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our ref
your ref
08 November 2016 date

Dear Client

RE: FINAL SUSPENSION ORDER GRANTED BY THE LABOUR COURT IN THE MATTER OF ANGLOGOLD ASHANTI LIMITED v XOLILE MBONAMBI AND 6 OTHERS: CASE NO. J2459/16 (LABOUR COURT, JOHANNESBURG)

1. On 4 November 2016 we obtained a final order for AngloGold Ashanti Limited, in terms of which instructions issued by Inspectors of Mines in terms of section 54 of the Mine Health and Safety Act 29 of 1996, were suspended pending an appeal to the Labour Court. We annex a copy of the judgment.

2. Important legal principles and requirements, stipulated by the Court are as follows:

   2.1. an Inspector may only close an entire mine if he had objective reason to believe that occurrences and conditions that he identified endangered or may endanger the health and safety of any person at the mine and not only of a portion of the mine;

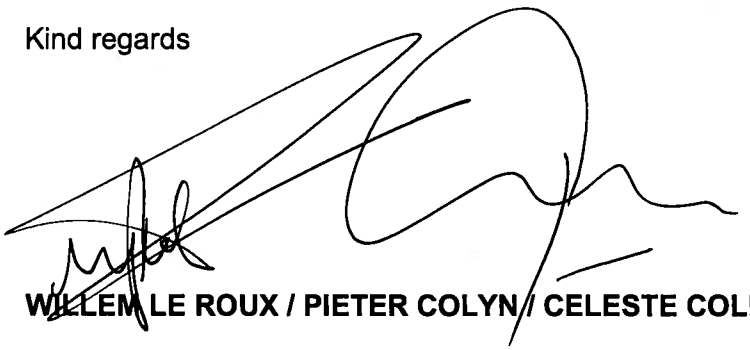
   2.2. in this particular case the Inspector of Mines merely inspected a tiny portion of the mine, but issued instructions which had the effect that all mining operations came to a standstill on the entire mine. The Judge concluded that no circumstances existed on the particular level which was inspected, which could lead the Inspector to infer that not only that level, but in fact the entire mine was unsafe.

2.3. an instruction issued in terms of section 54 or 55 constitutes administrative action for purposes of the Promotion of Administrative Justice Act 2000. Such an instruction must be proportional to the harm or potential harm that it intends to prevent. The Judge quoted in this regard an author on administrative law who said in this regard that "*.... one ought not to use a sledgehammer to crack a nut*".

2.4. The Judge remarked as follows about the approach followed by the Mine Health and Safety Inspectorate ("*MHSI*"):

> "*Further, as this case illustrates, the Respondents (the MHSI) are clearly under the impression that they are empowered to close entire mines on account of safety infractions in a single section or on a single level, without specific reference to objective facts and circumstances that rendered the whole mining operation unsafe. The MHSA has as its commendable purpose the promotion of a culture of health and safety and the protection of the health and safety of those employees employed in mining operations. That does not entitle those responsible for enforcing the Act to act outside the bounds of rationality.*"

Kind regards



WILLEM LE ROUX / PIETER COLYN / CELESTE COLES / WARREN HENDRICKS

MINE AND OCCUPATIONAL HEALTH AND SAFETY DEPARTMENT

ENSafrica

(EDWARD NATHAN SONNENBERGS INC.)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

04/11/2016 ..... DATE

..... SIGNATURE

THE JUDICIARY · REPUBLIC OF SOUTH AFRICA ·

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Of interest to other Judges

CASE NO: J 2459/16

In the matter between:

ANGLOGOLD ASHANTI LIMITED	Applicant
and	
XOLILE MBONAMBI	First Respondent
THABO NGWENYA	Second Respondent
PETRUS NTHONGOA	Third Respondent
NATIONAL UNION OF MINEWORKERS OF SOUTH AFRICA	Fourth Respondent
SOLIDARITY	Fifth Respondent
ASSOCIATION OF MINEWORKERS AND CONSTRUCTION UNION	Sixth Respondent

UNITED ASSOCIATION OF SOUTH AFRICA Seventh Respondent

Date of hearing: 28 October 2016
Date of judgment: 4 November 2016

JUDGMENT

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[1] On 24 October 2016, I granted the following order:

1 The forms and service provided for in the Rules for the Conduct of Proceedings in the Labour Court are dispensed with and this matter is permitted to be heard as one of urgency in accordance with the provisions of rule 8;

2 A rule *nisi* is hereby issued calling upon the first, second and third respondents to show cause **on 28 October 2016 at 14:00**, why a final order should not be made in the following terms:

2.1 subject to paragraph 2.2 below, suspending the instructions issued by the second and third respondents in terms of section 54(1) of the MHSA, and the third respondent's confirmation thereof in terms of section 57(3)(a) of the MHSA, in respect of the whole of Kopanang Mine, pending an appeal to this court in terms of section 58(1) of the MHSA;

2.2 the suspension of the instructions and confirmation thereof set out in paragraph 2.1 above shall not apply to:

2.2.1 level 44 of section 12 of Kopanang Mine (which will remain closed pending compliance with the relevant remedial measures); and

2.2.2 instructions B4 and B5 issued by the third respondent in terms of section 54(1) of the MHSA and confirmed by the first respondent in terms of section 57(3)(a) of the MHSA (as the applicant accepts these two instructions);

2.3 subject to paragraph 2.2 above, interdicting and restraining the first, second and third respondents, and any person acting under their authority, from enforcing and / or giving effect to the instructions issued by the second and third respondents in terms of section 54(1) of the MHSA, and confirmed by the third respondent in terms of section 57(3)(a) of the MHSA, pending an appeal to this court in terms of section 58(1) of the MHSA;

2.4 granting costs against the first respondent in his representative capacity on behalf of the Department of Mineral Resources and Mine Health and Safety Inspectorate, and against any of the first to seventh respondents who oppose this application.

Paragraphs 2.1, 2.2 and 2.3 above shall operate with immediate effect as an interim order pending the return date.

[2] I need first to say something about the status of the order, for reasons that will become apparent. On 24 October 2016, the day on which the matter was enrolled for hearing, counsel for both the applicant and the first to third respondents were present at court. The first respondent is the acting chief inspector of mines of the mine health and safety inspectorate of the department of mineral resources. The second respondent is the principal inspector of mines for the North West region of the mine health and safety inspectorate; the third respondent is a senior inspector of mines for the same region. (Where appropriate, I shall refer to the first, second and third respondents collectively as 'the respondents'.) The remaining respondents are trade unions who have members employed by the applicant. None of them oppose these proceedings.

[3] Counsel for the applicant and the first to third respondents approached me in Chambers and requested that the matter stand down. Later the same morning,

both counsel approached me in Chambers and the interim order, in draft form, was presented to me to be made an order of court. This much is reflected in the preamble to the order. Counsel for the first to third respondents did not oppose the granting of the order, nor did he dispute any term of it. In the presence of both counsel, the draft order was made an order of court.

[4] The first, second and third respondents filed an answering affidavit on 27 October 2016; the applicant filed a replying affidavit on 28 October 2015. The issue before the court, in essence, is whether the rule *nisi* ought to be confirmed, having regard to the content of the answering affidavit. Put another way, the court must determine whether the respondents' answering affidavit serves to defeat the interim order.

[5] The material facts can be summarised as follows. On 17 October 2016, the third respondent conducted an inspection at level 44 of section 12 of the applicant's Kopanang mine, situated in the district of Orkney in the North West province. The respondents do not dispute (other than by way of a sweeping bare denial) that this area constitutes a minute part of the overall mining operations at the mine. On 17 October 2016, the third respondent issued a series of six instructions in terms of s 54(1) of the Mine Health and Safety Act (MHSA). For present purposes, the first two instructions are particularly relevant. These form the main basis of the applicant's appeal to the first respondent, and I do not intend for present purposes to deal with the remaining instructions under appeal. These prohibit the use of explosives at the mine, and prohibit all underground tramming operations. The instructions had the effect of prohibiting the use of explosives and underground tramming throughout the entire mine, with the effect that the mine was closed with effect from 17 October 2016 at a loss to the applicant of some R9.5 million per day.

[6] On 18 October 2016, the applicant made representations to the second respondent in an attempt to set aside certain of the instructions. These representations were to the effect that the second respondent would request the first respondent to set aside certain of the orders and instructions and to amend others. These representations were supported by the trade unions that are cited as the 4th to 7th respondents in the present application. On the same day, the

second respondent refused the request and issued three additional instructions. These include an explosives audit (which included the retraining and reassessment of miners on the proper handling, control and management of explosives), an audit on all underground rails including rail switches (in addition to the retraining and reassessment of local operators and guards on the procedure for pre-use inspections), and the introduction of measures to ensure that the mines safety declaration procedure is complied with.

[7] On 19 October 2016, the applicant appealed to the first respondent against the instructions issued by the second and third respondents. On 20 October 2016, the applicant was advised that the first respondent required time to consider the appeal. On 21 October 2016, the applicant filed the present application. Later on the same day, after the launch of the present application, the first respondent dismissed the applicant's appeal and confirmed the instructions issued by the second and third respondents respectively. The applicant is undertaken, notwithstanding the period of 60 days within which it is entitled in terms of s 58(2), to file an appeal in this court, to do so prior to the expiry of that period.

[8] Section 82 of the MHSA confers exclusive jurisdiction on this court to determine any dispute about the application and interpretation of the Act. Section 5 of the MHSA provides as follows:

> Appeal does not suspend decision
>
> (1) An appeal against a decision and either section 57, 57A or 58 does not suspend the decision.
>
> (2) Despite subsection (1) –
>
> (a) an appeal in terms of section 57A or 58 against a decision to impose a fine suspends the obligation to pay the fine, pending the outcome of the appeal; and
>
> (b) the Labour Court may suspend the operation of the decision, pending the determination of the matter, if there are reasonable grounds for doing so.

[9] The respondents have raised a number of points in *limine*. First, the respondents raise the issue of urgency. They aver, in general terms, that there is no sufficient

explanation as to why urgent relief is necessary. Specifically, the respondents complain that the applicant has failed to comply with paragraph 12.3 of the practice manual applicable in this court which provides, amongst other things, for urgent applications to be set down on Tuesdays or Thursdays. The respondents also link the issue of urgency to that of compliance, a matter which is dealt with below. Finally, the respondents contend that the applicant has failed to disclose material facts which ought to have been disclosed at the hearing 'which was brought *ex parte*' and that the applicant is in breach of the requirement of good faith applicable to any applicant bringing an *ex parte* application.

[10] To the extent that the respondents aver that this court should not entertain the application simply because it was enrolled for hearing on a Monday rather than Tuesday or Thursday, it warrants noting that the practice manual promotes flexibility and may be departed from in appropriate circumstances (see paragraphs 1 and 2 of the manual). In my view, it was appropriate, given the nature of the relief sought and the extent of the harm suffered, for the applicant to have enrolled the application when it did. Paragraph 1 of the order granted on 24 October 2016 expressly dispenses with the forms and service provided for in the Rules and permit the application to be heard as one of urgency in terms of Rule 8. In any event, in circumstances where the respondents have delivered an answering affidavit and were the matter was argued on an agreed date and time, urgency cannot be an issue. There is thus no merit in the respondents' contentions regarding urgency.

[11] To the extent that the respondents submit, as they do in the answering affidavit, that the application was moved on an *ex parte* basis, this is not correct (In some instances, the respondents say in as many words that the application was brought *ex parte*; in other instances they aver the that the application was brought in circumstances that are tantamount to an *ex parte* application. During argument, counsel persisted with submission that the application had been brought *ex parte*).

[12] An *ex parte* application is an application in which as a fact, notice is not given to a party against whom relief is claimed in that party's absence either because the

applicant is the only person interested in the relief sought, or where other persons may be affected, immediate relief is essential because the danger of delay or because notice may precipitate the harm that the applicant seeks to forestall (see *Simross Vinters (Pty) Ltd v Vermeulen. VRG Africa (Pty) Ltd v Walters t/a Trend Litho. Consolidated Credit Corporation (Pty) Ltd v Van der Westhuizen* 1978 (1) SA 779 (T) at 782-3). In the present instance, notice was given to the respondents on 21 October 2016 of the hearing at 10h00 on 24 October 2016. After receipt of the application, the respondents instructed the state attorney, who instructed counsel. Counsel's appearance on the morning of the 24th is reflected in the preamble to the interim order. The fact that the respondents had not filed an answering affidavit at that juncture or may have been afforded a limited opportunity to do so, does not mean, as the respondents appear to suggest, that the application was brought *ex parte*. Again, even if it was, the respondents were afforded a full opportunity to file an answering affidavit and to be heard on the return date.

[13] The next point in *limine* concerns an alleged failure by the applicant to disclose material facts in its founding affidavit. As I understand the submission, the respondents contend that when the court granted the interim order, the applicant had failed to disclose material facts '*surrounding the fact that by the time the applicant launch this application, it had already complied with the instructions of the second and third respondents are substantially proved above. This leaves a lot to be desired and should be frowned at by this court*'. This point is inextricably linked to the compliance defence dealt with below.

[14] The next point in *limine* relates to the filing of a supplementary affidavit which the respondents contend was filed without the leave of the court and should thus be struck out. The respondents rely on two judgments in support of this contention. The first is the judgment of by Lagrange J in *Dicks v South East Node (Pty) Ltd* [2011] ZALCJHB 4 (2 February 2011) in which he observed that Rule 7 makes no provision for the filing of a supplementary affidavit in motion proceedings, and that the applicant ought to have made a formal application for the admission of the

affidavit. That judgment must necessarily be viewed in context. The matter concerned an application to obtain a certificate of service and the payment of overtime pay where in a supplementary affidavit, the applicant sought to amend its cause of action from the enforcement of statutory rights to one based in contract. No explanation had been proffered for what amounted to an amendment of the pleadings and the introduction of a new cause of action. In the second decision to which the respondents refer, *Impala Platinum Ltd v Mothiba NO* (JR 2567/13, 10 June 2016) the court similarly observed that the rules make no provision for the filing of a supplementary answering affidavit. The supplementary affidavit in this instance had been served and filed after the replying affidavit, and after the applicant had filed its heads of argument. Both judgments are clearly distinguishable. In the present instance, the supplementary affidavit was deposed to on 24 October 2016 and canvassed the decision of the first respondent on the appeal. That decision was received by the applicant at 17h36 on Friday, 21 October 2017, after service of the present application. The supplementary affidavit, read with the founding affidavit, makes the case for reasonable grounds for suspending the decisions of the first second and third respondents pending an appeal to this court on the basis of their the applicant has reasonable prospects of success on appeal, but also that the applicant will suffer irreparable harm if the relief is not granted. In this sense, the supplementary affidavit does no more than take into account events that occurred after the filing of the notice of motion and founding affidavit. In my view, given the content of the affidavit (it is no more than an update on the significant developments that occurred subsequent to the filing of the founding affidavit) and given particularly that the supplementary affidavit was filed prior to the filing of an answering affidavit, in my view, the applicant was entitled to file the supplementary affidavit without the leave of the court. If I am wrong in coming to this conclusion, for the reasons recorded above, the applicant is granted leave to file the supplementary affidavit. The respondents' point in *limine* accordingly fails.

[15] In so far as the merits are concerned, the applicant contends that the instructions issued by the second and third respondents were erroneously issued and that the

appeal to the first respondent was incorrectly dismissed, with the result that there are reasonable grounds to suspend their operation in terms of s 59(2) (b) of the MHSA, pending the outcome of the appeal to this court in terms of s 58(1).

[16] It is not seriously disputed that mine level 44 is relatively speaking, minute in comparison with the mining operations taking place across the whole mine. A total of 91 employees work on the 44 level, out of a total of 4218 employees who work on the whole mine. The number of employees engaged on 44 level therefore represents some 2% of the workforce of the whole mind. On 44 level, there are only 28 rail switches; on the whole mine there are 206. Only two shift bosses employed on the level, with three minus. They are supported by for stoping and three trimming team leaders. It is potently clear therefore that 44 level comprises a very small portion of the total mining operation and conditions there are not axiomatically represented of conditions elsewhere on the mine. No specific circumstances existed on 44 level which rendered the whole mining level and safe or upon which the third respondent could rely to interfere that not only was 44 level and safe, but also the whole mine.

[17] In its representations, in relation to the prohibition on the use of explosives across the mine, the applicant requested that the instructions be set aside because the non-compliance by the individual miner concerned was an isolated case. The applicant does not dispute that at the end of the shift, 43 explosive cartridges not used for charging up could not be placed in the explosive box. The individual miner concerned failed to make arrangements for the safe storage of the cartridges and failed to report the problem to shift bosses. The applicant undertook to audit the mine for similar conditions or deviations, to provide refresher training for all miners on their use of explosives and explosive controls, and to withdraw the affected miners from the workplace until they had been retrained.

[18] In relation to the prohibition of all underground training operations across the mine, what this instruction effectively meant was that no movement of vehicles may take place underground. Effectively, this bus stopped all mining operations. In its

representations, the applicant submitted that the order would have a negative east impact on employees who would be required to walk to their working places.

[19] With regard to the observation by the third respondent that 'at least more than four rail switches were observed without rail switching devices' it is not seriously disputed that the absence of such a device does not constitute a danger. Such devices are used to facilitate the switching a locomotive from one track to another. The applicant undertook to issue all training cruise with additional switching tools for areas where they were not in place and undertook to ensure that switching areas were equipped with switching tools prior to training operations taking place. The applicant further undertook to perform all critical safety checks, including break tests on locomotives, as part of an automated locomotive start-up and to undertake a number of preventative measures in the interests of health and safety. In short, the applicant submitted that the third respondent had no reason to believe that the transportation of persons by means of locomotives on the whole mine was unsafe.

[20] The primary averments made in the answering affidavit is that the applicant failed to disclose all material facts and that by the time it launched the present application, it had already complied with the instructions of the second and third respondents. There is no merit in the submission. First, the rule on which the respondents rely (they refer specifically to *Schlesinger v Scheslinger* 179(4) SA 345 (WLD)) applies to *ex parte* applications. Secondly, for the reasons recorded above, the present application was not brought on an *ex parte* basis and the respondents' submissions in regard to the facts deposed to in the founding affidavit are entirely misguided. Secondly, the respondents' averments are simply incorrect. The most cursory perusal of the papers discloses that far from contending that it had complied with all of the instructions issued by the second and third respondents, the applicant records that it abruptly 16:00 hours on 21 October 2016, the applicant compiled a report in regard to compliance up to that time with the instructions issued by the second and third respondents. That report is next to the answering affidavit as XM1, and is the sole source of the respondents' averments regarding compliance with the instructions. The deponent to the

replying affidavit, the mine manager, makes clear that the report was an endeavour to persuade the first respondent to set aside the instructions issued by the second and third respondents and to minimise its losses. The report advises that audits and refresher training had been done but clearly states that the identified deviations were identified for correction and 'will be attended to as part of the safe start up process once operations are allowed to continue'. Further, the applicant required the use of its locomotives to transport employees' material where deviations had to be attended to. These repairs could not be done by employees walking in manually caring the equipment and material required. For this reason, the deviations concerned had not been attended to by the time the application was made and when the interim order was granted. It was only after the granting of the interim order on 24 October 2016 that the applicant was allowed to continue with its operations in respect of the entire mine, excluding level 44. The respondents do not dispute that neither the first respondent nor any inspector had inspected the mine on Friday 21 October Monday, 24 October 2016. In other words, the respondents do not rely on their own knowledge to make submissions they do – they rely solely on a letter of which the mine manager was the author and which makes clear, on any reading, that while some progress had been made in regard to meeting the orders and instructions issued by the second and third respondents, there were orders and instructions that required further attention.

[22] Having sought to establish a general basis of opposition to the application on the basis of a letter of which they were not the authors, the respondents curiously simply deny paragraphs 11 to 26 of the founding affidavit, averments that span some 16 pages. The respondents' representative disputed that this constituted a bare denial, pointed to the preface, under the heading at paragraphs 11 to 26, 'Save as aforesaid the content of these paragraphs are denied. I repeat what I say above concerning the issues raised by the applicant in these paragraphs. The difficulty that the respondents have however is that the paragraphs concerned set out in great detail, the context of mining operations on 44 level, and analysis of the instructions and orders issued, both by the third and second respondents, internal remedies initiated prior to the filing of the application, urgency, the *prima facie* right

on which the applicant relies, the balance of convenience, a reasonable apprehension of irreparable harm, the absence of a suitable alternative remedy.

[23] It is not open to the respondents in the circumstances simply to rely, in support of their denial of the merits of the application, on what amounts to no more than a generally stated historical background to the issue. It is incumbent on a respondent in proceedings such as this to identify the specific averments that are dispute, and to proffer its version. Even less is it open to the respondents to plead no more than a bare denial, and then to contend, as they do, that the application of the *Plascon Evans* rule requires that factual disputes be resolved in their favour. The application of that rule presupposes that a respondent puts up a full and credible case in response to the founding affidavit. A bare denial can never give rise to a legitimate dispute of fact.

[24] Even if I were to have regard to that part of the answering affidavit that extends beyond the level of a bare denial, to the extent that the respondents aver that the applicant has been a '*culprit for flouting mine health and safety standards within the mining sector*' and that it had been found previously to have '*flouted the regulation dealing with explosives*', these generalized assertions have no relevance to the present enquiry. That enquiry is whether the third respondent had reason to believe that the alleged occurrences and conditions that he identified endangered or may endanger the health or safety of any person at the entire mine and not only on level 44. I fail to appreciate how averments of such a general nature, many of which refer to prior incidents and at least one of which does not relate to any of the applicant's mines, serve to demonstrate any compliance by the respondents with the provisions of s54(1) of the MHSA. That provision, it will be recalled, requires the inspector concerned objectively to establish a state of affairs which would lead a reasonable person to believe that it may endanger the health or safety of any person at the man, and contemplates an instruction that is limited by the extent to which it is necessary to protect the health and safety of persons at the mine. The imprecision with which the respondents have pleaded their case (especially in relation to the proportionality point raised by the applicant), with all

its bald assertions and bare denials, leaves me with little choice but to determine this matter on the basis of the facts deposed to by the applicant.

[25] Perhaps the starting point in the determination of any reasonable grounds for the suspension of the instructions concerned is the standard of safety prescribed by the MHSA. Section 2 of the Act makes clear that the standard is one of reasonable practicality. This is a standard that is consistent with an employer's common law obligation to provide a reasonably safe working place. By definition, this is not an absolute standard, its nature and scope require an objective assessment of the work concerned and the hazards associated with it.

[26] Section 54 of the MHSA regulates an inspector's powers to deal with dangerous conditions. Subsection (1) is as follows:

> (1) If an inspector has reason to believe that in the occurrence, practice or condition and a mining dangers or may endanger the health and safety of any person at the mind, inspect a giving instruction necessary to protect the health or safety of persons at the mine, including but not limited to an instruction that-
>
> (a) operations at the mine or a part of the mine be halted;
>
> (b) the performance of any act or practice at the mine or a part of the man be suspended or halted, and may place conditions on the performance of that act or practice;
>
> (c) the employer must take the steps it out in instruction, within the specified period, to rectify the occurrence, practice or condition; or
>
> (d) all affected persons, other than those who are required to assist in taking steps referred to in paragraph ©, be moved to safety.

[27] Although s 58 establishes a right of appeal against a decision made by a chief inspector (a remedy that the applicant has elected to invoke), any decision made in terms of s 54 and/or 55 clearly constitutes administrative action for the purposes of the Promotion of Administrative Justice Act (PAJA). An order or instruction is therefore subject to review under s 6 of PAJA. I mention this because the

applicant's primary submission in the present application is that the respondents failed correctly to identify dangerous conditions at the mine and respond to them proportionally.

[29] Proportionality, of course, is an element of the right to reasonable administrative action established by s 33(1) of the Constitution. Prof Hoexter, in *Administrative Law in South Africa* (2 ed, Juta & Co, 2012) describes the essential elements of proportionality as balance, necessity and suitability, the latter referring to the use of lawful and appropriate means to establish the administrator's objective. In other words, it is the notion that one ought not to use a sledge hammer to crack a nut (at p 344).

[30] For present purposes, given the nature of the present application, it is not necessary for me to say any more about precisely how the principle of proportionality ought to be applied in the present instance. I would refer though to the judgment in *Bert's Bricks (Pty) Ltd and another v Inspector of Mines, North West Region and others* [2012] ZAPPHC (9 February 2012) where this principle was applied in the context of a challenge to an instruction purportedly issued under s 54(1) of the MHSA. The court held that s 54 (1) (a) and (b) of the MHSA meant that:

> (1) objectively a state of affairs must exist which would lead a reasonable man to believe that it may endanger the health or safety of any person at the mine;
> (2) the inspector may only give an instruction which is necessary to protect the health or safety of that person.

(See paragraph [10] of the judgment.)

[31] The court concluded that there were no objective facts which would lead a reasonable person to believe that damage caused to a single trackless mobile vehicle necessitated the suspension of the operation of all trackless mobile machinery. At paragraph [11] of the judgment, the court concluded as follows

> The first and second respondents obviously did not make use of their powers in terms of section 50 of the MHSA. Apart from not asking for any documents to

> establish that it was not the first applicant who conducted the brick making operations and accordingly that a notice in terms of section 54 (1) should not be directed at the first applicant, they did not inspect more than one trackless mobile vehicle and they did not establish that the damage to the tread of the tyre of that vehicle would endanger the health or safety of any person at the mine. There were therefore no objective facts which would lead a reasonable person to believe that the damage to the trade would endanger the health or safety of any person at the mine. There were also no objective facts to justify the first and/or second respondents suspending the operation of the forklift let alone all the trackless mobile vehicles on portion 100. If only the one forklift was involved it was not necessary to suspend the operation of all the other trackless mobile vehicles. The order/direction was clearly out of all proportion to what the two respondents found.

[32] The present case is on all fours with this decision. In relation to the rail switching devices, an objective state of affairs did not exist which would lead a reasonable person to believe that it may endanger the health or safety of any person at the mine. Secondly, in respect of both the explosives and training instructions, an instruction that applied to the whole mine was not necessary to protect the health and safety of persons at the mine. It was not disputed, as I have indicated above, that the mining operations on 44 level comprised a very small portion of the total mining operations on the whole mine and that conditions at that level were therefore not representative of conditions elsewhere on the mine. No circumstances existed on 44 level which rendered the whole mining operation unsafe, or on which the third respondent could rely to infer that not only 44 level was unsafe, but also the whole mine.

[33] In short, the instructions insofar as they relate to a prohibition across the entire mine in respect of explosives and training were out of all proportion to the issues identified by the third respondent. At worst, they ought to have been confined to level 44.

[34] I am satisfied that there are reasonable grounds for this court to suspend the operation of the instructions issued by the second and third respondents pending

an appeal against the decision of the first respondent. The rule *nisi* thus stands to be confirmed.

[35] At paragraph 12 of the judgment in *Bert's Bricks*, the court went on to say the following:

> It seems that not one of the officials properly applied his mind to the operation of the MHSA and that there was a gross abuse of the provisions of the Act. This is most disturbing. This litigation has resulted in a waste of the state's funds (taxpayers' money) and a waste of the court's time. It is striking that throughout these proceedings the Department officials failed to give proper considerations to the applicant's complaints and that they have not deemed it necessary to dispute the applicant's factual allegations. In such a case the court should order that the responsible officials must bear the costs of the litigation. Over the applicants have not sought such an order and it requires no further consideration.

[36] The present case is one that involves the same regional office and indeed, some of the same individuals, at least the second respondent. The office and the officials engaged in it appear not to have heeded the caution issued by the High Court in *Bert's Bricks*. It is also astonishing, given the content of their answering affidavit and the submissions made on their behalf that the respondents clearly fail to appreciate the conceptual framework within which they are required to discharge their duties. For example, it was submitted that proportionality was irrelevant and that an inspector need not consider that principle when issuing instructions because it did not feature as a criterion in s 54 of the MHSA. Further, as this case illustrates, the respondents are clearly under the impression that they are empowered to close entire mines on account of safety infractions in a single section or on a single level, without specific reference to objective facts and circumstances that render the whole mining operation unsafe. The MHSA has as its commendable purpose the promotion of a culture of health and safety and the protection of the health and safety of those employees employed in mining operations. But that does not entitle those responsible for enforcing the Act to act outside of the bounds of rationality.

[37] Had the applicant sought an order for costs on the basis that the respondents bear the costs of these proceedings in their personal capacities, I would have given serious consideration to such an order. This court has a broad discretion in terms of s 162 of the LRA to make orders for costs according to the requirements of the law and fairness. In my view, and in the absence of any submission that costs ought to be awarded on a punitive scale, those interests are best served by an order that costs follow the result.

[38] Finally, Adv. Myburgh SC, who appeared for the applicant, drew my attention to two typographical errors in the interim order. In line three of paragraph 2.1 and line five of paragraph 2.3, 'third respondent' should read 'first respondent'. In terms of s 165 of the LRA, the order is varied accordingly.

I make the following order:

1. The rule *nisi* issued on 24 October 2016, as varied, is confirmed, with costs.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicant: Adv AT Myburgh SC, instructed by ENS Africa

For the first to third respondents: Adv. Dlamini, instructed by the state attorney.