

**A LEGAL ANALYSIS OF THE EMPLOYERS' DUTY TO PROVIDE A SAFE AND
HEALTH WORKING ENVIRONMENT IN THE MINING SECTOR IN SOUTH
AFRICA**

by

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A mini dissertation submitted in fulfilment of the requirements for the degree of

Master of Laws (LLM) in Labour Law

Faculty of Management and Law, School of Law

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July 2023

DECLARATION BY STUDENT

I, **Daphne Eileen Chidindi**, declare that this dissertation titled, '**A Legal analysis of the employers' duty to provide a safe and health working environment in the mining sector in South Africa**', is my own work in plan and execution. I also declare that I have not previously submitted this mini-dissertation to the University of Limpopo or any other University. All the sources herein have been acknowledged by means of references.

Signed: **Daphne Eileen Chidindi**

Date: 12 February 2023

DECLARATION BY THE SUPERVISOR

I, Advocate Lufuno Tokyo Nevondwe, hereby declare that I have supervised this mini-dissertation by **Daphne Eileen Chidindi** titled '**A Legal analysis of the employers' duty to provide a safe and health working environment in the mining sector in South Africa**' for the degree Master of Laws (LLM) in Labour Law, and in my own view and its scope is suitable and be accepted for examination.

Signed: **Adv Lufuno Tokyo Nevondwe**
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ACKNOWLEDGMENTS

See what the Lord has done! God is good, He who began a good work in me carried it to completion, His grace was sufficient, and His power was made perfect in this academic journey. All is from God, and all belongs to God. Ngiyabonga!

I convey my sincere appreciation to my research supervisor, Advocate Lufuno Tokyo Nevondwe, thank you for your suggestions and constructive criticism. Also, for his insight and knowledge into writing this work, I cannot thank you enough.

Furthermore, I would also like to give special thanks to my family and friends. Thank you for keeping me sane and your unwavering belief in that I could do it. You all are one in a million, and I am glad you were there. Denny, you were my biggest cheerleader, I wish you could look at this and see how far I have come.

This work is based on research supported in part by the National Research Foundation (NRF) of South Africa. I acknowledge that opinions, findings and conclusions or recommendations expressed in any publication generated by the NRF supported research is mine alone, and that the NRF accepts no liability whatsoever in this regard.

LIST OF ABBREVIATIONS

AMCU	Association of Mineworkers and Construction Union
AU	African Union
COIDA	Compensation for Occupational Injuries and Diseases Act, 130 of 1993
DMA	Disaster Management Act 53 of 2005
DMRE	Department of Mineral and Energy
GEAR	Growth, Employment and Redistribution
HSE	Health and Safety Executive
ILO	International Labor Organization
LRA	Labour Relations Act 66 of 1995
MHSA	Mine, Health and Safety Act, 29 of 1996
MPRDA	Minerals and Petroleum Resources Development Act, 28 of 2002
NMSF	National Mine Safety Framework
ODMWA	Occupational Diseases in Mines and Works Act, 78 of 1973
OHSA	Occupational Health and Safety Act, 85 of 1993
SADC	Southern African Development Community
SOP	Standard Operating Procedure
SWAA	Safe Work Australia Act
UDHR	Universal Declaration of Human Rights
WHO	World Health Organization
WHS	Work Health and Safety Act of Australia 137 of 2011

LIST OF INTERNATIONAL INSTRUMENTS

110TH International Labour Conference Development

African Union

Health and Safety at Work Act of 1974

Health and Safety Executive of the United Kingdom

International Labour Organization

Occupational Safety and Health Convention

Safe Work Australia Act, 84 of 2008

Safety and Health in Mines Convention

Southern African Development Community

Universal Declaration of Human Rights

Work Health and Safety Act of Australia 137 of 2011

World Health Organization

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City of Johannesburg v Swanepoel NO and Others 37 ILJ 1400 (LC)

Donovan Secretary of Labour v Dewey et al Number 80-901, 452 US 594 (1981)

Eskort LTD v Mogotsi JR1644/20

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

Government of the Republic of South Africa v Grootboom 2000 11 BCLR 1169 (CC)

Harmony Gold v National Union of Metalworkers of South Africa (NUMSA) (Unreported) case number J367/2012 of 14 March 2012

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Mankayi v AngloGold Ashanti Ltd 2011 32 ILJ 545 (CC) 233

Mulderij v Gold Rush Group GAJB 24054-21

NUM & others v Chrober Slate (Pty) Ltd [2008] 3 BLLR 287 (LC)

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Constitution of the Republic of South Africa, 1996

Disaster Management Act, 57 of 2002

Health and Safety at Work Act, 1974

Illinois Mining Statute of 1899.

Labour Relations Act, 66 of 1995

Mine, Health and Safety Act, 29 of 1996

Minerals and Petroleum Resources Development Act 28 of 2002

Mining Charter 2010

National Environmental Management Act, Act 107 of 1998

Occupational Diseases in Mines and Works Act, 78 of 1973

Occupational Safety and Health Act, of 1984

Safe Work Australia Act, 84 of 2008

Work Health and Safety Act of Australia 137 of 2011

ABSTRACT

This study discusses a legal analysis of the employer's duty to provide a safe and health working environment in the mining sector in South Africa. The employer's duty refers to the obligations and responsibilities which the employer has towards their employees in the workplace. Employer must adopt reasonable and practicable measures to ensure the safety and health of employees. Employer has a duty to ensure that the mode in which employees conduct their work obligations is safe and does not detrimentally affect their health. Safe and health working environment entails that mine workers perform their work obligations free from harm, risks or death. Sadly, in South Africa, the implementation, compliance, and enforcement of this duty has been done on a slow pace, and there is need to accelerate it, to mitigate the risks involved in the mining sector. The mining sector is a dangerous workplace which requires strict compliance to health and safety standards. Measures, policies, and legislation can curb safety and health in the mining sector. This study will benefit the law, the government of South Africa and employers in the mining sector to prioritize safety and health in the mining sector to mitigate harm and fatalities in the mining sector.

Keywords: employer, employees, health and safety, mines

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CHAPTER ONE: INTRODUCTION

1.1 Historical background to the study

The employee occupational health and safety in the work environment is derived from the common law and enacted into the national legislation in South Africa. In common law, employers are duty bound to provide a safe workplace for employees by taking reasonable steps to meet employee safety needs. Thus, employers are obligated under common law to ensure a safe workplace for workers.¹ South African common law has its origins from the English and Roman-Dutch law and it has a binding authority.² Furthermore, the employer's duty extends to ensuring that the manner in which work is conducted is safe.³ For example, in *SAR and H v Cruywagen*,⁴ the court asserted that, an employer at common law has a duty to provide a workplace, equipment, tools and a method of work that are all safe. To achieve this, employers and employees are accorded duties, rights and responsibilities.

The mining sector is a highly hazardous work environment which requires strict observance of occupational health and safety standards. Historically, the mining sector has a poor health and safety record compared to other workplace sectors. In the industrial sector it is the most hazardous as it degrades rapidly with the transformation of the mining processes.⁵

South African mine workers find themselves in poor and harsh working conditions to effectively perform their work obligations.⁶ For instance, mine workers are exposed to

¹ Van Niekerk A et al *Law @ Work* (3rd Edition 2015) 93.

² Schoeman-Malan L, 'Recent Developments Regarding South African Common and Customary Law of Succession', (2007) 10 *Potchefstroom Electronic Law Journal*, 107.

³ Tshoose CI, 'Employers Duty to Provide a Safe Working Environment: A South African Perspective', (2011) 6 *Journal of International Commercial Law and Technology*, 165.

⁴ 1938 CPD 219 at para 229.

⁵ Hermanus MA, 'Occupational Health and Safety in Mining—Status, New Developments, and Concerns' (2007) 38 (107) *Journal of the Southern African Institute of Mining and Metallurgy* <<https://www.saimm.co.za/Journal/v107n08p531.pdf>> accessed on 13 May 2022.

disease such as asbestosis and other diseases like novel corona virus. Silicosis is another disease common among mine workers, that causes shrinking and scarring of the lungs. The severity of silicosis results in breathing difficulties to infected persons and death.⁷ Also, underground accidents are widely reported although there has been decreasing in recent years due to improved safety standards. This posits the need for enhanced protection of mine workers. The health and safety systems plays a critical role in the protection of workers against workplace injuries, and sicknesses.⁸

The Mine, Health and Safety Act 29 of 1996 (hereinafter the MHSA) sets the backdrop for which mine workers are regulated in South Africa.⁹ The MHSA,¹⁰ places a duty on an employer to set up a practicable reasonably safe work settings.¹¹ The MHSA, stipulates that an employer must ensure that the activities of/at the mine do not expose employees to safety risks and persons involved. The prime features of the MHSA include the undertaking that mine owner bears the primary duty to safeguarding a healthy and safe workplace at the mine. In addition, the Act lays down steps employers must take in identifying, assessing records, and controlling health and safety risks at the mine environment. It also establishes fundamental worker rights. Notably, the right of workers to; participate in health and safety matters, receive health and safety information and to vacate the work environment in the case of foreseeable or present danger.¹² In summary, the Act gives guidelines to promote a culture of strict adherence to safety and health policies in the mining environment.

⁶ Behavioural Causes and Remedies Associated with Transportation Accidents <<https://researchspace.csir.co.za/dspace/bitstream/handle/10204/1299/SIM030504.pdf?sequence=1>> accessed on 13 May 2022.

⁷ Tshoose CI (note 3 above) 164.

⁸ Tshoose CI, 'Justice Delayed is Justice Denied: Protecting Miners against Occupational Injuries and Diseases: Comments on Mankayi v AngloGold Ashanti Ltd 2011 32 ILJ 545 (CC)' (2011) 3 (14) *Potchefstroom Electronic Law Journal* 233.

⁹ Section 1 and 2 of the MHSA.

¹⁰ Act 29 of 1996.

¹¹ Note 8 above 233.

¹² Guild R et al, *A Handbook on Occupational Health Practice in the South African Mining Industry* (2001) 3.

Nationally, mining corporations are obliged to comply with Constitutional provisions,¹³ labour rights, environmental protection, and ensuring occupational health and safety of employees and neighbouring communities.¹⁴ Thus, workers' rights to work in a safe and healthy environment is of paramount importance. Employers are therefore, expected to create and maintain a safe and healthy workplace environment.

Furthermore, employers should identify the health and safety risks associated with mining operations. This responsibility applies to both hazards to workers and to the health and safety of surrounding community members who are likely to be directly and indirectly impacted by mining activities.¹⁵ In identifying risks and hazards in a mine, various mechanisms are employed including inspection of the workplace.

The mining sector involves various operations such as working underground where there is no or limited oxygen and is characterised by overcrowding. Mine workers are also exposed and at risk of viral infections such as covid-19 due to overcrowding with limited physical distancing. In times of the novel coronavirus, prompt measures and protocols are a must in fighting the spread of the pandemic in the workplace.¹⁶ If not protected, mine workers are exploited and a vulnerable group to injuries, diseases or even death.

Female mine workers over and above, do not have adequate access to sanitary wear and suitable equipment fit for women to utilise.¹⁷ Historically, the mining sector is male dominated with exclusion of women. Furthermore, women in mining environment are exposed to greater safety risks compared to men. This is primarily based on that majority of machinery, tools, workplace environment and equipment used are/were previously designed for men. Hence, women face an increased risk of injury and ill-health.¹⁸ Due to societal emancipation of women, this has been radically transformed in recent years. However, while women are now employable in the

¹³ Section 24 of the Constitution of the Republic of South Africa, 1996.

¹⁴ Note 8 above 234.

¹⁵ Note 3 above 165.

¹⁶ *Eskort LTD v Mogotsi JR1644/20* at para 18.

¹⁷ Guild R et al, *A Handbook on Occupational Health Practice in the South African Mining Industry* (note 12 above) 3.

¹⁸ Note 5 above 535.

mining sector their protective clothing is still lacking. Women employed in this sector should feel safe and protected in a previously male dominated industry. Thus, workers have a pivotal role to play in occupational safety and well-being, as it is their healthy and lives that would have been at risk.¹⁹

The employer can only perform this duty and it to reach its full potential by employees carrying out their part too. South African legislation reinforces this common law obligation to ensure that employers take reasonable and practicable measures to employ it in the work environment. These are the Occupational Health and Safety Act (OHSA),²⁰ Compensation for Occupational Injuries and Diseases Act (COIDA),²¹ and the Occupational Diseases in Mines and Works Act (ODMWA).²² These acts of Parliament employ safety, health, and the prevention and or dealing with contracting diseases in the workplace or injuries and risks. For example, the OHSA and MSHA aim to ensure health and safety in the working environment and prevent injuries and diseases to employees. COIDA and ODMWA emphasizes on the consequences of injury or disease that would have been sustained in the workplace. Therefore, legislation enacted in South Africa obliges employers to safeguard a safe and healthy working environment for employees. Measures that are adopted in the various statutes are to protect employees at all costs. The common law duty of a workplace environment that is both safe and health is not solely based on injury or death of the employees. It encompasses the mental, psychological, and physical wellbeing of employees.

Against this background, this study analyses the employer's common law duty to ensure a safe and healthy workplace environment in the mining sector in South Africa.

1.2. Statement of the research problem

While the common law obligates employers to create a safe and healthy workplace, the problem is that employers are found wanting in continuous maintenance of a

¹⁹ Note 5 above 536.

²⁰ Act 85 of 1993.

²¹ Act 130 of 1993.

²² Act 78 of 1973.

safe workplace. It is only when harm ensues to workers that they attempt to create a safe and healthy work environment. A major challenge that exists is the lack of training and consistency when it comes to health and safety risk management in mines by employers. As a result, mine-related accidents, risks and injuries still occur.²³ Hence, there is a need for enforcement of reasonable and practicable health and safety standards on continuous basis. Failure to adhere to this, should carry heavy penalties and consequences for employers, such as imposing civil and criminal sanctions. This means stringent implementation of safety and health standards in all mining operations.

Employers are therefore expected to ensure due diligence and assume all necessary and practicable measures needed to prevent injuries or death to workers. Adopting measures on safety and health that are not appropriate or sufficient to curtail injuries sustained by workers in the mining sector should not be realized when an employee is afflicted. Employers should secure that the mining workplace is suitable for employees to conduct their work obligations, without emerging risks.

In practice, the application of common law's safe and health duties to the employer in the workplace are often overlooked. Employers only apply it in theory and on paper where it is black and white. The practicality of the inherent duties to the employer requires robust application. Measures and protocols at certain times cannot be enough as they require substantive application. Hastily need, is a necessity in upgrading health and safety standards to reduce mine-related injuries and deaths occurrences.²⁴

1.3. Literature review

Tenza,²⁵ points out that employer's duty to create a safe and healthy workplace is the cornerstone of the contractual relationship between an employer and employee. Failure to meet these obligations imposed by common law is a direct violation and contravening of law by such an employer.²⁶ Therefore, to guard and protect mine

²³ Shibambu ON and Odeku KO, 'The intricacies and challenges of ensuring safe and healthy mining environments in South Africa', (2017) (3) 8 *Environmental Economics Journal*, 19.

²⁴ *Ibid.*

²⁵ Tenza M, 'Is the Employer Compelled to Provide Safe Working Conditions to Employees During a Violent Strike', (2021) 1 (25) *Law, Democracy and Development* 267.

workers, necessary interventions and efforts that guarantee adequate health and safety standards in mining industry should be implemented.²⁷

The duty to make the workplace healthy and safe is a fundamental right that emanates from the Constitution, common law and various statutes.²⁸ As the supreme law of the country, the Constitution²⁹ Section 24,³⁰ asserts that all people are entitled to a safe and healthy work environment. The Constitution is the yardstick and cornerstone in that, it places a duty on employers to create a working environment that is safe and healthy for employees. The violation of this section is inconsistent with the Constitution.

Accordingly, Ahmed states that,³¹ the standards of a reasonable person or its equivalence is used in many countries to decide who is at fault in terms of negligence. In determining negligence, an employer is tested on to failure provide sufficient and necessary steps in creating and maintaining a safe and healthy workplace.³² Reasonableness is measured and viewed in terms of the reasonable person test. Questions considered in the test are, would a reasonable man in the employer's position have forecasted the likelihood of a person being endangered? On balance of probabilities, would a reasonable man have taken steps to guard against the accident which gave rise to the injury? and did the employer fail to take measures a reasonable man would taken to protect him/herself against the injury?³³ Therefore, this test is relied upon in analysing if an employer kept the workplace safe and healthy for employees. Section 8 of OHS Act enforces an obligation on every employer to establish and maintain, to the degree that it is reasonably practicable,

²⁶ *NUM & others v Chrober Slate (Pty) Ltd* [2008] 3 BLLR 287 (LC); *Oosthuizen v Homegas* 1992 (3) SA 463.

²⁷ Gunningham N, *Mine Safety: Law Regulation Policy*, (1st Edition, The Federation Press, 2008) 137.

²⁸ Section 24 South African Constitution, 1996.

²⁹ Section 2 of the South African Constitution.

³⁰ Section 24(a) of the Constitution everyone has the right-

(a) to an environment that is not harmful to their health or well-being

³¹ Ahmed R, 'The Standard of the Reasonable Person in Determining Negligence-Comparative Conclusions', (2021) 24 *Potchefstroom Electronic Law Journal* 2.

³² *Ibid*.

³³ Tshoose CI, (note 3 above) 165.

for a safe and healthy work environment for all workers.³⁴ What is measured as reasonable is applied on the merits of each case placed before the court. The word 'reasonable' is used to qualify the common law duty of the company.³⁵ Tshoose, opines that, the duty to provide safe working conditions, machinery, tools, and work methods is not absolute. It is however, limited by the concept of reasonableness.³⁶ Reasonableness is the conduct exhibited by the employer in an attempt to provide a safe and healthy mining workplace. Therefore, employers should reasonably ensure that all practical measures and steps are followed,³⁷ enhanced, managed and consistently improved at all times to ensure employees are not exposed to health risks and injuries in the workplace.³⁸ The OHS Act in Section 8 summarises reasonableness as an employer's endeavour to create a practicable work environment that is free of or has limited harm to the safety of employees.³⁹

It is of paramount importance to note that, the work environment is wider and diverse than the workplace as described in the Labour Relations Act (hereinafter the LRA).⁴⁰ The decision in the case of *City of Johannesburg v Swanepoel NO and Others*,⁴¹ interprets and adds to the understanding of the term reasonableness.⁴² The court held that it is the entire work setting that must be safe not only the place where work is actual performed or the immediate physical environment. The court stated that it is the environment in which an employee performs his duties as indicated in the employment contract. In *Van Deventer v Workmen's Compensation Commissioner*,⁴³ the court obliges employers to include safe machinery, tools, computers, and

³⁴ Basson A, *Essential Labour Law* (5th Edition 2009) 384.

³⁵ Tshoose CI, (note 3 above) 168.

³⁶ Tshoose CI (note 3 above) 168.

³⁷ Tshoose CI, (note 3 above) 166.

³⁸ Tshoose CI, (note 3 above) 165.

³⁹ Kubjana LL, 'Understanding the law on sexual harassment in the workplace (through a case law lens): a classic fool's errand', (2020) 1 (41) < http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1682-58532020000100006 > accessed on 13 March 2022.

⁴⁰ Section 213 of the LRA workplace is defined as "a place or places where the employees of an employer work.

⁴¹ 37 ILJ 1400 (LC) at para 1408.

⁴² Note 41 above, para 1408.

⁴³ 1962 (4) SA 28 (T); See also, *Oosthuizen v Homegas (Pty) Ltd* 1992 (3) SA 463 (T).

procedures and protocols as well as ensuring that all these are followed in understanding a safe work environment. In *NUM and Others v Chrober Slate (Pty) Ltd*,⁴⁴ it was noted that, where the workplace is hazardous, the employer would be in contravention of his responsibility to maintain a safe workplace. Judge Boshoff went further to state that:

“An employer owes a common law duty to a workman to take reasonable care for his safety. The question arises in each particular case what reasonable care is required. This is a question of fact and depends upon the circumstances of each particular case. A master (employer) is in the first place under a duty to see that his servants [employees] do not suffer through his personal negligence, such as failure to provide a safe working environment and a failure to provide (a) proper and suitable plant, if he knows or ought to have known of such failure”.

In comparison to South African law, the Australian law further place an obligation to the employer's common law obligation to create a safe and healthy work setting to protect all workers and must not jeopardize their or others' health or safety.⁴⁵ Similarly to South Africa law, Australian workers have a duty to make sure that the work settings are safe and healthy and that they take care of their own health and safety too.⁴⁶ Thus, the Australian law imposes a duty on both the employer and employees to ensure that the workplace is reasonably safe and healthy, as failure will result in imposition of substantial penalties being imposed against the employer.

More so, legislative framework in Australia such as the Work Health and Safety Act (hereinafter the WHSA)⁴⁷ can be compared to the South African OHSA that establishes criteria and standards for promoting healthy and safe living work environments.⁴⁸ It outlines what must be done to guard the safety and well-being of employees and others in the workplace.⁴⁹ The purpose of the WHSA is to improve

⁴⁴ Note 26 above.

⁴⁵ Work health and safety, <https://business.gov.au/risk-management/health-and-safety/work-health-and-safety#:~:text=Under%20Australian%20WHS%20laws%20your,maintain%20safe%20machinery%20and%20structures> accessed on 13 May 2022.

⁴⁶ *Ibid.*

⁴⁷ Number 137 of 2011.

⁴⁸ Work health and safety laws, <https://www.worksafe.qld.gov.au/laws-and-compliance/work-health-and-safety-laws> accessed on 13 May 2022.

the safety and health standards and to decrease the risks of danger or harm in the workplace. Therefore, its goal is to make the workplace significantly healthier and safer.

The Codes of Practice set in the WHSA offer employers guidelines on the standards for ensuring compliance to health and safety in Australia. Australian case laws reveal how mine safety and health are to be effectively implemented in the workplace. For example, the recent case of The State of Western Australia (Responsible Agency - Department of Justice),⁵⁰ was fined \$900 000.00 (Australian dollars) for failure to adhere to reasonably and practicably measures to create and provide a hazard free workplace for its employees.⁵¹ Thus, the Court held that the employer had violated section 19 of the OSHA.⁵²

Moreover, the Safe Work Australia Act (hereafter SWAA)⁵³ provides the basis for occupational safety and health in Australia. It also punishes offending companies by imposing fines. The act ensures that the workplace place safety is held in high esteem and vital lessons can be drawn from this act in the South African context to rapidly decrease the frequency of hazards that occur in the workplace.

Furthermore, employee health and safety are a critical matter that should not be left to concerned parties to self-regulate.⁵⁴ The Health and Safety Executive of the United Kingdom,⁵⁵ posits that a state of zero risk is impossible to achieve since such a reality does not exist. Therefore, by being in the workplace, employees will always be exposed to harm or danger, that might threaten their lives, or expose them to death.

The International Labour Organisation (ILO) sets out global labour practices in the Safety and Health in Mines Convention.⁵⁶ It lays out the precautionary measures an

⁴⁹ *Ibid.*

⁵⁰ Charge number AR10238/2021.

⁵¹ Act of 1984.

⁵² Prosecution details, <https://prosecutions.commerce.wa.gov.au/prosecutions/view/1518> accessed on 13 May 2022.

⁵³ Number 84 of 2008.

⁵⁴ Tshoose CI, (note 3 above) 165.

⁵⁵ Britain's National Regulator for Workplace Health and Safety.

employers must take to create a safe workspace for mine workers. Moreover, it imposes on employers in the mining sector a duty to prescribe measures on health and safety in the workplace. The Convention provides for the safety and health of all mine workers, and all affected by mining activities. Hence, the ILO sets international law standards for member states to adapt into their domestic laws. For example, Convention 176 on Safety and Health in Mines sets out practical suggestions for mine health and safety practices.

In addition, the ILO explains the work setting or environment meaning as, “all areas of working life, from the physical environment's quality and safety to how employees feel about their workplace, work climate, and work organization”.⁵⁷ Noteworthy, is the assertion by Nielson,⁵⁸ whereby he concurs with the ILO that employee wellness relates to an individual's mental, bodily, and general health. It also, includes how they feel about their work and life. The ILO guidelines inform on how this can be detrimental to people's health, protection, and welfare if not properly cared for.⁵⁹

In international law framework, employees have a right to refuse to conduct work obligations if the workplace is not safe and healthy. As postulated by Tshoose, workers are considered vulnerable in the contract of employment, as such they are accorded the right to health and safety and must be protected by the employer.⁶⁰ South African legislative framework ratified the ILO Convention on Safety and Health in Mines 176 of 1995 into its own domestic law in the MHSA. Workers have the right to abandon a mine if circumstances appear, with reasonable justification, to cause a serious threat to their safety or well-being, according to this legislative framework.⁶¹

⁵⁶ Number 176 of 1995.

⁵⁷ International Labour Organisation, “Workplace Health Promotion and Well-being, <https://www.ilo.org/safework/areasofwork/workplace-health-promotion-and-well-being/lang-en/index.htm#:~:text=Health%20promotion%20and%20well%2Dbeing%20at%20work%20programme%20focus%20on,promotion%20of%20tobacco%2Dfree%20workplaces>. accessed on 10 March 2022.

⁵⁸ Nielson K et al, “Workplace resources to improve both employee well-being and performance: A systematic review and meta-analysis, (2017) 104, < <https://doi.org/10.1080/02678373.2017.1304463> > accessed on 10 March 2022.

⁵⁹ Tenza M (note 25 above) 269.

⁶⁰ Tshoose CI (note 3 above) 165.

⁶¹ Mpedi LG, ‘Commentary on the Mine Health and Safety Act Regulations’, Masilo P and Rautenbach G: Book Review’ (2009) 2 (3) *Journal of South African Law* <https://journals.co.za/doi/epdf/10.10520/EJC55234> access date 9 March 2022.

In line with the Convention, Section 23 of MSHA in South Africa states that employees have a right to leave any workplace if it is unsafe or unhealthy for them.

The ILO emphasises the importance of safeguarding occupational health and safety, by stating that work should take place in a safe and healthy workplace; work conditions should be in line with workers' well-being and human dignity; and that work must provide opportunities for personal achievement, as postulated by Alli.⁶² Finally, it can be said that employees have a fundamental right to life and health protection at work,⁶³ and employers must practically and reasonably possible provide such.

Tenza⁶⁴, states that factors such as physical working conditions, equipment and machinery condition, including employer-provided transportation, and worker competence and behaviour, maybe sources of a dangerous workplace. In *Van Deventer v Workmen's Compensation Commissioner*,⁶⁵ the court upheld it to be so, as it was found that if the work environment is hazardous, an employer is required to take all reasonable precautions to safeguard the workers' safety. Thus, an employer as part of his common law duty is obligated to provide a safe and health workplace, and that employees should perform their work duties in a reasonably safe workplace.

McGregor M et al,⁶⁶ summarizes that the employer may have to provide workers with *inter alia*, protective devices and clothing, safety equipment, and sufficient safety supervision. A safe and healthy workplace saves lives, enhances productivity, and reduces risks of injury or accidents.⁶⁷ These measures seek to create conditions that enable workers to conduct their jobs efficiently and avoid possibly hazardous occurrences.⁶⁸ Workers' habits are influenced by safe working conditions, and have a

⁶² 'Alli BO, "*Fundamental Principles of Occupational Health and Safety*", (2nd Edition, International Labour Organisation, 2008) 17.

⁶³ Tshoose CI (note 3 above) 168.

⁶⁴ Tenza M (note 25 above) 272.

⁶⁵ Note 44 above, para 54.

⁶⁶ McGregor M et al, *Labour Law Rules* (2nd Edition 2014) 41.

⁶⁷ Jonathan GK et al, 'Maintaining Health and Safety at Workplace: Employee and Employers Role in Ensuring a Safe Working Environment', (2016) 29 (7) *Journal of Education and Practice* 2.

⁶⁸ Garcia-Herrero S et al, "Working Conditions, Psychological/Physical Symptoms and Occupational Accidents", (2012), [https://scholar.google.co.za/scholar?q=\(Garcia-Herrero+S+et+al+Working+Conditions+Psychological+Physical+Symptoms+and+Occupational+Accidents\)](https://scholar.google.co.za/scholar?q=(Garcia-Herrero+S+et+al+Working+Conditions+Psychological+Physical+Symptoms+and+Occupational+Accidents))

direct impact on efficiency.⁶⁹ Thus, by enforcing this common law duty it in turn implies that employees efficiently perform their obligations, with no harm to their safety or health.

In the United Kingdom there is legislation called Health and Safety at Work Act.⁷⁰ The Act outlines how to manage the workplace safety in the UK.⁷¹ Noteworthy that the Act in Section 2 regulates the over-all obligations of employers for providing a work place environment through the Health and Safety Executive (HSE).⁷² The Act further urges that the workplace must be secure, operations handled safely and work environment adequately maintained.⁷³ Moreover, the Workplace (Health, Safety and Welfare) Regulations,⁷⁴ ensures that all aspects of the working environment in terms of regulations are applied.⁷⁵ In the United Kingdom there are similarities with South Africa. Both countries recognize the safety in the workplace as a fundamental right and this is reflected in domestic legislation of both countries.⁷⁶

Furthermore, in the United Kingdom, the judiciary has authority to try cases that involve the contravention of safety and healthy laws. This has played an important role in asserting effectiveness in occupational health and safety laws.⁷⁷ To the contrary, in South Africa, violation of occupational health and safety standards does not award a criminal conviction to the offender or employer. There are some valuable lessons to draw from this practice by the United Kingdom. South Africa can adapt its regulations to improve its own efficiency in providing a safe and health workplace in

[Herrero+et+al.,+2012\).&hl=en&as_sdt=0&as_vis=1&oi=scholar#d=gs_gabs&u=%23p%3DkqQmGYa dxFYJ](#) accessed on 17 March 2022.

⁶⁹ Jonathan GK, (note 67 above) 1.

⁷⁰ Act of 1974; See also What is the Healthy and Safety at Work Act of 1974?, <https://www.britsafe.org/training-and-learning/find-the-right-course-for-you/informational-resources/health-and-safety-legislation-what-you-need-to-know/>, accessed on 15 March 2022.

⁷¹ Tshoose CI (note 3 above) 171.

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ Of 1992”.

⁷⁵ Tshoose CI (note 3 above) 167.

⁷⁶ United Kingdom’s Health and Safety at Work Act of 1974 <http://www.legislation.gov.uk/ukpga/1974/37/contents> , accessed on 15 March 2022.

⁷⁷ Niskanen T, ‘The Effects of the Enforcement Legislation in the Finnish Occupational Safety and Health Inspectorate’, (2013) 55 *Safety Science* 137.

the country. This further deters employers from contravening safety and health issues in fear of criminal cases instituted against them.

Covid-19 also provides us extra lenses to understand the importance of maintaining a safe and health workplace. Overcrowding and limited space in the sector especially underground mining, seriously exposes workers to Covid 19. This has a negative effect in the mining sector in many ways. For example, an employee maybe dismissed from their duties if they refuse to follow approved measures to protect others such as refusing vaccination.⁷⁸ In *Mulderij v Gold Rush Group*,⁷⁹ the Commissioner said it is justified to dismiss an employee if they fail or refuse to partake in contributing to providing a safe workplace environment. Covid-19 pandemic, saw many employers fulfilling their duty from common law to providing a safe and healthy work settings. The only way to prevent the escalation of the coronavirus in the workplace is to employ measures and protocols that curb its spread. Employers enforced mandatory vaccination policy in the workplace as a measure to ward off Covid-19. Non-compliance with the covid-19 protocols might result to an employee's dismissal due to permanent incapacity.⁸⁰

The case between *Eskort LTD v Mogotsi*,⁸¹ although this was not in the mining sector, the principles held by the court are applicable. In this case it was the first time to see an employee dismissed for failure to obey covid-19 protocols.⁸² The Commissioner pointed out that non-compliance with Covid-19 procedures, undermines a company's duty to create a safe and healthy workplace for all. The employer highlighted that Covid-19 regulations were enacted as essential efforts to protect the health and safety of all employers and customers.⁸³ Hence, the Commissioner held that the employee's dismissal was substantively fair.⁸⁴ Therefore

⁷⁸ Ndlovu L and Tshoose CI, 'Covid-19 and Employment Law in South Africa: Comparative Perspectives on Selected Themes', (2021) 1 (33) *South African Mercantile Law Journal* 26.

⁷⁹ GAJB 24054-21.

⁸⁰ *Ibid*, para 27

⁸¹ JR1644/20.

⁸² The second occasion being the *Mulderij* case, and the third occasion being *Solidarity obo Members v Ernest Lowe (a Division of Hugado Trading (Pty) Ltd* (2022) ZALCJHB61.

⁸³ *Eskort* case, at para 19.

⁸⁴ *Eskort* case (note 16 above) para 20.

disciplinary measures taken against other employees for violating the health and safety policies.⁸⁵ Hence, an employee should participate in providing a safe and health working environment.⁸⁶ In these Covid-19 times, all measures to prevent the increase of the disease should be endorsed. Thus, it is fundamental for employers to make sure certain reasonable care is adopted in fulfillment of their duty to create safe workplace for employees and customers. The outcomes are beneficial for both the employer and employee as they create and maintain a safe and health workplace for all.

1.4. Aims and objectives of the study

This study examines the feasibility of implementing the common duty by the employer to provide a safe and healthy work environment for employees in the mining sector.

The objectives that are distilled are:

1. To encapsulate what the duty of creating a safe working environment in the mining sector entails,
2. To assess jurisprudence on safety and healthy and if it offers substance to the right to a safe and healthy in the mining sector environment,
3. To identify the challenges in implementing the common law obligations to a safe and healthy work environment in the South African mining sector, and
4. To determine lessons to be drawn from Australia's implementation of common law by instituting criminal or civil case against violation of occupational safety and health by an employer in the mining workplace.

1.5. Research Methodology

The study used a qualitative approach. Specifically, a desktop-based literature review was conducted. Specifically, legislation, journal articles, books, reports, dissertations, thesis, discussion documents, and online internet sources were consulted and reviewed. Various sources assisted in analysing the importance of providing a safe and health work setting in the mining sector. Therefore, this study

⁸⁵ *Ibid.*

⁸⁶ *Mulderij* case (see note 79 above) at para 27.

assessed the implementation of the obligation assigned to the employer to create a safe and health mining workplace. To find solutions, a legal comparative method is used or amendments to the existing legislation on what employers should do to keep the workplace safe and health. A comparative analysis (South Africa and Australia) is used in the study. Australia was specifically chosen for this comparative study as it has valuable lessons which South Africa may adopt in curbing hazards and risks in its mining environments. The main notable difference is that Australian mining sector has advanced technology and skills to mitigate risks, deaths and injuries that arise in its workplace. There are also vast protective measures employed for Australian's mine workers. Moreover, there are clear strides and renowned development to practice and commitment to keeping the mining industry a safe and health and safety for employees to work in both countries.

1.6. Significance of the study

This study showcases the significance of providing and maintaining a safe and health work environment for workers in the mining industry. The study goes on to illustrate the importance of why employers should maintain a safe workplace. Failure to do so ultimately results in increased risks, deaths and injuries to employees and others in the mining workplace. Furthermore, it is highlighted how employers in the mining sector are failing to provide and maintain a safe and health working environment in the mines. Also steps and recommendations on improving the technology used in the mining environment, mine workers protective clothing and compliance to regulations in the workplace are outlined. The study findings are also beneficial to the advancement of knowledge in law and mining engineering students as it will bring insight into their studies. Furthermore, mining companies are likely to benefit from the knowledge produced and develop proper measures together with organised labour to prioritise safety of employees at work. Lastly, policy makers will gain insights into the complexities of matters involving health and safety in the mining industry, and propose appropriate measures, policies, regulations and implementation to curb deaths, minimise injuries and reduce exposure to hazardous factors.

1.7. Scope and limitation of the study

This dissertation is divided into five chapters. Chapter one introduces the study, its purpose, objectives and why it is important to have the study. In chapter two, the legislation governing health and safety in the mines in South Africa, Australia are reviewed and analysed. Chapter three introduces the case study used. Chapter four shows the comparative analysis of cases and literature between South Africa and Australia while chapter five is the last chapter which articulates the conclusions drawn from the comparative analysis and offers practical and policy recommendations.

CHAPTER TWO: POLICY AND LEGISLATIVE FRAMEWORKS

2. Introduction

To enforce compliance to provide a healthy and safe mining working environment for all, an employer needs to comply with all relevant legislative frameworks. These include local, regional and international conventions such as ILO ratified Conventions, regional provisions African Union and the Southern African Development Community (hereafter the AU and SADC) and domestic legal frameworks like MHSA⁸⁷ and the Constitution.⁸⁸

South Africa as a member of the ILO, SADC, and AU, is impacted by these instruments adopted by these organisations. Thus, they must be compliant to ensure that the workplace is conducive for all employees without risk and danger to their health, wellbeing and safety. Against this backdrop, these various policies and legislative frameworks are analysed in this chapter.

2.1 Health and Safety

The understanding and meaning of health and safety is defined in this section. 'Health' is defined as the absence of sickness or disability, including the physical and mental state that is directly linked to workplace safety and hygiene.⁸⁹ The World Health Organisation (WHO) describes health as the whole physical, social and psychological well-being.⁹⁰ In the workplace, the term health, is referred to as, "occupational health".

Oxford dictionary,⁹¹ defines 'safety' as the state of being secure and safe from injury or danger. In relation to this study, health and safety are defined under occupational health and safety as the study of workplace hazards, as well as their analysis and control. In the MHSA, health and safety are not defined, rather, the Act uses the term occupational health in mines to describe health.⁹² The MHSA and OHSA describe

⁸⁷ Section 1 and 2 of the Act.

⁸⁸ Section 24 of the Constitution of the Republic of South Africa.

⁸⁹ Article 3 (e) of the Occupational Health and Safety Convention 155 of 1981.

⁹⁰ Constitution of the WHO, <https://www.who.int/about/governance/constitution> accessed on 13 June 2022.

⁹¹ Oxford dictionary, <https://www.oxfordlearnersdictionaries.com/definition/english/safety?q=safety> accessed on 13 June 2022.

⁹² Section 102 of the MHSA.

employee occupational health as employees who are free of illness and injury in doing their work.

2.2 Legal framework

2.2.1. The Constitution

The Constitution is the highest law of the land,⁹³ and it is the yardstick to all the country's laws, rules and principles. In other words, all laws should be consistent with the Constitution of the Republic and no law should be inconsistent with it.

Section 24 of the Constitution,⁹⁴ entails that work settings should not be hazardous to the health and wellbeing of people. Albeit this section is applicable to environmental rights and not workplace rights, the right to a healthy environment can be linked to wellbeing and safety. An infringement of section 24 of the Constitution automatically violates the safety and wellbeing of employees, as mining activities degrade the environment rapidly, hence severely impacting on health and safety. Therefore, this provision assures all workers a safe workspace, and compels companies to deliberately create a workplace is not dangerous to employee's wellbeing and safety.⁹⁵ This can be applied to mining health and safety issues in the workplace. Therefore, compliance with Section 24 of the Constitution means employers should prevent all potential risks and hazards likely to occur in the workplace in a practical reasonable manner. Moreover, Section 7(2) of the Constitution, emphasizes that 'the government's duty is to respect, protect and fulfil the Bill of Rights including employee safety. This dictates that the state has an obligation to maintain a safe workplace by making sure that employees are not subjected to working conditions hazardous to their health or wellbeing.

In the Constitution, Section 23,⁹⁶ states that labour practices must be fair to all

⁹³ Section 2. 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'

⁹⁴ Section 24. "Everyone has the right—

(a) to an environment that is not harmful to their health or wellbeing"

⁹⁵ Shibambu ON and Odeku KO (note 23 above) 25.

⁹⁶ Section 23 (1) Everyone has the right to fair labour practices.

employees and employers. Equally, mine workers have fundamental rights and fair labour practices.

2.2.2. The Mine Health and Safety Act

The MHS Act is the central legislative framework that regulates the mining sector in terms of employee occupational health and safety in South Africa.⁹⁷ The Act also casts a duty on companies to create a safe and health work environment. The objectives of the MHS Act,⁹⁸ illustrate the commitment that promotion safety and health is always required in mines. In the Act, employers are further mandated by the MHS Act to take measures to identify and avert the potential incidence of any risks or dangers likely to ensue. The aim is to encourage a culture of safe and health practices in the mining sector.⁹⁹ Also, the MHS Act outlines the implementation, compliance and enforcement process to employers in eliminating risks and hazards to the safety and health of mine workers in South Africa.¹⁰⁰

In taking reasonable steps to provide a safe and healthy work settings for mine workers, an employer must assess potential risks.¹⁰¹ In the case of *Merriespruit*,¹⁰² of a collapsed gold mine's slime dam that resulted in human fatalities and significant damage to the surrounding town. A recent case in a diamond mine at Jagersfontein, South Africa, where a dam collapsed and released mining waste tailings into the community. A person was killed, and numerous others were injured when the muck flowed across the countryside, ruining homes, cars, and rivers and streams.¹⁰³ Such fatal incidences can be prevented by maintaining a safe and health in their

⁹⁷ Legislative Framework – Know the Main Principles of

the Mine Health & Safety Act
https://www.google.com/search?q=legislative+framework+for+mine+health+and+safety&rlz=1C1NHXL_enZA988ZA988&oq=Legislative+framework+for+mine+he&aqs=chrome.3.69i57j33i160l5.27155j0j7&sourceid=chrome&ie=UTF-8 accessed on 13 June 2022.

⁹⁸ Section 1 of the MHS Act.

⁹⁹ Section 1 (h)(i) of the MHS Act.

¹⁰⁰ Shibambu ON and Odeku KO (note 23 above) 23.

¹⁰¹ Section (2)(1)(a) of the MHS Act.

¹⁰² Free State Gold Areas Ltd v Merriespruit (OFS) Gold Mining Co Ltd 1961 (2) SA 505 (W).

¹⁰³ <https://www.reuters.com/world/africa/south-africa-mine-dam-collapse-highlights-patchy-regulation-2022-09-23/> accessed on 13 June 2022.

respective mines. Hence, mining operations should not be hazardous to employees and the surrounding communities as observed in the example of Jagersfontein.

More so, the MHSA mandates mine employers to develop a written safety and health policy.¹⁰⁴ This further transfers the responsibility to guard the safety and health of employees to direct supervisors and managers. The MHSA encourages a proactive approach by instructing employers to take specific steps to protect employees.¹⁰⁵ Also, a key area for MHSA is monitoring of circumstances that foster a culture of adherence to best practices of health and safety in the mines and to ensure that both mine workers and those affected by mining activities in South Africa are protected.¹⁰⁶

2.2.3. Occupational Diseases in Mines and Works Act

This Act was promulgated to provide a recourse for both former and present mine workers exposed to risks and hazards or harmed while working to file a claim for damages. For example, those that contracted silicosis and pneumoconiosis from mine dust, or other mine-related incidents.¹⁰⁷ Therefore, if employees suffer injuries or health risks, they may file a claim for damages under this Act. This is also specified in Section 32(1) of COIDA,¹⁰⁸ that is discussed in the next section.

2.2.4. Compensation for Occupational Injuries and Diseases Act

COIDA gives mine workers the opportunity for common action against the employer is replaced by the statutory claim for compensation.¹⁰⁹ The Act provides Compensation for employees that are incapacitated due to work-related illnesses or diseases, or who die because of their work. It is very useful in situations where

¹⁰⁴ Section 4(2)(b) of the MHSA.

¹⁰⁵ Swanepoel N, 'A single health and safety act for mining and industry in South Africa', (2016), https://repository.nwu.ac.za/bitstream/handle/10394/25939/Swanepoel_N_2016.pdf?sequence=1&isAllowed=y accessed on 13 June 2022.

¹⁰⁶ Tshoose CI, 'Placing the right to occupational health and safety within a human rights framework: trends and challenges for South Africa', (2014) 2 (47) *The Comparative and International Law Journal of Southern Africa*, 277.

¹⁰⁷ Shibambu ON and Odeku KO (note 23 above) 24.

¹⁰⁸ Section 32(1) of COIDA, "any person who works or has worked at a mine, or any other person acting on behalf of such a person, may at any time apply to the director for a medical examination of such person for the purpose of determining whether such person is suffering from a compensable disease, or, if he or she has previously been found to be suffering from such a disease, the degree of such disease".

¹⁰⁹ *Ibid.*

workplace injuries and deaths cannot be avoided, and only applicable if an injury, sickness, or death occurred.

Furthermore, COIDA grants discretion to the Compensation Commissioner to create a group or scheme whose sole objective is to prevent accidents or any disease that may develop as a result of the nature of specific activities, and the promotion of employee health and safety.¹¹⁰

2.2.5. The Mining Charter 2010

The Minerals and Petroleum Resources Development Act (hereafter the MPRDA) gives effect to the Mining Charter.¹¹¹ The Mining Charter, also called the Amendment to the Broad-Based Socio-economic Empowerment Charter for the South African Mining and Minerals Industry, 2010. The Charter is a mining tool created by the government to encourage sustainable development, growth, and radical transformation in the mining sector.¹¹² It is an important tool that also enhances mining industry safety and health.¹¹³ The South African Mining Charter is used to legislate and regulate the transformation in the mining industry in the Republic.¹¹⁴

The Charter also places remedies and penalties for non-compliance, in cases wherein an employer is non-compliant, their mining rights and or permits may be revoked.¹¹⁵ The Mining Charter plays a critical role in the mining sector's improvement of health and safety performance in South Africa. Mining corporations are encouraged to uphold a zero-harm policy for health and safety in mines. It further recommends eradicating mining-related illnesses like silicosis and pneumoconiosis as well as outlines the necessary methods to comply with the MHSA's

¹¹⁰ Section 4 (2)(b) of the COIDA.

¹¹¹ Section 100 (2)(a) MPRDA 28 of 2002.

¹¹² Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, 2018, https://www.gov.za/sites/default/files/gcis_document/201809/41934gon1002.pdf accessed on 13 June 2022.

¹¹³ *Ibid.*

¹¹⁴ Compliance with the Mining Charter, http://forum.tips.org.za/images/forum%20papers/2016/58c2c3_2bcba7a1faee4aa4ad69862a265d7b33.pdf accessed on 13 June 2022.

¹¹⁵ *Ibid.*

requirements.¹¹⁶ Thus, the Act is key to boosting transformation of health and safety in the mining.¹¹⁷

2.2.6. Minerals and Mining Policy White Paper

The White Paper on Minerals also talks about employee health and safety in the mines. The paper talks about protecting and fostering a culture of following safety and health protocols in the mines.¹¹⁸

The Leon Commission of Inquiry into Health and Safety in Mines in 1995 was the first of its kind to investigate occupational safety and health of mines in South Africa. The Commission found out that fatalities and injuries of mine workers were too high. For example, over 69,000 employees were killed in mine related accidents for the first 93 years in South Africa. Additionally, the Commission reported that over a million were seriously injured.¹¹⁹ As such, the Commission concluded that mine workers' occupational health experiences were at an all-time low. The Commission then recommended that a comprehensive legislative framework for promoting health and safety in mines be established. Pieces of legislation such as MHSA are a product of these findings. The commission further recommended that the mining industry, erect policies and safeguards to protect workers' health. For instance, occupational hygiene and medical surveillance programs.¹²⁰ These measures and Commission recommendations hoped to influence establishment of specific laws and foster considerable improvement to safety in the mining sector in South Africa.¹²¹

2.2.7. Growth, Employment and Redistribution (GEAR)

¹¹⁶ Mining Charter III-Mining safety implications, <https://m.polity.org.za/article/mining-charter-iii-mining-safety-implications-2017-07-18> accessed on 13 June 2022.

¹¹⁷ Madolo NV *Transformation of the Mining Sector of South Africa: Strategies Beyond the Life of the Mining Charter In 2014* (LLD-Thesis University of Witwatersrand 2014).

¹¹⁸ White paper mining minerals policy, https://www.gov.za/sites/default/files/gcis_document/201409/whitepaperminingmineralspolicy2.pdf accessed on 13 June 2022.

¹¹⁹ Leon Commission of Inquiry into Health and Safety in Mines Report, http://www.klasslooch.com/leon_commission_of_inquiry.htm#:~:text=The%20Leon%20Commission%20of%20Inquiry,OHS%20had%20ever%20been%20appointed accessed on 13 June 2022.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

GEAR is a five-year plan created by the South African government in 1996. The programme created a crucial foundation for future economic development. It put in place new laws and programs to improve worker welfare and grow the domestic economy. South Africa as a mineral wealthy nation, the mining industry must also fairly contribute to socio-economy of workers and communities.¹²² Hence, workers in the mining industry must be protected from over-exploitation by mining cooperations seeking to maximize profits at the expense of workers safety and health. In a similar vein, the Reconstruction and Development Programme, provides for a new set of minimum standards required for the mining industry to ensure safe and health working conditions for all employees. Thus, the health and safety systems in mines should recognise the unique hazards associated with mining.¹²³

2.2.8. Disaster Management Act 57 of 2002

Disaster Management Act 57 of 2002 was used recently in South Africa to manage the novel coronavirus. This was necessary for the government to ensure safety and mitigate the spread of Covid-19. As a result, safety and health mandatory protocols had to be adopted to prevent the spread of the virus in the workplace. Section 67 (4) of the Disaster Management Act (DMA), obligates the employer to ensure that all employees adhere to these workplace measures like wearing a face mask or any other appropriate item that would cover their nose and mouth while performing their duties.

2.2.9. Covid-19 Standard Operating Procedure for South African Mines

As a measure to lessen the spread of the virus in the mining sector, the Standard Operating Procedure (SOP) was developed to alleviate the transmission of the virus. The SOP ensured that the return of mine employees to work, is in such a manner that their good health and safety is prioritised. The Covid-19 lockdown saw some mines being closed down for health and safety maintenance. On the other hand, some were given permission to operate on a partial-scale capacity as an exemption to the regulations of the lockdown. The procedure specified that employers must

¹²² The Reconstruction and Development Programme”, “<https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv02039/04lv02103/05lv02120/06lv02126.htm> accessed on 13 June 2022.

¹²³ *Ibid.*

implement a process for managing the return to work following the lockdown. According to the SOP, their strategy should outline the steps for preventing the spread of infections, how employees would obtain medical treatment in relation to Covid-19 is to be communicated with the Departments of Mineral Resources and Energy and Department of Health.

In addition, on arrival, employees must be educated on curbing transmission of the virus in the workplace. These include frequent washing of hands and sanitisation, avoiding touching the face and handshakes, and the wearing of applicable personal protective equipment amongst others. In the SOP, employers were also required to set up screening sites at the workplace and monitor adherence to good hygiene practices.

2.2.10. Guiding Principles on Prevention and Management of Covid-19 in South African Mining Industry

The South African Department of Mineral and Energy (DMR) on 26 March 2020 published guidelines on how to prevent and manage Covid-29 virus in the mines in South Africa.¹²⁴ These guiding principles for managing Covid-19 exposure, included mitigation and readiness measures. In terms of Section 11 of the MHSA, companies were expected to adopt a risk-based approach assessing of all risk mine operations and identify cohort of employees who are vulnerable to being exposed to the virus. These guiding principles were enacted to mitigate the spread of the coronavirus in the mines and ensure health protection for everyone in the workplace. This meant that companies are also duty bound to examine workers for Covid-19 exposure prior to bringing them to the workplace.

2.2.11. Standard Operating Procedure (SOP) for addressing cases of COVID-19: Prepared for members of the Minerals Council South Africa

The aim of the SOP is to recognise at-risk individuals and managing them, reducing the risk, and gearing up for the workplace during Covid-19. Covid-19 as a new infectious virus had the potential to harm or jeopardise employee's health. To lessen

¹²⁴ Department of Mineral Resources Notice 253 of 2020, https://www.gov.za/sites/default/files/gcis_document/202005/43282gen253s.pdf accessed on 13 June 2022.

the effects of Covid-19 in the workplace, risk assessments by mines were evaluated and updated using the hierarchy of controls, made available in the SOP and the guiding principles. In providing safety and health in the mines, employers are to adopt Covid-19 infection policies and guidelines. Also, the SOP mandates employers to create a plan for preparing and responding to infectious diseases that can assist direct countermeasures against Covid-19.

2.3. Regional law framework

The occupational safety and health regulatory framework is primarily a collection of laws that govern how mining operations should be carried out.¹²⁵ The goal of the AU was to ensure that Africa plays a major role in the global economy, address socioeconomic growth issues and the promotion of good health on the continent.¹²⁶ As a member of the AU, South Africa is bound by policies, guidelines, instruments and various bodies of the AU.¹²⁷ At a regional level, workplace safety and health issues are now more widespread.¹²⁸ African countries have realised the importance of protecting mine workers' exposure to airborne pollutants like silica and coal dust, noise, heat, and vibration that are all major health hazards in the mining industry.

2.3.1. African Charter on Human and Peoples Rights

The Charter is a regional guideline set to promote the respect of individual human rights in Africa. Article 16(1) of the Charter says everyone has the right to labour in conditions that are both equitable and satisfactory, and, to attain the best possible state of physical and mental health.¹²⁹ Moreover, Article 24 says 'people are entitled to a generally pleasant environment conducive to their progress'.¹³⁰ This Charter is a driving force behind and improvement of work environment safety including the mining sector.¹³¹ Regional instruments, like the Charter, are useful in accelerating the

¹²⁵ Khoza N et al, 'The importance of an occupational safety and health legal framework and its progress in Southern Africa', (2021) 2 (27) *Occupational Health Southern Africa*, 56.

¹²⁶ Article 3 (n) of the Constitution of the African Union.

¹²⁷ Papisca A, *The Local Relevance of Human Rights* (1st Edition, 2011, Cambridge University Press, England) 84.

¹²⁸ Hermanus MA (note 5 above) 536.

¹²⁹ Article 16 of the African Charter on Human and Peoples Rights, <https://www.achpr.org/legalinstruments/detail?id=49> accessed on 13 June 2022.

¹³⁰ Article 17 of the African Charter on Human and Peoples Rights.

implementation of high-quality collective health and safety standards in the mining industry. South Africa's mining industry is required by law to build or improve their mining environments and comply to such mine workers' safety and health.

Companies and managers need to be aware that health and safety is a fundamental human right accorded to all mine workers.¹³² Mining companies tend to either ignore or fail to reach the minimum target due to the profit maximizing behaviour and leave employees vulnerable to health and safety hazards.

2.3.2. Charter of Fundamental Social Rights in SADC

This is known as the SADC Charter. It recognises the importance of the universal and indivisible human rights that everyone should enjoy. SADC member states expected to uphold these basic rights outlined in the SADC Charter. The Charter also calls for better working conditions, as well as employee safety and health. For example, Article 12 of the SADC Charter,¹³³ entails that member states develop an environment in which workers' health and safety are protected in an equitable manner. Henceforth, member states must promote a workplace where employees' right to health and safety is secured and protected.¹³⁴ The SADC Charter's recommendations, binds South Africa to establish a safe place of work, introduce and implement health and safety measures, and account for health and safety of mine workers.

2.3.3. SADC Protocol on Mining

SADC Protocol on occupational health and safety, affords all mine workers protection in the workplace. Member states agree to work together to develop and implement globally recognized standards on the aspects of health, safety, and environmental protection.¹³⁵ Furthermore, the countries agreed to work together in improving mining occupational health and safety practices and standards in the Region as stated in Article 9 of the Protocol.¹³⁶ This also further binds South Africa to

¹³¹ Article 16 and 17 of the African charter on human and people's rights.

¹³² Khoza N et al (see note 126 above) 56.

¹³³ Article 12(a), (b), (c) of the SADC Charter.

¹³⁴ Article 12 of the SADC Charter.

¹³⁵ Southern African Development Community-Unpacking the SADC Mining Protocol <https://www.sadc.int/news-events/news/unpacking-sadc-mining-protocol/> accessed on 13 June 2022.

commit to enhancing workplace safety and health for the benefit of mine workers and everyone else involved in mining operations.¹³⁷ These regional instruments and legislative frameworks binds South Africa and lays guidelines to ensure employers carry out their responsibilities in a safe and healthy workplace, with less or no risks, injuries, and deaths.

2.4. International law framework

There are various conventions and recommendations on international labour standards for safety and health to help governments, employers and workers, to create strategies for preventing injuries, diseases, and deaths at work. Also, the insights into the steps to be taken to make sure the safety, health, and well-being of employees while at work are provided for. In the case of *Government of the Republic of South Africa v Grootboom*,¹³⁸ the court held that,

“The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable”.

The case illustrates how South Africa is committed to be bound to international law where the relevant principles are applicable. Moreover, South Africa recognises international law and agreements entered as a result of such in terms of the Constitution.¹³⁹

2.4.1. The International Labour Organisation

The ILO sets global best practices on occupational health and safety.¹⁴⁰ South Africa as a member state of the ILO, is expected to follow these guidelines. The preamble of the ILO Constitution emphasises the safeguarding of employees against

¹³⁶ *Ibid.*

¹³⁷ Article 9 of the SADC Protocol on Mining.

¹³⁸ 2000 11 BCLR 1169 (CC).

¹³⁹ Section 231 (4) of the Constitution.

(4) “Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament”.

¹⁴⁰ Tshoose CI (note 106 above) 278.

occupational illness, diseases, and injuries at work.¹⁴¹ ILO Conventions are only binding once ratified by a member state. South Africa has proclaimed its determination to ratify international law in approach to occupational health and safety issues. South Africa has ratified various ILO Conventions, hence, entailing that it is bound by them and are incorporated into its domestic law.

By domesticating international law and agreements into its national law, it proves the commitment of South Africa to ILO labour standards.¹⁴² The ILO operates at a global level to set and propose best practices and standards that can be used globally to protect employees from workplace injuries and diseases.¹⁴³ Tshoose asserts that South Africa should make every effort to make sure that its occupational health and safety legislation are in line with ILO international standards.¹⁴⁴

2.4.2. Universal Declaration of Human Rights (UDHR)

From the onset of the ILO in its preamble, it states that,

“...the protection of the worker against sickness, disease and injury arising out of his employment...”¹⁴⁵

The ILO adopted the UDHR in the field of occupational health and safety.¹⁴⁶ The UDHR enshrined the right of employees to safety and health with its provision that,

“...everyone has the right to work...to just and favourable conditions of work...”¹⁴⁷

2.4.3. Occupational Safety and Health Convention

¹⁴¹ Key document-ILO Constitution, https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO accessed on 13 June 2022.

¹⁴² *Ibid*; See also Section 233 of the Constitution, “when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law”.

¹⁴³ Tshoose CI (note 106 above) 279.

¹⁴⁴ Tshoose CI (note 106 above) 291.

¹⁴⁵ Preamble of the ILO Constitution of 1919.

¹⁴⁶ Article 23(1) of the UDHR.

¹⁴⁷ *Ibid*.

South Africa ratified this Convention in 2003 and as such it is bound by the Convention Article 2,¹⁴⁸ that ensures all workers, regardless of the economic sector and activity are engaged on health and safety. Moreover, Article 4 of the Convention,¹⁴⁹ guides on cohesive national policies on occupational safety, health and the workplace settings to prevent injuries or accidents and reduce hazards to the extent that is reasonably practicable.¹⁵⁰ This Convention ensures compliance to article 4,¹⁵¹ and that regulations are enforced through efficient inspection systems. MHSA for instance reinforces the obligations set in the Convention.

2.4.4. Safety and Health in Mines Convention

South Africa ratified this Convention in 2009. This Convention acknowledges the need to avert deaths, injuries, or sicknesses among employees or the public and reduce environmental damage from mining operations.¹⁵² More so, article 4 of this Convention says its member states are required to develop national laws and regulations to supplement such guidelines and standards.¹⁵³ Various legislative framework like the MHSA, ODMWA and OHSA are some of the indications that South Africa is committed to this cause.

2.4.5. 110TH International Labour Conference Development

The recent annual International Labour Conference held from 27 May to 11 June 2022 added safety and health to the fundamental principles and rights at work.¹⁵⁴ The decision obligates all members of ILO regardless of whether they have ratified the relevant Convention or not, to respect and foster the fundamental right to a safe and healthy workplace.¹⁵⁵ This new measure adopted, is an addition to the four categories

¹⁴⁸ Article 2(1) of the Occupational Safety and Health Convention.

¹⁴⁹ Article 4(1) of the Occupational Safety and Health Convention.

¹⁵⁰ Article 4(2) of the Occupational Safety and Health Convention.

¹⁵² Tshoose CI (note 106 above) 293.

¹⁵³ Article 4 of the Safety and Health in Mines Convention.

¹⁵⁴ 110th International Labour Conference: International Labour Conference adds safety and health as fundamental principles and rights at work, https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_848132/lang-en/index.htm accessed on 14 June 2022.

¹⁵⁵ *Ibid.*

of important principles and rights of workers in the workplace since 1998. These were:¹⁵⁶

1. “Freedom of association and the effective recognition of the right to collective bargaining”
2. “The elimination of all forms of forced or compulsory labour”
3. “The effective abolition of child labour”
4. “The elimination of discrimination in respect of employment and occupation”

Hence, occupational health and safety is added as the fifth category to the four already mentioned above. This is regarded as transformative development in the workplace to add the principle of a safe and health workplace setting. Mine workers stand to benefit from exposure to various risks associated with mining activities. This is an important step in safety and health working environments.¹⁵⁷ South Africa is bound by this new commitment to step up and strengthen its work in realising a safe and health mining working environment.

2.5 Conclusion

The reviewed legislative frameworks and policies local, regional and international, bind South Africa to accord its advancement of safety and health in the mines. Thus, enabling a robust and radical transformation of the mining environments by improving the safety and health standards measures. Policies and legislative frameworks when effectively incorporated and implemented can significantly advance the working conditions in the mining sector. Compliance to these policies and legal frameworks is likely to deliver better safety and health measures in the mines.

Various legislative frameworks enacted nationally, provide that employers should always ensure that mining operations take place in an environment that is safe and

¹⁵⁶ *Ibid.*

¹⁵⁷ ILO adds safety and health as a fundamental principle and right at work, <https://www.ifj.org/media-centre/news/detail/category/press-releases/article/ilo-adds-safety-and-health-as-a-fundamental-principle-and-right-at-work.html> accessed on 13 June 2022.

health for all workers. This is captured in the instruments such as MHSA, ODMWA and the Constitution.

Also, membership to AU and SADC, binds South Africa to various regional frameworks, instruments and bodies on issues of occupational health and safety in the mines as illustrated by the SADC Protocol on Mining. International labour standards set by the ILO in its Conventions also binds South Africa as a member. Notably, the recent and welcomed landmark decision adopted by the 110TH International Labour Conference Development of 2022 added that occupational health and safety is a fundamental right in the workplace. Employers are therefore obliged to ensure that the mining sector adheres to the standards established on safety and health of mine employees in the workplace, overall goal being to achieve sustainable outcomes in safety and health of mine workers.

CHAPTER THREE: CASE STUDY

3. Introduction

In analysing employer's compliance to their duty of creating a safe and health mining workplace, various domestic and international case laws are considered. Case law is vital in revealing the interpretation of the law and its application in the courts of law. Courts interpret and analyse different case laws, through the principle of separation of powers.

Sentences for violators of occupational health and safety regulations present judges with a special set of difficulties.¹⁵⁸ This leaves the judiciary with the task of analysing whether the duty imposed on the employer was given due regard or not. Due to the hazardous conditions that the employees in mines are exposed to underground and, on the surface, occupational health and safety are important part of the mining industry.¹⁵⁹

The Constitution,¹⁶⁰ vests judicial authority in the courts. The judiciary is only bound by the Constitution and the law. The judiciary have made various decisions in relation to companies' obligation to create safety and health in the mining sector. Against this backdrop, these various case laws on safety and health in the mines is discussed next.

3.1 Association of Mineworkers and Construction Union v Minister of Mineral Resources and Energy and others¹⁶¹

3.1.1 Factual Background

A 10-point strategy developed by the Mining Occupational Health and Safety Committee to control the spread of COVID-19 was released by the Minister on March 26, 2020, as a disaster management regulation.¹⁶² The applicant complained to the Minister in a letter dated April 7, 2020, that the department had adopted the rules without consulting it. After operations resumed, the Chief Inspector of Mining issued a statement outlining health and safety precautions in all mines to be adopted.¹⁶³ These guidelines, according to the Association of Mineworkers and Construction Union (hereafter the AMCU), were inadequate, and the Minister ought to have used his authority under the MHSA to enact a code for the mining sector.¹⁶⁴

¹⁵⁸ McCallum R et al, 'The role of the Judiciary in Occupational Health and Safety Prosecutions: Institutional Processes and the Production of Deterrence', (2012) 5 (54) *Journal of Industrial Relations* 690.

¹⁵⁹ Sieberhagen C et al, 'Employee health and wellness in South Africa: The role of legislation and management standards', (2009) 1 (7) *SA Journal of Human Resource Management*, 20.

¹⁶⁰ Section 165 of the Constitution.

¹⁶¹ J 427/2020 (LC).

¹⁶² *Ibid*, para 13.

¹⁶³ Note 162 above, para 14.

¹⁶⁴ *Ibid*.

The Minister determined that this was adequate, and AMCU sought an order overturning that decision, that general regulations supplemented by voluntary measures in various operations were insufficient, and that binding standards were required for the mining sector.¹⁶⁵ The coronavirus pandemic constituted a public health matter as opposed to an occupational health matter, the Minister and the Chief Inspector contended that it was legitimate to refuse to comply with AMCU's request.

3.1.2 Legal Issues

1. The reasonableness of the decision not to invoke Section 9 of the MHS Act was contended in *AMCU vs the Minister and the Chief Inspectorate*.
2. Whether the decision fails to meet the reasonableness standard established by the Promotion of Administrative Act.¹⁶⁶

3.1.3 Decision of the court

The Chief Inspector's failure to invoke Section 9 of the MHS Act when faced with public health crisis, on health and safety; the insufficiency of the measures intended to stop the spread of the disease; and failure to recognize the convergence of public and occupational problems brought by Covid-19 in the mines; led to an unreasonable outcome, and the decision was reviewed and overturned.¹⁶⁷ The court decided that with the pandemic, employers are required to regulate the safety and health in mines by upholding to the provisions of the MHS Act.¹⁶⁸ The court considered the view that, since mine workers work in cramped settings where it is impossible to maintain social distance, they are particularly susceptible to COVID-19.¹⁶⁹ Furthermore, the court ruled that Section 9 in MHS Act be invoked to better manage COVID-19 hazards

¹⁶⁵ *Ibid.*

¹⁶⁶ Section 6(2)(h) of Act 3 of 2000.

¹⁶⁷ *Association of Mineworkers and Construction Union* (Note 162 above) para 36.

¹⁶⁸ Section 9 (2) of MHS Act 'An *employer* must prepare and implement a code of practice on any matter affecting the *health* or *safety* of *employees* and other persons who may be directly affected by activities at the *mine* if the *Chief Inspector of Mines* requires it.

(3) A code of practice required by the *Chief Inspector of Mines* must comply with guidelines issued by the *Chief Inspector of Mines*.

¹⁶⁹ *Association of Mineworkers and Construction Union* (Note 162 above) para 5.

across all mining operations and is to be achieved by developing a code of practice.¹⁷⁰ Thus, employers must reduce the negative effects of COVID-19 in the workplace, by implementing policies and practices that control the spread of the virus and protect the health and safety of workers in the mines and those impacted by mining activities.

3.1.4 Evaluation/Analysis of the case

The advent of the coronavirus in the workplace, meant that employers should put measures in place to deal with its adverse effects. Hence, in *Association of Mineworkers and Construction* case, the court concluded that it was unreasonable and improper for the Minister and Chief Inspector of Mines to refuse to publish enforceable regulations on Covid-19 prevention, health and safety protocols to fight the disease in the mines under the powers in the MHSA. The court considered serious implications and risks posed to and health effects to mineworkers by Covid-19. The spread of the Covid-19 virus has serious implications for South Africa's mining industry.¹⁷¹

The case of *Association of Mineworkers and Construction*, assisted in minimizing the effects of the Covid-19 outbreak on the health and safety of workers by paving the way for the development of mine code of practice in managing Covid-19. The applicant had also argued that the rules and directives that had been published to inform mine employees that they might return to work were insufficient. In addition, the current Covid-19 pandemic can be used to examine safety and health in the mines. Mine workers typically work in crowded conditions with little social distance. Employers should take steps to prevent the spread of coronavirus by implementing measures, procedures, and protocols that eliminate the risk of the virus transmission among mine workers. Hence, complying with regulations,¹⁷² and providing a healthy and safe mining work environment for workers.

In the case of *Eskort*,¹⁷³ the court declared that a safe and healthy workplace is

¹⁷⁰ *Ibid.*

¹⁷¹ *Association of Mineworkers and Construction Union case* (Note 162 above) para 35.

¹⁷² Section 1 and 9 of the MHSA.

¹⁷³ *Eskort case* (note 16 above) para 19.

infringed when Covid-19 guidelines are not followed. Thus, both employers and employees are duty bound to ensure that the workplace is a Covid-19 free, safe and health workplace.

In *Merriespruit*,¹⁷⁴ involved the fatalities and serious damages to the nearby town when the gold mine's slime dam collapsed. This incident demonstrates how dangerous the mining environment is and the need for adopting reasonable safety measures. Hence, to avoid situations like the one in *Merriespruit*, it is necessary to uphold the duty to guarantee the mining environment is safe and healthy to carry out work obligations.¹⁷⁵

Many accidents occur in mining operations. At the Kinross gold mine in Evander, Mpumalanga, 177 mineworkers were trapped underground and their bodies were never retrieved.¹⁷⁶ This was due to low safety standards that had been reported at the mine.¹⁷⁷ Another noteworthy occurrence occurred in 2018 at the Phalaborwa Mine Company, where six miners perished as a result of rising temperatures that caused a fire to erupt.¹⁷⁸ Two Harmony Gold Mine employees perished on October 22 2021, at the Kusasaletu mine in Carletonville in Gauteng as a result of the ground collapsing.¹⁷⁹ In March 2022, a miner at Harmony Gold's Doornkop mine in Johannesburg was killed in a mine-related material car accident.¹⁸⁰

Sadly, four more gold mine workers died on 7 May 2022, at the same mine after a mud wall fell as they were cleaning an underground mud dam.¹⁸¹ Improved health

¹⁷⁴ *Free State Gold Areas Ltd v Merriespruit* (OFS) Gold Mining Co Ltd 1961 (2) SA 505 (W).

¹⁷⁵ *Association of Mineworkers and Construction Union* (Note 162 above) para 34.

¹⁷⁶ 177 Kinross Mine disaster victims remembered, <https://ridgetimes.co.za/20981/177-kinross-mine-disaster-victims-remembered/?noapp=true> accessed on 19 June 2022.

¹⁷⁷ *Ibid.*

¹⁷⁸ Death toll in Phalaborwa mine fire rises to six, <https://www.timeslive.co.za/news/south-africa/2018-07-16-death-toll-in-phalaborwa-mine-fire-rises-to-six/> accessed on 19 June 2022.

¹⁷⁹ Two Gauteng miners killed in a 'fall of ground' incident, <https://www.news24.com/news24/southafrica/news/two-gauteng-miners-killed-in-a-fall-of-ground-incident-20211022> accessed on 19 June 2022.

¹⁸⁰ Four Harmony Gold miners die after a mud wall collapsed, <https://www.thesouthafrican.com/news/four-miners-dead-harmony-gold-ikusasaletu-mine-carletonville-gauteng/> accessed on 19 June 2022.

and safety measures in the mines are still highly required and to also prevent fatalities of employees. Therefore, employers are required to set up health and safety best practices to prevent such incidences as those mentioned above from occurring.

3.2 Mankayi v AngloGold Ashanti Limited¹⁸²

3.2.1 Factual Background

Mankayi, who worked as an underground miner for the mining company AngloGold, claimed that while employed by the company, he acquired tuberculosis and chronic obstructive pulmonary disease. This rendered him unable to perform his duties as a miner and other occupations.¹⁸³ Based on that AngloGold is obliged to protect workers from diseases, under both common law, delictual damages were instituted against the company. Following certification of a compensable disease, the applicant was given a sum of R16 320.00 by the Compensation Commissioner in accordance with ODIMWA.¹⁸⁴ AngloGold argued that Mankayi's "particulars of claim" raised "no cause of action," because Section 35(1) of COIDA is not specific and does not state that employees in common law can make claims against their employers.¹⁸⁵

3.2.2 Legal Issues

The applicant opposed the ruling by the South Gauteng High Court and the Supreme Court of Appeal. As a result, the court held that COIDA provision,¹⁸⁶ was interpreted as excluding workers in the mines from their right to sue the company for work-related illnesses and injuries while simultaneously defending companies from claims arising from failure to uphold the employer's common-law obligations, of the duty to

¹⁸¹ *Ibid.*

¹⁸² 2011 ZACC 3 (CC).

¹⁸³ Shibambu ON and Odeku KO (note 23 above) 21.

¹⁸⁴ Tshoose CI (note 8 above) 236.

¹⁸⁵ Shibambu ON and Odeku KO (note 23 above) 21.

¹⁸⁶ Section 35(1) COIDA states that, "no action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death".

maintain a safe workplace.¹⁸⁷ The question of whether Section 35(1)'s exclusionary impact solely applies to workers that have a claim for compensation under COIDA in relation to the occupational sickness sustained by Mankayi, and whether COIDA extends to workers included in Section 100(2) of ODIMWA.¹⁸⁸

3.2.3 Decision of the court

The Court ruled that "if an employee contracts a compensable disease at a controlled mine, that employee is required to seek compensation."¹⁸⁹ The Constitutional Court concluded that Section 35(1), excludes employees' from the right to sue their employers for occupation damages resulting from an injury or disease, and includes only employees who can claim under COIDA.¹⁹⁰

3.2.4 Evaluation/Analysis of the case

The *Mankayi* case signifies how to determine the scope and significance of the company's duty of care, on safety and health. The Court further established a precedent for all future cases. This decision instilled a sense of accountability in employers and reduces exploitation of workers health and safety against the provisions of the MHSA.¹⁹¹ It also illustrates how mine employers are tasked with the responsibility of work safety and health of mine workers.¹⁹² In *Van Deventer v Workmen's Compensation Commissioner*,¹⁹³ , the Judge summed what employer's duties and expectations are as follows:

“An employer owes a common law duty to a workman to take reasonable care for his safety. The question arises in each particular case what reasonable care is required. This is a question of fact and depends upon the circumstances of each case. A master [employer] is in the first place under a duty to see that his servants [employees] do not suffer through his personal negligence, such as failure to

¹⁸⁷ Tshoose CI (note 8 above)236.

¹⁸⁸ *Mankayi v AngloGold Ashanti Ltd* Case No 06/22312, South Gauteng High Court, Johannesburg, 26 June 2008, unreported at para 72.

¹⁸⁹ *Ibid.*

¹⁹⁰ Tshoose CI (note 8 above) 240.

¹⁹¹ Tshoose CI (note 8 above) 251.

¹⁹² *Ibid.*

¹⁹³ 1962 4 SA 28 (T).

provide a safe working environment and a failure to provide [a] proper and suitable plant, if he knows or ought to have known of such failure”.

In many instances, mine accidents occur when employers fail to uphold their duty as required by law. Hence, the court upheld that employers have a duty to ensure that mine workers conduct their work obligations in an environment that has safe and health standards as required in various statutory frameworks like the COIDA and MHSA.

The case of *Association of Mineworkers and Construction Union obo Matihola / Impala Platinum Ltd*,¹⁹⁴ can be employed in analysing compliance to the common law duty of the employer of ensuring that the workplace is safe and health. The applicant was dismissed for many safety-related misconduct violations. These included permitting subordinates drill without safety nets and installing support structures improperly. In concluding the case, the court ruled that the mine supervisor’s dismissal was substantive and procedurally fair, due to failure to ensure that subordinates comply with safety procedures. This included gross violations of public health and safety standards by permitting hazardous working conditions in their area of responsibility.¹⁹⁵ A supervisor who fails to maintain and create a safe and health mine can ultimately be dismissed.¹⁹⁶

More so, in the case of *NUM & others v Chrober Slate*,¹⁹⁷ the court ruled an employer who exposes employees to a workplace that is dangerous, is in violation of the common law duties to keep it safe. Efforts should be made to maintain optimal health and safety standards in mining environments. In *City of Johannesburg v Swanepoel NO and Others*,¹⁹⁸ it was decided court ruled that the mining environment, is not just the place where work is done, but the entire mining environment must be secure.¹⁹⁹ In the case of *SAR & H v Cruywagen*,²⁰⁰ the judge ruled that the

¹⁹⁴ [2014] 5 BALR 481 (CCMA).

¹⁹⁵ *Ibid* para 9.

¹⁹⁶ Section 4 and 6 of the LRA.

¹⁹⁷ *(Pty) Ltd* [2008] 3 BLLR 287 (LC).

¹⁹⁸ 37 ILJ 1400 (LC) at para 1408.

¹⁹⁹ Lewis D and Sargeant M, *Essentials of Employment Law* (8th Edition Cromwell Press 2004) 23.

company's obligation to create a safe workplace means the actual mode of doing work is safe. The employer has an obligation to monitor and control the risk of contamination at work, specifically in relation to Covid-19.²⁰¹ Thus, the employer fulfilled his duties and responsibilities, and being consistent with the Constitution.²⁰²

Moreover, in *Harmony Gold v National Union of Metalworkers of South Africa (NUMSA)*,²⁰³ the respondents were striking for the applicant to cease using the conveyor belt as a means of moving workers underground in the mine. Respondents said the conveyor belt transportation was unsafe, and that proper safety considerations were not applied in using this method. This relates to evaluating the chances of injuries that are likely to occur at work as result of the belt. *Harmony Gold v NUMSA* case demonstrates that employers must take personal responsibility for following mine rules and codes of conduct.

3.3 International Case laws

Internationally, how occupational health and safety standards are to be implemented in the workplace has been debated widely and extensively.²⁰⁴ In this section, international law case studies are discussed.

3.4 Wilmington star mining company v Fulton²⁰⁵

This case occurred in the United States of America. This case analyses the company's obligations to create a safe and health work environment in the mines. The employee had been exposed to an unsafe workplace and negligence of the

²⁰⁰ 1938 CPD 219 229.

²⁰¹ Olivier J et al, The Coronavirus: Implications for Employers in South Africa, (6 March 2020), <https://www.webberwentzel.com/News/Pages/the-coronavirus-implications-for-employers-in-south-africa.aspx> accessed 20 June 2022.

²⁰² Section 24 (a) everyone has the right to an environment that is not harmful to their health or wellbeing.

²⁰³ (Unreported) case number J367/2012 of 14 March 2012.

²⁰⁴ Tshoose CI (note 8 above) 253.

²⁰⁵ 205 U.S. 60,27 Supreme Court of the United States of America. 412,51 United States Supreme Court Reports 708.

employer was revealed on how hazards had not been identified that could have reduced safety and health risks to the mine worker.

3.4.1 Factual Background

Mr Fulton (a mineworker) was exposed to dangerous gases due to an explosion in the mine which ultimately resulted in his death. Mr Fulton's widow filed a lawsuit against the mining company to seek compensation for her husband's death.²⁰⁶

3.4.2 Legal Issues

1. Whether the state's decision to control the use of mining properties was acceptable.
2. Whether mine owners will be denied the equal protection of the law provided by the Illinois Mining Statute of 1899.

Among the charges against the mining company, was that it failed to maintain sufficient fresh air currents at the mine to ensure that workers are protected from health and safety hazards. There were eight counts in the petition, each of which spelled forth a specific act of negligence that was said to have been the accident's primary cause and to have represented the mining company's wilful disregard for a specific set of statutory duties in relation to safety and health.²⁰⁷

3.4.3 Decision of the court

The court enforced the company's duty to create a mine that is both health and safe for mineworkers. Simultaneously, the employer is duty bound to extend mineworkers' lives and promote their safety and well-being. Court considered that when two concurrent causes contribute to an employee's accident, the fact that the employer is not responsible for one of them does not absolve the company of the liability for the other where responsibility is.²⁰⁸ This, further cemented the duty of the employer to enforce health and safety for all mine workers.

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*

²⁰⁸ Tshoose CI (note 8 above) 267.

3.4.4 Analysis/Evaluation of the case

The court referred to the Coal Mining Act,²⁰⁹ which stipulates the need to create health and safety of persons employed in coal mines. Employers should exercise great caution in fulfilling their duties.

3.5 Taskin and Others v Turkey

In *Taskin*,²¹⁰ arguments were made to the construction and operation of a gold mine. The complainant claimed had negatively impacted the local population and the environment.²¹¹ According to the Turkish Supreme Administrative Court in deciding this case, it held that, member states are required to ensure that life, health, and human rights of safe and decent work environment are appropriately protected. Also, it was held that employers should ensure a working environment that is conducive and not hazardous to employees.

3.6 Tatar v Romania

In the case of *Tatar*,²¹² it involved an ecological catastrophe at a gold mine in Romania. The significant concentrations of sodium cyanide and heavy metals deposits into open water bodies like rivers, causing pollution and impacting locals were a major concern. In its decision, the court stated that the government has a responsibility to implement realistic and satisfactory measures,²¹³ capable to protect rights of individuals about threats to their health and security.²¹⁴

3.7 The Department of Labour v Pike River Coal Limited

In the *Pike River* case,²¹⁵ several workers died due to a methane explosion. The company was found to have been severely negligent. The lessons in this case, are the importance of taking reasonable precautions to avoid hazards by using mitigation mechanisms and various control measures.²¹⁶ Such measures are the enforcement

²⁰⁹ 225 ILCS 705.

²¹⁰ No. 46117/99 2004 European Court of Human Rights 621.

²¹¹ *Ibid.*

²¹² App. No. 67021/01 (judgment delivered on 27 January 2009).

²¹³ Tshoose CI (note 8 above) 253.

²¹⁴ Section 2 of the MHSA.

²¹⁵ The Department of Labour v Pike River Coal Limited CRN 11018500202/202,211.

of the employer's obligations to a safer and healthy workplace by taking concrete steps to protect their employees.²¹⁷

3.8 *Donovan, Secretary of Labour v Dewey et al*

In the case of *Donovan*,²¹⁸ the court stated that it is undeniable that the federal government has a significant interest in creating a safe and health workplace both underground and surface mines across the country.²¹⁹ It also referred to the Federal Mine Safety and Health Act,²²⁰ and said Congress was well aware of how dangerous mines were and their poor safety record in the state and the negative impact on interstate commerce.²²¹ Moreso, the court made reference to the Federal Mine Safety and Health Acts preamble which states that,

“[T]here is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal or other mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines...the existence of unsafe and unhealthful conditions and practices in the Nation's coal or other mines is a serious impediment to the future growth of the coal and other mining industry and cannot be tolerated”

In conclusion, the court was of the view that unsafe working conditions and serious accidents could be prevented by complying to the Acts' objectives, aims and provisions. The court in this case interpreted the law and upheld the regulations governing mine safety and health.

3.5 Conclusion

The case law analysed above reveal that mine employers who violate or do not uphold their duty of providing a health and safe working environment for their employees are liable for prosecution. Moreso, they are mandated to rectify the damage emanating from their negligence to their employees or the community at

²¹⁶ Swanepoel N (note 105 above).

²¹⁷ Tshoose CI (note 3 above) 168.

²¹⁸ Number 80-901, 452 US 594 (1981), Argued April 28 1981 Decided June 17 1981.

²¹⁹ *Ibid* para 602.

²²⁰ Of 1977.

²²¹ *Ibid*.

large. Moreover, case law indicates that courts play a significant role in accelerating improvement to safety and health standards by promoting and enforcing them. The reviewed case studies illustrate how the judiciary strengthens the implementation of health and safety practices in the mines.

Discussed case laws demonstrate how employers should make sure the safety and health of all workers in mines. Effective implementation could see reduction on risks, hazards, and deaths in the mining sector at national and international level. The law has been interpreted by courts to protect mine workers from occupational health hazards such as diseases, death, and mine accidents. The courts acknowledged that for a workplace to be productive it must be safe and free of health risks. This ensures that employers provide a mining workplace where health and safety standards are effectively improved. Through precedents and judicial authority, courts significantly contribute to accelerating the improvement of safety and health measures in mining environments.

CHAPTER FOUR: COMPARATIVE ANALYSIS BETWEEN SOUTH AFRICA AND AUSTRALIA

4 Introduction

Mining is at the centre of global development and improving socio-economic wellbeing of people.²²² The Covid-19 virus caused challenges to the world's economic and social structures.²²³ Environmental sustainability and economic development have been impacted by the containment efforts implemented to decrease the health impacts of the worldwide coronavirus pandemic.²²⁴ The mining sector was not spared from the undesirable effects of Covid-19 as it was not immune to it.²²⁵ Mining is a fundamental component of economic development.

This chapter focuses on the obligations of employers to create a safe and health mining workplace by comparing South African and Australian cases in the mining sector. To draw lessons for improvement is the main reason for this comparative analysis. There is an acknowledgement that there are areas that needs improvement in the South African mining sector's safety and health measures. It is therefore crucial to learn by comparing local practices and international best practices. Both South Africa and Australia are Commonwealth members and democratic states that share values like respect for human rights law. Despite this association, the two countries have distinct safety and health practices and measures in their respective mining sectors.

²²² Ibid.

²²³ Impact of Covid-19 on the Mining Sector and Raw Materials Security in Selected European Countries, <file:///C:/Users/USER301/Downloads/resources-10-00039-v2.pdf> accessed on 14 August 2022.

²²⁴ *Ibid*; See also Sarkodie SA and Owusu PA, Global Assessment of Environment Health and Economic Impact of the Novel Coronavirus (COVID-19), Environment Development Sustainability, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7272320/> accessed on 14 August 2022.

²²⁵ The Impact of Covid-19 on Employment In Mining, <https://www.iisd.org/system/files/publications/covid-19-employment-mining-en.pdf> accessed on 14 August 2022.

4.1 Impact of Covid-19 in South African mines

The first case of Covid-19 was reported in March 2020 in South Africa,²²⁶ and the mining sector was closed down under level five lockdown and resumed operations with reduced capacity.²²⁷ In different levels of lockdown implemented, mines resumed operations at 50% of their capacity.²²⁸ From January 2021, when many miners returned to work, the number of deaths linked to COVID-19 increased.²²⁹ This made it necessary for companies to take extra health and safety practices to stop the virus's spread.²³⁰ Working in restricted places puts mine workers at risk of damage or infections.²³¹ For mineworkers, the mining sector is already hazardous. These challenges were made difficult by Covid-19 with mining companies having to deal with an increase in infections and fatalities.²³² However, it became clear that it is currently impossible to reach the zero-harm aim established in the mining industry that requires every mine worker to return home without harm.²³³

Prior to the outbreak of Covid-19, the South African mining sector was already plagued by high rates of tuberculosis and HIV infections.²³⁴ Comorbidities from these

²²⁶ First case of covid-19 coronavirus reported in South Africa, < <https://www.nicd.ac.za/first-case-of-covid-19-coronavirus-reported-in-sa/#:~:text=This%20morning%2C%20Thursday%20March%205,Africa%20on%20March%201%2C%202020.>> accessed on 14 August 2022.

²²⁷ Kengni B, "The Covid-19 Pandemic Era: Challenging Compliance with Occupational Health and Safety Guidelines in the South African Mining Sector", (2022) *Research Gate* < https://www.researchgate.net/publication/358922933_The_COVID-19_Pandemic_Era_Challenging_Compliance_with_Occupational_Health_and_Safety_Guidelines_in_the_South_African_Mining_Sector> accessed on 14 August 2022 ; See also Timothy Laing, "The economic impact of the Coronavirus 2019 (Covid-2019): Implications for the mining industry" (2020) 7(2) *The Extractive Industries and Society* < <https://www.sciencedirect.com/science/article/pii/S2214790X2030126X>> accessed on 14 August 2022.

²²⁸ Kengni B (note 228 above).

²²⁹ South Africa's Mining Industry to Support COVID-19 Vaccine Rollout, < <https://www.reuters.com/article/uk-health-coronavirus-safrica-mining-idUSKBN29K1D6>> accessed on 14 August 2022.

²³⁰ Kengni B (note 228 above).

²³¹ Hermanus MA (note 5 above) 534.

²³² Bernard Kengni (note 228 above).

²³³ Minerals Council SA "Health and Safety" (2020) Minerals Council South Africa, < <file:///C:/Users/USER301/Downloads/minerals-council-recommits-to-the-goal-zero-harm-18102018.pdf>> accessed on 14 August 2022.

diseases are worsened by Covid-19 as it harms the respiratory system.²³⁵ Reportedly, about 60% of South African miners who died from COVID-19 in October 2020 were older than 50, and 86% had at least one comorbidity.²³⁶ About 17 155 employees out of a total of 454 595 had tested positive by October 5, 2020, with a record of 184 fatalities. Covid-19 is one of the biggest threats to workplace safety in the mining sector.²³⁷ Hence, the essential need for the employer to provide a safe mine workplace for employees, with less risk of exposure to such diseases.

In accordance with the Labour Court's directive, the Department of Mineral Resources and Energy (DMRE) published the COVID-19 mine safety regulations.²³⁸ The guidelines aimed to assist mining companies to develop and conduct a COVID-19 prevention program to the extent to which it is reasonably practicable.²³⁹ However, the guidelines were challenged by the AMCU. The guidelines stated that mine workers prior to entering the mines, they must be screened for COVID-19 rather than being physically tested.²⁴⁰ AMCU pointed out that simply asking employees if they possibly contacted the virus is insufficient to determine whether the person is at risk. Thus, it became necessary that workers are physically tested to determine infections. This was a crucial step as mine workers work in confined spaces where social distancing and poor ventilation might arise. Physical testing ensures that everyone entering the mines is at least completely safe.²⁴¹

As a result of frequent accidents and deaths, South Africa does not have a solid standing for health and safety.²⁴² Non-compliance by miners and employers taking

²³⁴ Naidoo R and Jeebhay M, "COVID-19: A New Burden of Respiratory Disease Among South African Miners?" (2021) 27 *Curr Opin Pulm Med* < <https://pubmed.ncbi.nlm.nih.gov/33417344/>> accessed on 14 August 2022.

²³⁵ *Ibid.*

²³⁶ *Ibid.*

²³⁷ *Ibid.*

²³⁸ Mine Health and Safety Act: Guidelines for Mandatory Code of Practice on Mitigation and Management of Coronavirus COVID-19 Outbreak (Covid-19 Safety Guidelines for Mines). See GN 280 in Government Gazette 43335.

²³⁹ *Ibid.*

²⁴⁰ Association of Mine Workers and Construction Union (note 169 above).

²⁴¹ *Ibid.*

²⁴² Muthelo L et al, 'Strategies to Enhance Compliance to Health and Safety Protocols within the South African Mining Environment' in Ayse Emel Onal (eds), *Primary Health Care* (InTechOpen 2022).

shortcuts are major causes of fatalities in the mining sector.²⁴³ As a result, strict adherence to mining safety and health regulations is always required. It is therefore required that South Africa improves its health and safety guidelines and measures in the mines. If steps to stop the spread of COVID-19 in mines were not reinforced in mining communities, it would have been impossible to contain.²⁴⁴ Another effective method is to educate and train mine workers on Covid-19 prevention and management so that they also contribute to their own safety and health in the mine workplace.

4.2 Australian Mining

Mining has long been an important part of Australian culture and economy.²⁴⁵ Australian law mandates that employers maintain a high level of safety and health at their workplaces and make every effort to prevent employees from suffering injuries or harm as a result of their work obligations.²⁴⁶ Section 19(1) of the Occupational Safety and Health Act (OSHA) posits that companies are responsibility for upholding, to the extent it is practicable reasonable, a safe and health workplace for their employees.²⁴⁷

The OSHA goes further to illustrate in Section 19 that the employer's obligation to care for workers should be practicable. This means employers must consider practical measures in protecting employee's safety and health. Additionally, the duty of care extends to the employer that something is practicable, not only because it can be done, but also because it is reasonable. Providing employees with guidance, training, and supervision for them to work safely is a part of the company's "duty of care".²⁴⁸ Employers are thus required to caution their workers on hazards that are

²⁴³ *Ibid.*

²⁴⁴ Muthelo L (note 243 above).

²⁴⁵ Note 237 above.

²⁴⁶ Occupational Safety and Health Act of 2000; See also Employers-Your Responsibilities, <<https://www.commerce.wa.gov.au/worksafe/employers-your-responsibilities#:~:text=In%20Western%20Australia%2C%20the%20law,harmed%20because%20of%20their%20work.>> accessed on 14 August 2022.

²⁴⁷ Section 19(1) of OSHA.

²⁴⁸ Employers-Your Responsibilities, < <https://www.commerce.wa.gov.au/worksafe/employers-your-responsibilities#:~:text=In%20Western%20Australia%2C%20the%20law,harmed%20because%20of%20their%20work.> >accessed on 14 August 2022.

likely to occur in the workplace and the safety measures put in place to mitigate them.²⁴⁹ Moreover, the Act obliges the employer to consider each employee's unique needs in ensuring that they can operate safely at their respective workplace.²⁵⁰ The employer is responsible for providing suitable personal protective apparel and equipment to mine workers as a way of ensuring their safety and health.²⁵¹

4.3 Impact of Covid-19 in Australian mines

On 25 January 2020, Australia experienced its first Covid-19 pandemic case, which quickly spread throughout the country.²⁵² Despite the Covid-19 pandemic emergence, Australian mines remained open and functional,²⁵³ with a relatively low rate of infection.²⁵⁴ Australian mining sector has always placed a high focus on health and safety, which has aided the sector's swift adaptation during Covid-19.²⁵⁵

Implementation of practices to lessen the spread of Covid-19 in the mines are a necessity, such as good hygiene practices and social distancing. The need for consistency on how these measures would alleviate the spread of the virus in the workplace was of paramount importance. In Australia, its legislative framework,²⁵⁶ provides for union safety inspectors and safety representatives to visit the mine site and ensure that employers adopt health and safety standards, identify risks that might ensue and mitigate them. These inspectors and representatives work hand in hand with employers to ensure safety and health standards adopted safeguard mine workers from risks associated with mining.

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.*

²⁵¹ Muthelo L (note 243 above).

²⁵² Timeline: how Australian mining reacted during Covid-19,< <https://www.mining-technology.com/analysis/timeline-how-australian-mining-reacted-during-covid-19/>> accessed on 14 August 2022.

²⁵³ Note 237 above.

²⁵⁴ How Australia's mining industry has responded to the Covid-19 crisis, <https://www.nsenergybusiness.com/features/australia-mining-covid-response/> accessed on 14 August 2022.

²⁵⁵ *Ibid.*

²⁵⁶ For instance, see Work Health and Safety Act Number 137 of 2011, Occupational Health and Safety Act, Work Health Safety Regulation 2011 and Codes of Practice.

The new challenges posed by Covid-19, need to be addressed efficiently and effectively by employers. This means complying to existing laws on safety and health as stipulated in legislation and government health protocols. Also, safety protocols such as stockpiling extra equipment and immediately quarantining sick employees remained effective in curbing the spread of the virus.²⁵⁷

On 15 May 2020, the Minerals Council of Australia (hereafter the MCA) published reforms to keep its communities safe and healthy from the corona virus pandemic and supporting a long-lasting and sustainable recovery.²⁵⁸ Mining was recognised by the government as an essential industry for economic development.²⁵⁹ Recovery from Covid-19 placed the mining sector on the list of crucial sectors, this enabled the sector to continue its operations in the midst of the catastrophic pandemic.²⁶⁰

Member companies of the MCA are expected to adhere to principles of eliminating mine worker fatalities and injuries; ensuring employees accomplish their work obligations in a respectful and harmless environment and recognizing hazards and taking steps to decrease their likelihood of occurring.²⁶¹ The mining sector in Australia is committed to ensuring that every employee who goes to work returns home safely and in good health similar to South Africa.²⁶² Thus, safety, health, and psychological wellbeing of Australian mine employees is at the core of the values in the mining sector.²⁶³ The MCA, ensured a positive obligation on all employers to promote safety and health of their employees and that mine employees are obliged to protect themselves and their colleagues from harm in the workplace.

The operator of a mine is required under Australian mine safety management to make sure that operations at the mine do not jeopardize the health and safety of workers and other people.²⁶⁴ To ensure that the employer places a priority on the

²⁵⁷ Note 255 above.

²⁵⁸ Mineral Council of Australia Immediate Reform Priorities to Accelerate Economic Recovery <<https://www.minerals.org.au/sites/default/files/200525%20MCA%20immediate%20priorities%20to%20accelerate%20economic%20recovery.pdf>> accessed on 14 August 2022.

²⁵⁹ *Ibid.*

²⁶⁰ Note 255 above.

²⁶¹ Safety and health, <https://www.minerals.org.au/safety-and-health> accessed on 17 August 2022.

²⁶² *Ibid.*

²⁶³ *Ibid.*

safety and health of mineworkers, it is crucial to identify and reduce all risks and hazards associated with mining activities.²⁶⁵

4.4 The National Mine Safety Framework

The National Mine Safety Framework (NMSF) governs occupational safety and health in the mines in Australia. It seeks to achieve consistency and improved measures in safety and health in mines.²⁶⁶ Additionally, it aims to safeguard the well-being of mine workers and anyone else who might be impacted by mining operations.²⁶⁷ With this, it adopts the principles set in the ILO Convention 176: Safety and Health in Mines.²⁶⁸ Thus, it promotes and encourages Australian mining companies to adhere to the principles set out in the international labour standards

4.4.1 Mining Legislation in Australia

The legislative framework in Australia is described as the most progressive in the world.²⁶⁹ It is founded on a duty of care, risk management principles, and the employer bearing the primary obligation for providing a safe work environment.²⁷⁰ The enforcement of mining legislation in Australia is greatly accepted in the mining sectors.

4.4.2 Occupational Health and Safety Regulations²⁷¹

It is the primary Act pertaining to people's health and safety in the workplace, with the mining sector included. Its objectives include safeguarding employees at their workplaces against hazards to their safety or health.²⁷² It assesses the health and

²⁶⁴ Australia's Mining Health and Safety Systems, < <file:///C:/Users/USER301/Downloads/Mining-Safety-Systems-flyer.pdf>> accessed on 17 August 2022.

²⁶⁵ *Ibid.*

²⁶⁶ National Mine Safety Framework Implementation Report Updated June 2009, < <https://www.industry.gov.au/sites/default/files/2018-11/national-mine-safety-framework-implementation-report.pdf>> accessed on 17 August 2022.

²⁶⁷ *Ibid.*

²⁶⁸ Convention 176: Safety and Health in Mines Preamble to the Convention, https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID,P12100_LAN_G_CODE:312321,en:NO accessed on 17 August 2022.

²⁶⁹ *Ibid.*

²⁷⁰ Alli BO, *Fundamental Principles of Occupational Health and Safety* (note 66 above) 20.

²⁷¹ Number 40 of 2000.

safety related issues in the working environment and ensures that they are mitigated.

4.4.3 The Occupational Safety and Health Regulations Act²⁷³

It states that employers have the duty to ensure that employees can move safely within the workplace. Besides that, the employer must also ensure that all health and safety measures implemented are reasonably practicable and implemented within a reasonable time frame.

4.4.4 Work Health and Safety Act²⁷⁴

It ensures each employee's wellbeing, health, and safety at work is prioritised.²⁷⁵ Hence, the WHSA seeks to attain a mining environment that incorporates all aspects of health and safety. This ensures sustainable and improved mining operations.

4.4.5 Work Health and Safety Regulations of 2012

This regulation describes the employer as being the duty holder. This provides that an employer must control health and safety risks.²⁷⁶ Under this regulation, an employer has a duty to carry out certain control measures to make sure that the safety and health of workers at work are adhered to. To manage health and safety risks, a duty holder must identify hazards that are potentially dangerous but are reasonably foreseeable,²⁷⁷ to the extent that it is reasonably practicable, alleviate health and safety hazards after identifying them in the workplace.²⁷⁸ The Australian government recently enacted the Mineral and Energy Resources and Other Legislation Amendment Act of 2020,²⁷⁹ to reduce risks and fatalities in the mining sector. Employers guilty of a mine worker's death, whilst performing their work duties may now be charged with negligence or recklessness.²⁸⁰ Employers will thus be held

²⁷² Occupational Health and Safety Act 2000 No 40, <https://legislation.nsw.gov.au/view/whole/html/inforce/2006-12-01/act-2000-040> accessed on 19 August 2022.

²⁷³ Part 3 Division 1 section 3.6 of 1996.

²⁷⁴ Number 10 of 2011.

²⁷⁵ *Ibid.*

²⁷⁶ Chapter 3 Part 1 section 32 of the Work Health and Safety Regulations.

²⁷⁷ Note 274 above Section 34.

²⁷⁸ Note 274 above section 35.

²⁷⁹ Of 2020.

criminally liable. Therefore, the mine executives will be charged with industrial manslaughter offence.²⁸¹ As a result, this entails positive employer obligations in ensuring a safe workplace for all workers. These developments make the current duty of care more applicable to mine accidents that happen at the workplace.²⁸²

4.5 Comparison between South Africa and Australia

South African mining industry had to prioritise Covid-19 risks and hazards, in ensuring health and safety steps were adopted. To guard and protect mine employees, all measures required to establish health and safety practices in mining industry had to be implemented. This was achieved by accelerating quality safety and health standards in the South African mining sector. On the other hand, Australia had ensured that covid-19 related mortalities and infections were reduced. This was achieved through careful planning and recognition of the importance to protect the health and safety of mine employees.²⁸³ Australia went to the extent of implementing procedures like storing additional supplies on hand and quarantining employees immediately who tested positive for Covid-19, which proved to be effective.²⁸⁴

Australian mine workers also benefited from geographical remote work arrangements. Chances of contracting Covid-19 at the workplace were lowered, reducing the likelihood of hotspots of community infections.²⁸⁵ Only about 1 900 cases of Covid-19 were reported in Australian mines with nine fatalities.²⁸⁶ To the contrary, most South African mines are located in urban areas, with few in the

²⁸⁰ New Industrial Manslaughter Laws for Queensland Mines & Resources Sector- Commenced 1 July 2020, <https://www.ohsa.com.au/new-industrial-manslaughter-laws-queensland-mines-resources-sector-commenced-1-july-2020/> accessed on 19 August 2022.

²⁸¹ Manslaughter offence is as a crime where the action or inaction of an employer results in the death of an employee, definition taken from <https://www.fcbgroup.com.au/news/what-is-industrial-manslaughter-heres-what-you-need-to-know/#:~:text=Industrial%20manslaughter%20is%20broadly%20understood,serious%20harm%20to%20a%20person>. Accessed on 19 August 2022.

²⁸² *Ibid.*

²⁸³ Note 281 above.

²⁸⁴ *Ibid.*

²⁸⁵ In Australian Mining State, Border Limbo Sparks Production Fears, < <https://www.aljazeera.com/economy/2022/2/11/in-australias-mining-state-border-limbo-sparks-production-fears>> accessed on 19 August 2022.

²⁸⁶ *Ibid.*

outskirts. Also, in South Africa mine workers live within the urban areas and are directly exposed to the transmission of covid-19 from their local communities.

In comparison between Australia and South Africa's position both countries are committed to achieving high level of mine safety and health. However, it can be observed that Australia goes further to employ extra steps and processes which are not implemented in South Africa. Also, health and safety laws are poorly enforced and inefficiently implemented in the mines in South Africa. South Africa needs to improve this in its implementation of technology, adopting new equipment suitable to promote health and safety standards and, training of mineworkers on safety and health and skills development. In relation to Covid-19, it can be said Australian mines had a holistic approach on curbing and mitigating the spread of Covid-19 in the mines.

4.6 Conclusion

A comparative analysis offers room for cross learning and improvement in the implementation of health and safety in South African mines. It appears that Australia might possess the expertise necessary to successfully perform the essential procedures and safety precautions required to operate in a safe manner. Australian law mandates that employers maintain a high level of safety and health at their workplaces. Australia's health and safety is a fundamental value, and the mining industry's collective commitment to safeguarding safety and health in the mining sector of its employees was essential to consider in the comparative study.

Specific health protocols are necessary to ensure the safety of workers and communities. Australian mining sector was also chosen because of its commitment to mine employees' health and safety as well as its proactive and well-known practice development. Therefore, the comparative analysis illustrates measures of preventing the spread of the virus and protecting the health and safety of workers and the local communities in South African mines.

CHAPTER FIVE: RECOMMENDATIONS AND CONCLUSION

5.1. Introduction

In general, there is nothing wrong with providing measures for a particular sector to adopt into its modus operandi. The analysis in this chapter, agrees with the judgment made in the case of *Mankayi v AngloGold Ashanti Ltd.*²⁸⁷ The judgement points out that given South African history in mining, and its significant contribution to the economy and the effects on mineworkers' health, it validates the distinct treatment of miners by giving them special statutory treatment. However, mineworkers must conduct their work obligations in a safe working environment, which the employer should ensure is provided to them.

Health and safety in South African mines is provided for under a variety of laws as discussed in chapter two above, such as the MHS Act and MPRDA. The discussions in chapter two, the measures which employers adopt in creating and upholding a safe and health workplace in the mines fall short of both the Constitutional obligations and statutory frameworks. Mineworkers remain a vulnerable and susceptible group to exposure to accidents and hazards. Case law illustrates this gap. For instance, case studies such as the Jagersfontein diamond mine collapsing releasing mine waste and ultimately resulting in the death of one person.

It is therefore imperative for safety in mines to be radically improved, to prevent accident occurrence. Also, punitive sanctions must be enforced on employers not adhering to the safety and health standards to protect their workers, surrounding community and environment. Thus, the deployment of safety and health measures is critically important in mitigating fatalities, risks or hazards that frequently occur in mines.

5.2. Recommendations

A comparative analysis was conducted between Australia and South Africa, and due to the vital differences between developed and developing countries, exchange of safety and health standards is of essential value. Lessons can be learnt from both South African and Australian experiences on mining safety and health as well as adherence to this duty. The adoption of safe and improved mining techniques, work practices, and technology that are reasonably practicable may be adopted to improve safety standards in both countries. In Australia, enough capital helped the

²⁸⁷ Note 183 above.

country to put arrangements in place to financially support safety and health standards, regulations, and policies. This led to significantly lower levels of incidents or dangers occurring in its mining sector.

In consideration of more productive and safer mining techniques used in Australia can bring valuable lessons to safety and health standards in South African mines. At both the national and sector levels, there is a need for extensive and robust mining safety and health standards improvement in South Africa. There are valuable lessons for both countries in this comparative analysis. Law reforms on safety and health compliance in the mine sector in South Africa need to be improved.

Employers should prioritise health and safety in their line functions. This is an imperative duty that is bestowed upon employers as they conduct their mining operations. The health and safety of workers must be of utmost importance. The South African mining sector is managed by a plethora of mining legislations, policies and recommendations, and these can only be effective in the mining industry when employers prioritise them. The numerous mining legislation ensure that workers' health and safety are of utmost priority. Consequently, mining companies stand to gain by emphasizing health and safety as this will increase profits in their respective sectors as risks will rarely occur.

The South African government as a policy maker should prioritise the health and safety measures. This can be done by appointing health inspectorates and representatives to inspect if employees in the mining sector prioritise health and safety in mining operations.

The degree and effectiveness of the steps taken on a mine to ensure that safety and health standards are significantly influenced by the employer's attitude towards how they conduct activities.

Other recommendations to consider are:

5.2.1. Criminal and civil liability

- The institutions established that monitor and enforce compliance should be strict and hold accountable any employers who violates the regulations governing safety standards procedures.²⁸⁸
- Mining employers who are found guilty of breaching their duty to guard the health and safety of workers and anybody else who are likely to be impacted by mining operations should be subject to both criminal and civil liability.
- This can be introduced to the employers in line with the polluter pays principle, as stated in the National Environmental Management Act.²⁸⁹

5.2.2. Withholding of the mining right from the employer till compliance is met.

- The employer must demonstrate to the state how and what safety and health precautions will be taken before mining explorations commence. The state may withhold the employer's mining rights until the employer clearly demonstrates to the state that mining activities can be carried out without endangering or exposing mineworkers to risks or accidents.

5.2.3. Health and safety inspections

- There is a need to increase an adequate number of inspectors and personnel equipped with expertise in the area of safety and health to monitor mines. The absence of apparent and consistent mine inspections, results in poor application and implementation safety standards. Hence, the need for inspections to be conducted.

5.2.4. Injection of capital that assist in creating technological safety and health measures.

- Employer and employee benefit from the adoption of up-to-date enhanced safety practices. If this happens, mining cooperates operate more sustainably and responsibly while also protecting mineworkers.²⁹⁰
- There is a need to speed up the implementation of health and safety in the mines. This will potentially decrease hazards and accidents which might

²⁸⁸ Shibambu ON and Odeku KO (note 23) 26.

²⁸⁹ Act 107 of 1998.

²⁹⁰ Shibambu ON and Odeku KO (note 23) 20.

ensue at mines. Investing in and deploying safety technologies is vital to guaranteeing high standards of safety in the mines.²⁹¹

- The mining industry should invest in modern safety measures, as well as the essential knowledge and training.²⁹²
- Technology has the capability to avert accidents and save trapped or injured mineworkers. Incorporating it into mine safety regulations is paramount.²⁹³

5.2.5. Employers and the state to collectively work together

- Extensive consultations of all relevant stakeholders in the mine health and safety sector (including labour organisations, trade unions, employer organisations, private sector entities and academics) is a must in dealing with improvement of safety and health in the mine sector.
- Awareness and promotion measures such as conferences and workshops in safety and health should be made compulsory for employers, government and other relevant role stakeholders to develop policies and discuss ways to ensure safety and health standards are implemented.
- Inviting the ILO and WHO to provide technical assistance to the guidance and process as to the strategies and other measures and ensuring that they are in accordance with the ILO and WHO guidelines while also being in accordance with South Africa's own specific circumstances.

5.2.6. Measures to combat the spread of Covid-19 in mines

Covid-19 is an infectious disease that is transmitted via respiratory droplets. Covid-19 prevention programs should be implemented in mines. As mine workers have direct contact with one another and are at high risk of infection, these prevention programs may be very helpful in combating the virus's spread.

Identify measures that can be adopted to minimise the spread of coronavirus in the workplace such as:

1. Practising good hygiene,

²⁹¹ *Ibid.*

²⁹² Shibambu ON and Odeku KO (note 23 above) 18.

²⁹³ *Ibid.*

2. Conducting a risk assessment of the mine
3. Adopting procedures to ensure that infected or potentially infected mineworkers are taken home from the mine after being isolated.
4. Putting in place safeguards against retaliation for miners who voice concerns about Covid-19.

5.3 Conclusion

In this instance, it can hardly be said that the overall measures taken by mining companies to guarantee the safety and health of their employees are reasonable or sufficient to provide mineworkers with a safe and healthy work environment in South Africa. Promotion of occupational safety and health in the mines must still meet the constitutional requirements and obligations imposed in various legislative frameworks of the country. However, sadly the sector continues to face significant challenges due to the inadequate implementation and weak enforcement of these laws and policies. The implementation of high safety standards depends on mining employers conducting their activities more efficiently to ensure the safety and health of their workers.

Therefore, there is a need to reform the law in relation to safety and health in the mines in South Africa. Mine safety regulations are enacted in order to promote mine safety in South Africa. Mining poses a risk by nature, current methods for enhancing safety need to be reconsidered. Instead of merely enforcing the provisions of safety standards, legislation should be targeted at developing a framework with a constructive attitude toward the adoption of more productive and safe mining methods. Mine employers must take all reasonable precautions to ensure safe working conditions in accordance with mine-specific codes of practice that govern the mines such as the MHSA and OHSA.

The case of *Association of Mineworkers and Construction Union v Minister of Mineral Resources and Energy and others* analysed in chapter three assists in the way forward regarding employers providing a healthy and safe mining workplace. This is because the court in the case held that, it was unreasonable and improper for the Minister and Chief Inspector of Mines to refuse to exercise their authority under the MHSA to publish general health and safety practices to combat Covid-19 virus in

the mining industry since enforceable regulations for mines are needed. This is informed by the fact, mine workers are likely to contract the virus, hence the department of Mineral Resources work with mining companies implement safety and health measures and policies to fight the novel coronavirus.

To protect mine workers, recommendations mentioned and analysed in this chapter to transform and guarantee adequate health and safety practices in mining settings. This should be radically accelerated to improve the safety and health in mines. These are measures that can be deployed to fast-track significant transformation, assist and reform the mining industry.

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