

Inspection and Enforcement Services:

Enforcement Of Occupational Health And Safety Act No 85 Of 1993 And Regulations

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employment & labour

Department:
Employment and Labour
REPUBLIC OF SOUTH AFRICA



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International Labour Organisation Convention: Occupational Safety and Health Convention, 1981 (No.155)

- Ratified by the Republic of South Africa during February 2003.
 - **Article 4**
- Each Member shall, in the light of national conditions and practice, and in consultation with the most representative organisations of employers and workers, formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment.
- The aim of the policy shall be to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, by minimising, so far as is reasonably practicable, the causes of hazards inherent in the working environment.

The Constitution of the Republic of South Africa

- Chapter 2: Bill of Rights
 - **Sec 24: Environment**
 - “Everyone has the right
 - (a) to an environment that is not harmful to their health or well-being;
 - (b).....”
 - **Section 38** empowers any person who believes an infringement has occurred the right to go to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.

Occupational Health and Safety Act No. 85 of 1993

- **Section 8: General duties of employers to their employees**

“ (1) every employer shall provide and maintain, as far as is reasonably practicable, a working environment that is safe, and without risk to the health of his employees.”

OHS Cont...

- **Section 16: Chief Executive Officer charged with certain duties**
 - The actions of the CEO shall be deemed to be his / her employer and in the case of a Department of State, the Head of the CEO of that Department.
 - When referring a matter to a Court of Law for non compliance with the OHS Act, the CEO is cited as the person representing the company.

OHS Cont...

- **Sec 29: Functions of the Inspector**

“(3) When an Inspector enters any premises under sub-section 1 the employer occupying or using those premises and each employee performing any work thereon or therein and any user or plant or machinery thereon or therein, shall at all times provide such facilities as are reasonably required by the Inspector to enable him or his assistant (if any) to perform effectively and safely his or their functions under this Act.”

- **Sec. 30 (2): Special powers of the Inspector**

- In enforcing a prohibition the Inspector may:

- block, bar, barricade, or fence off

that part of the workplace, plant or machinery to which the prohibition applies

OHS Cont...

- **Functions of the Inspector**

When performing their functions Inspectors are sometimes:

- **Denied** entry to the employer's premises;
- **Refused permission** to conduct interviews;
- **Refused** the right to examine any book, record or any document.

Reasons vary but a common reason is because of the **Protection of Personal Information Act 2021**, however this may be detrimental to the employer as

a). The Inspector will make a negative finding; and

b). A case of obstructing the Inspectors from performing their functions may be pursued against such employer (**Section 92: Basic Conditions of Employment Act 75 of 1997**)

OHS Cont...

- **Section 38: Offences, Penalties and Special Orders of Court**
 - Any person contravening or failing to comply with provisions of this Act as well as wilfully furnishing the Inspector with information which is false or misleading is guilty of an offence and on conviction be liable to a fine not exceeding R50 000 or imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

OHS Cont...

- **Section 46: Jurisdiction of the Magistrates Court**
- “Notwithstanding anything to the contrary contained in any law-
 - (a) a magistrates court shall have jurisdiction to impose any penalty or to make any order provided for in this Act
 - (b) no magistrate’s court shall be competent to pronounce upon the validity of any regulation made under this Act.”
- **PSA obo Members v Minister of Health and Others (J3106/18) [2018] ZALCJHB 345; [2019] 1 BLLR 71 (LC); (2019) 40 ILJ 193 (LC) (12 October 2018)**

Conducting Inspections

- **Director General, Department of Labour vs Win-Cool Industrial Enterprise (Pty) Ltd** Case No. D731/05 held at paragraph 125:

125. “...The pre-litigation steps render the quality of the evidence required to discharge the onus more reliable. Employers bear the burden of rebuttal which is relatively easy to overcome if the contravention is alleged to be formal as the evidence is documentary. ...”

Inspection and Enforcement Services

Branch SOP (IES SOP)

- OHS offences and penalties imposed are criminal in nature resulting to the National Prosecuting Authority (the NPA) involvement:
- Upon the expiry of the enforcement notice (Prohibition, Prevention and Improvement notice) given to employer, the Inspector in terms of the IES SOP must compile a **competent file** and hand over to Statutory Services Directorate for referral to the NPA .

Inspection and Enforcement Services

Branch SOP (IES SOP)

- At all relevant times Inspectors must adhere to the IES SOP. Consequences of not are harsh.

- **Eskom Holdings SOC vs Commission for Conciliation Mediation and Arbitration & Others Case No. JR 430/2015**

“transformer, electrocution, loss of a limb and dismissed” The employee was dismissed for failing to follow the SP which resulted in him omitting to earth a transformer and electrocuting himself resulting in him losing an arm.

When he pleaded that his sentence was harsh the Arbitrator indicated that if he can be reinstated he would teach others not to take their duties serious and that may result in others not to be fortunate enough to survive. The sentence was upheld.

- **National Union of Metal Workers of South Africa vs The CCMA & Others Case No. PR 10/2022**

“forklift daily oil check explosion dismissal”

IES SOP cont...

➤ A Competent file must have:

- Notice of inspection with proof of service;
- Relevant documents (subject to the applicable regulation);
- Proof of interview of the Health and Safety Representative(s) of the workplace;
- Proof of interview of the at least two employees;
- Original Enforcement Notices (Improvement, Prevention and Prohibition notices);
- Inspection report compiled and signed by the Inspector and Supervisor;
- Follow Up Report (where applicable); and
- Referral form to Statutory Services is compiled where there is non-compliance.

National Prosecuting Authority Act No 32 of 1998

➤ 20. Power to institute and conduct criminal proceedings

(1) The power, as contemplated in section 179 (2) and all other relevant sections of the Constitution , to-

(a) institute and conduct criminal proceedings on behalf of the State;

(b) carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and

(c) discontinue criminal proceedings, vests in the prosecuting authority and shall, for all purposes, be exercised on behalf of the Republic.

NPA cont...

Conducting criminal proceedings on behalf of the Department, the NPA may:

- Require any other relevant information / documentation that will assist in securing a conviction;
- Require the Inspector to appear in person to testify and be subjected to examination in chief, cross examination and re examination; and /or
- May decline to prosecute, give reasons, return the file and close the case.

In closing.

“You will never understand bureaucracies until you understand that for bureaucrats procedure is everything and outcomes are nothing” Thomas Sowell

In a court of law you will always hear lawyers raising *points in limine* which is technicalities more than raising facts e.g. a certain procedure was not followed.

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