

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

7/8/15

CASE NO: 74793/2013

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED.
 SIGNATURE	
7/08/2015 DATE	

In the matter between:

INDUSTRIAL HEALTH RESOURCE GROUP

EDWIN STOFFELS

ISABELLA PETERS

TITUS PIETERSEN

WILMA JOHNSON

STANLEY ADONIS

KATERINA DIEDERICKS

LYDIA BLANCKENBERG

BRADLEY ALBERTYN

ELIZABETH JACOBS

CONGRESS OF SOUTH AFRICAN TRADE UNIONS

1st Applicant

2nd Applicant

3rd Applicant

4th Applicant

5th Applicant

6th Applicant

7th Applicant

8th Applicant

9th Applicant

10th Applicant

11th Applicant

CHEMICAL ENERGY PAPER PRINTING WOOD &**ALLIED WORKERS UNION**12th Applicant**NATIONAL UNION OF METAL WORKERS OF
SOUTH AFRICA**13th Applicant

Versus

THE MINISTER OF LABOUR1st Respondent**CHIEF INSPECTOR, OCCUPATIONAL HEALTH SAFETY
DEPARTMENT OF LABOUR**2nd Respondent**MR TIBOR SZANA**3rd Respondent**PAARL PRINT (PTY) LTD**4th Respondent**DIRECTOR OF PUBLIC PROSECUTIONS,
WESTERN CAPE**5th respondent**NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**6th Respondent

JUDGMENT

MATOJANE J

Introduction

- [1] This matter concerns the interpretation and application of section 32 of the Occupational Health and Safety Act. The Department of Labour ("the Department") has denied the applicants access to a section 32 report following a workplace fire at the Paarl Print Facility on 17 April 2009 ("the Paarl Print fire")

- [2] The Applicants seeks a declaratory relief that they are entitled, on request, to be furnished with a copy of the report contemplated in section 32(9) of the Occupational Health and Safety Act¹ ("the OHSA") or alternatively in terms of PAIA. The report aforesaid is the report into any inquiry held in terms of section 32 of the OHSA
- [3] The Applicant also seeks an order directing the Minister of Labour, the First Respondent, to give the second to the tenth applicant's access to the Presiding Inspector's section 32 inquiry report, into the fire that occurred at the Paarl Print Facility on 17 April 2009, within 5 days from the date of the order.
- [4] The Respondents deny that the provisions of the OHSA allow for an interested party to have access to the Presiding Inspector's report into a section 32 inquiry. Respondents contends that the disclosure of the Presiding Inspector's section 32 inquiry report to any person other than the Chief Inspector and the National Prosecuting Authority, would violate the principles of co-operative governance enshrined in sections 40 and 41 of the Constitution.
- [5] Respondents contends further that because employees injured on duty and/or the dependants of employees, who have died as a result

¹ Act 85 of 1993

of injuries on duty, are not entitled (by virtue of the provisions of section 35 of the Compensation for Occupational Injuries and Diseases Act², to sue their employer for damages, arising from such injury or death, such employees and/or dependants do not require access to the report of the presiding inspector into a section 32 inquiry, for the protection of, or for the exercise of, any right as they have no right of action against the employer.

The Parties

- [6] The first applicant is a unit of the University of Cape Town ("UCT") a university with its own juristic personality established in terms of the Higher Education Act³. The second to tenth applicants are dependants, parents and spouses of employees who died in consequence of injuries suffered at the Paarl Print fire.

Issues to be determined

- [7] The issue to be determined is whether the applicants and similarly situated interested parties are entitled to be furnished with a copy of the report of an enquiry contemplated in section 32(9) of the OHSA as of right. The answer to this question depends on the interpretation of section 32 of OHSA in particular section 32(10) thereof.

² Act 130 of 1993

³ Act 101 of 1997

Factual background

[8] On 17 April 2009 a fire incident broke out in a printing factory owned and operated by Paarl Print (Pty) Ltd ("Paarl Print"). The fire spread rapidly through the facility, destroying much of it and killing 13 people and injuring 10 more.

[9] The Second Respondent ("the Chief Inspector") appointed the third respondent, Mr. Tibor Szana, who was the Senior Inspector in the Department at the time to conduct a formal inquiry in terms of section 32 of the OHSA, and to prepare a report into the inquiry.

[10] The inquiry was held in public and was attended by members of the public and the media. The inquiry ran for some 20 days, between the 1st of March 2010 and the 15th of June 2010. Some 30 witnesses were called to testify and approximately 3000 pages of evidence were submitted as evidence in the inquiry.

[11] The following parties were represented and actively participated in the enquiry by leading evidence, cross examining witnesses and making their submissions both orally and in writing.

11.1 The twelfth applicant and the families of the second to the tenth applicants.

11.2 Paarl Print and Paarl Media, the parent company of Paarl Print

11.3 The Drakenstein local Municipality;

11.4 The engineers and architects responsible for the construction and design of the facility;

11.5 The manufactures of the product "Kulite" which is used for roof insulation.

[12] According to the deponent to the answering affidavit of the first, second and third respondents, the inquiry was directed at establishing causes for the fire and also making a recommendations that maybe helpful either during the prosecution in terms of the Criminal Procedure Act or conducting an inquest in terms of the Inquest Act.

[13] The applicants urged the Presiding Inspector to make a findings that included the origin and cause of the fire, the reason for its rapid spread through the premises, preventative steps that could have been taken by Paarl Print and whether any parties ought to be held criminally and/or civilly responsible for the resultant injuries and death.

- [14] The twelfth applicant contends that the original fire in the kitchen ignited the "Kulite" thermal roof insulation, which burned furiously and provided the fuel for the fire as it raced through the facility
- [15] Applicants raised concerns regarding the safety of the design and construction of the factory. These included inadequacies in the alarm and fire detection system, inadequate fire training and the absence of physical fire divisions in the building.
- [16] The Presiding Inspector completed his report in late 2010 and submitted it to the Chief Inspector and the Director of Public Prosecutions pursuant to section 32(10) of the OHSA. In January 2011 families of the deceased requested the Chief Inspector to furnish them with the copy of the Presiding Inspector's report. Applicants were informed of the blanket policy not to make section 32 reports available to anyone other than the NPA.
- [17] The Applicants wrote the Director of Public Prosecutions requesting a copy of the report and an update on the progress of the investigations. The Director of Public Prosecutions informed the families of the deceased that he was not at liberty to disclose the contents of the report by virtue of section 36 of OHSA and that the reports are submitted to him marked "confidential".

[18] On 16 May 2013, the Director of Public Prosecutions decided that no prosecutions would be instituted arising out of the Paarl Print fire and the matter was referred to an inquest.

[19] On 31 May 2013 the Department refused the Applicant's PAIA request stating that the reports have been submitted to the Senior Public Prosecutor and in terms of section 39(1)(b)(iii)(aa) of [PAIA] the department was unable to release the report.

[20] On 24 April 2014, the National Prosecuting Authority informed the applicants that it would not be instituting any prosecutions arising from the incident.

The statutory framework

[21] The purpose of the Occupational Health and Safety Act as set out in the preamble is:

"to provide for the health and safety of persons at work and for the health and safety of persons in connection with the use of plant and machinery; the protection of persons other than persons at work against hazards to health and safety arising out of or in connection with the activities of persons at work; to establish an advisory council

for occupational health and safety; and to provide for matters connected therewith”.

- [22] Section 8 of the Act imposes positive duties on employers and third parties to their employees in respect of workplace safety. The duties includes *inter alia*:

“the provision and maintenance of systems of work, plant and machinery that, as far as is reasonably practicable, are safe and without risks to health;(section 8(1) taking such steps as may be reasonably practicable to eliminate or mitigate any hazard or potential hazard to the safety or health of employees, before resorting to personal protective equipment; (section 8(2)(b)) making arrangements for ensuring, as far as is reasonably practicable, the safety and absence of risks to health in connection with the production, processing, use, handling, storage or transport of articles or substances; (section(2)(c)(d) establishing, as far as is reasonably practicable, what hazards to the health or safety of persons are attached to any work which is performed, any article or substance which is produced, processed, used, handled, stored or transported and any plant or machinery (section 8(2)(d).”

- [23] Section 10 imposes general duties on manufacturers of articles and substances for use at work and state that:

"(1) Any person who designs, manufactures, imports, sells or supplies any article for use at work shall ensure, as far as is reasonably practicable, that the article is safe and without risks to health when properly used and that it complies with all prescribed requirements."

[24] Failure to comply with these duties constitutes a criminal offence in terms of section 38(1) of the OHSA.

[25] The Act defines an "incident" as each incident occurring at work or arising out of or in connection with the activities of persons at work, or in connection with the use of plant or machinery, in which, or in consequence of which-

"(a) any person dies, becomes unconscious, suffers the loss of a limb or part of a limb or is otherwise injured or becomes ill to such a degree that he is likely either to die or to suffer a permanent physical defect or likely to be unable for a period of at least 14 days either to work or to continue with the activity for which he was employed or is usually employed;

(b) a major incident occurred; or

(c) the health or safety of any person was endangered and where-

- (i) a dangerous substance was spilled;
- (ii) the uncontrolled release of any substance under pressure took place;
- (iii) machinery or any part thereof fractured or failed resulting in flying, falling or uncontrolled moving objects; or
- (iv) machinery ran out of control, shall, within the prescribed period and in the prescribed manner, be reported to an inspector by the employer or the user of the plant or machinery concerned, as the case may be."

[26] The Act defines "major incident" as "an occurrence of catastrophic proportions, resulting from the use of plant or machinery, or from activities at a workplace".

[27] Section 32 governs any incident occurring at work or arising out of or in connection with the use of plant or machinery. The chief Inspector is required to direct an inspector to conduct an inquiry into any incident in terms of section 32 of the OHSA when presented with

prima facie evidence of an offence⁴. Section 32(4) provides that an inquiry must be held in public.

[28] Section 32(5)(b) identify persons who have an interest in the issue of the formal enquiry and limits their rights to participating in the inquiry through putting questions to a witness to such an extent as the Presiding Inspector may allow. Section 32(5)(b) provides:

"(b) Any person who has an interest in the issue of the formal inquiry may personally or by representative, advocate or attorney put such questions to a witness at the inquiry to such extent as the presiding inspector may allow.

(c) The following persons shall have an interest as referred to in paragraph (b), namely

(i) any person who was injured or suffered damage as a result of the incident forming the subject of the inquiry;

⁴ Section 32 reads: (1) The chief inspector may, and he shall when so requested by a person producing prima facie evidence of an offence, direct an inspector to conduct a formal inquiry into any incident which has occurred at or which has resulted, or in the opinion of the chief inspector could have resulted, in the injury, illness or death of any person.

- (ii) the employer or user, as the case may be, involved in the incident;
- (iii) any person in respect of whom in the opinion of the presiding inspector it can reasonably be inferred from the evidence that he could be held responsible for the incident;
- (iv) a trade union recognized by the employer concerned or any trade union of which a person referred to in subparagraph (i) or (iii) is a member;
- (v) any owner or occupier of any premises where the said incident occurred;
- (vi) any other person who, at the discretion of the presiding inspector, can prove such interest."

[29] Section 32(9) requires the Presiding Inspector at the conclusion of the inquiry to compile a written report thereon. Section 32(10) provides:

"The evidence given at any inquiry under this section shall be recorded and a copy thereof shall be submitted by the presiding

inspector together with his report to the chief inspector, and in the case of an incident in which or as a result of which any person died or was seriously injured or became ill, the inspector shall submit a copy of the said evidence and the report to the attorney-general within whose area of jurisdiction such incident occurred”.

[30] Section 32(13) provides that an inspector presiding at any formal inquiry shall not incur any civil liability by virtue of anything contained in the report compiled in terms of subsection (9).

[31] Section 35 affords a right to any person aggrieved by any decision taken by the inspector to appeal against such a decision.

Approach to statutory interpretation

[32] Section 39(2) of the Constitution obliges courts to promote “the spirit”, purport and objects of the Bill of Rights when construing legislation. Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to the context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous. See **Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd**⁵.

⁵ [2007]ZACC 12;2007(6)SA 199 CC;2007(10)BCLR 1027 (CC) at para 53

It is trite that words in a statute must be given their ordinary grammatical meaning, unless doing so would result in an absurdity, added to this general principle is the rider that (a) a statutory provision should always be interpreted purposively, (b) the relevant statutory provision must be properly contextualized and (c) all statutes must be construed consistently with the Constitution. See **Cool Ideas v Hubbard**⁶

[33] Therefore in construing section 32, we are obliged to consider the statute within the context of the related provisions and the statute as a whole including its underlying values bearing in mind that we should avoid an interpretation that is contrary to the Bill of Rights.

[34] Respondents submit in their heads of argument and in court that section 32 expressly mentions the individuals who must be provided with the report, namely the Chief Inspector and in some instances, the Director of Public Prosecutions. Respondents argue that section 32(10) does not provide for access to the report by interested parties listed in section 32(5). Respondents argue that it prescribes specifically that the report shall be submitted to the people mentioned in section 32(10) only.

⁶ 2014(4)SA 474 at 484 para 28

[35] Section 32 inquiry is not limited to incidents involving employees only, but may be convened whenever "*any person*" suffers the consequences referred in section 24(1)(a) of the OHSA.

[36] Section 32(5) of the OHSA affords interested parties the right to participate in section 32 inquiries.

[37] Section 35(1) confers a right of appeal to the Chief Inspector to "*Any person*"_aggrieved by any decision taken by an inspector under a provision of this Act". The section provides that "*after the Chief Inspector has considered the grounds of the appeal and the inspector's reasons for the decision, he shall confirm, set aside or vary the decision or substitute for such decision any other decision which the inspector ought to have taken.*"

[38] If the reports are not made available to interested parties, they could never become aggrieved by anything contained in it, as they would not have had sight of its contents. It is absurd, in my view, to confer on interested parties a right of appeal against the finding of a report and at the same time deny them access to the report.

[39] Section 32(13) of the OHSA confers a statutory indemnity on the inspector in respect of the content of the report. This indemnity

would be redundant if the only recipients of the inspector's report are the Senior Inspector and the Prosecuting authority only. In my view the right of access of interested parties to section 32 reports follows from the express language of the order.

[40] It is clear from the reading of section 8⁷ and section 10 that the purpose of the section 32 inquiry is to determine whether any duties imposed on employers and manufacturers have been breached and whether any party ought to be held criminally liable hence the referral of the report to the Prosecuting Authority. Civil liability on the part of the employers or manufactures is not catered for in the Act. The family members and dependants of employees, who are killed in an industrial accident have a legitimate interest in the outcome of any section 32 inquiry into such accident as they may have a claim for loss of support against any third party, who might be held liable under common law.

[41] The findings and recommendations of the Presiding Inspector in any section 32 inquiry are of direct relevant to employers who are under a duty in terms of section 8 of the Act to establish the hazards to the health and safety of persons in the workplace and to take all measures reasonably required to eliminate the risk posed by such hazards. By denying employers and employees sight of the presiding

⁷ supra

inspectors report into the causes of the accidents and their recommendations on means to prevent future occurrences, they will be deprived the knowledge they require to ensure safe and healthy workplace.

[42] The respondents submit that applicants do not need the inspectors report to enforce any right against the employer as the Compensation for Occupational Injuries and Diseases Act⁸ ("COIDA") provides for compensation for disablement caused by occupational injuries or death resulting from such injuries during the course of employment. The difficulty with this submission is that COIDA does not have application to persons who are not employees of the party whose negligence is the cause of their disablement or death. In the present matter, COIDA will not apply if the presiding inspector finds that third parties like the manufacturers of Kulite, the engineers who designed the premises or the contractor who operated the canteen where the fire broke out were responsible for the fire and the ensuing deaths and injuries.

[43] It follows that the finding of the presiding inspector are relevant to the rights of the dependants of the deceased and those of the injured workers to recover damages from third parties who may be held responsible for the deaths and injuries.

⁸ Act 130 of 1993

- [44] For the above reasons, I find that OHSA itself interpreted purposively entitles persons in the position of the applicants to access section 32 reports.
- [45] Section 32(1)(a) of the Constitution provides that everyone "*has the right of access to any information held by the state*". This right gives effect to the founding constitutional values of openness and accountability in public affairs. The founding values in s 1 include the pursuit of "accountability, responsiveness and openness".
- [46] Section 39(1)(a) provides that the courts must promote the values that underlie "*an open and democratic society*". Section 41(1)(c) of the Constitution requires all spheres of government and all organs of state to provide "transparent and accountable" government.
- [47] Section 195(1)(g) provides that "transparency must be fostered by providing the public with timely, accessible and accurate information.
- [48] The Respondents' interpretation of section 32, in my view, undermines the constitutional values of transparency openness and accountability in that it deprives interested parties their right to information held by the state. The refusal to disclose section 32 reports violates the right to human dignity provided for in section 10

of the constitution, in that families and next of kin of workers killed in industrial accidents do not receive an authoritative report on the cause of their loved one's death to enable them to find psychological closure.

[49] Without access to the reports, employers and trade unions are hampered in their ability to ensure health and safety in the workplace. It is also not possible for unions to adequately protect their members' interest by advocating for reform and improvement of safety in the workplace which infringes the workers right to fair labour practice provided for in section 23 of the Constitution.

[50] It follows in my view, that an interpretation that entitles interested parties to access section 32 reports respects, protects and promotes various rights in the Bill of Rights and other important values enshrined in the Constitution. It allows employees and unions to hold employers accountable to past and future conduct by ensuring that they comply with the recommendations and findings contained in the report.

[51] The Respondent contend that PAIA is not applicable because the OHSA specifically excludes disclosure to interested parties and that PAIA, being a "general stature", cannot override the provisions of OHSA.

[52] Section 46 of the Promotion of Access to Information Act⁹ makes access to the inspector's report mandatory. It provides:

Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section 34 (1), 36 (1), 37 (1) (a) or (b). 38 (a) or (b). 39 (1) (a) or (h). 40, 41 (I) (a) or (b). 42 (1) or (3). 43 (1).or (2), 44 (1) or (2) or 45, if -

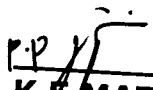
- (a) the disclosure of the record would reveal evidence of-
 - (i) a substantial contravention of, or failure to comply with, the law; or
 - (ii) an imminent and serious public safety or environmental risk; and
 the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.

[53] The order:

1. It is declared that the persons referred to in section 32(5)(c) of the Occupational Health and Safety Act 85 of 1993 ("OHSA"), are entitled, on request to the presiding inspector, to be furnished with a copy of the report contemplated in section 32(9) of OHSA, into any inquiry held in terms of section 32 of OHSA.

⁹ ACT 2 OF 2000

2. It is declared that the policy of the Department of Labour to refuse access to a section 32 inquiry report in all instances and without regard to the circumstances of each case once the report is referred to the National Prosecuting Authority is inconsistent with OHSA, the Promotion of Access to Information Act 2 of 2000, and the Constitution of the Republic of South Africa, 1996, and is accordingly unlawful and invalid.
3. The Minister of Labour is directed to provide, within five (5) days of this court order, the second to tenth applicants with access to the presiding inspector's section 32 inquiry report, into the fire that occurred at the Paarl Print facility, in Paarl, on 17 April 2009.
4. It is directed that the costs of this application are to be paid by the first respondent and such other respondents who opposed this application, jointly and severally, the one paying the other to be absolved.


K E MATOJANE
JUDGE OF THE HIGH COURT