Legal Liability Awareness –
Mine Health & Safety Act 29 of 1996

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INTRODUCTION

• What is the Legal implications to the Holder of the Mining Right when fires erupt at a mine?

• What needs to be done in order to comply with the MHSA and the Employer's associated responsibilities?
Letters of Appointment

- Do you know what is contained in your letter of appointment?
- *Caveat Subscriptor* – “He who signs must be aware”

34. The following Schedule is hereby inserted in the principal Act after Schedule 7:

<table>
<thead>
<tr>
<th>Schedule 8</th>
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<td>Table 1</td>
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**MAXIMUM FINES OR PERIOD OF IMPRISONMENT THAT CAN BE IMPOSED FOR OFFENCES**

<table>
<thead>
<tr>
<th>Column 1</th>
<th>Column 2</th>
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<tbody>
<tr>
<td>Section under which convicted</td>
<td>Maximum fine and term of imprisonment</td>
</tr>
<tr>
<td>2</td>
<td>R1 000 000 or 5 yrs imprisonment</td>
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<td>R1 000 000 or 5 yrs imprisonment</td>
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<td>10</td>
<td>R1 000 000 or 5 yrs imprisonment</td>
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<td>15</td>
<td>R500 000 or five years imprisonment</td>
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<td>16</td>
<td>R500 000 or five years imprisonment</td>
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<td>21(1), (3) or (4)</td>
<td>R500 000 or five years imprisonment</td>
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<td>22</td>
<td>R200 000 or two years imprisonment</td>
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<td>24</td>
<td>R500 000 or five years imprisonment</td>
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<td>52</td>
<td>R200 000 or two years imprisonment</td>
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<td>53</td>
<td>R200 000 or two years imprisonment</td>
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Failure to comply

Section 91: **Failure to comply with this Act**

(1) Any person, including an employer, who contravenes, or fails to comply with, any-

(a) provision of this Act;
(b) regulation; or
(c) condition, suspension, notice, order, instruction, prohibition, authorisation, permission, consent, exemption, certificate or document determined, given, issued, prescribed or granted by or under this Act by the Minister, Chief Inspector of Mines, inspector, any person authorised under section 49 (4) or any person to whom any power has been delegated or the performance of any duty has been assigned under section 96,

• commits an offence and is liable to a fine or imprisonment as may be prescribed.
Failure to comply

Section 86: **Negligent act or omission**

(1) Any person who, by a negligent act or by a negligent omission, causes serious injury or serious illness to a person at a mine, commits an offence.

(2) Any person, other than an employer or employee, who, by a negligent act or by a negligent omission, endangers the health or safety of a person at a mine, commits an offence.
FURTHER PENALTIES

• PERSONAL LIABILITY OF DIRECTOR / SERVANT
  ○ CRIMINAL PROCEDURE ACT
    Section 332(1) & (5) - acts / omissions of employees are attributed to the company, and if the company can be found liable, then any director or employee can be found liable
APPLICATION OF THE MHSA

• Traditional test used by inspectorate
  o employee
  o on duty
  o on premises of the mine

• MHSA determines that it is the responsibility of the Employer to create and maintain a healthy and safe workplace and to ensure that the mine conducts its operation without risk qualified with reference to “reasonably practicable” towards achieving the objects of the Act as stated in section 1 thereof.

• Rule of thumb – MHSA is applicable on the whole of the mining right area
APPLICATION OF THE OHSA

• In terms of Section 103 of the MHSA:-

"The Occupational Health and Safety Act 1993, (Act No 85 of 1993), is not applicable to any matter in respect of which any provision of this Act is applicable"
APPLICATION OF THE OHSA (CONTINUED)

• Section 103 of the MHSA provides that the OHSA is not applicable to any matter in respect of which any provision of the MHSA is applicable.

• The Department of Mineral Resources ("DMR") generally adopts the view that the OHSA is not applicable to any mine / mining area / works, even if an aspect is not specifically addressed in the MHSA, but is addressed in the OHSA.

• As a starting point therefore, the MHSA applies, exclusively, to a mine, as defined, in the MHSA (which includes "mining area" as defined).
The responsibilities placed on the employer are not absolute and qualified with reference to "reasonably practicable".

The term "reasonably practicable" is defined in Section 102 of the MHSA to mean:

"… practicable having regard to –

(a) the severity and scope of the hazard or risk concerned;

(b) the state of knowledge reasonably available concerning that hazard or risk and of any means of removing or mitigating that hazard or risk;

(c) the availability and suitability of means to remove or mitigate that hazard or risk; and

(d) the costs and the benefits of removing or mitigating that hazard or risk."
COMPLIANCE WITH PRIMARY RESPONSIBILITIES PLACED ON AN EMPLOYER

• The primary responsibilities placed on the employer, are those contained in Section 2 of the MHSA.

• Section 2(1) of the MHSA provides:

"The employer of every mine that is being worked must –
(a) ensure, as far as reasonably practicable, that the mine is designed, constructed and equipped –
“(i) to provide conditions for safe operation and a healthy working environment; and

(ii) with a communication system and with electrical, mechanical, and other equipment as necessary to achieve those conditions;

b) ensure, as far as reasonably practicable, that the mine is commissioned, operated, maintained, and de-commissioned in such a way that employees can perform their work without endangering the health and safety of themselves or of any other person …"
COMPLIANCE WITH PRIMARY RESPONSIBILITIES PLACED ON AN EMPLOYER (SUPPLEMENTED)

• The general responsibilities for health and safety of employees placed on employers in terms of Section 2(1) of the MHSA are supplemented by those in Section 5 of the MHSA.

• Section 5(1) of the MHSA provides:

"As far as reasonably practicable, every employer must provide and maintain a working environment that is safe and without risk to the health of employees...."
EMPLOYEES into MHSA- (SECTION 5)

- “Employee” defined to mean any person who is employed or working at a mine
- Widely defined
- Includes Contractor employees
- The Employer is therefore responsible to ensure compliance by contractors, their employees or any of their subcontractors (and their employees) with the provisions of the MHSA, when working within the boundaries of the mining area, mine or works
WHO IS THE EMPLOYER?

Who is regarded as the Employer who has the legal obligation to ensure Health & Safety in terms of the MHSA:

- Owner of the Mine
- Board of Directors
- CEO
  - Sec 4(1) – Employer may entrust functions to another person
  - Sec 3(1) – Employer may appoint a manager/s
  - Reg 2.6.1 – Manager may appoint one or more competent persons to assist
  - Reg 2.9.2 – Manager shall appoint such persons as may be necessary to assist in enforcing and observation of regulations.

Accountable /Responsible?

“Strong demands are placed,… on those engaged in trades or activities which are legally regulated and known by them to be…..”

S v Waglines (Pty) Ltd 2003 (4) 1135 (SA) 1146
HOW SHOULD EMPLOYER ENSURE COMPLIANCE?

– Employers generally demonstrate compliance with the provisions of Sections 2 and 5 of the MHSA, by implementing a health and safety system, which incorporates the following:

(a) Hazard identification and risk assessment (HIRA) – base-line, issue-based, and continuous HIRA (Section 11 of the MHSA read with the SIMRAC Guidelines on HIRA);

(b) Implementation of measures to address the identified hazards and the assessed risks, consisting of codes of practice, standards, procedures and instructions;
HOW SHOULD EMPLOYER ENSURE COMPLIANCE? (Continued)

(c) Health and safety training, aimed at communicating the identified hazards and the assessed risks, and the measures to be taken to avoid the hazard from eventuating (Section 10 of the MHSA);

(d) Appointment of competent supervisors who know and understand the hazards to which employees are exposed (Section 7 of the MHSA);

(e) Over-inspection, which incorporates both formal and informal systems of over-inspection.
HIRA's AS A POINT OF DEPARTURE

• Health and safety systems has an appropriate point of departure, namely Hazard Identification and Risk Assessments (HIRA).

• Section 11(1) of the MHSA provides:

  "Every employer must –

  (a) identify the hazards to health or safety to which employees may be exposed while they are at work;

  (b) assess the risks to health or safety to which employees may be exposed while they are at work;

  (c) record the significant hazards identified and risks assessed; and

  (d) make those records available for inspection by employees."
SECTION 11(2) - MEASURES TO BE IMPLEMENTED BY THE EMPLOYER

• Section 11(2) of the MHSA provides that the employer, after consulting the Health and Safety Committee at the mine, must determine all measures necessary, including changing the organisation of work and the design of safe systems of work necessary to:

(a) Eliminate any recorded risk;

(b) Control the risk at source;

(c) Minimise the risk; and

(d) Insofar as the risk remains, provide for personal protective equipment ("PPE") and institute a programme to monitor the risk to which employees may be exposed.
SECTION 11(3) OF THE MHSA

• Section 11(3) of the MHSA provides that every employer must, as far as reasonably practicable, implement the measures determined necessary in terms of Section 11(2) of the MHSA in the order in which the measures are listed in the paragraphs of Section 11(2) of the MHSA.
THESE OBLIGATIONS ARE:

(a) In terms of Section 11(1)(c) of the MHSA, only significant hazards need to be recorded;

(b) In terms of Section 11(2)(a) of the MHSA, the primary goal is to eliminate recorded risks, i.e. those recorded in terms of Section 11(1)(c) of the MHSA, i.e. it is not required to eliminate every possible risk;

(c) The obligation to implement the measures in the hierarchy referred to in Section 11(2) of the MHSA is not absolute, i.e. it is qualified with reference to reasonably practicable, and the implementation of the hierarchy will always be determined with reference to what is reasonable in the circumstances.
The measures contemplated in Section 11(2) of the MHSA are supplemented by specific provisions of the MHSA, such as Section 9 of the MHSA, which requires an employer to implement Compulsory Codes of Practice ("COPs").
SECTION 10 – TRAINING

• Section 10 of the MHSA provides that, as far as reasonably practicable, every employer must:

  (a) Provide employees with any information, instruction, training or supervision that is necessary to enable them to perform their work safely and without risk to health;
(b) Ensure that every employee becomes familiar with work-related hazards and risks and the measures that must be taken to eliminate, control and minimise those hazards and risks;

(c) Ensure that every employee is properly trained to deal with every risk to the employee's health or safety that is associated with any work that the employee has to perform and has been recorded in terms of Section 11 of the MHSA, in the measures necessary to eliminate, control, and minimise those risks to health or safety, in the procedures to be followed to perform that employee's work and in relevant emergency procedures.
TRAINING (CONTINUES)

• Section 10(3) of the MHSA provides further that the obligations set out in Section 10 (1) & (2) of the MHSA must be complied with:

  (a) before the employee first starts work;

  (b) at intervals determined by the employer after consulting the Health and Safety Committee;

  (c) before significant changes are introduced to procedures, mining and ventilation layouts, mining methods, plant or equipment and materials and before significant changes are made to the nature of that employee's occupation or work.
SECTION 7 - SUPERVISION

• In terms of section 7(1)(e) MHSA, the employer, as far as reasonably practicable, must ensure that work is performed under the general supervision of a person trained to understand the hazards associated with the work and who has the authority to ensure that the precautionary measures laid down by the employer are implemented.
OVERINSPECTION

• A system of over-inspection is vital towards compliance and should consist of formal and informal over-inspections and systems.

• A system of over-inspection has, as its primary purpose, confirmation that the various systems are implemented and complied with, and if there are any shortcomings identified, that these are addressed.
EMPLOYER's OBLIGATIONS SIMPLIFIED

Section 2-12 of the MHSA deals with the statutory obligations and responsibilities of the Employer:-

1) Risk assessment
2) Safe Work Procedures
3) Training
4) Task Observation
5) Enforcement of discipline

ADMIN FINE = R 1 000 000,00 for each contravention
The Employer’s / Employee’s Duties and Responsibilities in terms of MHSA to ensure Health and Safety of Persons within Mine Licence Area

**Risk Assessment**
Ensure following HIRAs:
- Baseline
- Issued Based
- Continuous

**Training**
Ensure that people are trained to perform Activities applicable to them and to preform HIRAs.

**Enforcement**
Ensure that all rules and procedures are adhered to and transgressions are recorded and dealt with.

**Procedures**
Ensure the Implementation and Compliance of:
- COP’s / SPI’s / BPIs
- Instructions
  Are drawn up according to Risk assessments.

**Competence**
Ensure that people are competent to perform tasks by performing PTOs and are competent and authorized to use and operate equipment.
Risk assessment

Section 11  Employer to assess and respond to risk

1) Every employer must-

   a) identify the hazards to health or safety to which employees may be exposed while they are at work;

   b) assess the risks to health or safety to which employees may be exposed while they are at work;

   c) record the significant hazards identified and risks assessed; and

   d) make those records available for inspection by employees.
Risk Assessment (Continued)

- Sec 11 obligates every employer to identify hazards, assess risk, to record them and make such records available for inspection;

- An employer is obligated to review such hazards identified at regular intervals, to determine control, minimization or total elimination;

- Obligation not controlled by “Reasonably Practicable”, taking steps regarding risk assessment absolutely mandatory;

- Compliance becomes pointless if risk assessments are not reviewed and updated from time to time.
Risk Assessment (Continued)

Three types of Risk Assessments

• **Baseline Risk Assessments**
  – General or broad risk assessment that identifies all hazards in the workplace;

• **Issued Based Risk Assessments**
  – Deals with particular or individual hazards identified in the based line risk assessment;

• **Continuous Risk Assessments**
  – Day to day monitoring or control of hazards and associated risks or periodical review thereof.

*Must be in writing and must be made available for inspection*

*If it is not in writing it does not exist*-DMR*
4.) Planned task observations

What is a PTO?:

• PTO’s are the systematic examination of a task to identify all loss exposures associated with the task and develop controls for those exposures.

• Organizations of all types have found this to be an extremely useful activity, not only for improved safety and health but also for improved overall operations.

• Task analyses through PTO’s are the direct application of the goals of risk control management to the work the employees are doing.
Planned task observations (continued)

Why a PTO?:

• The best way to find out how well a person does a particular task is to observe him or her doing it.

• It is a sure way to know whether or not a critical task is being performed according to the procedure, and if there are better ways to perform the task.

• The importance of identifying and evaluating changes in the ways people do critical tasks cannot be overstated (Change Management).

• There is abundant evidence that undetected change in the workplace is a major source of casual factors that contribute to a high percentage of accidents.
Planned task observations (continued)

Compliance with MHSA (Continuous Risk Assessment)

• These changes can slip into the workplace unnoticed and not be evaluated until problems occur.

• Also there are beneficial changes that occur as people discover better ways of doing things.

• The key is to be certain that change is detected and evaluated to determine its full potential for improvement or loss.

• Planned observation is a tool for observing conditions and practices in an organized and systematic way.

• It enables you to know with a high level of confidence how well people are performing specific tasks.
5.) Enforcement of discipline

- Poor Mining Discipline or rather the lack thereof has caused more accidents than managerial oversight or system failures;

- The Disciplinary Code makes provision for the violation of Company Rules, Procedures or Regulations as a dismissible offence;

- Responsibility of Direct Line Management

- 5 Requirements to identify misconduct
5 requirements in determining misconduct (breach of a rule)

1. Does a Rule exist (is it a valid Rule)?
   – SWP

2. Was there knowledge or reasonably expected knowledge of the Rule?
   – Training / Competency

3. Was the Rule consistently applied in the workplace?
   – PTO’s /Over inspection

4. Has the Rule been breached (factual issue)?
   – Complainant

5. Did this breach made the working relationship intolerable?
   – Risk Factor
Scope of responsibility

Appointment letter:-

1. GEOGRAPHICAL AREA OF RESPONSIBILITY

2. FUNCTIONAL RESPONSIBILITY

3. AUTHORITY

4. SAFETY, HEALTH, ENVIRONMENT AND QUALITY MANAGEMENT SYSTEM (“SHEQ MANAGEMENT SYSTEM”) REQUIREMENTS
RE-AFFIRMATION OF KEY PRINCIPLES
QUESTIONS ?
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