

**A CRITICAL ANALYSIS OF THE IMPACT OF THE NAMIBIAN 1992 LABOUR
ACT ON THE HEALTH AND SAFETY REGULATION IN THE NAMIBIAN
MINING INDUSTRY**

By

ZEKA ALBERTO

U16363290

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prepared under the supervision of

Adv. Leonardus J. Gerber

Department of Public Law

Faculty of Law

University of Pretoria

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DECLARATION OF ORIGINALITY

I, ZEKA ALBERTO, hereby declare that this dissertation is my original work, and other works cited or used are clearly acknowledged. This work has never been submitted to any University, College or other institution of learning for any academic or other award.

Signed:

Date:

DEDICATION

I dedicate my dissertation work to my children as a source of inspiration to always aspire to greater heights through determination and perseverance and to my colleagues that sought answers from me thereby motivating me to research this subject matter.

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ABSTRACT

This dissertation attempts to bring clarity and certainty in respect of the regulation of the health and safety aspect within the Namibian mining Industry. At the moment, there is lack of legal clarity in Namibia as to which set of laws or regulations applies to the mining industry in so far as health and safety of employees within the extractive industry is concerned therefore making it difficult for the industry to comply or comprehend its legal obligations. The absence of legal clarity culminated into uncertainty over which state functionaries are entrusted with the responsibility to regulate the health and safety aspect of mining in Namibia.

It is observed that the uncertainty which prevails in the Namibian mining industry as to which laws or regulations are applicable in respect of health and safety of employees at work is attributed to and aggravated by the misconception of the Ministry of Mines and Energy which fails comprehend its role due to lack of proper legal advice and thereby assuming status quo.

This research has found that Ordinance 20 of 1968 and its regulations were repealed to the extent that it dealt with health and safety of employees on mines and consequently the regulations of 1968 do not find application in Namibia since 1 November 1992.

This paper further reveals or identifies the Health and Safety Regulations on the Health and Safety of Employees at Work made under Labour Act 6 of 1992 as the applicable law in this regard notwithstanding the fact that the assignment of the administration of functions under the Health and Safety regulations, is vague and contributes to the uncertainty instead of ameliorating the situation.

The ordinance continues to be implemented by the ministry as if it is still applicable and very little is actually implemented under the 2007 Labour Act. Therefore, one can clearly say that in the absence of a new regulatory regime which introduces substantial change, there is nothing to measure against unless the Labour Act Regulations are properly assigned with post assignment directives.

LIST OF ACRONYMS

African Charter	African Charter on Human and Peoples' Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
LDIFR	Day Injury Frequency Rate
MoME	Ministry of Mines and Energy
WHO	World Health Organization

KEYWORDS

Health, safety, mining, regulations, employee, injury.

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CHAPTER 1: INTRODUCTION

1.1. Introduction and background of study

“...2016 began with another fatality at B2Gold’s Otjokoto gold mine as a result of a mine accident that had occurred on the 28th December 2015 when Martin Shilompoka, a Machine Operator, was trapped between a dozer and a diesel truck during a re-fuelling operation. The injury was treated for 25 days at the Roman Catholic Hospital in Windhoek. Unfortunately, on 22nd January 2016 he succumbed to his injuries and passed away.”¹

The mining industry bears a high risk of industrial accidents because of the nature of mining operations, in the same vein the industry is still a largely labour intensive process. The industry employs a large labour force to carry out various operational activities.² Mining remains one of the most perilous occupations in the world, both in terms of short term injuries and fatalities, but also due to long term impacts such as Cancers and respiratory conditions such as silicosis, asbestosis and pneumoconiosis.³

In order for mining companies to optimise, coordinate and manage their operations, personnel, plant and equipment, the health, safety and wellness of employees must be prioritised. A worker’s safety at work now features as an important component of a company’s industrial relations.⁴

¹ Chamber of Mines of Namibia: Annual Review. 2016. Available at: www.chamberofmines.org.na, last accessed on: 13 February 2017.

² Chamber of Mines of Namibia: Annual Review. 2017. Available at: www.chamberofmines.org.na, last accessed on: 17 February 2017.

³ Yaboah, J. Y. 2008. *Environmental and Health Impact of Mining on Surrounding Communities: A Case Study of Anglogold Ashanti In Obuasi*. A Thesis submitted to the Department of Geography and Rural Development, Kwame Nkrumah University of Science and Technology in partial fulfilment of the requirements for the degree of Master of Arts Faculty of Social Sciences College of Art and Social Sciences. Available at: <https://www.elaw.org/system/files/ENVIRONMENTAL%20AND%20HEALTH.pdf>, last accessed on 15 February 2017.

⁴ Steinberg, M. et. Al. 1988. Occupational Health and Safety in South Africa: The perspectives of Capital, State and Unions. Soc. Sci. Med. Vol. 27. No. 7. Page 697.

The right to safe and healthy working conditions has gained prominence at the local, regional, and international levels.⁵ The United Nations General Assembly has reiterated the language of the Stockholm Declaration, by asserting that all individuals are entitled to live in an environment adequate for their health and well-being.⁶

Regionally, article 15 of the African Charter provides that everyone has a right to work under equitable and satisfactory conditions. Those conditions include the safety of the individuals, particularly those who work under dangerous conditions such as a mine. In addition to that, the ILO's Convention on Health and Safety in Mines⁷ direct that national laws shall provide for the supervision of safety and health in mines and the inspection of mines by inspectors designated for that purpose by the competent authority. The ILO's Convention on Health and Safety in Mines is not enforceable in Namibia, but it provides a fair standard to be emulated⁸.

The regulation of health and safety within the Namibian mining industry has been a particularly neglected subject. There have been minimal efforts made to enhance the understanding of the aspect, not only of the development of health and safety legislation, but also of the mining industry. The mining industry creates employment and improves infrastructure, it brings forth large-scale, short-term economic gains through investment. This often overshadows the impact of mining activities on health

⁵ Tshoose, C. 2014. *Placing the right to occupational health and safety within a human rights framework: trends and challenges for South Africa*. The Comparative and International Law Journal of Southern Africa, Vol. 47, No. 2 (JULY 2014), pp. 276-296 Published by: Institute of Foreign and Comparative Law Stable. Available at: <http://www.jstor.org/stable/24585872>, last accessed: 14-02-2017.

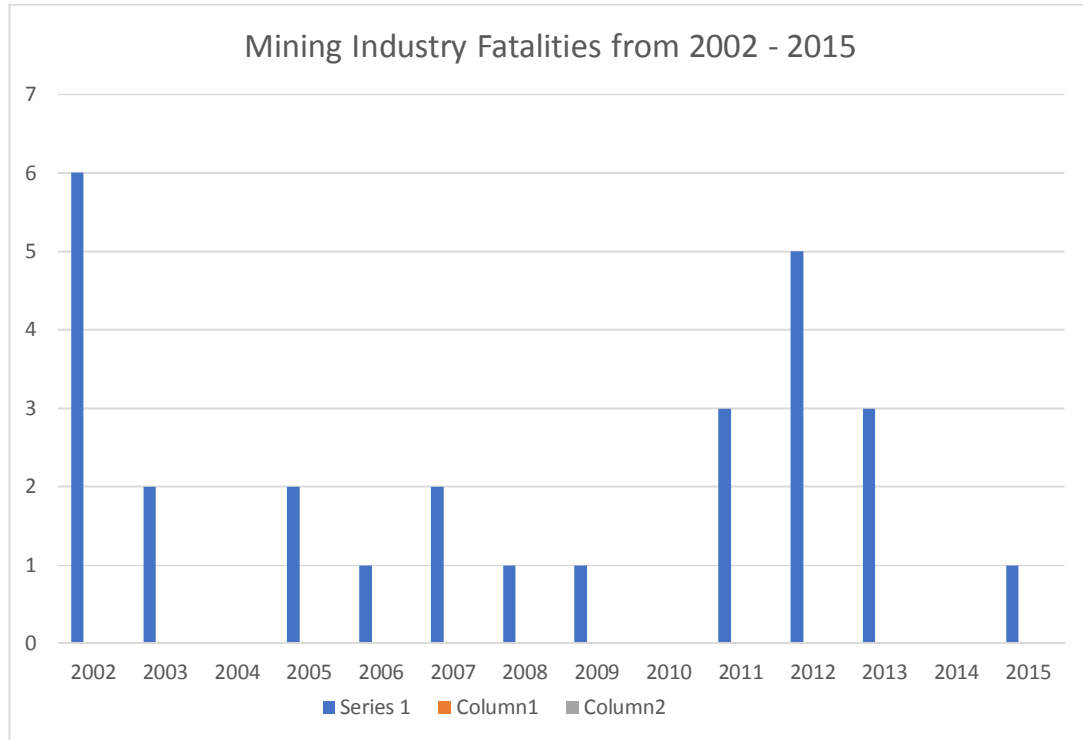
⁶ Resolution adopted by the United Nations General Assembly at its 45 session/94, 68th Plenary Meeting, 14 December 1990 at: <http://www.un.org/depts/dhl/resguide/r45.htm> (last accessed 23 August 2013). Also make reference to **WHO Global Strategy for Occupational Health for all 1994-2000**: Every citizen of the world has a right to healthy and safe work and to a work environment that enables him or her to live a socially and economically productive life.

⁷ Article 15 of the African Charter on Human and Peoples Rights (African Charter), 27 June 1981, CAB/LEG/67/3. Rev. 5, 21 I.L.M 58 (1982), Adopted in Banjul, the Gambia.

⁸ In terms of Article 95 (b) and (d) of the Namibian Constitution, the State shall actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at enacting the safety and strength of employees and adherence to and action in accordance with the international Conventions and Recommendations of the ILO.

and safety of its employees. The mining sector has historically been the main driver of growth in the Namibian economy.⁹

In the Namibian mining industry, the total number of lost day injuries recorded in 2015 was 50, a significant reduction from 65 recorded in 2014. This equates to a Lost Day Injury Frequency Rate (LDIFR) of 1.48, an improvement of 35% from the 2014 LDIFR of 2.26.¹⁰



¹¹ Source

As clearly evidenced by the above statistics, the past decade has witnessed several high profile mine incidents that led to injuries, illnesses, and fatalities.¹²

⁹ Sherbourne, R. 2017. *Guide to the Namibian Economy 2017*. Institute for Public Policy Research. ISBN 978-99945-60-66-0.

¹⁰ Chamber of Mines of Namibia: Annual Review. 2016. Available at: www.chamberofmines.org.na, last accessed on: 13 February 2017. Page 16.

¹¹ Chamber of Mines of Namibia: Annual Review. 2016. Available at: www.chamberofmines.org.na last accessed on: 13 February 2017. Page 16

¹² Kaira, C. 30 May 2013. *The Namibian Newspaper*. Available at: <http://www.namibian.com.na/index.php?id=108531&page=archive-read>, last accessed on 14 February 2017.

Fatalities in 2012:

- ❖ Wilbard Angula was struck by a rock fall at Weatherly's Otjihase Mine in January.
- ❖ Stefanus Akawa died when his dump truck rolled over him at Namdeb's Southern Coastal mine.
- ❖ Gottfried Sikongo was struck by a rock slab at Weatherly's Otjihase Mine in April.
- ❖ Ambrosius Maharero died in April at Purity Manganese when he was pressed between a forklift and a brick making machine.
- ❖ Petrus Kashango fell from a height of 24 meters above the ground and died at Areva's Trekkopje mine in October.

Fatalities in 2013:

- ❖ Benjamin Aib was struck by a diamond wire that cuts dimension stone blocks at Marvest Marbel Mine at Karibib in February.
- ❖ Petrus Engelbrecht was electrocuted underground at Weatherly's Matchless Mine in March.

¹³ Source

In order to curb this ordeal, the regulatory framework must be clear and comprehensive, and it is essential that there is adequate capacity for monitoring and enforcement.¹⁴ It is the duty of the government and the relevant stakeholders to regulate the occupational health and safety of the employees in the mining industry, and put in place measures that deal with compliance management.

In Namibia, the health and safety of mining employees within the industry is regulated under the auspices of the Mines, Works and Minerals Ordinance of 1968¹⁵ (hereinafter referred to as the Ordinance) and its subsequent regulations. That law made provision for and gave specific authority to a Chief Inspector of Mines, whose overall function was to ensure health and safety compliance management¹⁶.

¹³ Kaira, C. 30 May 2013. The Namibian Newspaper. Available at: <http://www.namibian.com.na/index.php?id=108531&page=archive-read>, last accessed on 14 February 2017.

¹⁴ *The World Bank's Evolutionary Approach to Mining Sector Reform*. Available at: <https://openknowledge.worldbank.org/handle/10986/18288>, last accessed on 02 February 2017.

¹⁵ Ordinance 20 of 1968 as amended and shall be dealt with in full under chapter three

¹⁶ The functions and role of the chief inspector of mines shall be dealt with under chapter two

Shortly after independence, the Labour Act 6 of 1992 was enacted.¹⁷ The 1992 Labour Act Schedule¹⁸ repeals section 93 of the Ordinance and the whole of the 1968 Ordinance, in so far as it relates to the health and safety of workers employed in or in connection with mining and prospecting operations.

On the other hand, the Minerals Act 33 of 1992,¹⁹ in terms of section 139 read in conjunction with Schedule 2 thereof, provides for the repeal of the entire 1968 Ordinance except in so far as it relates to the appointment of and powers, duties and functions of the Chief Inspector of Mines, and the provisions which relate to the safety and health of persons employed in the mines. Simply put, the Minerals Act which was enacted after the Labour Act attempted to resurrect provisions of the 1968 Ordinance relating to the health and safety which were already repealed by an earlier piece of legislation, namely the 1992 Labour Act.

This state of affairs creates an incongruity between the two principle acts, namely the Labour Act and the Minerals Act. Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not revive anything not in force or existing at the time which the repeal takes effect.²⁰ The lack of clarity about the health and safety regulatory framework therefore thwarts the efforts undertaken by management, employees and regulators in continually working at reducing risks in the workplace.²¹

It is very clear that the role of government is to create a suitable investor friendly environment for the private sector in which investors are able to ascertain accurately what is expected of them under the regulatory framework, so as to enable them to

¹⁷ The Act came into operation on 01st November 1992 and was the first piece of employment legislation enacted after Namibia's independence and hence had to address most issues pertaining to pre independence discriminatory practices whilst integrating the regulation of employment issues to a single institution.

¹⁸ Refer to section 116 of the Labour Act 6 of 1992.

¹⁹ The Minerals (Prospecting and Mining) Act was enacted on 31 December 1992, and came into operation on the 01 April of 1994.

²⁰ Refer to the 1920 *Interpretation of Laws Proclamation*.

²¹ By complying with both pieces of legislation, more resources are needed by companies in order to fully comply with the law, further more reporting to two separate institutions not only demands more resources and time but resultantly contradicting directions/or advise is received from different ministries on the same subject matter which puts the mining company in a dilemma.

meet the relevant requirements without difficulties²². This requires a clearly articulated mining sector policy (legislation) that emphasises the role of the private sector as owner and operator and the role of government as regulator and promoter. Just who exactly is responsible for overall regulation of safeguarding the health and safety of mine employees in the Namibian mining industry?

1.2. Problem statement

Having preliminarily pointed out the conflicting statutes in that area, it is therefore important to determine the extent to which the discrepancy between the major regulatory legislation negatively impacts on the attempts made by the policy makers to lowering health and safety incidents.

The effective use of the law to protect workers has been of crucial importance to improved mining conditions.²³ However, this can only be done if there are clear laws put in place desalinating the responsibilities of the governmental officials that will ensure implementation, whilst securing adherence by the mining sector.

1.3. Research aims and objectives

In this thesis, the author's primary purpose is to determine the extent of the function of the Ministry of Mines as a whole in regulating the occupational health and safety of employees within the mining sector under the current legal framework.

The competent functionaries involved in the administration and enforcement of health and safety related regulations in the Namibian mining industry need to be able to effortlessly determine which laws are applicable in that area.

²² International best practice on regulatory regimes, see Policy, legal and contractual framework, EI SourceBook Online, at 5.3.2. and at 5.4.1. available at:
http://www.eisourcebook.org/642_5PolicyLegalandContractualFramework.html

²³ Stephens, C. and Ahern, M. (2001). *Worker and Community Health Impacts Related to Mining Operations: A Rapid Review of the Literature*. Page 42. Available at: http://www.natural-resources.org/minerals/CD/docs/mmsd/topics/worker_community_health.pdf, last accessed on 15 February 2017.

This will pave the way for improved administration and uniform application of the law by the designated officials. In the same vein, the mining sector needs to comprehend their roles with regards to the regulation of occupational health and safety in so far as it pertains to implementation, adherence and reporting thereof.

1.4. Theoretical framework

Conceivably the enactment of health and safety regulations is premised on the sacrifice of the law and economics school of thought (which informs the game/ rational choice theory) in favour of the human rights theory. As aforementioned, the right to safe and healthy working conditions has gained prominence at the local, regional, and international levels.²⁴

According to the former, decisions are made based on the cost effectiveness in a particular engagement. It is undisputed truth that businesses (employers) engage in trade with the object of profit gain. In the premise of ensuring that health and safety standards are met in such a high risk and labour intensive industry, it is always argued that compliance is expensive and costly.

The employers are concerned with maximising profits and hence undertake improvements in health and safety only insofar as these are profitable and in the interest of stable industrial relations.²⁵ The current situation is that the application of the regulations and labour act requires companies to duplicate safety issues which are covered under the different act but dealing with the same issue thereby requiring a company to employ more resources.

²⁴ See footnote no. 3; Tshoose, C. 2014. *Placing the right to occupational health and safety within a human rights framework: trends and challenges for South Africa*. The Comparative and International Law Journal of Southern Africa, Vol. 47, No. 2 (JULY 2014), pp. 276-296 Published by: Institute of Foreign and Comparative Law Stable Available at: <http://www.jstor.org/stable/24585872>, last accessed: 14-02-2017.

²⁵ Steinberg, M. et. Al. 1988. Occupational Health and Safety in South Africa: The perspectives of Capital, State and Unions. Soc. Sci. Med. Vol. 27. No. 7. Page 691.

As Carbado and Gulati²⁶ put it, the law and economics school of thought is not only status-quo-oriented, but can as well be hostile to the concerns of the poor people. This is said to be the case because the theory is centred on notions of economic efficiency, which is characterised by rational actors and the perfect markets assumptions.

The human rights theory on the other hand, serves as a criterion to regulate conduct. According to David, the human rights theory springs from the natural law theory.²⁷ Duffy, in reviewing David's works with which he disagrees, found that human rights theorists, who maintain the link with natural law, justify such a link with the human rights principle of universality.²⁸ It is because of universality, that the recognition of fundamental rights imposes a duty upon the state, which is inseparably part of a state's responsibility.²⁹

When companies look where to invest, labour costs become a factor for consideration and the ease of doing business in a particular country. In light of the above, when comparing the two theories, there seem to be conflicting interests. On the one hand the protection of individual rights of equality vs company costs and benefits. This is so because, businesses argue against government intervention with cost/economic implications to companies. The two theories therefore operate in oppositional discourses.

1.5. Hypothesis

At the moment, there is lack of legal clarity in Namibia as to which set of laws or regulations applies to the mining industry in so far as health and safety of employees within the extractive industry is concerned. The uncertainty is further aggravated by expectations by various governmental ministries to be informed about safety or health

²⁶ Carbado, D.W. 2002. Law and Economics of Critical Race Theory. The Yale Law Journal, Volume 112: 1757.

²⁷ David, Q. 1998. Presidency of Mary Robinson. Studies: An Irish Quarterly Review. Volume 87 No. P.117.

²⁸ Duffy, S. 1999. The Universality of Human Rights. Studies: An Irish Quarterly Review. Volume 88 No. 352. At 389.

²⁹ Vasak, K. 1982. Human Rights: As a Legal Reality' in Vasak, K The International Dimension of Human Rights 4, Unesco ISBN: 92-3-101477-3.

incidences and appointments which casts doubt on which Ministry regulates and enforces occupational health and safety within the Namibian mining industry. To that end, the author makes the following hypothesis:

Regulatory certainty and legal precision with which state functionary regulates the health and safety aspects of mine workers is likely to result in positive outcomes, these include (but not limited to):

- ❖ Uniform implementation of health and safety regulations within the mining industry.
- ❖ Ease of identification and the provision of an accountable state functionary/institution responsible to guide the mining sector.
- ❖ Improved compliance by the mining industry due to certainty and clarity on the regulation thereof.
- ❖ Elimination of uncertainty in the regulatory regime which would foster foreign direct investment

1.6. Research Questions

- ❖ Is the 1968 Ordinance of Mines, Minerals and Works still applicable in Namibia in so far as it relates to the regulation of health and safety of employees at work?
- ❖ Is the Chief Inspector of Mines the designated authority to oversee the health and safety of employee component within the mining sector?
- ❖ Are the Health and Safety regulations of 1997 made under the Labour Act 6 of 1992 a legitimate authority in regulating the health and safety aspect in the mining industry?

1.7. Research methodology and limitations

1.7.1. Methodology

The methodology for this thesis will come mainly from empirical research. The material will then be critically analysed and compared in a detailed and balanced manner in order to accomplish the main object of the study, mainly to determine the regulation of

the mining industry in relation to occupational health and safety, and further sufficiently provide academically informed conclusions and recommendations.

1.7.2. *Research limitations*

Statistics on health impacts are unavailable and incomplete, especially during the period of the Mines, Work and Mineral Ordinance no. 20 of 1968. Namibia, like most African countries, does not have comprehensive sources of occupational health data. Much of the data is fragmented and when taken together does not sufficiently covers all areas the author sought to measure.

Although the research was well carried out, it is inevitable that it would lack. This paper limits its research to investigating the influence of the 1992 Labour Act of the health and safety regulation in the Namibian mining industry. Therefore the study does not analyse comprehensive sources of occupational health data, which are in any event either unavailable or fragmented in order to determine health impacts on the regulatory regime.

1.8. **Significance of study**

At the moment, as aforementioned, there is a discrepancy between the primary sources of law supposedly dealing with the regulatory aspects of health and safety within the Namibian mining industry.

The lack of clarity makes it almost impossible to determine and/or to uniformly implement the health and safety standards pertaining to the mining employees within the Namibian mining industry. In itself, the lack of clarity does not provide for an accountable state functionary or procedure too be taken with regards to the execution of health and safety standards.

Legal clarity is important to understand and measure because of its connection to the rule.³⁰ Law's role, in large part, is to determine the rules of the game and to inform

³⁰ Owens, R.J. & Wedeking, P. 2011. *Justices and Legal Clarity: Analyzing the Complexity of the U.S Supreme Court Opinions*. Page 1027 Available at: <http://www.jstor.org/stable/41475243>, last accessed on 15 February 2017.

actors of those rules so that they can best seek out their potential within the confines of the law.³¹

1.9. Chapter overview

1. Introduction

In this chapter, the author seeks to give a brief overview of the envisaged research. The area of research to which the work belongs will be established and a broad foundation laid for the problem that led to the study.

2. *The regulation and control under the 1968 Mines, Works and Minerals Ordinance*

In this chapter, the regulation of the health and safety component in the mining sector as under the 1968 Ordinance shall be examined and looked at. The aims of this chapter are threefold; the first part shall reveal the trends and challenges that necessitated the promulgation of the health and safety regulations for the mining industry.

Secondly, the contents of early legislation regulating health and safety within the mining industry will be revisited. Thirdly, the chapter will determine the impact made by legislation on the health and safety aspects within the Namibian mining industry.

3. *The regulation and control of health and safety in the Namibian mining industry: the 1992 aftermath*

This chapter will examine the provisions of the Labour Act 6 of 1992 and provide an overview, in relation to the regulation of the health and safety of the mining industry with a view to ascertain any potential impact of the 1992 Labour Act on the 1968 Ordinance. In the same chapter, the Proclamation for the assignment of the provisions of the Regulations relating to the Health and Safety of Employees at Work, which purportedly allocates the powers to various players within the regulatory regime will be analysed.

³¹ *Ibid.* page 1029.

4. Conclusion

Conclusions will be made.

CHAPTER 2: LEGISLATIVE BACKGROUND OF HEALTH AND SAFETY REGULATION IN THE NAMIBIAN MINING INDUSTRY

It is crucial that the governing instrument that made provision for the regulation and implementation of health and safety standards in the Namibian mining industry before independence is discussed.

The aims of this chapter are threefold; the first part shall reveal the trends and challenges that necessitated the promulgation of the health and safety regulations for the mining industry. Secondly, the development of early legislation regulating health and safety within the mining industry will be visited. Thirdly, the chapter will reveal the extent to which early legislation regulated the health and safety aspects within the mining industry.

2.1. The right to health and safety at work: pre-1968 ordinance

Although not a comprehensive history, this section highlights the key events that occurred, that affected mining safety and health regulation in the neighbouring South Africa at that time.³² In order to understand the need for a legislative framework to regulate mine safety and health, in Namibia as a protectorate of South Africa, one has to grasp the scope and context of the disasters at the time. When mining started on an industrial scale in the 1880s, miners faced very high levels of risk to both safety and health.³³

It should be noted here that Namibia's prospectivity for minerals has long been recognised as early as 1855, copper production began at the Walvis Bay Mining Company's Matchless mine, just West of Windhoek.

³² The author chose South Africa due to the fact that Administration of South West Africa(Namibia) became a Protectorate of South Africa as a result of the Peace Treaty of Versailles which was signed on 28 June 1919 in terms of which it mandated South Africa to administer the affairs of South West Africa subject to the South West Africa Mandate Act 49 of 1919, which generally delegated the administration of the territory of South West Africa to the Governor-General of South Africa, who was entrusted with the legislative and executive powers.

³³ Hermanus, M. A. 2007. Occupational health and safety in mining—status, new developments, and concerns. *The Journal of The Southern African Institute of Mining and Metallurgy*. Volume 107. Page 531.

By the turn of the century, further base metal mines had been developed at Tsumeb in the north of the country and, eight years later, some of the highest-quality alluvial diamonds in the world were discovered near Lüderitz.³⁴

The following review is incomplete, but attempts to focus attention on some of the more important events in the history of health and safety regulation within the South African mining industry. The discovery of gold in Witwatersrand in 1886 led to the expansion of the gold mining industry. Dust levels in gold mines were particularly high, and as a result diseases like tuberculosis spread rapidly amongst mineworkers.³⁵

A number of governmental inquiry commissions were set up as there were alarming rates of TB and Silicosis amongst gold miners. The government's response was also due, in part, to the fact that white miners raised complaints about the risks of TB & Silicosis during organised strikes.³⁶ The Workmen's Compensation Act (WCA) of 1941 was then passed³⁷. It guaranteed compensation for certain statutorily defined diseases as well as for injuries,³⁸ the period from the early development of the mining industry in South Africa until the Erasmus Commission.

Occupational injuries and ill-health have huge social and economic implications for individuals, their families and their communities.³⁹ There was keen appreciation of the importance of social justice in securing peace, against a background of exploitation of workers in the industrializing nations after WWI.⁴⁰ This was roundabout the time the ILO was founded, the notion of societal justice was reflected in the organization's constitution preamble.⁴¹

³⁴ Namibia: Abundant Exploration Opportunities. *Mining Journal*. Volume 329, No. 8450. Page 2. Available at: <http://www.gsn.gov.na/pdf/miningjournal.pdf>, last accessed on: 19 February 2017.

³⁵ Steinberg, M. et. Al. 1988. Occupational Health and Safety in South Africa: The perspectives of Capital, State and Unions. *Soc. Sci. Med.* Vol. 27. No. 7. Page 691.

³⁶ *Ibid.* page.

³⁷ Employees' Compensation Act, Act 30 of 1941.

³⁸ *Ibid.* page 693.

³⁹ *Ibid.* 532.

⁴⁰ Origins and History of the International Labour Organization, narrative available at: <http://www.ilo.org/global/about-the-ilo/history/lang--ja/index.htm>, last accessed on 19 February 2017.

⁴¹ Whereas universal and lasting peace can be established only if it is based upon social justice.

In summary, it is plausible to conclude that the Administrator of South West Africa after realising the tremendous potential of the protectorate’s mining sphere reconciled itself with the fact that health and safety creates an undeniable climate for industrial peace. Peaceful labour conditions are necessary for the operations of the protectorate’s major industry. It was thereafter, that the sentiment in favour of government regulation increased,⁴² hence the enactment of the 1968 Ordinance.

2.2. Preceding international instruments

The following are brief highlights of the international instruments preceding the enactment of the 1968 Ordinance, that place the right to occupational health and safety within a human rights framework.

Although only legally binding on member states at that time, the 1919 ILO Constitution recognized that universal peace could only be attained if labour conditions are not *unjust*. In the following years, ILO passed numerous declarations – with the aim of fulfilling its mandate. Nearly three decades after its 1919 Constitution, the ILO Declaration in Philadelphia was passed in 1944.⁴³ The Declaration emphasized that member states of the ILO should enact legislation that aims to achieve adequate protection for the life and health of workers in *all* occupations.⁴⁴

The ILO establishes international labour standards, in the form of Conventions and Recommendations. About 80 of these deal with occupational safety and health, including, in particular, the following:

- ❖ The Occupational Safety and Health Convention, 1981 (No. 155) “Employers shall be required to ensure that, so far as reasonably practicable, the workplaces, machinery, equipment and processes under their control are safe and without risk to health” (Art.16.1).

⁴² *Ibid.*

⁴³ ILO Declaration on Fundamental Principles and Rights at Work. Available at: <http://ilo.org/declaration/thedeclaration/history/lang--en/index.htm>; last accessed 24 April 2017.

⁴⁴ ILO Declaration of Philadelphia 1944.

- ❖ The Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187) “Each Member shall promote and advance, at all relevant levels, the right of workers to a safe and healthy working environment” (Art. 3.1).
- ❖ The Seoul Declaration on Safety and Health at Work, (2008) (World Congress Summit on Safety and Health at Work, ILO/ISSA). “Recalling that the right to a safe and healthy working environment should be recognized as a fundamental human right and that globalization must go hand in hand with preventative measures to ensure the safety and health of all at work.
- ❖ ILO Declaration on Social Justice for a Fair Globalization, (2008) “In the context of accelerated change, the commitments and efforts of Members to place full and productive employment and decent work at the centre of economic and social policies... through which the Decent Work Agenda is expressed... In particular, developing and enhancing measures of social protection – social security and labour protection – which are sustainable and adapted to national circumstances, including healthy and safe working conditions;... and adapting its scope and coverage to meet the new needs and uncertainties generated by the rapidity of technological, societal, demographic and economic changes.

In the 48th year of the 20th century, a specialised agency of the United Nations, the World Health Organization (WHO) set the ambit for the definition of *health*. Accordingly, *health* has been defined as a state of complete physical, mental and social well-being and not merely the absence of diseases or infirmity.⁴⁵

Even though it is not legally binding, the international Magna Carta asserted that everyone has the right to life, to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.⁴⁶ The International Covenant for Economic and Social Rights (ICESR)⁴⁷ later affirmed and enshrined the aforementioned right, with particular emphasis on the improvement of all aspects of environmental and industrial hygiene; the prevention, treatment and control of epidemic, endemic, occupational and other diseases; the creation of

⁴⁵ WHO Constitution, (1948), electronic version available at: www.who.int/governance/eb/who_constitution_en.pdf, last accessed 20 February 2017.

⁴⁶ Universal Declaration on Human Rights (UN, 1948).

⁴⁷ International Covenant on Economic, Social and Cultural Rights, (UN, 1976).

conditions which would assure to all medical service and medical attention in the event of sickness.

As a part of the WHO Global Strategy for Occupational Health for all 1994-2000, the Thirteenth Session of the Joint ILO/WHO Committee on Occupational Health was held at the ILO headquarters in Geneva, from 9 to 12 December 2003.⁴⁸ During that session it was concluded that:⁴⁹

“Occupational health should aim at: the promotion and maintenance of the highest degree of physical, mental and social well-being of workers in all occupations; the prevention amongst workers of departures from health caused by their working conditions; the protection of workers in their employment from risks resulting from factors adverse to health; the placing and maintenance of the worker in an occupational environment adapted to his physiological and psychological capabilities; and, to summarize, the adaptation of work to man and of each man to his job.”

2.3. The 1968 mines, works and minerals ordinance

It is an established fact that from 1920 onwards the territory (South West Africa, Namibia) became a Protectorate, or a Mandated Territory of South Africa in terms of the Peace Treaty of Versailles.⁵⁰ This in essence enabled the South African administration to draft, enact and implement laws in Namibia (*South West Africa* as known then) before the delegation of the administrative powers to the Administrator General of South West Africa by the Governor General of the Republic of South Africa,

⁴⁸ Thirteenth Session of the Joint ILO/WHO Committee on Occupational Health Geneva, 9-12 December 2003. Available at: http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/safework/documents/publication/wcms_110478.pdf, last accessed on 14 April 2017.

⁴⁹ *Ibid.*

⁵⁰ Amoo, S. K & Skeffers, I. *The Rule of Law in Namibia*. Available at: http://www.kas.de/upload/auslandshomepages/namibia/HumanRights/amoo_skeffers.pdf, last accessed on 10 December 2016.

matters which were not specifically legislated remained under the legislative powers of the South African government.⁵¹

The South West African Administrator promulgated the Mines, Works and Mineral Ordinance of 1968 (the Ordinance) and its subsequent regulations (the regulations) within the same year⁵² primarily to deal with matters relating to minerals and the operating of mines, works and machinery⁵³.

In terms of the Ordinance as promulgated in 1968, the Secretary of the Territory was vested with the authority to supervise and control the mining industry in the territory and to exercise all rights, powers and jurisdiction in respect of the administration of mines and works in the territory⁵⁴.

The Administrator was empowered to appoint a Director of mines, inspectors of mines or machinery and a Mining Commissioner to assist the director of mines in the execution of his duties⁵⁵. This appointment had to be done through the Secretary for the Territory.

In 1969, the Ordinance and the regulations were amended⁵⁶ and essentially the amendment replaced the Administrator with the Minister and the Secretary for the Territory was replaced with the Secretary of Mines of the Republic of South Africa⁵⁷. This essentially vested the control of the mining industry in Namibia back in the hands of South African Government with the consequence that mining licences or grants had to be issued from Pretoria.

⁵¹ Legal Assistance Centre. NAMLEX Index to Law of Namibia. 2010 Update. Available at: <http://www.lac.org.na/namlex/Intro.pdf>, the areas that were reserved included defence; railways and harbours; posts and telegraphs; matters pertaining to the courts; immigration; customs and excise; banking and currency; and "native affairs" and hence did not include mining which left it open to the Legislative Assembly established in terms of The South West Africa Constitution Act 42 of 1925.

⁵² The regulations came into operation on the 1 October 1968 through Official Gazette Extraordinaire No. 2927 of South-West Africa.

⁵³ Preamble of Ordinance 20 of 1968.

⁵⁴ Section 4(1) of the Ordinance 20 of 1968.

⁵⁵ Section 4(2) of the Ordinance.

⁵⁶ Proclamation R 89 of 2 June 1969, gazette number 3002.

⁵⁷ Section 3 of Proclamation R 89 of 1969.

The 1969 amendment however removed the role of Director of mines and split the function to the Mining Commissioner⁵⁸ and some functions to a “new” role of Chief Inspector of mines⁵⁹. In terms of the said amendment the overall functions of health and safety within the mining industry was assumed by the Chief Inspector of mines, which vested him with the overall function of supervision and inspection of mines.

It is critical that selected aspects of the 1968 Ordinance as amended, in so far as it related to the regulation of health and safety on mines are narrated. At this point in the work, the author will discuss the role of the functionary responsible for the regulation of health and safety at mines in terms of the 1968 Ordinance as amended and subsequent regulations.

The Ordinance, which formed the backbone of regulating the mining sector provided for the administration, prospecting, mining, special grants or prospecting and mining of prospectors, holders or owners of claims, mining areas or grants including the rights of owners of private land, the survey and registration of mining areas and general provisions relating to mining and related matters. The Ordinance therefore regulated almost all aspects of mining as it regulated the allocation of mineral rights and the administration thereof except the health and safety aspects which were only contained in the regulations.

As per the Ordinance as amended, the regulatory aspect of health and safety of employees in the Namibian mining sector were delegated to the Chief Inspector of mines⁶⁰, who had the powers to exercise general supervision of mines, works and machinery and to do anything which is conferred by the 1968 Ordinance and the regulations.

⁵⁸ The Mining Commissioner retained the functions in respect of the regulation of mineral rights such as the allocation, cancellation, suspension of licences and permits under the Ordinance.

⁵⁹ Section 1 (c)(i) of Proc. R 89 of 1969 specifically allocates the functions of the Director of mines contained in sections 5,9,10,12,14,15,31,33,34,53,59,84 and section 85 to the chief inspector of mines. These functions relate to the supervision and inspection of mines and the implementation of the regulations a function which relate more to ensuring that mines comply with the health and safety aspects of mining.

⁶⁰ Section 4(1) (a) of Proc. R 89 of 1969 which vested the Chief Inspector of Mines with the general supervision of mines, works and machinery.

In terms of section 95 of the Ordinance the then Administrator-General of the territory of South West Africa could make regulations under the Ordinance. Pursuant to that section, the administrator made regulations which in essence are health and safety regulations for the mining sector in Namibia, save for regulations 1 -24 which relates to the pegging, beacons and the registration of claims.

Typically, a regulatory functionary identifies a hazard, declares that it is harmful and should be eliminated, then establishes standards to mandate the regulation of the risk to the lowest possible level. This strategy for job risk regulation is followed by the Chief Inspector of Mines as per the powers vested in that functionary by the 1968 Ordinance and its subsequent regulations.

The regulatory efforts are based on a simplistic view that risks are generated by mistaken technological choices. It is safe to state herein that, mechanical related accidents throughout the history of mining have driven legislators to emphasize and focus on operator's safety.

The Chief Inspector views the mandatory health and safety standards as contained in the 1968 regulations, as rigid requirements which it enforces through legalistic inspections and a penalty system and blames the non-compliance to the regulations on the lack of understanding by both employers and employees⁶¹ and stressed the importance of the mining industry complying with the Ordinance and its regulations⁶².

Indeed, the Chief Inspectors' strategy as per the Ordinance includes inspections; criteria for standards' violations and penalties for such violations. The latter two elements come into play only after an enterprise is inspected. Therefore, it can be concluded that the strategy is based on the following loosely defined priorities:

⁶¹ Mathews Amunghete – Chief Inspector of Mines. Republic of Namibia: Ministry of Mines and Energy. Report prepared for Mining Conference held on 22nd May 2014. Data available at: http://www.chamberofmines.org.na/files/4614/7031/0421/4._2013-05-23_Mine_Safety_and_Challenges-_Mathews_Amunghete_-_2013.pdf. In the presentation the Chief inspector of mines quotes regulation 147 and states that it places a duty on the employer to ensure the health and safety of employees. The quoted regulation 147 only deals with the responsibility of an employer over contractors.

⁶² It appears that the Chief Inspector of mines is not aware that the Ordinance was repealed by the Minerals Act, Act 33 of 1992.

- a) Inspections of imminent danger;
- b) Investigation of fatalities and catastrophes;
- c) Granting of permission for the performance of activities that pose potential health and safety risks; and
- d) Investigation of complaints and accidents.

The Ordinance and the regulations made thereunder do not set out a clear enforcement mechanism role to be carried out by the Chief Inspector in respect of the health and safety.

This in turn paves way for superficial inspections and penalties for inconsequential or *de minimis* violations. Perhaps the most fundamental test is to ascertain the extent to which the regulatory functionary's efforts are directed to dimly understood health risks as opposed to readily monitor able hazards.

Specific powers and functions which were the functions of the Director of mines under the Ordinance were transferred to the Chief inspector of mines. These powers and functions include the powers to enter any mine or works with the purpose to inspect or examine any mine.⁶³ In the event that the Chief Inspector of mines found anything which is dangerous or defective or of which the absence thereof has the likelihood to cause bodily injury or injurious to the health and safety of any person, he may give notice in writing to the mine manager stating that the particular thing, matter or practice which he requires to be done or not to be done or observed or discontinued and may give such instructions about it as he may deem expedient.

In essence, the Chief inspector of mines had broad powers regarding the safety and health of any person on a mine, which may include the safety or health risk eminent from any malpractice or otherwise. The chief inspector is further empowered to hold an enquiry, were any accident occurs, which caused death or grievous bodily harm to any

⁶³ Refer to section 5 of the 1968 Ordinance.

person at a mine or works⁶⁴. One can clearly see that the function is aimed at the protection of lives on mines or works.

In terms of section 59 of the Ordinance, it is required that the Chief inspector of mines approves the removal of any timbering, masonry work, safety pillars, ladder ways or anything which has been provided for, for the safety of underground workers on a mine. Finally, section 84 requires of any person who is required to hold any permit, licence or certificate under the Ordinance to produce any such document as may be required by the Chief inspector of mines.

The essence of the above powers is that it vests the Chief inspector of mines with a broad authority over the safety and health of any mine employee, which may include the safety or health risk eminent from any malpractice or otherwise within a mining area.

In summation, at present as per the 1968 Ordinance and its subsequent regulations, the regulatory functions of the Chief Inspector are:

- ❖ To conduct inspections in or at mining operations in Namibia in respect of the safety of employees in the mining industry, recommend remedial actions, provision of advices to Mine Managers and advice the Minister of Mines and Energy on matters related to Safe Working Conditions in the Mining Industry in Namibia.
- ❖ To conduct investigations related to Mine Accidents in Namibia and submission thereof to the Office of the Prosecutor General for decision making.
- ❖ The Mine Safety and Services Division issues authority for Blasting Certificates for both Open Cast and Underground Mines in Namibia.

On the other hand, the regulations made pursuant to the Ordinance regulated the process of claims and mining areas, mines and works, machinery, accidents, blasting

⁶⁴ Section 5(2) of the Ordinance.

certificates and hours of work of employees⁶⁵. It is clear that the regulations were comprehensive and covered almost all aspects relating to mining operations.

In terms of the Regulations specific legal duties were imposed on mining institutions so as to secure compliance with the regulations for the purpose of achieving greater safety. The following legal appointment needs special mention as it forms the gist of safety in mining under the regulations:

2.3.1. Mine manager:

The regulations made it obligatory for mines to appoint a mine manager, subject to the approval of the Chief Inspector of mines, who would be responsible for the confront management and direction of the mine or works⁶⁶ and such mine manager could only be responsible for one mine unless the supervision of two mine by one manager is approved by the Chief Inspector of mines. The mine manager is essentially the person with the legal duty to ensure the safety⁶⁷ on a mine and ensure compliance with the regulations⁶⁸ and may therefore appoint such other persons to assist him/her in the fulfilment of his obligations⁶⁹ whilst having the duty to discipline employees not observing the regulations.

The regulations impose additional responsibilities on the mine manager, which entail the provision of sufficient sanitary conveniences and all aspect related to sanitation, the duty to make sure that employees are not exposed to dust or fumes resulting from blasting, provision of drinking water, not permitting any incompetent or inexperienced employee to be employed on dangerous work, or work, which may affect the safety of others including the control of the following:

- ❖ Time for blasting;
- ❖ prevention of flooding;

⁶⁵ Explanatory notes on the regulations of 1968.

⁶⁶ Refer to section 28 of the Regulations as per the 1968 Ordinance.

⁶⁷ The mine manager is obligated to appoint , in his absence from the mine a person who would be the acting mine manager in his absence, see regulation 28(4).

⁶⁸ Refer to section 28(5) of the Regulations as per the Ordinance.

⁶⁹ Refer to section 28(5)(b) of the Regulations as per the Ordinance.

- ❖ slimes dams;
- ❖ reporting of accidents;
- ❖ appointment of a competent person to oversee machinery;
- ❖ arresting of persons who brings alcohol on a mine site; and
- ❖ the appointment of any other person that may be required to be appointed under the regulations⁷⁰.

The chief inspector of mines issued blasting tickets and the testing of applicants under regulation 251 as amended, which allowed the blasting teams on mines to use explosives and to blast in accordance with the regulations.

2.4. Health and safety: reflecting on the impact made by the 1968 Ordinance

‘You can’t manage what you can’t measure’; ‘If you don’t know where you are going, chances are you will end up somewhere else’⁷¹

Determining the impact of health and safety legislation is usually measured by quoting injury statistics.⁷² This means that it comes down to a negative measure, i.e. measurement of failure. However, a low injury rate or ill-health rate, over a period of years, is no guarantee of the existence of adequate legislation. Indeed, there is no single measure of health and safety performance.

	1997	1998	1999	2000	2001	2002
Number of lost time accidents	69	52	36	41	38	47
Fatalities	1	1	1	2	3	5
Shifts lost per accident	113,30	47,50	198,53	323,10	491,58	665,77 ⁷³

⁷⁰ *Ibid.* section 31.

⁷¹ *A Guide to Measuring Health and Safety Performance*. Available at: <http://www.hse.gov.uk/pubns/indg301.pdf>, last accessed on: 21 February 2017.

⁷² *Ibid.* page 5.

⁷³ Chamber of Mines of Namibia: Annual Review. 2002. Available at: www.chamberofmines.org.na, last accessed on: 21 February 2017.

Statistics and methods of recording accidents and occupational disease have been inadequate, and there is a dearth of reliable data. This lack makes nearly impossible to assess the impact made by the Ordinance.

Measurement is a key step in any management process and forms the basis of continual improvement. If measurement is not carried out correctly, the effectiveness of the health and safety management system is undermined and there is no reliable information to inform managers how well the health and safety risks are controlled.

If there is no assessment, it makes it difficult for policy makers or those who allocate resources to perceive the real gains from resource allocations towards occupational health practice or to assess the performance of their investment in this area.⁷⁴

2.5. Conclusion

It is clear that the regulation of the health and safety aspect within the mining industry in Namibia primary vested in the Director of mines of the then territory(Namibia) and that subsequent amendments to the 1968 Ordinance resulted in the creation of the position of Chief Inspector of mines, with general duties to supervise the mines, works and machinery.

Consequently the amendment to the regulations vested the health and safety aspect of mining in the hands of the Chief Inspector of mines which duties then entailed the carrying out of inspections in respect of accidents and general compliance with the regulations, issuing of blasting certificates and approving certain legal appointments within mines. The regulations, albeit senile, appear to cover a broad area in terms of health and safety within the mining sector.

The irony lies in the fact that the only available statistics as shown above relate to a **supposedly post 1968 Ordinance era** i.e. the period after the enactment of the 1992 Act – but bear in mind that despite the existence of the 1997 regulations, the Ministry of

⁷⁴ Loewensen, R. 1999. Assessment of the Health Impact of Occupational Risk in Africa: Current Situation and Methodological Issues. *Epidemiology*. Volume 10, No. 5. Page 637.

Mines and Energy continued to regulate health and safety in the mining industry based on the Ordinance.

CHAPTER 3: THE REGULATION AND CONTROL OF HEALTH AND SAFETY IN THE NAMIBIAN MINING INDUSTRY: THE 1992 AFTERMATH

It is key that the relevant legal provisions regulating the health and safety of the employees in the mining industry are exposed. Thereafter, the author will determine how the Minerals Act 33 of 1992 and the Labour Act 6 of 1992 impacted the regulation of health and safety under the 1968 Ordinance, in the same vein whether there are any substantial deviations from that Ordinance. In addition to that – the author will discuss the provisions of the Labour Regulations of 1997 promulgated under the Labour Act, Act 6 of 1992. Finally, the author will examine the Proclamation that assigns the administration of the Regulations relating to the Health and Safety of employees at work.

3.1. Health and safety under the 1992 Labour Act

It should be acknowledged that the Labour regulatory framework in Namibia at the moment is governed by the Labour Act 11 of 2007 after the repeal of Labour Act, 15 of 2004⁷⁵ which never came fully into operation after it repealed the Labour Act 6 of 1992⁷⁶.

In identifying the applicable legal instruments as aforementioned it should be noted here that a comparative study of the similar provisions that relate to the health and safety of employees in the 1992 Act and the 2007 Act was done. This was done in order to determine whether or not there are any substantial departures in the relevant provisions. The minor discrepancies discovered will not be mentioned here as they are not relevant to the study at hand. Therefore, the provisions revealed herein are as imported from the 1992 Act into the 2007 Act and thus applicable in the Republic, unless otherwise provided.

⁷⁵ Labour Act 15 of 2004 contained in Government gazette number 3339 of 04 December 2004

⁷⁶ The Labour Act 15 of 2004 was meant to repeal the Labour Act 6 1992, but it never came fully into operation and only certain section were put into operation before its subsequent repeal. Sections 75, 97(a), (b), (c), (e) and (h), 94(1) and (4), 98, 99, 100 and 101 and items 1 and 11(3) of Schedule 1 came into force on 30 November 2005 (GN 162/2005, GG 3545).

The regulation of health and safety is contained in part eleven (XI) of the 1992 Labour Act. The Act imposes a positive duty on employers i.e. persons in charge of work premises to take, free of charge to such employees, all such steps as may be prescribed by regulation under the Health and Safety Regulations, in order to ensure the safety, health and welfare at work of all employees in his or her employment.⁷⁷ In addition to that, employers further have to ensure that persons not in his or her employment who may be affected by the operations of his/her business thereby are not exposed to hazards to their safety or health.⁷⁸

The Act does not only impose obligations on the employers to ensure the health and safety of their employees – but also places a corresponding duty on employees to safeguard their own health and safety. Every employee at work has the duty to take reasonable care for the health and safety of him or herself and of other persons who may be affected by his or her acts or omissions at work.⁷⁹

Furthermore, An employee at work shall have the right to remove himself or herself from any place where he or she is employed when he or she has reasonable cause to believe that his or her safety or health will be endangered at such place until such time as effective measures have been taken to ensure his or her safety or health, provided such employee shall forthwith report the reasons for his or her belief to his or her employer.⁸⁰

It should be noted that a provision that a places a duty on an employee to remove himself or herself from an employment premises on the grounds of reasonable cause to believe that his or her safety or health will be endangered is not favourable. The employee will most likely choose to endanger his or her life as opposed to resigning temporarily.

⁷⁷ Refer to sections 96(1) of the Labour Act of 1992.

⁷⁸ *Ibid.* section 97(1) This section essentially extends the duty of a mining institution to save guard the safety of non-employees and may therefore extend to communities around the mine. It may be safely implied that that a mine has a duty to make sure that its mining activities do not infringe on the communities safety and health which includes contractors performing work for the mine.

⁷⁹ *Ibid.* section 98(1).

⁸⁰ *Ibid.* section 98(2).

The legislature unquestionably took note of this as the 2007 Act made favourable changes. As per that Act, such an employee is entitled to the same conditions of service applicable to that employee and to receive the same remuneration during the period of absence.⁸¹ That essentially means that prejudicial measures should not be taken against an employee who quits due serious inadequacy in the health and safety measures taken by the employer.

In addition to the incumbent duties on employees to partly ensure their health and safety, they are also entitled to elect an individual amongst themselves to act as their workplace safety representative.⁸² The elected individual paves way for the establishment of a workplace safety committee⁸³ which is inclusive of him or herself. The aforementioned committee essentially has the responsibility to observe the application of the regulations made under section 101⁸⁴ i.e. the health and safety regulations.

Furthermore, the workplace safety representative has the duty to:⁸⁵

- a) to carry out inspections at places where employees represented by him or her are employed, to investigate potential hazards and dangerous occurrences at any such places or where persons other than employees have access and to examine the causes of accidents and diseases at such places;
- b) to investigate complaints by any such employees relating to such employees' health, safety or welfare at work;
- c) to make representations to the employer on any matter referred to in subparagraph (i) or (ii) or, generally, on any other matter relating to the health, safety or welfare at work of employees represented by him or her;
- d) to collect and receive information and make representations in relation to

The employer is mandated to provide the workplace safety representative with sufficient information on health, safety and welfare at work of employees relating to

⁸¹ Refer to section 42(3) of the Labour Act 11 of 2007.

⁸² Refer to section 99(1)(a).

⁸³ *Ibid.* 99(1)(b).

⁸⁴ *Ibid.* 99(1)(b)(iii).

⁸⁵ Refer verbatim to section 99(2)(b)(i – iv).

the place where employees are employed who are represented by such workplace safety representative, to enable him or her to examine any matter relating to his or her functions, and to encourage any workplace safety representative to improve or maintain conditions relating to the health, safety or welfare at work of such employees.⁸⁶ In other words, the fairly elected representative has a right to information in order to fulfil his duties as per legislation. This enables the representatives to play a major role in the development of safer conditions in mines.⁸⁷

Worker participation in participation in the identification, assessment and control of workplace hazards is fundamental to reducing work-related injury and disease. It generally achieves better outcomes than unilateral management initiatives.⁸⁸ Employees have the most direct interest in occupational health and safety (hereafter OHS) of any party: it is their lives and limbs that are at risk when things go wrong. Moreover, workers often know more about the hazards associated with their workplace than anyone else, for the obvious reason that they have to live with them, day by day.⁸⁹

There is probably no industry where effective employee engagement with health and is more crucial than mining. Mining is one of Namibia's most important industries, accounting for some 12.5 percent of gross domestic product.⁹⁰ It is also one of the most dangerous, as aforementioned in the preceding chapters. Certainly, the legislative intervention to the inclusivity of employees is of much importance.

Although it may be argued that there is a natural 'identity of interest' between employers and employees in relation to health and safety, and that not only employees, but also employers, have an interest in reducing work hazards.⁹¹ In this view, because

⁸⁶ Refer to section 99(2)(c)(i).

⁸⁷ Derickson, A. (1991). *The United Mine Workers of American and the recognition of occupational respiratory diseases, 1902-1968*. Am J Public Health 81(6): 782-90.

⁸⁸ Gunningham, N.2008. *Occupational Health and Safety, Worker Participation and the Mining Industry in a Changing World of Work*. Australian National University. Availbale at: journals.sagepub.com/doi/abs/10.1177/0143831X08092460, last accessed on 18 April 2017.

⁸⁹ *Ibid.*

⁹⁰ Refer to Annual National– 2015. Namibia Statistics Agency. Availbale at: www.nsa.org.na, last accessed on 18 April 2017.

⁹¹ Robens (1972) *Safety and Health at Work: Report of the Committee, 1970–72*. London: HMSO, as referenced in Gunningham, N.2008. *Occupational Health and Safety, Worker Participation and the*

both sides have common interests they are likely to discharge their health and safety responsibilities voluntarily, and there is little need for negotiation or for trade unions to act as a countervailing force to the power of employers.⁹²

The assumption of common interest is flawed: although employers and workers may agree in principle on the desirability of reducing workplace injury and disease, they often hold very different positions on the best means to achieve this, and the level of time, resources and money that should be devoted to it. Such a divergence of views means that reliance upon 'consultation' is unlikely to bring about the degree of safety that workers require. Consequently, mining unions have sought to use whatever bargaining power was available to them to exert pressure on employers to change their behaviour.⁹³

The legislature foresaw the abovementioned predicament and included a clause that caters for it, and empowered the workplace safety representative to perform such other duties as may be determined by mutual agreement between the workplace safety committee and the employer concerned or may be contained in a collective agreement.⁹⁴

An inspector is empowered where he has reason to believe that an employer has contravened the provisions of the Act, to issue a notice to such employer alerting on the alleged contravention and the facts associated with the contravention and request that the contravention be remedied with the period stipulated in the notice⁹⁵.

The above clause takes a different stance from the punitive provisions of the 1968 Ordinance and affords employers the opportunity to remedy a wrong. This may however minimise the seriousness of a non-conformance to the act as employers would know that they would first get an opportunity to remedy it.

Mining Industry in a Changing World of Work. Australian National University. Available at: journals.sagepub.com/doi/abs/10.1177/0143831X08092460, last accessed on 18 April 2017.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ Refer to section 99(2)(b)(vi).

⁹⁵ Section 100 of the Act 6 of 1992.

In well rounding up part XI the Act then goes on to make provision for the enactment of regulations to secure the safety and the preservation of the health and welfare of employees at work.⁹⁶ The aforementioned provision is akin to section 95 of the 1968 Ordinance that empowers the Administrator to enact the Mines, Works, and Minerals Regulations under that Ordinance. The difference lies in the fact that the Act identifies the President of the Republic as the competent authority to pass the regulations, only after consultation with the Labour Council.⁹⁷

3.2. Deviations made from the 1968 Ordinance by the 1992 Labour Act in the regulation of health and safety in the mining industry

The 1992 Labour Act introduced clearly demarcated sections that dealt specifically with health and safety of employee at a workplace. Whereas the Ordinance briefly mentioned that if a chief inspector found at any mine or works that anything or any practice in any way connected therewith is dangerous or defective or that the absence or anything or practice is likely to cause bodily injury to or be injurious to the health of any person and no provision existed in any law, regulation, or special rule requiring any such thing to be done or not to be done, or requiring any such practice to be observed or forbidding any such practice, he shall give notice in writing to the manager of the mine or works stating the particular thing, matter or practice which he requires to be done or not to be done or observed or discontinued and may give such instructions about it as he deemed expedient.⁹⁸

The Act introduced health and safety representatives which would be appointed depending on the size of the operations to assist the employer in the implementation of health and safety policies and to identify non-conformances whilst empowering the health and safety representatives with a right to approach the Labour Inspector on any issue which may affect the health or safety of employees at work and which the employer fails to address after taking it up with the employer and where the employer fails to address the safety issues so identified.

⁹⁶ Refer to section 101 (2)(a) of the Labour Act of 1992.

⁹⁷ Refer to section 101(1) of the Labour Act 6 of 1992.

⁹⁸ Refer verbatim to section 5(1) of the Mines, Works and Minerals Ordinance 20 of 1968.

The Ordinance did not contain much to be desired in terms of the regulation of health and safety of employees at work. Indisputably, initiatives to improve health and safety in Namibian mines have come as a result of the country's subscription to ILO Standards.

3.3. The Regulations relating to the Health and Safety of Employees at Work of 1997

As aforementioned the Labour Act of 1992 made provision⁹⁹ for the promulgation of Regulations relating to the Health and Safety of Employees at Work.¹⁰⁰ The Regulations were made by the President after consultation with the Labour Council in order to achieve optimum health and safety for employees at work¹⁰¹. In essence the regulations include any matter relating to the measures to be taken to secure the safety and the preservation of the health and welfare of employees (and other persons that may be affected by mining operations) at work.¹⁰² These Regulations remain valid although made under an act that has been repealed.¹⁰³

The first part of the regulations that deals with employer's duties is partly identical to the relevant provision in the Labour Act.¹⁰⁴ In addition to that, the regulations mandate the employer to consult with the work-place safety representatives and come up with a joint written policy and programme on the protection of the health and safety of employees.¹⁰⁵ The regulations require that the health and safety programme must be as detailed and clear as possible - containing the responsibilities relating to health and safety of persons occupying positions concerning the health and safety programme, and the procedures and methods to be adopted to implement the health.

⁹⁹ Refer to section 101 of the Labour Act 6 of 1992.

¹⁰⁰ Contained in Government Notice No. 156 of 1997 of 1 August 1997, Government Gazette No. 1617

¹⁰¹ Refer to section 101(1) of the Labour Act 6 of 1992.

¹⁰² *Ibid.*

¹⁰³ Section 2 under Schedule 2 of the Transitional Provisions, which states that any regulation promulgated in terms of the previous Act or the 2004 Act remains in force as if it had been promulgated under this act as from the effective date.

¹⁰⁴ Refer to section 96 of the Labour Act 6 of 1992; Duties of employers on health safety and welfare at work of employees.

¹⁰⁵ Refer to section three of Regulation No. 156 of 1997.

At the core, the first part of the regulations dealing with the rights and duties of employers and employees mimic chapter 11 of the Labour Act of 1992, therefore repetition here was deliberately avoided.¹⁰⁶ It is interesting to note that the provisions for the *Notification of Accidents and Dangerous Occurrences* at a mine in both regulations i.e. regulations as per the 1968 Ordinance and Regulations as per 1992 Act are surprisingly similar.¹⁰⁷ However, the difference comes in with regards to competent authority to which the notification should be made.

The 1968 Regulations provide that immediate notification should be made to the Chief Inspector of Mines, whilst the 1997 Regulations maintain that the functionary to be notified is the Chief Inspector of Labour.¹⁰⁸

The Labour Act's Health and Safety Regulations impute direct responsibility over the safety of employees at work on the Chief Executive Officer of a body corporate. The chief executive may delegate his duties to any person under his control provided that such delegation is in writing and further that despite such delegation the chief executive is not relieved from any duty so delegated and therefore remains the responsible person for securing the safety at work.

This is certainly a departure from the Regulations under the Ordinance which simply vested such duties on the mine manager which obligates the chief executive of a mine to be responsible for the safety of its employees.

The Health and Safety regulations further introduced a Safety Officer¹⁰⁹, in addition to the health and safety representatives, whose duty is to monitor and evaluate the

¹⁰⁶ Refer for example to section 11(1) of the Reg. no 156 of 1997 which also provides that *An employee who removes himself or herself from any place where he or she is employed when he or she has reasonable cause to believe that his or her health or safety will be endangered at such place.*

¹⁰⁷ Refer to section 235 of the Regulations per the 1968 Ordinance; whilst similar provisions are contained in section 22 of the Regulations as per 1992 Act.

¹⁰⁸ Refer to regulation 1 of the 1997 Health and Safety Regulations of Employees at Work which deals with the interpretation of the regulations. "Chief Inspector" means an inspector appointed under section 3, and holding the position of Chief Inspector of Factories in the Ministry of Labour; and an "Inspector" means a Labour Inspector.

¹⁰⁹ Regulation 6, the safety officer must be approved by the inspector, however so far in practice the author being a Corporate Legal Counsel at a mine, has not seen this being implemented by the ministry of labour let alone the fact that in the seven years so employed no single inspection or presence of an inspector at the mine was observed.

employer's compliance with its safety policy, the Act and its regulations. The regulations further obligate the employers to establish Health and Safety committees.

Therefore it can be deduced from the aforementioned discussions that the Labour Act and its subsequent regulations overturned the Ordinance. The new regulatory regime makes no definite reference specifically for the mining industry; instead it broadly tackles the issue of occupational health and safety of all industries.

3.4. The Proclamation for the assignment of the provisions of the Regulations relating to the Health and Safety of Employees at Work

Pursuant to the 1997 Health and Safety Regulations of Employees at Work (Health and Safety Regulations), a proclamation that dealt with the assignment of the provisions of the regulations relating to the health and safety of the employees at work was promulgated.¹¹⁰ The Proclamation made provision for the assignment of the administration of the Health and Safety Regulations in so far as they relate to specific actions to be exercised and performed by three governmental ministries as more fully expanded thereunder.

At first glance, it is evident that the administration of the regulations is predominantly dealt with by or mainly assigned to the Ministry of Labour which has to either act after consultation with the Ministry of Health and Social Services on matters related to health or the Minister of Mines and Energy on matter relating to mining. Therefore the Proclamation assigns the administration of the diverse parts of the regulations or specific regulations of the Health and Safety regulations to different governmental Ministries¹¹¹. On a closer reading the Proclamation, dictates that the Minister of Labour shall administer particular provisions acting after consultation with the relevant Ministry as necessitated by the provisions in question.

It is noteworthy to mention here that none of the provisions afford the Minister of Mines and Energy the upper hand, i.e. that empowering that Minister to be the principal authority with a duty to consult other ministries. It appears that that the

¹¹⁰ Proclamation 10 of 1997 contained in Government Gazette No.1615 of 31 July 1997.

¹¹¹ Schedule E under Proclamation 10 of 1997.

consultations are mandatory. However, what remains unclear is whether or not it is mandatory for the Minister of Labour to incorporate the propositions of either the Minister of Health and social services and Minister of Mines and Energy. Whether the Proclamation dictates that a consultation must occur.

In the case of *Commercial Union Assurance Company of South Africa Ltd v Clarke*¹¹² the court stated as follows:

The basic test, in deciding as to the imperative nature of a provision, is whether the Legislature expressly or impliedly visits non-compliance with nullity. . . In applying that test, 'each case must be dealt with in the light of its own language, scope and object and the consequences in relation to justice and convenience of adopting one view rather than the other.

The Proclamation makes mention that the Minister of Labour *must act "after consultation with"* instead of "in consultation with". It is important to note that there is fundamental difference between the two. Whilst the first one implies that the Minister may only act after consultation with the requisite ministries meaning that in the absence of a consultation the minister cannot act. It further presupposes further action by the Ministry of Labour after consultation and its outcomes to those that are obliged to comply with the regulations whilst, the second one actually means or implies that the power cannot be exercised independently and that a consultation is mandatory and hence may only be exercised "with the concurrence of" of the party who must be consulted.¹¹³ "In consultation with" in effect affords a veto power to the other party.¹¹⁴

Public law (*lat. ius publicum*) is that part of law which governs relationships between individuals and the government,¹¹⁵ and due consideration of the proclamation does not require the Minister to announce the outcome of its consultation and neither does the proclamation dictate further action on the part of the Minister after consultation. The

¹¹² 1972 (3) SA 508 (A).

¹¹³ *Minister of Health v New Clicks South Africa (Pty) Ltd 2006 (2) SA 311 (CC).*

¹¹⁴ South African Law Reform Commission. Discussion paper on Statutory Revision: Review of the Interpretation Act 33 of 1957 (project 25) September 2006. isbn: 0-621-36904-7. Also available at: <http://www.doj.gov.za/salrc/index.htm>.

¹¹⁵ Public Law, Available at: https://en.wikipedia.org/wiki/Public_law, last accessed on: 20 April 2017.

institutions that ought to comply with the Health and Safety regulations are not appraised of the outcome of such consultations, if any was ever held, and neither are directives issued to the public on the implementation of the Health and Safety regulations.

The presentation by the Chief inspector of mines at the Mining Conference of 2013 ought to have enlightened the mining institutions on the functions assigned to it in terms of the proclamation and how the mining industry ought to comply with such legal instruments, Instead the presentation reveals that the Chief Inspector of mines is not well informed with law applicable to mining in so far as the health and safety component is concerned.

What the Proclamation does is to leave to the Minister of Labour in isolation, tasks which ideally should be the joint responsibility of the Minister of Labour and the Minister of Mines and Energy, without there being any practical necessity for this to be done, or any obvious reason why the Minister of Mines and Energy's power should be subordinated to that of the Minister of Labour. In my view the delegation of the decision making power to the Minister of Labour alone is an improper delegation of a power vested that ought to be jointly in the Minister of Labour and the Minister of Mines and Energy. Clear-cut consultation mechanisms must be laid out for implementing the system of government of national unity.

In light of the aforementioned provision, it is logical to conclude that the language used in the provision is vague, and the Minister of Labour may side-line the outcome of the consultations made by the other party. It appears , therefore that the assignment of the administration does not require the relevant ministries to publish, in the government gazette the outcome of their consultation, so as to enable the employers to know how to implement the regulations and where to report certain activities as required by the Act. It may be safely concluded that the three ministries responsible for the administration of the act, are not in sync with their duties and obligations.

3.5. Overriding implications

As aforementioned in chapter one, at the moment in Namibia, the health and safety of mining employees within the industry is regulated under the auspices of the Mines, Works and Minerals Ordinance of 1968 and its subsequent regulations of even year.¹¹⁶

The Mines, Works and Minerals Ordinance of 1968 as amended made provision for and gave specific authority to a Chief Inspector of Mines, whose overall function was to supervise mining sector in Namibia and ensure the health and safety compliance.

As briefly mentioned in the introduction, it appears that the authorities involved are oblivious to the existence of the Labour Act 6 of 1992¹¹⁷ which came into operation on 1 November 1992 and its subsequent Regulations as well as the Proclamation thereafter.

The Labour Act repealed section 93 of the 1968 ordinance and the whole, in so far as it relates to the Health and Safety of workers employed in or in connection with mining and prospecting operations¹¹⁸. The Minerals Act, Act 33 of 1992¹¹⁹ which was enacted after the Labour Act attempted to resurrect, eight months after its repeal, provisions of the 1968 Ordinance relating to the health and safety which were already repealed by an earlier piece of legislation, namely the 1992 Labour Act.

The Minerals Act, repealed¹²⁰ Ordinance 20 of 1968 to the extent specified in Column 2 of Schedule 2 which states that the whole of Ordinance 20 of 1968 is repealed, except in so far as it relates to the appointment and powers, duties¹²¹ and

¹¹⁶ Mathews Amunghete – Chief Inspector of Mines. Republic of Namibia: Ministry of Mines and Energy. Report prepared for Mining Conference held on 22nd May 2014. Data available at: http://www.chamberofmines.org.na/files/4614/7031/0421/4._2013-05-23_Mine_Safety_and_Challenges-_Mathews_Amunghete_-_2013.pdf. This is clearly reflected by the presentation of the Chief Inspector of mines whose duty is to supervise mines in Namibia and further proof is published on the ministry of mines and energy website http://www.mme.gov.na/files/publications/e9a_Regulations%20made%20Under%20the%20Provisions%20of%20Mines,%20Works%20and%20Minerals%20Orid....pdf.

¹¹⁷ Promulgated on 8 April 1992, Government Gazette No. 388.

¹¹⁸ Section 116 of Act 6 of 1992 and Schedule.

¹¹⁹ Enacted 31 December 1992 and came into operation 1 April 1994 under GN 41 Of 1994 Government Gazette 828.

¹²⁰ See section 139(1) of Act 33 of 1992, Minerals (Prospecting and Mining) Act.

¹²¹ Even if it is the appointment and powers of the Chief Inspector are not affected by the repeal under the labour act of 1997, without regulations to enforce, his appointment is futile.

functions of the Chief Inspector of Mines and an inspector of mines, and the safety and health of persons employed in or in connection with mines and works. It is imperative to note that Ordinance 20 of 1968 in itself does not contain a chapter or a provision on Health and Safety of employees on a mine neither is there any section empowering the Chief Inspector of mines with authority over the health and safety of employees. However this is rather contained in the Regulations, which regulations, it is argued, are repealed.

Although the repeal under the Labour Act, Act 6 of 1992 did not repeal the whole Act, it repealed the whole in so far as it relates to the health and safety of employees in employed in a mine. To that extent, the regulations made under Ordinance 20 of 1968 pertaining to health and safety would *ipso facto* have been repealed¹²².

This would be in line with section 11(2) of the Interpretation of Laws Proclamation 37 of 1920, which states that:

“where a law repeals any other law, then, unless the contrary intention appears, the repeal shall not revive anything not in force or existing at the time which the repeal take effect”.

In any event, the President after consultation with Labour Advisory Council under section 101 of the 1992 Labour Act made regulations relating to the health and safety of employees at work. As pointed out above, the regulations made no express exclusion of mine employees and to the contrary the repeal under the Labour Act, clearly intended to remove any authority in respect of the health and safety of employees employed more specifically on any mining or prospecting operations from the Ministry of Mines and Energy.

In the event that the contention herein advanced is wrong, then consideration must be given to the fact that the regulation in respect of days and hours of work including leave of employees employed on a mine were regulated under old.¹²³ Those Regulations

¹²² In *Hatch v Koopoomal 1936 AD 197* the court held that If enabling legislation is repealed, all delegated legislation issued in terms of such enabling legislation also ceases to exist, unless new legislation expressly provides otherwise.

¹²³ Refer to regulation 256 to 258 of the Regulations under the Ordinance.

which ceased after the Labour Act of 1992 came into operation which essentially is indicative of the inroads made by the 1992 Labour Act and a further justification in favour of the arguments raised.

Pursuant to the 1997 Health and Safety Regulations, a proclamation that dealt with the assignment of the provisions of the regulations relating to the health and safety of the employees at work was passed. The proclamation made provision for the assignment of the administration of the Regulations in so far as they relate to specific actions to be exercised and performed by the relevant ministries. .

The enactment Labour Act 11 of 2007 made provision for the continuity of any regulation promulgated under the 1992 Labour Act¹²⁴. This in essence means that the regulation and implementation of safety and health in the Namibian mining industry lies with Minister of Labour, but only in specified circumstances, and in any event *with consultation with* the of Health and Social Services and the Minister of Mines. If the provisions of earlier legislation are incorporated into subsequent legislation, the incorporated provisions are not affected when the earlier legislation is repealed. These provisions were in effect adopted twice as legislation, and the repeal of the earlier legislation does not repeal the incorporated provisions.

A repeal of legislation or a provision revokes or abrogates the legislation or part of the legislation. A repeal of legislation may be either express or implied. The repeal of a provision of an Act constitutes the amendment of the Act containing it.¹²⁵ The old legislation i.e. the 1968 Ordinance was repealed with the exception of certain provisions which are not relevant to the regulation of health and safety of employees at work.

The repeal of the Ordinance had the consequent effect of annulling the subsequent regulations. If enabling legislation is repealed, all delegated legislation issued in terms of such enabling legislation also ceases to exist.¹²⁶ Bearing this in mind the only health and safety regulations which remain valid would be the regulations made under the Labour, Act 6 of 1992.

¹²⁴ Section 2(2) of the Transitional Provisions in Schedule 1 of Act 11 of 2007.

¹²⁵ South African Law Reform Commission. Discussion paper on Statutory Revision: Review of the Interpretation Act 33 of 1957 (project 25) September 2006. Page 15, isbn: 0-621-36904-7. Also available at: <http://www.doj.gov.za/salrc/index.htm>.

¹²⁶ *Ibid.* page 222.

CHAPTER 4: CONCLUSIONS

It is clear that uncertainty prevails in the Namibian mining industry as to which laws or regulations are applicable in respect of health and safety of employees at work. This is further aggravated by the misconception by the Ministry of Mines and Energy that the Health and Safety Regulations promulgated under Ordinance 20 of 1968 remain valid and that companies are expected to comply with it.

This research has found that Ordinance 20 of 1968 and its regulations were repealed in so far as health and safety of employees on mines are concerned and consequently the regulations of 1968 do not find application in Namibia since 1 November 1992.

It is therefore clear that the Health and Safety regulations made under the Labour Act 6 of 1992 remain valid and must be complied with by all institutions including the mining industry.

It is obvious that in terms of Proclamation 10 of 1997, the responsibility over the administration of the functions under the Health and Safety regulations were assigned to various ministries vis a vis, the Ministry of Labour, Ministry of Health and Social Services and the Ministry of Mines and Energy which may only act after consultation with the relevant prescribed institution.

The assignment of the administration of the provisions of the health and safety regulations are vague and does not facilitate compliance as the institutions so assigned does not comprehend the extent of participation or enforcement of the regulations and simultaneously making it almost impossible for employers to comply with as the responsibilities cannot be clearly established.

Clearly the issuing of blasting tickets under the 1968 regulations may pose a risk to the government albeit an administrative decision may be valid until such time that it is legally challenged.

The ordinance continues to be implemented by the ministry as if it is still applicable and very little is actually implemented under the 2007 Labour Act. Therefore, one can clearly say that in the absence of a new regulatory regime which introduces substantial

change, there is nothing to measure against unless the labour act regulations are properly allocated to the state organ to implement it in full.

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