THE POTENTIAL LEGAL LIABILITIES POSED BY CONVEYOR BELT INSTALLATIONS – A STUDY OF THE ROLE OF THE MANUFACTURER, INCLUDING A DISCUSSION OF THE APPLICABILITY OF THE MINE HEALTH AND SAFETY ACT AND ITS REGULATIONS VERSUS THE OCCUPATIONAL HEALTH AND SAFETY ACT.

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INTRODUCTION

It is commonly accepted that in terms of safety in the mining industry, employers are vulnerable. The Department of Mineral Resources has markedly increased its enforcement activities as is clear from the number of Section 54 and Section 55 notices which are issued nationally on a daily basis. While this is indeed a source of concern (in terms of the liability faced by mining employers, and the workplace risks faced), the situation in the future is set to become worse.

While the (current) maximum sanction on a transgression which may be imposed on the employer is R 3 000 000, five years imprisonment or the loss of its rights to mine[2], the proposed amendments to the Act in Bill form would increase this to ten per cent of annual turnover or ten years imprisonment[3]. This should be seen within the context of comments from role players in the industry.

In a proposal to the Portfolio Committee on Minerals and Energy, the National Union of Mineworkers made the following submission:

> *...We have condemned and mourned the preventable deaths of workers in the mines. These accidents and fatalities occur at the height of industry's pursuit of production targets to maximize profits...*
>
> *...The NUM therefore proposes that the maximum fine that can be imposed upon an employer for either an administrative penalty or on conviction of the employer for an offence involving the negligent causing of death, injury, illness or serious endangerment should be the greater of R 1 million or 10% of the employer's turnover[4]...*

What is very interesting to note is that the submission was made in 2008, and was not included in the Mine Health and Safety Amendment Bill 2008, which included the last current amendment to the principal Act. Five years later, however, the principles contained in the submission have become a proposed legal requirement.

The Department of Mineral Resources has on numerous occasions, through the Minister, given intention that prosecution and enforcement measures will be increased in future. An example reads:

> *My Department is currently reviewing the Mine Health and Safety Act to strengthen enforcement. This is in direct response to the outcome of*

inspections and audits that have been conducted by our inspectors which highlights a worrying culture of non- compliance with minimum standards. In this regard my Department will continue to take action against mines that do not comply with the expected standards[5.]

If, on top of this, one considers the socioeconomic impacts that are currently faced by the mining industry, it becomes clear that senior executives may well feel themselves to be an endangered species.

The net result is that those engaged in mining, from mine managers to senior executives, will investigate all avenues available to them to reduce their potential liability. This includes attempting to transfer as much liability as is allowed in terms of the legislative environment to designers, suppliers, installers, importers and erectors. It is against this backdrop that the role, and indeed the potential liability, faced by conveyor installation manufacturers should be considered.

DEFINING THE MANUFACTURER.

It is well understood that the primary source of legal obligations applicable to the mining industry is the Mine Health and Safety Act, Act 29 of 1996.

A cursory examination of the Act shows that conveyor belt installations and their components are not specifically dealt with in the body of the Act, but that certain obligations may be found in the Regulations made in terms of the Act.

On studying the Mine Health and Safety Act Regulations[6], conveyor belt installations are specifically dealt with in Regulation 8.9[7.] It is however, important to note that the legal obligations dealt with in Regulation 8.9 are squarely placed on the shoulders of the employer, and that no mention is made of the manufacturer of the installation.

This regulation should be read in conjunction with the general duties pertaining to manufacturers in terms of the Mine Health and Safety Act.

Section 21 of the Act deals with the general duties of manufacturers. The first question that should be addressed before the specific obligations of the manufacturer can be identified is what constitutes a manufacturer. Typically, the first step in answering this question would be to consult Section 103 of the Act, which contains definitions used in the Act, but it is interesting to note that no specific definition has been legislated. In the absence of a specific definition, it then becomes imperative that the relevant section of the Act be studied.

In essence, Section 21 deals with various scenarios concerning manufacturers and identifies role players accordingly:

1. Those engaged in the provision of items for use at a mine (implying no mine involvement).
2. Role players involved in mine activities through installation and erection activities.
3. Those involved in the provision of hazardous substances for use on mines.

If the above is taken into account, a list may be compiled of the various role players within the three scenarios (as mentioned in the Act)[8]. These are:

1. Designers
2. Manufacturers
3. Repairers
4. Importers
5. Suppliers
6. Erectors
7. Installers

It should be obvious that one conveyor belt installation may involve numerous manufacturers, and that all individual manufacturers share similar legal obligations, as no differentiation is made between the designer, the supplier, the party engaged in the civil component of the construction of the installation or the contractor engaged in the splicing of belts.

NATURE OF THE MANUFACTURER'S LEGAL OBLIGATION.

Section 21(1) deals with the principal duties of the manufacturer. In short, this may be summarised as:

1. That components do not, as far as is reasonably practicable, pose a risk to health and safety *when properly used.*
2. That the items comply with all the requirements of the Act.
3. That the manner of installation or erection does not render unsafe practices or create risk *when properly conducted.*
4. Considering and implementing the principles of ergonomics during design, manufacture, erection and installation insofar as they impact on risk.
5. In terms of hazardous materials, that it is safe and without risk to health and safety *when properly used,* and that adequate information is provided.

While the above is an attempt at summarising the duties of the employer, the impact and proposed steps to be taken by the employer are briefly discussed.

1. That items do not, as far as is reasonably practicable, pose a risk to health and safety *when properly used.*

A recurring theme in the specific requirements placed on the manufacturer is the use of the term *when properly used,* implying that the manufacturer has an obligation to ensure that the end user (employer as defined in the Act) has adequate information to use properly[9].

The implication of the use of the term *when used properly* is twofold. Firstly, it is a defence for the manufacturer (in the broad sense of the word manufacturer as discussed above), following on an accident or incident, to prove that it had discharged its duties by showing that it had furnished the employer (client) with sufficient information to enable use of the installation or equipment in a healthy and safe way. Secondly, it becomes a defence for the employer, following an accident or incident, to illustrate that the risk that led to the accident/incident was not reasonably foreseeable and that the expert (being the manufacturer) had not furnished the employer with sufficient information to enable use in a healthy and safe fashion.

In order to discharge the duty placed on the manufacturer, the key elements which should be addressed include:

1. Illustrating that risk had been reduced, as far as was reasonably practicable, before the design, installation, component etc. was provided for use on a mine.
2. The provision of installation and erection risks and mitigating steps.
3. The provision of minimum maintenance standards and requirements.
4. The provision of minimum requirements in terms of competence for operators, maintenance personnel etc.
5. The provision of baseline risks, insofar as the article/installation/substance may impact on other activities on the mine.

A typical means to prove that the above has been complied to is the provision of an issue based risk assessment. This however poses a couple of questions. On the one hand, the completion of a generic risk assessment will not take into account mine specific risks, for example, commodities being mined or mining methodologies. Where the employer aims to reduce its overall liability, the suggested practice is for the employer to provide the manufacturer with access to its baseline risk assessment, which lists the unique risks to be taken into account by the manufacturer when compiling the manufacturer's risk assessment.

Another issue with a potential impact is where a project, as opposed to the provision of a single conveyor component, is concerned. Where a conveyor belt installation is to be installed, it is obvious that multiple manufacturers will be involved. Each individual manufacturer (from designers to the suppliers) will individually be liable in terms of the Act, which could lead to practical difficulties. The question as to whether the lead contractor/designer/EPCM has a responsibility to collate the individual risk based information and mitigation actions is not addressed by the Act, and should be addressed as a component of the contractual relationship between client and EPCM or other role players.

As a matter of interest, the above issue is specifically addressed in the original Construction Regulations in terms of the Occupational Health and Safety Act[10], as well as the new Construction Regulations 2014[11], where the principal contractor has an obligation to provide the client with a consolidated health and safety file. This provides a practical pointer as to how the client may choose to approach EPCMs, but as the Occupational Health and Safety Act does not apply to mining projects, this is not a legislated requirement.

One practical manifestation of the use of the information provided by the manufacturer is the drafting of procedures by the employer. Various examples of mandatory procedures to be drafted by the employer are found in the Mine Health and Safety Act Regulations. Examples include:

1. Written Lock Out Procedures – Regulation 8.8(3)(g)
2. Alignment and Training of Conveyor Belt Installations – Regulation 8.9(b)
3. Independent Conveyor Test Run Procedure – Regulation 8.9(i)
4. Belt Splicing Procedure – Regulation 8.9(9)

While the duty to ensure that the procedures are in place rests with the employer, it can be deduced from the above that where the manufacturer cannot prove that it has provided adequate risk-based information impacting on the above procedures, the manufacturer may be in breach of Section 21 of the Act.

2. That it complies with all the requirements of the Act.

It should be obvious that all manufactured articles or installations in the mining environment comply with the Mine Health and Safety Act. What is less obvious is what the exact definitions of the obligations are.

While the general obligations in terms of Section 21 of the Act have been discussed, the Act itself does not specifically deal with conveyor belt installations. The Act should be seen as the enabling legislation, where in terms of Section 96, the Minister of Mineral Resources may create regulations to give effect to the general provisions of the Act and in terms of Regulation 96(5) and (8) incorporate any standard into a regulation.

In short, the manufacturer would have to embark on a process to identify all references in the legislation applicable to its articles/installations and ensure compliance therewith before supplying such for use at a mine.

REGULATIONS

One of the difficulties in dealing with the Mine Health and Safety Act is the fact that two sets of regulations have to be consulted: the Mine Health and Safety Act Regulations and the Mines and Works Act Regulations[12].

The existence of two sets of regulations applying to the mining environment is a result of the history of the development of the mining legislation. When the Minerals Act replaced the Mines and Works Act in 1991, it adopted the Mines and Works Act Regulations and when it in turn was replaced with the Mine Health and Safety Act in 1996, Schedule 4 of the new Act adopted the previous regulations. A recurring theme since 1997 has been the repeal of old regulations, and the making of new regulations dealing with the same topic under the Mine Health and Safety Act. This process has, however, been slow, and while it is ongoing, it leads to a situation where both old and new regulations remain in force.

Where conveyor belt installations are concerned, it has been shown that the trend internationally is towards a reduction in the associated fatal injury frequency rate[13]. Historically, this has not been part of the South African experience, and it has been shown that conveyor belt installations have, over time, contributed a large proportion of mining accidents[14], with 37 per cent of all machinery related fatalities between 1988 and 1992 being attributable to tail pulleys[15].

The net result of this has been an increased focus on bulk materials handling from a legislative perspective, ultimately leading to Regulation 8.9 of the Mine Health and Safety Act Regulations dealing specifically with conveyor belts, being gazetted in 2008. It would however, be foolish for the manufacturer, or the employer, to focus exclusively on Regulation 8.9 when dealing with conveyor belt installations as these

and their components would still fall within the definition of machinery in Section 102 of the Act.

Note that other regulations would still have a bearing on conveyor belt installations, including:

Mine Health and Safety Act Regulations	Mines and Works Act Regulations
Chapter 5 – Fires and Explosions	Chapter 3 – General Provisions
Chapter 8 – Machinery and Equipment	Chapter 4 – Workmen
Chapter 10.1 – Hazardous Locations	Chapter 5 – Surface Protection
Chapter 10.3 – Draw Points, Tipping Points, Rock Passes and Box Fronts	Chapter 20 – Machinery: Special Safety Measures
	Chapter 21 – Machinery

Table 1. Regulations affecting conveyor belt installations

It is important to note that while the duties in the regulations are primarily the responsibility of the employer, and at times on the manager, in terms of the Mine and Works Act Regulations, the responsibility on the manufacturer is to provide equipment which is able to be used in a safe and healthy way, as well as the obligation to provide in accordance with the regulations, would by default extend to the duties of the manufacturer.

STANDARDS

In addition to the specific and general regulations that impact on conveyor belt installations, incorporated standards also constitute a binding obligation on the manufacturer.

The minister may incorporate any standard into a regulation, and does so by merely incorporating a reference to the standard in a regulation, without restating the text of the standard. While the impression is that this incorporated standard will be a SANS code, any standard having a health and safety impact may be incorporated. Once incorporated, the full text of the standard has the same impact as a regulation.

As with regulations, the manufacturer has to identify all incorporated standards that have a bearing on the article, substance or installation used on a mine and subsequent to identifying such standards, ensure compliance to them.

CODES OF PRACTICE

Section 9 of the Act places a duty on the employer to create a mandatory code of practice when the chief inspector issues a guideline for the compilation thereof. The chief inspector has published a guideline for Safe Use of Conveyor Belt Installations for the Transportation of Mineral, Material and Persons[16].

While the exact nature of the legal status of codes of practice and their guidelines are debatable, the manufacturer has to consider the employer's Mandatory Code of Practice.

3. **That the manner of installation or erection does not render unsafe practices or create risk *when properly conducted*.**

The requirement that the manner of installation or erection should not impact on the usage risk profile following commissioning takes into account the reality that an impact on the potential liability of different manufacturers could ultimately also impact on the liability of the employer.

A simple scenario to illustrate this concept is the following:

1. Company A, based in Europe, designs and manufactures modular fire detection and suppression systems.
2. Company B is the authorised distributor in South Africa, and imports modular systems for sale into the African market.
3. Company C is engaged by a mining house D as EPCM for the delivery of a complete crushing, screening and bulk materials handling facility for a mine expansion project.
4. The mine specifies the use of the equipment manufactured by Company A.
5. Sub-contractor E is contracted to install and commission the equipment supplied by Company A.
6. After commissioning, a fire in the secondary crushing plant conveyor installation leads to the death of two mine employees. The investigation following the accident indicates that the fire detection and suppression system had failed.

It should be clear from the discussion of Section 21 in this paper that Companies A, B, C and E would fit the description of manufacturer in the Act, and should be able to show compliance with the duties contained in Section 21. If all the individual manufacturers are able to illustrate that the installed equipment was fit for use as delivered, but failed as a result of improper installation, subcontractor E would face liability for the manner in which the installation was completed. For manufacturers A, B and C to eliminate liability, they would, however, have to show that sufficient information had been provided regarding the specific requirements for the installation phase. If this cannot be proven, the defence available to subcontractor E would be to show that it had acted as far as is reasonably practicable, and that no specific information had been provided to it by manufacturers A, B and C regarding installation procedures.

4. Considering and implementing the principles of ergonomics during design, manufacture, erection and installation insofar as they impact on risk.

The requirement that manufacturers consider ergonomic risk points to the fact that the liability faced by the manufacturer does not end after supply, installation or commissioning, but extends into the operational phase. The implication is that the manufacturer could face liability for operational incidents, even if these take place years after the commercial relationship with the employer has come to an end.

It further implies that the original design phase has to take into account maintenance and operational risk. This would mean a more involved design function, and closer liaison with the end user, where the end user (employer as defined in the Act) would have to furnish information regarding the potential risks which current mining operations may pose on the new installation.

5. In terms of hazardous materials, that it is safe and without risk to health and safety *when used properly,* and that adequate information is provided.

When a manufacturer's liability in an incident has been questioned, the one area where the principle of the provision of risk based information to the end user has largely been addressed is when hazardous substances are considered.

It is common practice that mines will not allow the use of a chemical or substance where the manufacturer does not provide a Material Safety Data Sheet (MSDS).

Section 21 places a duty on the manufacturer to provide information on:

1. The use of the substance
2. Risks to health and safety
3. Restrictions on use (exposure limits etc.)
4. Precautions to be taken
5. Emergency procedures
6. Disposal of containers[16]

Note that the information required in terms of the substance does not comply with all the requirements of ISO 11014 and ANSIZ400.1.1993, which standards have been incorporated into the Hazardous Chemical Substances Regulations made under the Occupational Health and Safety Act 1993[17]. While the Occupational Health and Safety Act is not binding on a mining operation, it is suggested that the 16 point MSDS be used as best practice.

In reducing legal liability from the perspective of the employer, it would be beneficial to provide prospective suppliers of hazardous materials and substances with information regarding the intended use of the substance or chemical. The information provided should include:

1. Intended use (tasks)
2. Area of use
3. Operational risks including other substances and materials involved.

This is often best done through giving the potential manufacturer access to the relevant component of the baseline risk assessment. This implies that the manufacturer has an obligation to provide substances and chemicals which do not only comply with minimum requirements, but which are fit for use given the specific risk profile of the employer.

CONCLUSION

In summarising the legal situation regarding the manufacturer in the mining industry, in terms of the Mine Health and Safety Act, the following applies:

1. Section 21 places a duty on manufacturers.
2. It identifies designers, manufacturers, repairers, importers, suppliers, installers and erectors as having equal liability.
3. It places a duty on manufacturers to ensure that all articles, substances and installations comply with those sections, regulations and incorporated standard. Further to ensuring compliance with the above, the manufacturer must ensure that the article, substance or installation is safe to use if used properly.

4. In order to ensure the above, the manufacturer would have to provide the employer with information regarding risk and mitigating steps.
5. The information to be provided to the employer should include risk assessments, maintenance standards, competency requirements, maintenance and operational procedures, dependant on the level of residual risk.
6. Liability does not end with handover or commissioning.

As mentioned in the introduction to this paper, the mining industry at large is facing increased pressure in terms of health and safety performance. This manifests in increased liability. Senior mining executives and mine managers will look to offset some of this increased liability by enforcing the duties of manufacturers, probably more so than in the past. While we are already seeing this increased focus on manufacturers, this also gives the prudent manufacturer a strategic advantage, as the degree to which the manufacturer is able to reduce the liability of the mine manager may equate to a competitive advantage over the manufacturer's competitors.

To achieve this, we advocate the creation of legal intelligence within the broader manufacturing industry (including suppliers, designers, EPCMs etc.). Greater focus on product risk assessment, documented risk mitigating measures and assistance with operational and maintenance procedures will result in future benefit, not only for the individual manufacturer, but also for the mine worker in general.

A DISCUSSION OF THE APPLICABILITY OF THE MINE HEALTH AND SAFETY ACT AND ITS REGULATIONS VERSUS THE OCCUPATIONAL HEALTH AND SAFETY ACT IN A PROJECT ENVIRONMENT

Company A is engaged, in an EPCM capacity, in the provision of an overland conveyor belt installation from a coal mining operation B, to a proposed new coal fired power station C, 20 kilometres away in the Waterberg area.

1. As falling within the legislated definition of a manufacturer, the following questions are posed by the EPCM:

    a. Would the Mine Health and Safety Act apply to construction activities taking place on farms along the 20 km length of the conveyor belt installation?
    b. Would construction activities within mining operation B be subject to the Construction Regulations, 2014?
    c. It is accepted that activities within the power station project C falls within the scope of the Occupational Health and Safety Act. At which point would the Mine Health and Safety Act cease to be applied in terms of the overland conveyor belt installation?
    d. What is the impact, given the above, on the manufacturer?

INTRODUCTION

While not unique in terms of the international situation, South African health and safety legislation follows a disjointed approach, as two primary Acts deal with health and safety legal liability.

Where workplace activities fall within the mining industry, the Mine Health and Safety Act, 29 of 1996 would apply and conversely (with some exceptions, i.e. maritime operations) where the Mine Health and Safety Act does not apply, the Occupational Health and Safety Act, 85 of 1993 would.

Although the two Acts follow similar principles and a common approach, there are certain distinct differences between the two pieces of legislation. This does to some degree lead to a difficult situation where one legal entity as an employer would have to apply both sets of legislation, implying for example that two legal appointment structures, for the same appointees, needs to be drafted.

There are a variety of reasons why a discussion of the different fields of application of the mining or industrial health and safety legislation is relevant. These include:

1. *Perceptions regarding potential liability.* The maximum punishment under the Occupational Health and Safety Act is R1 000 000 and/or two years imprisonment[19] versus R3 000 000 or five years imprisonment under the Mine Health and Safety Act.
2. *Perceptions regarding nature of enforcement.* Sheer number of Section 54/55 notices issued by the Department of Mineral Resources versus the

perceived lack of Section 30 prohibition notices issued by the Department of Labour.

3. *Contractors' liability*. The Mine Health and Safety Act does not distinguish between contractors and own employees in terms of vicarious liability. The Occupational Health and Safety Act contains mechanisms for limiting the liability posed by contractors.
4. *Activities.* Many activities performed by mining operations do not fit the classic notion of what constitutes mining, for example the construction of employee wellness facilities like housing.
5. *Contractor experience*. It is often found that contractors involved in construction activities within the broader sense are accustomed to applying the Occupational Health and Safety Act and specifically the Construction Regulations made thereunder. This is especially true in a project environment where EPCM's principal contractors, contractors and sub-contractors are involved.

From the above, it becomes evident that role players would often want to apply the Occupational Health and Safety Act above the Mine Health and Safety Act. Unfortunately, choice does not enter into whether a specific Act applies.

GENERAL SITUATION REGARDING HEALTH AND SAFETY LEGISLATION

No area of life is free from the effects of the legal obligations imposed by law. Simply put, this means that the law abhors a vacuum. This is borne out by the statement that the Occupational Health and Safety Act applies (in terms of workplace health and safety) to all workplace activities.

To every rule there is an exception, and the Occupational Health and Safety Act limits its application in Section 1(3)(a) thereof:

(3) *This Act shall not apply in respect of–*

(a) a mine, a mining area or any works as defined in the Minerals Act, 1991 (Act No. 50 of 1991), except insofar as that Act provides otherwise

From the above it is thus clear that the answer as to whether either the Occupational Health and Safety Act or the Mine Health and Safety Act applies lies in the latter.

When the Occupational Health and Safety Act commenced on 1 January 1994, the Minerals Act still had application to health and safety issues in the mining industry. The Minerals Act was repealed and replaced by the Mine Health and Safety Act on 15 January 1997, and any reference to the Minerals Act would then apply to its successor in title, the Mine Health and Safety Act, Act 29 of 1996.

In short, this means that should the Mine Health and Safety Act not apply, the Occupational Health and Safety Act would automatically be applicable.

APPLICATION OF THE MINE HEALTH AND SAFETY ACT: LEGAL REFERENCES

In general the Mine Health and Safety Act is understood to apply to all mining activities. In the normal course of mining activities, the question as to whether the

Act applies or not would not pose any problem and the Act would be applied as a matter of course. This implies that Department of Mineral Resource's Mine Health and Safety Inspectorate would be the government agency responsible for the application and enforcement of the Act. It is typical that when the application of the Mine Health and Safety Act is considered, at least from a lay perspective, focus is placed on the physical activities being undertaken. In this sense, stoping or face preparation by miners underground would obviously be deemed to constitute 'mining' while the removal of building rubble from a construction area on surface would be deemed less so.

However, if the legal situation is examined, the actual activity being performed only carries ancillary authority when the question regarding the application of the Mine Health and Safety Act is considered.

In determining whether the Mine Health and Safety Act applies, the point of departure is to understand what is meant where the Act uses the word 'mine', where the first step is to investigate the actual legal definition of the word in Section 102 of the Act. ***(Authors' emphasis).***

mine means, when –

(a) used as a noun

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

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

(iii) ***a works***

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

From the above, the following should be clear:

1. That the focus is not only on the physical activity being performed.
2. That the geographical area of where an activity is performed has to be considered.
3. That the definition of the words 'works' and 'mining area' will have an impact.

The meaning of the word 'mine' in the Act will include the definition of the word 'works' as used in the definition. 'Works', in Section 102, is defined as:

works means any place, excluding a mine, where any person carries out –

(a) the transmitting and distributing to another consumer of any form of power from a mine, by the owner thereof, to the terminal point of bulk supply or where the supply is not in bulk, to the power supply meter on any such other consumer's premises; or

(b) training at any central rescue station; or

(c) the making, repairing, re-opening or closing of any subterranean tunnel; or

(d) any operations necessary or in connection with any of the operations listed in this paragraph.

It should be clear from the above that the definition of 'works' should not have a major impact on the question whether the Mine Health and Safety Act would apply to construction activities as in the problem statement above. The reference to 'mining area' however does have an impact.

Section 102 defines 'mining area' as:

> ***mining area*** *means a prospecting area, mining area, retention area, exploration area and production area as defined in section 1 read with section 65(2)(b) of the Mineral and Petroleum Resources Development Act, 2002 (Act No 28 of 2002);*

(Note: The reference to Section 65(2)(b) above was incorrectly gazetted, as no such section exists.)

The importance of the above definition is the move away from an activity based approach to a geographical approach. The definition does not exactly define 'mining area', but instead references the Mineral and Petroleum Resources Development Act. In order to then definitively interpret the Mine Health and Safety Act's meaning of 'mine', the Mineral and Petroleum Resources Development Act is to be consulted.

Section 1 of the Act defines a 'mining area' as: ***(Authors' emphasis)***

'mining area'—

(i) in relation to a mining right or a mining permit, means the ***area for which that right or permit is granted;***

(ii) in relation to any environmental***, health, social and labour matter*** and any latent or other impact thereto, includes—

(a) any adjacent or non-adjacent surface of land on which the extraction of any mineral and petroleum has not been authorised in terms of this Act but upon which ***related or incidental operations*** are being undertaken and, including:

(i) ***any area connected to such an area by means of any road, railway line, power line, pipeline, cable way or conveyor belt***; and

(ii) any surface of land on which such road, railway line, power line, pipeline or cable way is located; and

(b) ***all buildings, structures, machinery, mine dumps or objects situated on or in that area which are used for the purpose of mining on the land in question***

From the Mineral and Petroleum Resources Development Act definition, the following should be noted:

1. Areas subject to a mining rights authorisation are defined as a mining area.
2. It expands the application of the Mine Health and Safety Act to include areas which are not subject to a mining rights authorisation.
3. Where the Mine Health and Safety Act's definition of 'mine' refers to activities 'related' to winning, exploiting and processing of a mineral, the Mineral and Petroleum Resources Development Act goes further by including reference to matters 'incidental' thereto.

CONCLUSION

From the above, it is contended that conveyor installation activities fall within the scope and ambit of the MHSA. This is further seen within the context of Section 103 of the MHSA, which states:

103. ***Occupational Health and Safety Act, 1993, not applicable***

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.

The implication of the above is that the Occupational Health and Safety Act would never have blanket application to any operation where the Mine Health and Safety Act applies, but certain elements would apply where the Mine Health and Safety Act does not regulate a matter at all. In practice this means that the Act itself will never apply, but some stipulations from certain of the regulations made under the Act may from time to time apply, for example, where the Mine Health and Safety Act does not deal with suspended platforms but the Occupational Health and Safety Act, Construction Regulations, contains reference to suspended platforms. In this example, the Construction Regulations would not apply, but suspended platforms utilised during the project would have to comply with the SANS codes incorporated under the regulations.

EXEMPTION FROM ALL OR CERTAIN REQUIREMENTS OF THE MHSA

Anecdotally, numerous examples are found in the mining industry where the Mine Health and Safety Inspectorate have excluded certain tasks or geographical areas from the working of the Mine Health and Safety Act. This sometimes takes the form

of an oral opinion expressed by an inspector engaged in a mine visit, but is sometimes the outcome of correspondence with the inspectorate.

An example is the following:

Mining house A, in a joint venture with mining house B, constructed a water reclamation plant to deal with rising underground mine water levels within the confines of an operating coal mine in Mpumalanga Province. The facility is operated by a third party, where reclaimed mine water is treated through a reverse osmosis process after which a portion thereof is provided to the local municipality. The mining house approached the Department of Mineral Resources in order for the treatment plant to be excluded from the scope of the mine's liability in terms of the Mine Health and Safety Act.

In a letter addressed to the mining house, the Department stated the following:

1. That the water treatment plant does not fall within the definition of 'mine' as it is not used in connection with searching, winning, exploiting or processing a mineral.
2. Compared the water treatment plant with the mining house's head office in Johannesburg.

The criticism of this approach lies in the fact that it overly places a focus on the physical activity of 'mine', and does not consider the Mineral and Petroleum Resources Development Act's definition of 'mining area' as discussed above.

This does not mean that the water reclamation plant, or any conveyor installation project or components thereof could not be formally excluded from the Mine Health and Safety Act's sphere of application.

Should an employer wish to exempt all or certain activities from the Mine Health and Safety Act, a formal application in terms of Section 79 would have to be brought:

79. ***Exemption from all or part of this Act***

(1) The employer of a mine may request an exemption from the Minister, and if satisfied that the employer has consulted appropriately with the affected employees or their representatives, the Minister may exempt the employer from any or all the provisions of this Act or from a notice or instruction issued under this Act. An exemption may be –

(a) general or particular;

(b) for any period; and

(c) on any conditions that provide the same overall protection which would result from the full application of this Act.

(2) When an exemption is granted under subsection (1), the Minister must issue a certificate of exemption to the employer, specifying the scope, period and conditions of the exemption.

(3) The Minister may amend or withdraw a certificate of exemption at any time.

(4) The employer must prominently and conspicuously display any exemption granted, or deemed to have been granted, under this section to the employees to read.

It should be obvious from the above that the only person who may exclude an activity or geographic area from the Act is the Minister, and that this would be the outcome of a formal process. In addition, the only competent authority on a point of interpretation of the Act is the Labour Court (Section 82(1).

In addressing the question of the construction of an overland conveyor installation, the following conclusion may be reached where construction takes place in various areas:

Activity	**Mine Health and Safety Act**	**Occupational Health and Safety Act**
Construction on mine premises, within mining rights area	**X**	
Construction on adjacent farm, where mine owns property but where no mining right applies	**X**	
Construction on non-adjacent farm where mine is owner, or where servitude is registered	**X**	
Construction activities in power station coal yard		**X**

Table 2. Application of Mine Health and Safety and Occupational Health and Safety Acts

In conclusion, the suggested course of action where there is any confusion regarding which of the two Acts to apply, non-compliance with the Mine Health and Safety Act carries more severe penalties than a non-compliance with the Occupational Health and Safety Act. Where compelling reasons exist for non-compliance with the Mine Health and Safety Act, formal application must be made for exemption.

It is submitted that the current definition of a mine is not ideal, and it is hoped that this issue will be addressed in future amendments to the Mine Health and Safety Act. In the interim it is suggested that the issue be dealt with circumspectly.

REFERENCES

1 Mine Health and Safety Amendment Bill, GNR 37027

2 Mine Health and Safety Act, 29 of 1996, Section 92

3 Mine Health and Safety Amendment Bill, Section 28

4 NUM Submission to the Portfolio Committee on Minerals and Energy, 8 August 2008.

5 Keynote address by Ms. S Shabangu, Minister of Mineral Resources at the Mine Health and Safety Council (MHSC) Summit at Emperor's Palace, Johannesburg 17-18 November 2011

6 Mine Health and Safety Act Regulations, GNR 93 of 1997, as amended

7 Mine Health and Safety Act Regulation 8.9 as amended by GNR 622 of 2013

8 Mine Health and safety Act, Section 21(1)

9 Mine Health and Safety Act, Section 21(1)(a)(i) and 2(3)

10 Construction Regulations, 2003, GNR 1010 of 2003

11 Construction Regulations, 2014, GNR 84 of 2014

12 Mines and Works Act Regulations, GNR 992, 1970

13 J Hill. An assessment of the effectiveness of safety interventions in the field of bulk materials handling. Paper presented to Beltcon 16

14 Oberholzer and Thorpe. Quantifying the nature and magnitude of the contribution of human engineering factors to the risk of injury or fatality caused by underground machinery or transport and delineate the essential causes. CSIR Miningtek, 1995

15 Peake and Ritchie. Establish the primary causes of accidents on mines other than gold, platinum or coal. CSIR, 1994

16 Guideline for the compilation of a Mandatory Code of Practice for the safe use of conveyor belt installations for the transportation of minerals, materials and persons. DME 16/3/2/2-A8

17 Mine Health and Safety Act, Section 21(4)(b)(i-vi)

18 Hazardous Chemical Substances Regulations, GNR 1179 of 1995 as amended by GNR 930 of 2003

19 Occupational Health and Safety Act, Section 38(2)

20 Mineral and Petroleum Resources Development Act. Act 28 of 2002

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