

When is a workplace safe or unsafe?:
The safety criterion in terms of the
Occupational Health and Safety Act and the
Mine Health and Safety Act

Mine and Occupational Health and Safety 2010

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1 Statute and common law

Occupational health and safety is regulated by statute and common law. South Africa has, like many other countries, legislated extensively on occupational health and safety. Despite the body of legislation, the common law continues to play an important role as far as it concerns contractual, delictual and criminal liability. Two major Acts regulate occupational health and safety viz. the Occupational Health and Safety Act, No. 85 of 1993 (“OHASA”) and the Mine Health and Safety Act, No. 29 of 1996 (“MHSA”). The MHSA applies to mines and works as defined and related aspects. OHASA applies to other industries but does not apply to employers and workplaces to which the MHSA and certain matters covered by the Merchant Shipping Act, No. 57 of 1951 apply. See section 1(3) of OHASA.

2 The employer’s health and safety obligations in terms of the MHSA

2.1 Section 2(1) of the MHSA provides amongst others, as follows:

“The employer of every mine that is being worked must:

(a) ensure, as far as reasonably practicable, that the mine is designed, constructed and equipped:

- (i) to provide conditions for safe operation and a healthy working environment
- (ii) ...

(b) ensure, as far as reasonably practicable, that the mine is commissioned, operated, maintained and decommissioned in such a way that employees can perform their work without endangering the health and safety of themselves or of any other person”.

2.2 The obligation to maintain a healthy and safe environment

Section 5(1) provides that “(t)o the extent that it is reasonably practicable, every employer must provide and maintain a working environment that is safe and without risk to the health of employees”.

3 Section 8 of OHASA: the primary obligation to ensure that the workplace is safe and without risk to the health of employees

3.1 Section 8(1) provides as follows:

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

3.2 Section 8(2) refers to a large number of matters which must be attended to by an employer to ensure compliance with the above obligation. These include the following:

- the provision and maintenance of systems of work, plant and machinery that, as far as is reasonably practicable, are safe and without risk to health;
- the performance of an appropriate risk assessment;
- the provision of information, instruction and training to employees;
- the provision of supervision.

4 The health and safety criterion contained in the MHSA: The criterion of “reasonably practicable”

4.1 Section 102 defines the words “reasonably practicable” as practicable having regard to:

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

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

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

(b) the costs and the benefits of removing or mitigating that hazard or risk.”

5 The standard of care required of the employer in terms of OHASA

5.1 The standard of care required of the employer by OHASA is set out in section 1 and is similar to the requirement of the MHSA.

The words “reasonably practicable” are defined as meaning “practicable having regard to –

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

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

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

(d) the cost of removing or mitigating that hazard or risk in relation to the benefits deriving therefrom ...;

6 Conclusion: The practical implication of the application of the safety criterion prescribed by the MHSA and OHASA

6.1 The health and safety obligations of the employer to take steps which are reasonably practicable to ensure health and safety, are consistent with the common law duty to provide a reasonably safe working place. Section 8(1) read with section 1 of OHASA and section 102, 2 and 5 of the MHSA were an attempt by the legislature to give some content to the requirement of reasonableness.

6.2 The legislation read with the common law, allows and to a great extent compels the employer to adopt a holistic approach to safety management. The employer may use a number of measures forming part of a safety management system to ensure a reasonably safe working place. The employer may rely on amongst others:

- risk management;
- formal and informal training of employees;

- an organisational structure of experienced and competent employees;
- safe equipment;
- safe systems of work;
- safety procedures;
- supervision;
- discipline;
- maintenance procedures;
- the fact that the employee also has a duty to take reasonable care for his own safety and the safety of others.

7 The difference between a safety goal and the legal safety criterion

Very often employers set for themselves a safety objective, e.g. to achieve zero risk and harm in the workplace. Such a goal must be distinguished from the legal criterion of safety. The legal safety criterion determines when a workplace is regarded as “safe” or “safe as far as reasonably practicable”. This question is completely separate from any goal set by the employer. In other words, even if an employer does not achieve its own safety goal, such fact does not mean that the workplace was “unsafe” or not “safe as far as reasonably practicable”.

7.1 In order to be meaningful, a safety objective must refer not only to a fatality or a lost time injury rate, but also to a time period to which it applies. Such objective should be realistic and achievable.

8 Safety obligations of employees

The safety obligations of employees are relevant and must be taken into account when considering the question whether the workplace was safe, as far as reasonably practicable.

8.1 Section 14 of OHASA provides as follows :

“General duties of employees at work

Every employee shall at work –

- take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions;
- as regards a duty or requirement imposed on his employer or any other person by this Act, co-operate with such employer or person to enable that duty or requirement to be performed or complied with;
- carry out any lawful order given to him, and obey the health and safety rules and procedures laid down by his employer or by anyone authorised thereto by his employer, in the interest of health and safety;
- if any situation which is unsafe or unhealthy comes to his attention, as soon as practicable report such situation to his employer or to the health and safety representative for his workplace or section thereof, as the case may be, who shall report it to the employer; and
- if he is involved in any incident which may affect his health or which has caused any injury to himself, report such incident to his employer or to anyone authorised thereto by the employer, or to his health and safety representative, as soon as practicable but not later than the end of the particular shift during which the incident occurred, unless the circumstances were such that the reporting of the incident was not possible, in which case he shall report the incident as soon as practicable thereafter.”

8.2 Section 22 of the MSHA provides amongst others as follows:

“Every employee at a mine, while at that mine, must –

- take reasonable care to protect their own health and safety;
- take reasonable care to protect the health and safety of other persons who may be affected by any act or omission of that employee;
- use and take proper care of protective clothing, and other health and safety facilities and equipment provided for the protection, health or safety of that employee and other employees;
- report promptly to their immediate supervisor any situation which the employee believes presents a risk to the health or safety of that employee or other person, and with which the employee cannot properly deal;
- co-operate with any person to permit compliance with the duties and responsibilities placed on that person in terms of this Act; and
- comply with prescribed health and safety measures.”

9 The duty of the employer to take reasonable care for the safety of employees

9.1 Provisions of legislation, amongst others, the MSHA and OHASA and regulations may indicate the existence of a duty of care. See in this regard the above.

9.2 **The safety criterion: the “reasonable person” (“bonus/diligens paterfamilias”) and “reasonableness”**

9.2.1 The statutory measure of health and safety must also be interpreted in the light of the common law duty of care. In general, the duty of care means that the employer, acting personally or through its employees or agents, must take reasonable care for the safety of its employees (**Van Deventer v Workmen’s Compensation Commissioner** 1962 (4) SA 28T; **Oosthuizen v Homegas (Pty) Ltd** 1992 (3) SA 463 T). It is important to note that the obligation to provide safe premises, safe machinery and tools and safe systems of work is not an absolute one, but is restricted by the concept of reasonableness.

9.2.2 **The reasonable person**

Our Courts have used the standard of the reasonable person as the criterion to determine the reasonableness of conduct. JC van der Walt & JR Midgley, *Principles of Delict* (3rd ed.) at par 121 remark as follows concerning the concept of the reasonable person and such person’s attributes:

"The criterion of the reasonable person is the embodiment of an external and objective standard of care. The qualities, experience, idiosyncrasies and judgment of the particular actor are in principle not relevant in determining the qualities of the reasonable person. The law requires adherence to a generally uniform and objective degree of care. The reasonable person is the legal personification of the ideal standard to which everyone is required to conform. Such a person represents an embodiment of all the qualities which we require of a good citizen. The concept denotes a person exercising those qualities which society requires of its members for the protection of their interests. The reasonable person is therefore the legal personification of the ideal standards of care which the community desires its members to exercise in their daily actions and contact. The general nature of the hypothetical reasonable person can be gathered from the following attempts at characterization:

The concept of the bonus paterfamilias is not that of a timorous faintheart always in trepidation lest he or others suffer some injury; on the contrary, he ventures out into the world, engages in affairs and takes reasonable chances. He takes reasonable precautions to protect his person and property and expects others to do likewise;

And:

Ons maatstaf is die van die vroeë huisvader, nie van die kroniese pessimis nie, wat altyd die ergste vrees ("Our standard is that of the diligens paterfamilias, not that of the chronic pessimist who always fears the worst").

The particular attributes or qualities of this mystical figure have an important bearing upon whether harm was foreseeable and whether or not steps should have been taken to prevent the harm. Powers of prognostication are certainly dependent upon characteristics such as knowledge, intelligence, concentration, memory, perception and judgement."

The reasonable person is "*the man (person) of ordinary knowledge and experience*" (**S v Mbombela** 1933 AD 269 AT 273). In **S v Burger** 1975 (4) SA 877 (A) at 879D the Court expressed itself as follows in relation to the standard of the reasonable person:

"Culpa and foreseeability are tested by reference to the standard of a diligens paterfamilias ("that notional epitome of reasonable prudence" - **Peri-Urban Areas Health Board v Munarin** 1965 (3) SA 367 (AD) at p 373F) in the position of the person whose conduct is in question. One does not expect of a diligens paterfamilias any extremes such as Solomonic wisdom, prophetic foresight, chameleonic caution, headlong haste, nervous timidity, or the trained reflexes of a racing driver. In short, a diligens paterfamilias treads life's pathway with moderation and prudent common sense."

In **S v Bochrus Investments (Pty) Ltd and Another** 1988(1), SA 861 (A) AT 865 F - I the Court held in the present context, amongst others, as follows:

"The onus of proving culpa was on the State, which had to establish a failure by the accused to observe that degree of care which a reasonable man would have observed. The reasonable man is the diligens paterfamilias of Roman Law, the average prudent person "that notional epitome of reasonable prudence" in the words of Holmes J A in **Peri-Urban Areas Health Board v Munarin** 1965 (E) SA 367A at 373F. The reasonable man is the embodiment of the social judgment of the court, which applies "common morality and common sense to the activities of the common man" (per Diplock L J in **Doughty v Turner Manufacturing Co Ltd** 1964 (1) QB 518 (CA) at 531 ([1964] 1 All ER 98 at 103 in fine). The criterion of liability for culpa in both civil and criminal cases is reasonable foreseeability. In a case of culpable homicide, the question is whether a diligens paterfamilias in the position of the accused would have foreseen the possibility of death resulting from his conduct. (See **S v Burger** 1975 (4) SA 877 (A) at 879A; **S v Bernardus** 1965 (3) SA 287 (A))" (at 865 F - I).

At 867 D - G, the Court concluded that the *diligens paterfamilias* would not have foreseen the occurrence of the accident. The conviction of the accused was accordingly set aside.

In regard to the present question, the Appellate Division (now the Supreme Court of Appeal) has accepted that a driver may proceed on the supposition that other drivers will not act unlawfully. See **Netherlands Insurance Co of SA Ltd v Brummer** 1978 (4) SA 824 (A) at 833 E - F.

The reasonable person is also not expected to see remote possibilities. See **Ablort-Morgan v Whyte Bank Farms (Pty) Ltd** 1988 (3) SA 531 (E).

It must be borne in mind that if an actor operates in a particular field, the "*reasonable diligence, care and skill*" required of that person is the general level of skill and diligence possessed and exercised at the time by other members in that field (**Van Wyk v Lewis** 1924 AD 438; **S v Meyer** 1971 (4) SA 178 (R) at 183 E - G; **S v Mkwetshana** 1965 (2) SA 493 (N) at 497; **Blyth v Van den Heever** 1980 (1) SA 191 (A) at 221 D - F; **Rampal and Another v Brett, Wills and Partners** 1981 (4) SA 360 (D) at 370 A).

9.2.3 Reasonableness

"Reasonableness" is ultimately the measure which determines whether conduct complies with the Act. It is a complicated concept, the content of which may change from place to place and from time to time. Something which is regarded as reasonable and legally acceptable in one society or at a particular time may not be so regarded in another society or at another time. To determine whether conduct is reasonable or unreasonable, courts consider and balance the particular conflicting interests of the relevant parties, the parties' relationship to each other, the particular circumstances of the case, whether the harm was foreseeable, and any appropriate considerations of public policy. It is acknowledged that the inquiry into the reasonableness of conduct involves considerations of public and legal policy and that the courts are required to render a value judgment as to what society's notions of justice demand, in the process of determining a party's rights and granting relief to such party. (See Van der Walt & Midgley "Delict (Principles and Cases)" vol 1 par 56).

Very important indications of unlawfulness of conduct are the attitude of the legislature or maker of subordinate legislation, the existence of an industry practice and the attitude of the enforcing State agency. See JC van der Walt and JR Midgley, **Principles of Delict** (3rd ed.) par 123.

9.3 Negligence and Unlawfulness

9.3.1 To find that any person has acted unlawfully and negligently for purposes of section 2 of the MHSA, section 8 of OHASA and the offence of culpable homicide, it must be established amongst others, that the measures, which such person took, were insufficient in that reasonably safe working conditions did not exist. If one safety measure on which an employer relied was not effective, but if the working environment was still safe, as far as reasonably practicable, the conduct of the

employer is not unlawful or negligent. In other words, regard must be had to the totality of measures taken by an employer to ensure that a working environment is safe, as far as reasonably practicable.

In assessing the risk of harm eventuating, the relevant surrounding circumstances must be taken into account, viz. the level of training of employees, safety rules and procedures, the degree of safety of equipment and other relevant safety measures and whether or not the risk has materialised in the past despite existing precautions.

9.3.2 In **Barker v Union Government** 1930 TPD at 120 - 128 Tindall AJP said:

“But the following statement of the law in an American case seems to me in accordance with the principles of our law: It was the unquestioned duty of the defendant to exercise ordinary care and foresight to provide safe machinery and a reasonably safe place in and about which the helpers and other labourers were required to work. But the question of the fulfilment of this duty must be tested by the experience of employees who are themselves in the exercise of due care and vigilance, and not with reference to those who are themselves either negligent or the unfortunate victims of unaccountable accidents. **The fact that a labourer sustains a serious injury in the place of his service has no necessary tendency to prove the machinery unsafe or the place unsuitable. No machinery can be deemed safe for those who are thoughtless and inattentive or reckless and venturesome. Pure accidents will also continue among the inexplicable factors in the problem of life. Again, the fact that the accident might have been avoided by the exercise of extraordinary precautions on the part of the defendant has no necessary tendency to prove that the existing conditions did not meet the requirements of reasonable safety. Absolute safety under all circumstances is not guaranteed to the labourer by the contract of employment. The employer is not an insurer. He is not bound to furnish the safest machinery, nor to provide the best possible methods for its operation, in order to relieve himself from responsibility. He is only required to furnish instrumentalities that are reasonably and ordinarily safe and well adapted to the purpose for which they are designed.**”

9.3.3 In **Van Deventer v Workmen's Compensation Commissioner** 1962 (4) SA 28 T at 31B - G, Boshoff J held as follows:

“An employer owes a common law duty to a workman to take reasonable care for his safety. The question arises in each particular case as to what reasonable care is required. This is a question of fact and depends upon the circumstances in each particular case. A master is in the first place under a duty to see that his servants do not suffer through his personal negligence, such as failure to provide a proper and safe system of working and a failure to provide proper and suitable plant, if he knows or ought to have known of such failure. He is not bound to give personal superintendence to the conduct of his workings and there are many cases in which it is in the interest of the workmen that the employer should not personally undertake such superintendence. He may for instance be not sufficiently qualified to do so. In that event the master would be liable for the negligence of persons so acting on his behalf. If a servant is employed on work of a dangerous character, the employer is bound to take all reasonable precautions for the workman's safety. This may entail the provision of a proper and safe system of working. An employer does not warrant the plant provided by him: if there is a latent defect which could not be detected by reasonable examination or if, in the course of working, the plant becomes defective and the defect is not brought to the master's knowledge and could not by reasonable diligence have been discovered by him, the master is not liable for accidents caused by such defect; see **Wilson's Clyde Coal Co. Ltd v English**, 1937 (3) A.E.R. 628; **Qualcast (Wolverhampton) Ltd. v Haynes**, 1959 (2) A.E.R. 38.”

9.3.4 In **MacDonald v General Motors South Africa (Pty) Ltd** 1973 (1) SA 232 (E), the Court dealt with the alleged failure on the part of an employer to adequately protect a tank platform, by the provision of railings, so as to prevent accidents to persons. In dealing with the standard of care, which should be taken in such a case, Eksteen J held as follows:

“Here again the test as to whether the protective devices contended for by the plaintiff ought to have been supplied must be the view that a reasonable person would take. An employer would only be expected to guard against accidents which are likely to happen in the ordinary common use of the machinery” (at 236).

The Court then quoted with approval the case of **Barker v Union Government** (above) at 128.

At 237F - 238A, Eksteen J said:

“It cannot be expected of the defendant to provide handrails or guards to every part of production machinery to which maintenance personnel may be required to climb in the course of their maintenance duty. **The defendant, to my mind, was entitled to rely on the experience of its maintenance personnel and particularly of its mechanical maintenance foreman in their execution of maintenance work and to expect them to exercise due care and vigilance when climbing onto parts of the machine which are not ordinarily accessible to normal working personnel** (own emphasis). I do not think that it can be said that a diligens paterfamilias in the position of the defendant would have foreseen the reasonable possibility that its maintenance personnel, and, more particularly its experienced mechanical maintenance foreman, would act as precipitately and as unthinkingly as plaintiff concedes he acted in the circumstances, and that it ought to have taken any steps to guard against such behaviour. To my mind the behaviour of the plaintiff in the present case in executing the strange manoeuvre of bending forward and moving quickly under the angle iron after having turned off the bypass valves and prior to jumping off the tank may aptly be described as “thoughtless and inattentive or reckless and venturesome”, and the defendant could not be expected to have guarded against such conduct by erecting railings on the washing tank or any other parts of the machine, nor, for that matter, providing permanent steps as a form of access to the tank platform or any other part of the machine.”

9.3.5 The employer is required to take only reasonable precautions and not all precautions in the circumstances. See **Moni v Mutual & Federal Versekeringsmaatskappy Bpk en Andere** 1992 (2) SA 600 (T).

The employer is also not expected to foresee remote possibilities. In **Ablort-Morgan v Whyte Bank Farms (Pty) Ltd** 1988 (3) SA 531 (E).

9.3.6 In **Kruger v Charlton Paper of South Africa (Pty) Ltd** 2002 (2) SA 335 SCA, the Supreme Court of Appeal held that a person in the position of employer (Charlton Paper of South Africa (Pty) Ltd), would not have foreseen that the plaintiff (appellant), a qualified electrician would have squeezed through a gap on the side of a live electrical terminal which was not isolated, which conduct resulted in him sustaining certain injuries. The Court took into account that the terminal was located inside an enclosure and that the plaintiff was a qualified electrician. The Court held that in those circumstances a reasonable person would not have considered it necessary to take steps to insulate the terminal.