

BUSINESS UNIT: INSPECTIONS AND ENFORCEMENT SERVICES

THE DOCTRINE OF FUNCTUS OFFICIO IN OCCUPATIONAL HEALTH AND SAFETY ENFORCEMENT

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employment & labour

Department:
Employment and Labour
REPUBLIC OF SOUTH AFRICA



INTRODUCTION

- The Inspection and Enforcement Services (IES) is responsible to ensure compliance with employment laws through Advocacy, Inspections and Enforcement.
- IES has a standard operations for inspectors. RSA has also ratified the ILO Convention 081 for the independence of the labour Inspectors in the course of their practice.
- Labour inspectors are statutory creatures in that they are established by law and have powers limited only by law.

MANDATE

➤ **The Inspection and Enforcement Services Branch derives its mandate from the following relevant legislation:**

- Basic Conditions of Employment Act, Act 75 of 1997, as amended (BCEA)
- Employment Equity Act, Act 55 of 1998, as amended (EEA)
- Unemployment Insurance Act, Act 30 of 2001, as amended (UIA)
- Occupational Health and Safety Act, Act 85 of 1993, as amended (OHSA)
- Compensation for Occupational Injuries and Diseases Act, Act 130 of 1993, as amended (COIDA)
- Employment Services Act, Act 4 of 2014, as amended (ESA)
- Unemployment Insurance Contributions Act, Act 4 of 2002, as amended (UIC)
- National Minimum Wage Act, Act 9 of 2018 (NMWA)

MANDATE

- Ensure a right to a safe working environment in terms of section 24 of the Constitution.
- A right is an entitlement that is enforceable and it is sacrosanct. (Please refer to *Kylie v CCMA* Case where an employee of a brothel was found to enjoy a fair labour practices)
- Legislation in the form of the Occupational Health and Safety Act, 1993 gives effect to this right.
- Section 8 provides for the duties of an employer to create a safe working environment.



DOCTRINE OF FUNCTUS OFFICIO

- Functus Officio is a principle in terms of which decisions of OHS Inspectors are deemed to be final and binding once made.
- The decision is made following an inspection or an investigation and or a formal enquiry.
- Please note a preliminary investigation is not a complete investigation.
- The doctrine means that an inspector that has conducted and concluded the inspection, made a decision and pronounced on it, has no further authority to amend, review, substitute, set aside or vary an outcome.
- The most underlying factor is that an inspector must conclude the inspection and pronounce on an outcome.



LOCUS STANDI ON AN INSPECTOR

- The inspector is appointed in terms of section 63 of the Basic Conditions of Employment (BCEA), 1997 as amended.
- The inspector is designated in terms of section 63 of the BCEA read with section 28 of OHSA, 1993.
- The inspector is, at common law, expected to be a competent creature of the statute that only discharges functions and exercises powers subject to the Constitution and the law.
- The duties shall be discharged and decisions made without fear, favour or prejudice.
- The inspector shall discharge the duty of care and skill.



SPECIAL POWERS OF AN OHS INSPECTOR

- Section 30 of OHSA directs an inspector to apply his or her mind and in writing directs the employer or the user to take within a period specified in the direction such steps , as in the inspector's opinion are necessary to comply with said provision and are specified in the direction.
- In practice, the directions are in the form of improvement notice where an inspector directs an improvement that is not legislated.
- A contravention notice where there is non compliance with the Regulations;
- A prohibition Notice where a workplace or use of a machinery is among other things prohibited.

EFFECT OF SPECIAL POWERS



- Section 30 powers are obligations and only compliance can extinguish the order.
- A Chief Inspector may in terms of section 35 of OHS Act entertain an appeal against the decision of an inspector within 60 days of the decision being taken.
- The Chief Inspector may confirm, vary or set aside the decision of an inspector.
- In essence, a Chief Inspector is not legally entitled to conduct an inspection.
- If confirmed the decision retains a locus standi; if varied, it retains a varied locus standi; and if set aside it is extinguished as an outcome of an appeal process.

IMPACT OF THE DOCTRINE ON FOLLOW UPS.

- A follow up inspection has no place in law, especially in terms of this common law doctrine, as it revives an otherwise concluded inspection and decision taken.
- Further challenges is that a follow inspection may unintentionally cause a recurring inspection without an ending.
- Section 35 of OHSA which provides for an appeal to the Chief Inspector is based on legal assumption that the decision is taken and that it is a final decision.

RECOMMENDATIONS



- That The Chief Directorate OHS study and investigate processes in other jurisdictions like Minerals to determine if the practice of presentations to the Principal Inspector which seem to be a successful in Minerals is not adopted in the place of follow up inspections.
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THE IMPACT ON THE DOCTRINE ON EXTENSIONS

- Section 30 (5) grant an inspector a power to grant an extension. Who is that inspector, the one that conducted an inspection? If so, does that comply with *Functus Officio* doctrine? Certainly not. (To close this gap the interpretation of the inspector in casu is accorded to the Provincial Chief Inspector in the IES Standard Operating Procedure)
- The extension must be granted in writing to a person concerned, who is the person, is it an employer?
- If so, what about the voice of the employees in making that decision? What is the objective of our inspections: Is it not to strengthen occupational safety protection?
- If so, what about *audi alteram partem* rule, the principle of natural justice?

Thank You...



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