THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

JUDGMENT

Of interest to other Judges

CASE NO: J 427/2020

In the matter between:

ASSOCIATION OF MINEWORKERS AND CONSTRUCTION UNION	**Applicant**
and	
MINISTER OF MINERAL RESOURCES AND ENERGY	**First Respondent**
CHIEF INSPECTOR OF MINING	**Second Respondent**
MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	**Third Respondent**
MINERALS COUNCIL SOUTH AFRICA	**Fourth Respondent**
MINING AFFECTED COMMUNITIES IN ACTION	***Amicus Curiae***

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Heard: 29-30 April 2020

Judgment delivered: The order recorded in paragraph 1 was issued by email on 1 May 2020. These reasons were handed down electronically by circulation to the parties' legal representatives and the registrar by email on 4 May 2020.

(by email)

REASONS FOR JUDGMENT

VAN NIEKERK J

Introduction

[1] On 1 May 2020, I made the following order:

> IT IS ORDERED THAT:
>
> 1. The Second Respondent's decisions not to:
>   1.1. require employers to prepare and implement a code of practice on the Covid-19 viral pandemic present and spreading in South Africa in terms of section 9(2) of the Mine Health and Safety Act, 1996 (MHSA); and
>   1.2. issue guidelines in terms section 9(3) of the MHSA,
>
> are reviewed and set aside.
>
> 2. The Second Respondent is directed by no later than 18 May 2020 to publish a notice ("the Notice") in the Government Gazette –
>   2.1. containing guidelines in terms of section 9(3) and 49(6) of the MHSA; and
>   2.2. in terms of section 9(2) thereof requiring employers (as defined in the MHSA) to prepare and implement a code or codes of practice, to mitigate the effect of the outbreak of Covid-19 on the health and safety of employees (as defined in the MHSA) and persons who may be directly affected by the disease at the mine.
> 3. Before publishing the Notice in terms of paragraph 2, the Second Respondent shall:
>   3.1. consult with the Mine Health and Safety Council, if constituted at the date of the order of this court;

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3.2. elicit and consider all available expert advice, including but not limited to the expert opinions of Professors Ehrlich, Murray, Naidoo, Sonnenberg, and Rees contained in the Applicant's papers;
3.3. meaningfully engage with the relevant trade unions, including but not limited to the Applicant, relevant employer organisations, including but not limited to the Fourth Respondent, Mining Affected Communities United in Action, and such other interested persons as the Second Respondent may determine regarding the content of the guidelines;
3.4. consider the directions issued by the First Respondent on 29 April 2020 in terms of regulation 10(8) of the regulations issued in terms of section 27(2) of the Disaster Management Act No. 57 of 2002 ("the Directions"); and
3.5. after having completed the steps in paragraphs 3.1 to 3.4, but no later than 11 May 2020, publish the draft guidelines for public comment.

4. Pending the publication of the Notice and the lodging of codes of practice with the Chief Inspector in terms of section 9(5) of the MHSA, and in addition to complying with any regulations and directions issued under section 27(2) of the Disaster Management Act ("the Regulations"):–
4.1. all employers as defined in the MHSA shall, at a minimum, comply with the Standard Operating Procedures, a copy of which is attached hereto marked "A", to the extent that it is not inconsistent with the Regulations, and as read with, but not limited by, -
4.1.1. the Directives issued by the Second Respondent to employers on 26 March 2020, a copy of which is attached marked "B"; and
4.1.2. paragraphs 1 and 3(a) to (d) of the Directions, a copy of which is attached marked "C";
4.2. compliance with paragraph 4.1 will be deemed to constitute compliance with paragraph 2 of the Directions.
5. In order to publicise this order, the First Respondent shall publish a copy of this order in the Government Gazette within 5 days.
6. Judgment on the question of costs is reserved.[1]

[2] The order substantially reflects the terms of a draft order submitted by the parties' representatives after a hearing conducted by video conference using the Zoom platform. I am indebted to all of the parties and their representatives for their perseverance in seeking to narrow the issues in dispute. AMCU and the fourth respondent (the Minerals Council) reached consensus on paragraphs 1 to 5 of the order, with the caveat that the Minerals Council took no position on the reviewability or otherwise of the chief inspector's decision (i.e. the subject of the ruling in paragraph 1). As between them, the issue of costs is irrelevant, since AMCU sought costs only against the first respondent (the DMRE minister) and the second respondent (the chief inspector). The DMRE minister and chief inspector disputed that the chief inspector's decisions not to require employers to prepare

[1] The Annexures are not reflected here. They are attached to the signed order issued on 1 May 2020.

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and implement a code of practice and to issue guidelines in terms of s 9 (3) of the MHSA are reviewable (i.e. they remained opposed to the granting of the relief reflected in paragraph 1 of the order.) However, the DMRE minister and the chief inspector agreed that if the court finds otherwise, paragraphs 2 to 5 of the order constitute appropriate relief, but they disavow any liability for costs.

[3] The terms of the draft order reduced the issues for determination to first, whether the chief inspector's decisions are reviewable; and secondly, an order for costs that accords with the requirements of the law and fairness, the touchstones established by s 162 of the Labour Relations Act (LRA).

[4] These are my reasons for the ruling reflected above, and my judgment on the issue of costs.

[5] The factual background is not contested, but it is relevant especially to the issue of costs. It was not seriously disputed that mineworkers are particularly vulnerable to Covid-19 for two reasons - they operate in confined spaces where social distancing is difficult or impossible. Whether in moving between entrances or exits to different parts of a mine, in underground cages, in transport to and from mines, or in mine dormitories, it is impossible for mineworkers to avoid contact with others who may be infected. The experts' report draws particular attention to the fact that mineworkers are widely affected by lung diseases, including the hidden pandemics of pulmonary tuberculosis and pneumoconiosis. HIV/AIDS is also more prevalent amongst mineworkers than the general population. Both these facts render mineworkers particularly vulnerable to serious illness or death from Covid-19.

[6] The *amicus curiae* submitted argument in support of the interests of mining affected communities. Again, it is not seriously disputed that the vulnerability of mineworkers in turn renders the communities in which they live vulnerable to Covid-19. There are almost half a million mineworkers in South Africa. Any Covid-19 infection at a mine is likely to spread to the communities surrounding the mine where the mineworkers live. This risk is not new – mineworkers have long brought tuberculosis and HIV/AIDS from the mines back to their communities. Mining communities are also particularly vulnerable to Covid-19 because they too have a

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higher burden of lung disease and HIV/AIDS, precisely because they host mineworkers. These communities are often in rural, underserved areas of South Africa or neighbouring countries with poorer access to healthcare than other South Africans enjoy.

[7] In so far as formal engagement between the parties is concerned, what follows is a brief recordal of events from mid-March to the date of the hearing. On 15 March 2020, consequent on the Covid-19 global pandemic, a national state of disaster was declared in terms of the Disaster Management Act, 27 of 2002. A number of measures to limit the spread of the Covid-19 virus were put in place by way of regulations issued under the DMA, among them a 21-day national lockdown with effect from 26 March 2020 (later extended to 30 April 2020), during which only essential services (including some mines) were permitted to operate. Later amended DMA regulations, enacted on 16 April 2020, in effect exempted all mines from lockdown regulations, subject to certain conditions. These included a requirement that all collieries that supply Eskom must continue to operate at full capacity, and that other mining operations operate at a reduced 50% capacity during the lockdown, subject to certain conditions that relate to occupational health and safety. On 29 April 2020, a new DMA regulation was issued in terms of Regulation 10 (8) of the Regulations issued in terms of s 27 (2) of the DMA, repealing the regulations referred to above, but in respect of the mining industry preserving the concept of reduced operations at a level of no more than 50%, with the DMRE minister afforded the right to direct that operations be conducted at greater capacity. It is estimated that some 250 000 employees will return to work (and to communities adjoining the mines in which they are employed) as mining operations resume and return to full production.

[8] On 29 April 2020, the DMRE minister issued directions on measures to address, prevent and combat the spread of Covid-19. The direction reads as follows:

> 1. In implementing regulation 11K of the Regulations issued in terms of section 27 (2) of the Disaster Management Act, and published in Government Gazette 43232, Government Notice No. 465 of 16 April 2020, every employer conducting mining operations and activities in connection therewith that in

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mind, must implement appropriate measures to protect the health and safety of workers in respect of COVID19.

2. The measures contemplated in paragraph 1 must be contained in a standard operating procedure which must be developed in consultation with organised labour or worker representatives at the mine.
3. In the development of the standard operating procedure contemplated in paragraph 2, the following must be applied:
    (a) Relevant guidelines issued by the World Health Organisation;
    (b) Directions and guidelines issued by the National Department of Health;
    (c) Guidance issued by the National Institute of communicable diseases; and
    (d) the risk-based approach is embedded in the guiding principles of prevention and management of COVID 19 in the South African Mining Industry issued by the Chief Inspector of Mines of the Department of Mineral Resources and Energy on 26 March 2020.

[9] Prior to the declaration of a national disaster, the Mining Occupational Health and Safety Committee (MHSC) met on 13 March 2020 to address the implications presented by Covid-19 for the mining industry. The MHSC resolved to prepare guiding principles, as well as a guidance note through the mining occupational health advisory committee (MOHAC). The MHSC is a statutory body established in terms of the MHSA, and comprises a tripartite board with the chief inspector as chair. The MHSC's main purpose is to advise the minister on occupational health and safety legislation and the improvement in promotion of occupational health and safety in the mining industry. AMCU is a member of the MHSC and was represented at the meeting on 13 March 2020. At the meeting, the MHSC appears to have taken the position that Covid-19 is a public health rather than an occupational health issue as contemplated in the MHSA.

[10] On 15 March 2020, the Minerals Council disseminated information to its members and adopted what subsequently became a 10-point plan to manage the spread of the virus responsible for Covid-19. The Minerals Council has supported implementation of appropriate measures to prevent and mitigate the spread of the virus, while at the same time emphasising the significant disruptive effects of a partial or full closure of mining operations and the devastating economic impact

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that it would have. Indeed, the answering affidavit filed by the Minerals Council in these proceedings was instrumental in laying the foundations for the consensus represented by the draft order.

[11] On 17 March 2020, MOHAC met and began preparing the guiding principles. A representative of AMCU attended the meeting. A copy of the draft guiding principles was sent to AMCU on 19 March 2020. AMCU prepared a response and sent its proposals to the department on 20 March 2020.

[12] On 24 March 2020, AMCU attended a meeting with the DMRE minister. On 25 March 2020, the minister issued remarks in preparation for the lockdown. AMCU wrote to the minister on 26 March 2020 to express concerns regarding the divergence between the remarks and what had been discussed and agreed at the engagement on 24 March 2020.

[13] On 26 March 2020, the DMRE minister issued guiding principles to employers in the industry. These are reflected in annexure B to the order, and set out the basis for a risk-based approach to limit the spread of Covid-19. AMCU states that it did not receive the final guiding principles until 16 April 2020. Given that the guiding principles had been issued some three weeks prior to that date, this is improbable. AMCU had commented on and the proposed guiding principles and contributed in writing to the formulation of the draft, and I fail to appreciate why there was no follow-up to what was obviously an important development in the management of the risk presented by Covid-19.

[14] On 3 April 2020, the DMRE minister issued a statement in which he addressed the DMRE's ongoing efforts to ensure adherence to the regulations and the guiding principles and scheduled a further meeting of stakeholders in the industry, to be convened on 7 April 2020. AMCU was invited to the meeting. On 5 April 2020, AMCU's general secretary wrote to the minister recording the union's disappointment in the department's failure to respond particularly to its letter of 26 March 2020. The letter records that AMCU had criticised the Department for unilaterally drafting a document for public consumption, without prior consultation

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with AMCU and other stakeholders. AMCU noted further that a physical meeting at the department's offices was highly irresponsible.

[15] AMCU tendered to attend the meeting remotely to avoid the risks associated with undertaking travel and attending lodge meetings. This was reiterated in a letter addressed to the Minister on 8 April 2020. The meeting went ahead without AMCU in attendance on 7 and 8 April 2020. On 8 April 2020, the department responded to AMCU's letter dated 5 April 2020 in which it motivated the partial reopening of the industry, explained which categories of mines would be eligible to reopen and how inspectors would enforce the regulations

[16] By 12 April 2020, matters became litigious. On that date, AMCU instructed attorneys (not its attorneys of record in the present matter) regarding the lawfulness of exemptions to operate. On 13 April 2020, AMCU replied in detail to the department's letter dated 8 April 2020 and amongst other things, complained that the Minister had failed to take any measures to stipulate or to make any binding directions.

[17] On 16 April 2020, letters were addressed to the Minister by AMCU's current attorneys of record. There was no response to these letters. However, on the same day, the Minister invited AMCU to attend a physical meeting on 17 April 2020. AMCU requested remote attendance at the meeting, which was to include the minister, the director-general, the chief inspector, the representatives of the Department of Labour and representatives of the Minerals Council and other trade unions, including NUM, UASA, NUMSA and Solidarity. The chief inspector states in the answering affidavit that AMCU refused to participate in the meeting because it was unwilling to hold discussions in the presence of other parties. AMCU disputes that it refused to attend the meeting and avers that it was unable to do so because it did not have access to the platform on which the video-conference was conducted. This much was conveyed to the department by way of a letter sent on 22 April 2020.

[18] On 23 April 2020, and in response to the president's announcement on 23 April 2020 that the country would move to a new phase of lockdown with effect from 1

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May 2020, the chief inspector issued a communiqué for distribution to all mines dealing with health and safety issues arising from the restarting of operations after the period of shutdown generally, as well as measures to be taken to prevent the spread of Covid-19.

[19] AMCU relies on s 6 of Promotion of Administrative Justice Act, 3 of 2000 (PAJA). to contend that the chief inspector's decision not to invoke s 9 fails to meet the test of reasonableness standard established by s 33 of the Constitution, as it finds expression in s 6 (2) (h) of PAJA. That standard was given content in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC), at paragraph 44 of the judgment:

> Even if it may be thought that the language of s6(2)(h), if taken literally, might set a standard such that a decision would rarely if ever be found unreasonable, that is not the proper constitutional meaning which should be attached to the subsection. The subsection must be construed consistently with the constitution and in particular s 33 which requires administrative action to be "reasonable". Section 6 (2) (h) should then be understood to require a simple test, namely that an administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision-maker could not reach.[2]

[20] In the same judgment, at paragraph 45, the court listed the factors that ought properly to be taken into account in deciding whether a decision is reasonable:

> What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant in determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected.

[21] Central to the present case is AMCU's contention that despite the raft of regulatory measures at the disposal of the DMRE minister and the chief inspector (including the declaration of a health hazard under s 76 of the MHSA and the formulation of a code of practice under s 9 (3)), the measures that have been adopted and implemented under the DMA (and other voluntary measures), are inadequate to

[2] Referring to *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd* [1999] 1 All ER 129.

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ensure that mineworkers return to a safe working environment, and that the communities in which they reside are safe. AMCU does not oppose the return to work, nor does it seek to disrupt it.

[22] AMCU states that the purpose of bringing this application is to establish a detailed, national standard to protect the health and safety of its members through binding obligations as opposed to the existing broad regulatory measures, supplemented by voluntary measures adopted by discrete mining operations. AMCU does so by seeking to review and set aside the chief inspector's decisions not to enact guidelines in terms of s 9 (3) of that Act.

[23] In the result, all parties agree that there is a need for urgent, detailed, binding national standards to guide employers and protect mineworkers against the hazards presented by Covid-19 to return to work in the mining industry. AMCU and the DMRE minister and the chief inspector disagree only about which statutory mechanism should be employed to achieve that purpose.

[24] The parties do not seriously dispute that the chief inspector's decision not to act under s 9 of the MHSA constitutes administrative action. What is at issue (at least between AMCU and the DMRE minister and the chief inspector) is the reasonableness of the decision not to invoke s 9 of the MHSA; more specifically, whether the decision fails to meet the threshold for reasonableness that is set by s 6 (2) (h) of PAJA.

[25] The DMRE minister and the chief inspector raise two primary grounds to oppose the relief sought. First, they submit that the Covid-19 pandemic is a public health matter rather than an occupational health issue; the fact that Covid-19 poses a risk to mineworkers because it is a communicable disease is not in itself sufficient to render it an occupational health issue. They contend the risk presented by Covid-19 remains best controlled through regulatory measures under the DMA. Secondly, the DRME minister and the chief inspector contend that AMCU has not established that unless the chief inspector compels employers in the mining industry to implement mandatory codes of practice, employers will not protect the health of workers. Further, it is disputed that there is a need for a single detailed

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set of national standards, and that AMCU's claim to this effect is undercut by its acknowledgement that necessary measures to be put in place at individual mining operations ought to take into account the different circumstances that applied each mine and each mining affected communities. Finally, they contend that even if AMCU's assertion that employers ought to be compelled to implement measures under s 9 is correct, the DMRE minister has issued directions requiring every employer carrying out activities a demand to implement appropriate measures to protect the health and safety of workers, which measures must be contained in a standard operating procedure, developed in consultation with organised labour or worker representatives at the mine concerned. In other words, the existing regulatory regime is both sufficient and adequate.[3]

[26] Section 9 (1) of the MHSA provides that any employer may "*prepare and implement a code of practice on any matter affecting the health or safety of employees and other persons who may be directly affected by activities at the mine*." Section 9 (2) obliges employers to prepare and implement a code of good practice "*if the Chief Inspector of Mines requires it.*" If the chief inspector requires a code of good practice, that code "*must comply with guidelines issued by the Chief Inspector of Mines.*" (See 9(3)).

[27] The chief Inspector must consult with the Mine Health and Safety Council before issuing the guidelines, and must publish them in the Government Gazette. In terms of s 91(1B) (c) of the MHSA, read with s 91(1C) and s 55, a contravention of or failure to comply with any standard in any code of practice prepared in terms of s 9 (2) also renders the employer liable to an administrative fine. The only time non-compliance with a standard is not an offence is when the standard exceeds the compulsory standards set in the chief inspector's guidelines, and the employer did comply with the compulsory standard in the guideline (see s 91(1C)).

[28] In my view, the distinction that the DMRE seeks to draw between public health and occupational health issues is a false dichotomy. That there is no bright line

[3] Paragraphs 26 to 30 draw liberally on the applicant's heads of argument.

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between public health and occupational health, especially in the context of mining, is confirmed in the further report of the experts. They expressly disagree with the averments made by the Chief Inspector. In particular, they state there is "*a fundamental overlap between*" public health and occupational health. Public health concerns the entire population, and occupational health a subset of that population. Occupational health includes "*concern with the health of not only workers within their specific geographical workplaces, but also persons or populations affected directly or indirectly by operations in a particular worksite or across a particular industry.*" In terms of s 9(2), the chief inspector can act with regard to "*any matter affecting the health or safety of employees and other persons who may be directly affected by activities at the mine*". The medical experts report makes clear that "*[t]here is no clear or separating boundary between public health and occupational health in regard to Covid-19.*" In other words, the Covid-19 pandemic presents both a public health concern and an occupational health concern. It is a risk for the entire nation. But it presents particular risks, and requires particular responses in workplaces generally, and in mines in particular. It is the occupational health element of the pandemic that AMCU seeks to compel the chief inspector to address. The fact that other responses are also required to address the other public health aspects of the pandemic, does not exclude the need for an occupational health response to the position on mines.

[29] Secondly, the argument is textually unsustainable. Section 9(2) refers to "*any matter affecting the health or safety of employees*". The word "*any*" is, as Innes CJ held in *R v Hugo*, "*upon the face of it, a word of wide and unqualified generality. It may be restricted by the subject-matter or the context, but prima facie it is unlimited.*" Without some indication to the contrary, "*any matter affecting the health*" of mineworkers includes the Covid-19 pandemic. The context is provided by the further definitions. "Health" is defined as "*occupational health at mines*". Occupational health is defined as "*includes occupational hygiene and occupational medicine*". Occupational hygiene is defined as "*the anticipation, recognition, evaluation and control of conditions at the mine, that may cause illness or adverse*

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health effects to persons". And occupational medicine means: "*the prevention, diagnosis and treatment of illness, injury and adverse health effects associated with a particular type of work*". The State Respondents admit that the Covid-19 pandemic poses a particular threat in the context of mining. They admit that the pandemic requires a response from the state and employers to prevent the transmission of the disease in mines, and from mines to mining communities. They therefore admit that the response must "*anticipat[e], recognis[e], evaluat[e] and control conditions at mines that may cause illness to persons*", and must "*prevent, diagnos[e] and treat illness associated with mining*". That meets the definition of "*any matter affecting the health*" of mineworkers. Section 9(2) applies.

[30] Third, the DMRE's stance is contrary to the purpose of the MHSA generally and s 9 in particular. Applying section 9(2) and (3) to the circumstances of the Covid-19 epidemic is entirely consistent with the purpose of the MHSA generally and with the following particular objects identified in section 1 of the MHSA:

> *"(a) to protect the health and safety of persons at mines;*
> *(b) to require employers and employees to identify hazards and eliminate, control and minimize the risks relating to health and safety at mines;*
> *(c) to give effect to the public international law obligations of the Republic that concern health and safety at mines;*
> …
> *(e) to provide for effective monitoring of health and safety conditions at mines;*
> *(f) to provide for the enforcement of health and safety conditions at mines;*
> …
> *(h) to promote (i) a culture of health and safety in the mining industry; (ii) training in health and safety in the mining industry; and (iii) co-operation and consultation in health and safety between the State, employers, employees and their representatives."*

Not applying s 9(2) or (3) (or s 76) will tend to defeat these objects of the MHSA.

[31] The second argument raised by DRME minister and the chief inspector is that AMCU has failed to make out a case on the facts to show that the health of workers

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is likely to be endangered if the chief inspector does not immediately act under s9 of the MHSA. In any event, and which the DRME and chief inspector submit is dispositive of AMCU's claim, is that the Minister has issued directions under regulation 10(8) that would have precisely the effect that AMCU contends will be achieved through the chief inspector acting under s9.

[32] This submission must necessarily be evaluated by the facts as they fall to be determined from the papers, and the nature and status of the DMRE minister's directions. I deal first with the latter. The directions, which I have reproduced in paragraph [8] above, and in contrast to the terms of the draft order, contemplates only the development of the standard operating procedure (SOP) by every employer at a mine. There is no time limit for the implementation of the required SOP, and the direction does not establish a mechanism for interim protection, nor is there any provision for review by the chief inspector or any compliance mechanism. In comparison, a code of practice issued under s 9 will have the advantage of a single, national standard in the form of guidelines issued by the chief inspector, a standard that is set after consultation with representatives of employees and workers in the industry. Any code of practice is furthermore subject to review by the chief inspector, who may instruct an employer to review any code of practice within a specified period in the event that the code does not comply with a guideline or is otherwise inadequate to protect the health and safety of employees.

[33] In other words, s 9 provides a flexible method enabling the chief inspector to take measures in the interests of the health and safety of employees and other persons who may be directly affected by the activities of mining operations. It is self-evident that a code of practice under s 9 and the enforcement measures established by the MHSA provide an appropriate mechanism to address COVID-19 hazards effectively, with due deference to the position of particular mines and with appropriate degrees of flexibility. The parties did not seriously dispute that the flexibility embodied in s 9 is wholly appropriate in dealing with a disease about which there are gaps in scientific understanding, both as to its behavior and as to

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the most appropriate way to suppress its spread, and which is expected to attenuate over time.

[34] In summary: public health and occupational health are not discrete categories. Covid-19 is both a public health issue, and an occupational health issue. It requires both a public health response, and an occupational health response in the specific context of mines. That is what s 9 is designed to achieve. Textually and purposively, it must apply to the risks posed to mineworkers by Covid-19. Fundamentally, administrative directions in the present circumstances are not meant to be a replacement for legislation and regulation.

[35] Turning then to the factors relevant to deciding whether an administrative decision is reasonable, I should reiterate the requirement that each case is circumstance dependent. There is no dispute that the circumstances of the present case are exceptional. In the face of a global pandemic, the spread of the Covid-19 virus on South Africa's mines has profound implications for the country, neighboring countries and especially for mineworkers and mining-affected communities. The containment of the virus, especially in the context of a return to work after lockdown, is a matter that ought primarily to be guided by medical opinion. In the present case, the medical experts have made out a compelling case for measures that extend beyond those formulated and implemented by the DMRE. The fact that the Minerals Council, representative of employers in the mining industry, supports statutory intervention in the form of a code of practice issued under s 9 is also significant. The reasons given for the decision not to invoke s 9, as I have found, are based on premises that are unsustainable. The evidence discloses that the impact of the decision on the lives and well-being of those affected by it is profound. To the extent that the chief inspector's decision not to invoke s 9 is premised on the belief that Covid-19 is not an occupational health issue, that belief cannot be sustained. Further, the guidance note issued by the DMRE and the minister's directives issued on 29 April 2020 are not in themselves adequate to meet the defined purposes of the MHSA, which include the protection of the health and safety of patients at mines, the obligation on employers to identify hazards and to

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eliminate, control and minimise risks relating to health and safety, to provide for the effective monitoring of health and safety conditions at mines and to provide for the enforcement of health and safety measures at mines. While I appreciate that strategies for the management of the risk presented by Covid-19 is necessarily dynamic, the evidence overwhelmingly indicates that a single, national and enforceable standard, with the build-in flexibility that s 9 permits, is necessary in the current circumstances. Proper account ought to have been taken of that evidence.

[36] In my view, for the above reasons, the chief inspector's failure to appreciate the concurrence of public and occupational issues presented by Covid-19 in the mining industry, and his decision not to invoke s 9 of the MHSA in the face of the profound threat to occupational health and safety and the inadequacy of the measures designed to address it, led to an unreasonable result or outcome, and his decision thus stands to be reviewed and set aside.

[37] The parties agreed that if the chief inspector's decision is found to fall short of the reasonableness threshold established by s 6 of PAJA, the appropriate remedy is one of substitution, a remedy ordinarily reserved for exceptional circumstances (see PAJA s 8 (1) (c) (ii) (aa)). They also agreed on the terms of the substitution, those reflected in paragraphs 2 to 5 of the order. Again, the parties are to be commended for their reaching agreement on an appropriate remedy. As AMCU points out, this relief combines the best of both worlds. It provides immediate relief through an existing document already being used as a non-binding guide by many mines, and introduces amendments to the existing document based on the advice of five leading, internationally recognised, experts in the relevant fields. It allows full consultation and participation in developing a final document without sacrificing mineworkers' rights, health, safety and lives and those they live with. It is binding at a national level and based on the consensus of business and labour as to an appropriate section to apply.

[38] Finally, I should mention that the *amicus curiae* was also a party to the draft order that was submitted after the hearing. Its submission drew attention to the plight of

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mining affected communities, and the risks posed by the return of large numbers of mineworkers. The *amicus curiae* recorded that it was satisfied that its interests had been adequately addressed by the terms of the draft order.

Costs

[39] Judgment was reserved on the issue of costs. AMCU seeks an order for costs against the DMRE minister and the chief inspector, including the costs of the experts who provided the opinions annexed to the founding affidavit.

[40] In terms of s 162 of the LRA, the court has a broad discretion to make orders for costs according to the requirements of the law and fairness. That discretion must be exercised judicially, having regard to all of the relevant factors.

[41] In *Zungu v Premier of the Province of KwaZulu-Natal & others* (2018) 39 *ILJ* 523 (CC), the Constitutional Court said the following, at paragraph 22 of the judgment:

> …The correct approach in labour matters in terms of the LRA is that the losing party is not as a norm ordered to pay the successful party's costs.

In *Long v South African Breweries* 2019 (5) BCLR 609 (CC), the Constitutional Court affirmed this approach:

> [27] It is well accepted that in labour matters, the general principle that costs follow the result does not apply…This principle is based on section 162 of the LRA, which reads:
>
> "(1) The Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness.
>
> (2) When deciding whether or not to order the payment of costs, the Labour Court may take into account—
>
> (a) whether the matter referred to the Court ought to have been referred to arbitration in terms of this Act and, if so, the extra costs incurred in referring the matter to the Court; and
>
> (b) the conduct of the parties—
>
> (i) in proceeding with or defending the matter before the Court; and
>
> (ii) during the proceedings before the Court."
>
> [28] The relationship between the general principle of costs and section 162 was considered and settled by this Court in *Zungu*:
>
> > "In this matter, there is nothing on the record indicating why the Labour Court and Labour Appeal Court awarded costs against the applicant.

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> Neither court gave reasons for doing so. It seems that both courts simply followed the rule that costs follow the result. This is not correct…"

[42] The judgment in *Zungu* makes reference to *Member of the Executive Council for Finance, KwaZulu-Natal & another v Dorkin NO & another* (2008) 29 *ILJ* 1707 (LAC) in which Zondo JP (as he then was) said the following:

> The rule of practice that costs follow the result does not govern the making of orders for costs in this court. The relevant statutory provision is to the effect that orders of costs in this court are to be made in accordance with the requirements of the law and fairness. And the norm ought to be that costs orders are not made unless the requirements are met. In making decisions on costs orders this court should seek to strike a fair balance between on the one hand, not unduly discouraging workers, employers, unions and employers organisations from approaching the Labour Court and this court to have their disputes dealt with, and, on the other, allowing those parties to bring to the Labour Court and this court frivolous cases that should not be brought to court.

[43] In short, the discretion to be exercised in relation to orders for costs extends beyond the rule that costs follow the result (a rule that does not apply); the norm is that no order for costs should be made unless an order for costs can be justified by reference to the requirements of the law and fairness. This is so regardless of the particular statute under which the court exercises jurisdiction. Although s 162 is located in the LRA, the section concerned regulates the powers and jurisdiction of this court as an institution, irrespective of the particular legislation in terms of which any particular claim is brought. In so far as a parties success in any proceedings remains a relevant factor, AMCU has achieved partial success in the present application, on the basis of what amounted in broad terms to a negotiated outcome.

[44] AMCU relied in particular on the 'Biowatch' principle, established by the Constitutional Court in *Biowatch Trust v Registrar Genetic Resources and others* 2009 (6) SA 232 (CC). In terms of that principle, the general rule for an award of costs in constitutional litigation between a private party and the state is that if the private party is successful, the state should pay its costs, and if unsuccessful, each party should pay its own costs.

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[45] While it is correct that the present case raised a constitutional issue (in the form of the right to just administrative action), the matters on which the judgment ultimately turned did not directly invoke the courts constitutional jurisdiction, which in terms of s 157 (2) is a concurrent jurisdiction enjoyed with the High Court in respect of any alleged or threatened violation of the fundamental right arising from employment or labour relations and any executive or administrative act or conduct by the state in its capacity as an employer. Although AMCU sought to invoke this court's constitutional jurisdiction in respect of the constitutional validity of the regulations issued under the DMA and the DMRE minister's directions, the matter ultimately proceeded and was decided on the basis of the court's jurisdiction in terms of s 82 of the MWA, which confers exclusive jurisdiction of this court to determine any dispute about the interpretation or application of any provision of the Act, except where the Act provides otherwise. That is not to say that the *Biowatch* principle is not relevant – rather, it is subsumed under the general requirements relating to the law and fairness as reflected in s162 of the LRA.

[46] To the extent that the relevant authorities suggest that an order for costs is warranted primarily to cases where a party has acted frivolously or vexatiously in initiating or opposing proceedings in this court, the DRME has done neither. The case raises important issues of principle in circumstances where the policy environment continues to shift rapidly as more medical evidence becomes available. Indeed, in the present instance, it is not disputed that as at mid-March 2020, representatives of all of the social partners in the mining industry supported regulation in the form of the guiding principles issued on 26 March 2020, after the DMRE had consulted with them. While it is correct that AMCU was (and remains) a proponent of measures with a higher degree of enforceability, the guidelines represented a position broadly common to employer and worker representatives. To the extent that AMCU suggests that at the heart of its application is a contention that the DMRE has abdicated its responsibility to ensure the safety of mineworkers in the face of the Covid-19 pandemic and that the DMRE minister and departmental officials have acted only in the interests of mining companies, this is not an assertion that is borne out by the facts.

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[47] To the extent that AMCU's complaint is that it has been excluded from participating in these processes and that its efforts have been 'rebuffed or ignored' this is not entirely correct. There is no dispute on the papers that the DMRE has been willing to engage with AMCU on the same basis as any other union represented in the industry. Regrettably, AMCU's position appears to be one in which it has declined to attend meetings convened by the minister. For example, in response to an invitation to attend a meeting at the DMRE on 7 April 2020, AMCU's response was, as I have recorded above, that '*we have no reason to believe that this will be a genuine consultative engagement. Rather, we believe, it will be another "rubber stamp" and "tick box" exercise by the DMRE to flout the rights of workers for the sake of the profits of the mining bosses'*. This conclusion must necessarily be read in its context, one of increasing frustration at a lack of response to AMCU's demands, but it indicates an attitude that served to undermine the consensus-seeking process that the DMRE has implemented, and the efforts to reach consensus within a tripartite structure. A further meeting was set up on 22 April 2020, specifically to discuss AMCU's concerns. That meeting was attended by all the other representatives of organised labour, including the NUM, UASA, Solidarity and NUMSA as well as representatives of the Minerals Council, the Minister and senior officials of the Department as well as the Department of COGTA. AMCU declined to participate in this meeting, legitimately, on account of an insistence on a face to face meeting. But AMCU (which appears to be the only party not willing to attend a physical meeting) did ensure that adequate arrangements were made for its participation by video-conference or some other suitable alternative. Indeed, as early as 12 April 2020, four days after the DMRE had responded to AMCU's letter dated 5 April 2020, lawyer's letters became the preferred means of communication. By that stage, AMCU appears to have elected to refuse to participate in collective, consensus seeking efforts to address the threat that Covid- 19 poses to the mining industry and instead to pursue the option of litigation which by its nature, is an adversarial process.

[48] None of these developments suggest that the DRME acted in an exemplary fashion in the course of its engagement with AMCU. The failure to respond to

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correspondence addressed to the DMRE by AMCU and its attorneys is inexplicable. In that correspondence, AMCU raised serious issues of concern, and was entitled to the courtesy of a considered response. In short, there were shortcomings on both sides.

[49] The factor that is perhaps more significant than any other in the present instance is that expressed as long ago as 1992, in *NUM v East Rand Gold and Uranium Co Ltd* (1991) 12 ILJ 1221 (A), where what was then the Appellate Division of the Supreme Court considered the prejudice that an order for costs might have on a relationship between collective bargaining partners. The court held that an order that each party pay its own costs was appropriate. The court (per Goldstone JA) said the following:

> Frequently the parties before the industrial court will have an on-going relationship that will survive after the dispute has been resolved by the court. A costs order, especially where the dispute has been a bona fide one, may damage that relationship and thereby detrimentally affect industrial peace and the conciliation process (at 1243).

[50] Although the present case is not concerned with collective bargaining, it is intimately concerned with the tripartite relationship that exists as between the state, employers and organised labour in the mining industry. The concerns expressed about the effect that an adverse order for costs might have on an on-going relationship between collective bargaining partners is equally valid to relationships between the social partners. This is particularly so where the order granted in these proceedings, but for the two issues addressed in this judgment, is by and large the product of consensus. The terms of that order anticipate future and on-going engagement by the DMRE with the social partners and the representatives of mining affected communities. The degree of co-operation (rather than confrontation) that will be necessary to give effect to the order and to the limit may well be undermined should relationships between the parties be soured by an order for costs.

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Order

I make the following order:

1. Each party is to pay its own costs.

André van Niekerk
Judge

APPEARANCES

For the applicant: Adv. A Dodson SC, with him Adv. C Bishop, instructed by Richard Spoor

For the first, second and third respondents: Adv. MA Wesley, with him Adv. N Mabvungua and Adv. J Chanza, instructed by the state attorney.

For the fourth respondent: Adv. CDA Loxton SC, with him Adv. JL Gildenhuys SC and Adv. PJ Daniell, instructed by ENS Africa Inc.

For the *amicus curiae*: Adv. L Siyo, with him Adv L Phasha, instructed by Centre for Applied Legal Studies

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