the industry.

From the analysis and comparison between the MHSA and its Enforcement Guidelines and the OHSA and its Enforcement Manual it becomes clear that the Department of Labour assists the employer who is not complying to achieve compliance at the earliest possible time. The inconsistent and often unfair issuing of section 54 stoppage orders on the other hand creates the impression that the officials from the Department of Mineral Resources responsible for the enforcement of mine health and safety legislation, does not have co-operation between the Department of Mineral Resources and the employers as its aim. The next paragraph of Chapter 4 analyses the enforcement of the NEMA in an attempt to compare the enforcement with that of the MHSA. The goal is to identify the differences in practice to find possible solutions to the inconsistent issuing of section 54 stoppage orders.

229 Section 30(3) of the *Occupational Health and Safety Act* 85 of 1993.

230 Department of Labour Enforcement Manual for Inspectors, 2011 86.

231 See the discussion under paragraph 3.2.

4.2 National Environmental Management Act

The NEMA is best described as framework legislation that governs environmental law in South Africa.²³² The origin of the NEMA, as its preamble states, lies in section 24 of the *Constitution*²³³ which states that everyone has the right to an environment that is not harmful to their health and well-being.²³⁴ Section 2 of the NEMA sets out the national environmental management principles²³⁵ of the Republic of South Africa and binds all organs of state. The court in *Bareki NO v Gencor Ltd*²³⁶ confirmed the court's duty to interpret NEMA in such a way that it will promote the spirit, purport and objectives of the Bill of Rights.²³⁷ The inspectors will have to take these principles²³⁸ into account in their decision-making.²³⁹

Part 2 of Chapter 7 of the NEMA governs the enforcement of the provisions of the NEMA and all other specific environmental laws (specific environmental management laws referred to as SEMA's).²⁴⁰ There are different sections of the NEMA that makes provision for the appointment of different types of inspectors: Section 31B of the NEMA determines the designation of environmental management inspectors by the Minister of Environmental Affairs. Section 31BA of the NEMA provides for the designation of environmental management inspectors by the Minister responsible for water affairs and section 31BB of the NEMA deals with the designation of environmental mineral

232 Kidd *Environmental Law* 35.

233 1996.

234 Section 24(a) of the *Constitution*, 1996.

235 For a discussion on the environmental management principles, also see Glazewski *Environmental Law in South Africa* 167.

236 2006 1 SA 432 (T).

237 Du Plessis and Kotzé 2007 *Stell LR* 165.

238 For more information regarding the environmental principles, the reader is referred to Strydom and King (eds) *Fuggle and Rabie's Environment Management* 198; Nel and Du Plessis 2004 *SA Public Law* 186; Murombo 2008 *South Africa Law Journal* 493-494.

239 Section 2 of the NEMA stipulates the environmental principles that have to be taken into consideration. For purposes of the enforcement of health and safety legislation on mines, the inspectors will have to take these principles into consideration in their decision-making process. The following principles will especially be of importance: section 2(4)(b) stipulates that environmental management should be integrated in such a manner, taking into account the environment and all people to ensure the selection of the best practicable environmental option; section 2(4)(e) states that responsibility for the health and safety consequences of, amongst others, a process or service have to exist throughout the life cycle; section 2(4)(g) states that decision-making must take into account the interests, needs and values of all interested and affected parties; section 2(4)(i) stipulates that the social, economic and environmental impacts of activities must be considered and, assessed and evaluated and in terms of section 2(4)(k) decisions have to be taken in an open and transparent manner.

240 NEMA is seen as framework environmental legislation and sets out the principles pertaining to environmental management. For a discussion on the SEMAs also see Paterson and Kotzé (eds) *Environmental Compliance and Enforcement in South Africa* 88.

resource inspectors by the Minister responsible for mineral resources and section 31C for the designation of environmental management inspectors by the MEC in the provincial sphere. Section 31D(3) of the NEMA states that the appointed environmental management inspector and an environmental mineral resource inspector may exercise all the powers granted to environmental management inspectors in terms of the NEMA.²⁴¹

The functions of the inspectors that can be appointed in terms of the NEMA are listed in terms of section 31G of the NEMA and their general powers are governed by section 31H of the NEMA.²⁴² These powers are very comprehensive and includes the power to question persons regarding noted non-compliances,²⁴³ the issuing of written notices to persons who refuse to answer such questions instructing the person to answer,²⁴⁴ the inspection of questioning of a person regarding a document,²⁴⁵ and the making of copies of documents.²⁴⁶ Important powers granted to an environmental management inspector is that he/she is regarded as a peace officer as contemplated in terms of the *Criminal Procedure Act 51 of 1977*²⁴⁷ and that he/she may exercise any power granted to a peace officer for purposes of enforcing compliance with his/her mandate and within his/her assigned jurisdiction.²⁴⁸ Section 31I of the NEMA permits the environmental management inspectors to seize certain items under certain circumstances. Section 31J of the NEMA grants the environmental management inspectors the power to stop, enter and search vehicles, vessels²⁴⁹ and aircraft.²⁵⁰ Other than being regarded as a peace officer, the powers granted to these

241 The Environmental Management inspectorate is commonly known as the Green Scorpions (see the Department of Environmental Affairs website: www.environment.gov.za/mediarelease/necer_201213).

242 Also see Paterson and Kotzé (eds) *Environmental Compliance and Enforcement in South Africa* 89.

243 Section 31H(1)(a)(i)-(iii).

244 Section 31H(1)(b).

245 Section 31H(1)(c).

246 Section 31H(1)(d).

247 Section 1 of the *Criminal Procedure Act 51 of 1977* defines a "peace officer" as follows: any magistrate, justice, police official, correctional official as defined in section 1 of the Correctional Services Act, 1959 (Act 8 of 1959), and, in relation to any area, offence, class of offence or power referred to in a notice issued under section 334 (1), any person who is a peace officer under that section; See Chapters 2, 5, 7 and 8 of the *Criminal Procedure Act 51 of 1977* for the functions and powers of a peace officer.

248 Section 31H(5) of the NEMA.

249 Section 1 of the NEMA defines a "vessel" as follows: means any waterborne craft of any kind, whether self-propelled or not, but does not include any moored floating structure that is not used as a means of transporting anything by water.

250 Section 1 of the NEMA defines an "aircraft" as follows" means an airborne craft of any type whatsoever, whether self-propelled or not, and includes a hovercraft.

environmental management inspectors are very similar to the powers granted to the respective inspectorates established in terms of the MHSA²⁵¹ and the OHSA.²⁵²

Section 31K of the NEMA makes provision for the routine inspections. These inspections have to be done at reasonable times and the environmental management inspector may enter a premise without a warrant (except for purposes of entering private homes) and inspect any item for the purposes of determining compliance with legislative provisions or the permit or other regulatory instruments or authorisation. Section 31L of the NEMA stipulates that an environmental management inspector may issue certain compliance notices if there are reasonable grounds to believe a person has contravened legislative provisions or do not comply with a condition set out in a condition, permit or other regulatory instruments²⁵³ and that this has to be done in accordance with the applicable procedure (section 31L-compliance notices). The NEMA sets the minimum requirements for the content of such a compliance notice and states that it has to contain the details of the incident or non-compliance, steps the person should take to rectify the situation together with the allocated time period, any conditions the person has to comply with during the period and the procedure followed in lodging an objection to the compliance notice with the Minister or MEC.²⁵⁴ The inspector may also extend this corrective time period granted to the person who is in contravention.²⁵⁵

Regulation 8 of GN R494 in GG 28869 of 2 June 2006 (hereinafter referred to GN R494) governs further requirements pertaining to section 31L-compliance notices and states that the notice has to be on the form as provided for by Annexure 1.²⁵⁶ Regulation 8(2) of GN R494 determines that before an inspector issues a compliance notice in terms of section 31L of the NEMA, he/she has to issue the person with an advance notice in writing informing the person of his/her intention to issue such a notice and provide such a person with a reasonable time to make representations in writing to the environmental management inspectorate with reasons why he/she should not be issued with a compliance notice. However, regulation 8(3) of the GN R494 permits the inspector to proceed with issuing a compliance notice without

251 See the discussion under paragraph 3.1.
252 See the discussion under paragraph 4.1
253 Section 31L(1) of the NEMA.
254 Section 31L(2)(d) of the NEMA.
255 Section 31L(3) of the NEMA.
256 Regulation 8(1) GN R494.

following this pre-notice step when the inspector has reason to believe that such a delay may cause significant and irreversible harm to the environment. This pre-notice step opens the opportunity to exercise the *audi alteram partem*-rule and GN R494 specifically states that an inspector may only disregard this step in the instance where he has reason to believe the delayed may result in significant and irreversible harm to the environment. This emphasise the importance to exercise the *audi alteram partem*-rule. The *audi alteram partem*-rule is included in terms of section 3(2)(b) of the PAJA which provides, amongst others, that an administrator must give a person a reasonable opportunity to make representations. Section 31M of the NEMA which governs objections to compliance notices and provides for the granting of an opportunity to the employer to make representations and gives effect to the *audi alteram partem* rule. Secondly, the fact that section 31L(2)(d) of the NEMA stipulates that the inspector has to inform the employer of the process to follow to lodge an objection to the compliance notice with the Minister or MEC, also emphasises the legislator's intention to ensure that the issuing of the compliance notices is done fairly and in adherence to the *audi alteram partem*-rule.

When comparing the model for enforcing compliance in terms of the NEMA with that of the MHSA, the impression is created that the inspectorate under the NEMA is more lenient in assisting the companies or organisations to implement the necessary steps with the ultimate goal of compliance as the only target.²⁵⁷

The Department of Environmental Affairs has launched an annual National Compliance and Enforcement Report (NECER), to provide an overview of environmental compliance and enforcement in South Africa.²⁵⁸ This report reflects the efforts made by the environmental management inspectorate throughout the year and the enforcement activities undertaken by the relevant bodies.²⁵⁹ This initiative by the Department of Environmental Affairs shows their efforts in keeping their activities, including enforcement activities known and transparent. The Department of Environmental Affairs also has a 24 hour hotline available where one can report any

257 See the discussion under paragraph 3.2 regarding the amendments made to the MHSA caused the *audi alteram partem*-rule to be ignored with regards to the opportunity granted to an employer prior to issuing of a section 54 stoppage order.

258 Department of Environmental Affairs website: www.environment.gov.za/mediarelease/necer_2012/13.

259 Department of Environmental Affairs website: www.environment.gov.za/mediarelease/necer_2012/13.

environmental crimes and incidents.²⁶⁰ A similar compliance mechanism does not exist in terms of the MHSA.

It is evident that the Department of Environmental Affairs is attempting to implement an integrated system to enforce compliance whilst assisting the industry to implement the corrective measures to achieve this goal and as such it is clear that the Department of Environmental Affairs is balancing compliance with other important factors such as the importance of economic growth by allowing the issuing of pre-compliance notices. However, the Department of Environmental Affairs is still enforcing strict compliance as is clear from the increase of appointments of inspectors and the increase of directive or compliance notices.²⁶¹

260 Department of Environmental Affairs website: www.environment.gov.za/mediarelease/necer_2012/13.

261 Department of Environmental Affairs website: www.environment.gov.za/mediarelease/necer_2012/13.

5. Conclusion and recommendations

The aim of this study was to investigate how the practice of issuing section 54 stoppage orders in terms of the MHSa can be aligned with the enforcement of similar provisions in the OHSA and the NEMA, to achieve more effective and efficient results.²⁶²

The reason behind this study was high levels of dissatisfaction voiced by the mining sector and the fact that South African courts were approached on occasion regarding the incorrect and allegedly inconsistent application of section 54 stoppage orders. This, together with the high economic losses suffered by an industry that is essential in a country with high unemployment rates and when the industry concerned forms an integral part of South Africa's economic growth, identified the need to investigate the *status quo* of the enforcement of health and safety legislation in the mining sector to determine what the root cause is of the problem. It was important to keep in mind during this study that the mining industry is regarded as one of the most dangerous workplaces and creates high risk work environments. Therefore, strict legislative provisions coupled with strict enforcement thereof are necessary to ensure the health and safety of mine workers.²⁶³

As discussed under Chapter 2, the closure of mines, due to various reasons, hold potential detrimental consequences to factors such as the economy and social development. The mining industry's role and the importance thereof was demonstrated in this discussion.²⁶⁴ This important role that the mining industry has to play is embedded in the Mining Charter with its objectives and targets set for the mining industry. This on the one hand and on the other the enforcement of health and safety legislation on mines, specifically section 54 stoppages that are often being issued unfounded or inconsistently, may hamper the mines in achieving the goal of playing an important role to build the economy and its communities. Only the economic statistics alone as discussed in paragraph 2.2 is indicative of the problem stated in the fact by the mining industry.

262 See the introduction to this study in Chapter 1.

263 See the discussion on the consequences of the closure of mines as in Chapter 2.

264 Chapter 2.

It was found in this study that the wording of section 54 and 55 does not cause the main problem but the implementation thereof. This study identified four key implementation challenges.

The first key issue relates to the MHSI's lack of consistency in issuing the section 54 stoppage orders is most definitely the first issue identified. When the function of the Chief Inspector is properly discharged, such function can cause consistent issuing of section 54 stoppage orders as it is one individual, only the Chief Inspector, who reviews the inspectors' decisions. However, as discussed under paragraph 3.2, with the *Draft Mine Health and Safety Bill*, it is planned to take this function away from the Chief Inspector and place it in the discretion of the Principal Inspectors. This may possibly add to the inconsistency issue as multiple principal inspectors appointed for different regions has the potential to result in more inconsistent orders (see paragraph 3.2).

The second key issue links with the consistency issue and is of an interpretational nature. This issue deals with the interpretation and application of the words "reason to believe" as contemplated in section 54 of the MHSA (see paragraph 3.2). Section 54 of the MHSA in its current form provides the MHSI with wide discretionary powers and therefore the correct interpretation of "reason to believe" is of crucial importance to establish consistency. The case law indicates that an objective interpretation should be followed (see paragraph 3.2). In the *Bert's Bricks-case*,²⁶⁵ however, on objectively determining the facts at the time of the incident, does not provide a clear answer as how the inspector came to the decision he did.

The third key issue refers to the Enforcement Guidelines that the MHSI has to follow. Whilst the guideline cannot be made out to be inadequate, there is room for improvement when it is compared to the implementation provisions and guidelines of that of the OHSA and the NEMA. The Enforcement Manual pertaining to the OHSA, drafted and implemented by the Department of Labour, indicates the Department of Labour's efforts in assisting the industry in becoming compliant. This Enforcement Manual places emphasis on the importance of economic growth of the industry, rather than more compliance and punishment.

265 See the discussion under paragraph 3.3.

Lastly, the fourth key issue dealing the lack of exercising the *audi alteram partem*-rule is problematic. Whilst the action of the MHSI constitutes administrative action,²⁶⁶ the exclusion of the *audi alteram partem*-rule can be viewed as detrimental. The previous sections 54(7) and 54(10) of the MHSA provided for employer's right to make representations prior to the issuing of a section 54 stoppage order. This resulted in section 54 stoppage orders being issued without due regard to the *audi alteram partem* rule. This causes mine employers' hands to be tied with limited options available to challenge the inspector's decision or at least to be heard. This disregard of the *audi alteram partem* rule as a fundamental legal principle cannot be allowed and can be regarded as retrogression in enforcement of health and safety legislation on mines. When comparing the OHSA Enforcement Guidelines for the MHSI with the Enforcement Manual for other workplaces in terms of the OHSA, it is apparent that the *audi alteram partem*-rule is applied throughout the information sessions between the stakeholders as suggested by the Enforcement Manual. The importance of the *audi alteram partem*-rule is also emphasised by the enforcement measures in terms of the NEMA and relevant regulations. The Environmental Management Inspectorate established in terms of the NEMA has to inform the employer or person who is in contravention of a said provision of their intention to issue him/her with a compliance notice. When the compliance notice is issued, the inspector has to ensure that the person to whom it is being issued, is aware of the internal appeal procedure available should he/she wish to oppose the notice.²⁶⁷ There is no reason as to why the MHSI cannot follow the same approach. Of course provision has to be made for instances where such a warning notice can cause more harm to the environment or health and safety of persons however, due to the possibility of achieving more effective enforcement of mine health and safety legislation, it is recommended that a similar provision be considered to permit the MHSI to issue a notice without such warning in such cases, as was the case under the now repealed section 54(9) of the MHSA, but provided that such endangerment would have resulted in an imminent threat and this applied to all section 54 instructions, not only to section 54(1)(a).²⁶⁸

266 See the discussion in this regard in paragraph 3.2

267 See the discussion under paragraph 4.2 in this regard.

268 This section was deleted by section 17 of the *Mine Health and Safety Amendment Act 74 of 2008*: "If an inspector has reason to believe that the delay caused by allowing representations could endanger the health or safety of any person, the inspector is not required to allow representations before issuing an instruction under section 54(1)(a)". See the discussion under paragraph 3.2.

Le Roux states that orders issued to stop all operations on a mine mean that all work done to ensure health and safety measures are implemented also has to stop as a result thereof and such an order according to him is invalid.²⁶⁹ It is therefore important that the health and safety legislation on mines is enforced correctly and consistently. Based on these key issues identified, certain recommendations can be suggested in order to align the enforcement of the MHSA with the enforcement of similar provisions in the OHS Act and the NEMA to achieve more effective and efficient results.

To achieve consistency in the issuing of section 54 stoppage orders, it is recommended that the reviewing function should remain the responsibility of the Chief Inspector and this function should not be transferred to the Principal Inspectors. The interpretation of "reason to believe" has to be consistent. With existing case law that provides the meaning of this phrase, it is important to ensure all inspectors, Principal Inspectors and the Chief Inspector understands how to interpret the phrase and be able to apply it correctly. The importance of the correct interpretation of the inspector's "reason to believe that certain circumstances exist" as contemplated by both sections 54 and 55 of the MHSA has to be dealt with extensively and the MHSI has to understand that the right to an administrative process which is fair is embedded in the highest law of the country and has to be adhered to.²⁷⁰ The MHSI has to be trained, in amongst others, in the application of the reasonable person test to apply the correct application of "reason to believe" and to objectively determine the facts before issuing section 54 stoppage orders. The Enforcement Guidelines for the MHSI should be reviewed and updated to make provision firstly for the training of the appointed MHSI to understand the meaning and correct interpretation of the proviso "reason to believe" and the *audi alteram partem* rule, and secondly to provide for the accountability of the MHSI when an inspector issues an inconsistent and unfounded section 54 stoppage order, without the existence of objectively determined facts that lead to such issuance. It is recommended that the inclusion of a provision to hold the inspector personally liable has to be considered for cases where mines or parts of mines are closed down unnecessarily in terms of section 54 of the MHSA result in economic losses to the industry.

269 De Ryhove 2012 Mining Law www.polity.org.za.

270 Section 33 of the *Constitution*, 1996.

To address the issue of the non-existence of the *audi alteram partem*-rule, the Enforcement Guidelines for the MHSI has to be reviewed and updated to make provision for such a process. This process has to be combined with pre-notice system, as is the case with the enforcement guidelines in terms of both the OHSA and the NEMA (see paragraphs 4.1 and 4.2). The employer should have the opportunity to make representations to the inspector after a pre-notice has been issued but before a final section 54 stoppage order is issued. This will afford the employer to place his/her case on record and also afford him/her the opportunity to rectify the unsafe act or condition prior to the mine or part thereof being closed. This may also result in a stronger and better relationship with between the industry and the Department of Mineral Resources, a relationship of importance for purposes of cooperation to ensure a safe mining industry. As mentioned, this is already the case in the workplace in terms of the OHSA and the NEMA (see paragraphs 4.1 and 4.2). Compliance mechanisms, such as the provision for the issuing of reminder notices,²⁷¹ demonstrate the partnership nature of the relationship that exists between the Department and the industry. Through these measures, the employer are afforded more than one opportunity to state his/her case, to and give effect to the *audi alteram partem* rule resulting in effective management and enforcement of health and safety in the industry. To achieve a good standard of communication between the mining industry and the Department of Mineral Resources, it is recommended to reinstate the deleted provisions of sections 54(7) to 54(10) of the MHSI.²⁷² There should be communication and proper engagement between the Department of Mineral Resources and the mining industry stakeholders to find solutions to achieve more consistent and reasonable implementation of section 54 stoppage orders.

During the analysis of the enforcement of the OHSA and the NEMA, it has become clear that the responsible state department for each of these acts were more prevalent to grant the employer who is in non-compliance on opportunities to rectify the situation after means of consultation or information sessions (see paragraphs 4.1 and 4.2). The employer is granted a time period within which the corrective actions have to be implemented. The officials from the relevant department will only issue a compliance notice after this time has lapsed and the employer has still not taken reasonable steps

271 Department of Labour Enforcement Manual for Inspectors (2011) 86.

272 There is no evidence available to indicate that this is being considered in terms of the *Draft Mine Health and Safety Bill*.

to ensure the rectification of the identified non-compliance. (see paragraphs 4.2 and 4.2). There are of course instances where immediate action by the department is required and the extension of time periods and pre-compliance notices are not possible and will defeat the purpose. The complete closure of a workplace due to the non-compliance with the provisions of either the OHSA or the NEMA is used as a last resort (see paragraphs 4.2 and 4.2). However, the current MHSA provisions governing enforcement does make provision for a similar mechanism nor does the MHSI exercise their powers in a manner that reflects cooperation between the stakeholders in an attempt to assist employers to make the industry safe (see paragraphs 4.2 and 4.2).

The alternative options to the issuing of section 54 stoppage orders available to the MHSI also have to be re-emphasised. The wording of section 54 of the MHSA clearly states that the inspector, if he/she has reason to believe that certain circumstances exist that may endanger the health or safety of any person at the mine, he/she can give any instruction necessary to protect the health and safety of persons at the mine.²⁷³ The emphasis is on "any instruction necessary". This means that the inspector is permitted to take actions to eliminate the dangerous occurrence or possible dangerous occurrence. This should not result in the use of unfair and unbalanced enforcement measurement that has the possibility of causing economic loss.

It is therefore recommended that the necessary measures be implemented to ensure the appointed MHSI is aware of the fact that the enforcement of health and safety legislation on mines is a duty which has to be conducted with great responsibility and with due diligence as the consequences can be far reaching. For example, section 55-compliance notices could also be considered in situations which do not require the stoppage of a mine's operations when the identified unsafe incident can be isolated, only the affected area should be closed or stopped.

An approach to find the balance between regulating and enforcing safety measures in the mining industry on the one hand, and ensuring profitability by ongoing production, on the other hand, has to be found in order to create a mining environment which continues to be a major contributor to the South African economy but not at the cost

273 See paragraph 3 for the wording of Section 54 of the MHSA.

of employees' safety. The enforcement of compliance of these legislative measures to regulate health and safety in the mining sector has to be done with the necessary consideration of all existing factors including the accurate identification of the specific unsafe condition or incident and deciding on the most appropriate enforcement action to apply. The wide discretionary powers granted to the MHSI can easily cause more damage than good when not regulated properly as is clear from the statistics²⁷⁴ and case law discussed.²⁷⁵

The Enforcement Guideline for MHSI is a comprehensive document which can be of great value when being properly used in practice. The principles identified by this Enforcement Guideline are very important in guiding inspectors during the decision making process when ascertaining the enforcement measure applicable to a specific situation. However, it is evident from the practical implementation of section 54 stoppage orders and the losses it caused, that this Enforcement Guideline is not always duly regarded by the inspectors other than using the prescribed forms (see paragraph 4.1). Based on this observation made on the difference in enforcement of the MHSA when compared to the enforcement of the OHSA and the NEMA, the first suggestion to improve the implementation of section 54 stoppage orders is to train the MHSI properly on not only the content of their legislative powers but also the correct application of these powers.

It is, however, not suggested that the section 54 stoppage order problems should only be laid in front of the MHSI's door, the mining industry may also be at fault. It was, however, not the aim of this study to discuss the mining industry's role in the cause of section 54 stoppage orders. To achieve success in enforcing health and safety in the mining industry, engagement between all stakeholders is of great importance. The employers have to be included in the process undertaken by the Department of Mineral Resources to find possible solutions on the enforcement of health and safety legislation in the mining sector. The alignment of the MHSA with the provisions of the OHSA and the NEMA may, for example, achieve more effective and efficient results. To be able to achieve a balance in enforcement of health and safety legislation in the mining industry, cooperation with all stakeholders is absolutely necessary. The mining industry's confidence in the MHSI has to be restored and these two parties have to

274 See the discussion under Chapter 2 regarding the economic losses suffered by the mining industry due to mine closures.

275 See the discussion under paragraph 3.3.

work together with regard to the interest of health and safety for mine workers as its goal. The impact of closure of mines on society and the economy should also be considered.

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STANDARD LETTER OF CONFIRMATION OF EDITING

I, Nicholas K. Challis (M.A.), of the professional editors group (PEG), started and completed an edit of a LLM degree

For: Magdalena Gloy

Title: The use of Section 54 stoppage orders in terms of the Mine Health and Safety Act

This took place during October 2014.

I have thoroughly checked her work.

Sincerely,

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