



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

REPORTABLE

Case No: J 1597 / 21

In the matter between:

TRUWORTHS LIMITED

Appellant

and

**THE CHIEF INSPECTOR: OCCUPATIONAL HEALTH
AND SAFETY, DEPARTMENT OF EMPLOYMENT
AND LABOUR**

First Respondent

**DEPARTMENT OF EMPLOYMENT AND
LABOUR**

Second Respondent

Heard: 12 November 2024

Delivered: 7 March 2025

This judgment was handed down electronically by circulation to the parties and legal representatives by email. The date and time for hand-down is deemed to be 7 March 2025

Summary: Appeal in terms of OHSA – principles considered – entails wide appeal – Court entitled to reconsider matter *de novo* – permissible to raise new grounds and evidence on appeal – Court may substitute decision on the basis of it being wrong

OHSA – s 28(2) considered – requirement of a certificate for inspectors – requirement peremptory – not competent for inspector to carry out duties

without certificate – where inspectors not issued with certificate inspections irregular / unauthorised

OHSA – Facilities Regulations – meaning of ‘*reasonably practicable*’ considered – constitutes balanced assessment – inspectors failing to consider reasonably practicable – contravention notices wrongly issued

OHSA – Facilities Regulations – s 8 considered – does not contemplate preference by inspectors – provision misconstrued by inspectors – contravention notices wrongly issued

OHSA – appeal to chief inspector in terms of s 35(1) – chief inspector failing to properly consider appeal – chief inspector relying on irrelevant consideration in refusing appeal – insufficient reasons given – refusal of appeal by chief inspector erroneous

Appeal – appellant making out proper case for appeal under s 35(3) – appeal upheld – notices of contravention set aside.

Costs – principles considered – no costs award justified

JUDGMENT

SNYMAN, AJ

Introduction

[1] This judgment concerns an appeal by the appellant to the Labour Court in terms of section 35(3) of the Occupational Health and Safety Act (OHSA)¹, against decisions of the first respondent, being the chief inspector appointed under the OHSA. In terms of section 158(1)(i) of the Labour Relations Act (LRA)², the Labour Court is given the power to hear and determine any appeal in terms of section 35 of OHSA.

[2] The appellant’s appeal has been noted by way of a notice of appeal dated 20 December 2021, filed in terms of Rule 9(1) of the Labour Court Rules as they existed at the time. This was followed by the record of the appeal in terms of Rule 9(5A)(a),

¹ Act 85 of 1993 (as amended).

² Act 66 of 1995 (as amended).

filed by the respondents, concerning the proceedings before the first respondent. The appeal has been opposed by the first and second respondents, on the merits thereof.

[3] In the notice of appeal, the appellant has raised the following grounds of appeal:

3.1 It was not established that the Contravention Notices were issued by persons properly designated as Inspectors and duly certificated as such in terms of sections 28(1) and (2) of OHSA.

3.2 The appellant has complied with the provisions of Regulation 8 of the Facilities Regulations, 2004 issued by the Minister of Labour under section 43 of the OHSA.

3.3 The first respondent failed to determine whether any or all of the employees at either of the appellant's stores normally performed their work standing up, nor whether their work could effectively be performed while sitting, nor whether it was reasonably practicable for the employer to provide seating for any employees employed at the stores.

3.4 The Facilities Regulations provide for criminal sanctions for non-compliance. Notwithstanding, the first respondent wrongly imposed an onus upon the employer to establish compliance with the Regulations, alternatively to prove it was reasonably practicable for seating to facilities to be provided to employees working at the cash desk.

3.5 The first respondent was not empowered to require the appellant to update any risk assessment and submit it to the Department of Labour.

3.6 The contravention notices were incorrectly or unlawfully issued by the inspectors and should be set aside.

3.7 The appeals were incorrectly dismissed by the first respondent and should have been upheld.

[4] Before deciding these grounds of appeal, it is necessary to first determine the nature of this appeal, which I will turn to next.

The nature of the appeal

[5] In deciding the nature of this appeal, a consideration of the exact wording of section 35(3) of OHSA is important, which reads:

‘Any person aggrieved by a decision taken by the chief inspector under subsection (1) or in the exercise of any power under this Act, may appeal against such decision to the Labour Court, and the Labour Court shall inquire into and consider the matter forming the subject of the appeal and confirm, set aside or vary the decision or substitute for such decision any other decision which the chief inspector in the opinion of the Labour Court ought to have taken.’

[6] In *Meyer v Iscor Pension Fund*³ it was decided that any appeal, broadly described, to a Court against a decision of a statutory body, can take one of three different forms, where the Court said:

‘... As was explained by Trollip J in *Tikly and Others v Johannes NO and Others* 1963 (2) SA 588 (T) at 590F - 591A, an appeal usually falls into one of the following three categories:

‘(i) an appeal in the wide sense, that is, a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information ... ;

(ii) an appeal in the ordinary strict sense, that is, a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong;

(iii) a review, that is, a limited re-hearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly. ...’

³ 2003 (2) SA 715 (SCA) at para 8.

[7] The case *in casu* is obviously not a review, so that leaves only the question whether the current appeal is an appeal in the wide sense, or a narrow appeal in the strict sense. For the reasons to follow, I believe it is a wide appeal, in terms of which this Court would be entitled to conduct a reconsideration of the matter in its entirety, by way of a re-hearing, and may in this context even consider additional evidence produced or legal grounds advanced by the parties.

[8] In *Calvinia Lande BK v Department of Labour and Another*⁴ the Court dealt with an appeal to the Labour Court in terms of section 72(1) of the Basic Conditions of Employment Act (BCEA)⁵, as it existed at the time.⁶ Section 72(1) of the BCEA was similarly worded to section 35(3) of the OHSA. The Court described the nature of the appeal as follows:⁷

‘In my view giving the word ‘appeal’ where it is used in s 72 of the BCEA the meaning of a narrow appeal as defined in the *Staff Association* matter will give this court so narrow a role in supervising the statutory scheme of enforcement in the BCEA, that the provisions of s 72 would be rendered virtually meaningless. This could not have been the intention of the legislature. I thus conclude that the appeal contemplated in s 72 of the BCEA is a wide appeal.’

[9] In my view, this reasoning would make equal sense in the context of section 35(3) of OHSA. This section is similarly aimed at monitoring and supervising the enforcement activities of the inspectorate under OHSA, and in doing so, this Court should not be constrained by the confines of a narrow appeal, and should be entitled to conduct a complete re-assessment of the matter in discharging this supervisory and monitoring duty this Court has.

[10] The Court in *Meyer supra* considered section 30P(2) of the Pension Funds Act⁸, which provides for an appeal of a decision of the pension funds adjudicator to the High Court, which section reads: ‘*The Division of the High Court contemplated in ss (1) shall have the power to consider the merits of the complaint in question, to take*

⁴ (2013) 34 ILJ 359 (LC).

⁵ Act 75 of 1997 (as amended).

⁶ This section was repealed by section 12 of Act 20 of 2013, with effect from 1 September 2014.

⁷ *Id* at para 8.3.

⁸ Act 24 of 1956.

evidence and to make any order it deems fit'. It is clear that the gist of this provision is quite similar to section 35(3) of OHSA. The Court decided as follows where it came to section 30P(2):⁹

'From the wording of s 30P(2) it is clear that the appeal to the High Court contemplated is an appeal in the wide sense. The High Court is therefore not limited to a decision whether the adjudicator's determination was right or wrong. Neither is it confined to the evidence or the grounds upon which the adjudicator's determination was based. The Court can consider the matter afresh and make any order it deems fit. At the same time, however, the High Court's jurisdiction is limited by s 30P(2) to a consideration of 'the merits of the complaint in question'. The dispute submitted to the High Court for adjudication must therefore still be a 'complaint' as defined. Moreover, it must be substantially the same 'complaint' as the one determined by the adjudicator. ...'

[11] Another comparable example can be found in *Staff Association for the Motor and Related Industries v Motor Industry Staff Association and Another*¹⁰, where the Court considered an appeal to the Labour Court in terms of section 111(3) of the LRA against a decision by the Registrar of Labour concerning the registration of a trade union. Accepting this appeal was an appeal in the wide sense, the Court reasoned as follows:¹¹

'In my view the absence of the record, the lack of procedure for lodging objections with the second respondent, the absence of power on the part of the second respondent to reconsider the decision in the light of objections, and the lack of discretion on the part of the second respondent, show that the appeal contemplated in s 111(3) is an appeal in the wide sense. It is a complete rehearing and adjudication of the merits with or without additional evidence or information. This procedure allows the objectors who were not parties before the second respondent to present such evidence or

⁹ Id at para 8

¹⁰ (1999) 20 ILJ 2552 (LAC). See also *Independent Municipal and Allied Trade Union v Municipal and Allied Trade Union of SA and Others* (2017) 38 ILJ 1283 (LAC) at para 17.

¹¹ Id at para 24.

information as they may wish to place before the Labour Court in support of their objections.’

[12] The Court in *Simunye Workers Forum v Registrar of Labour Relations*¹² similarly dealt with an appeal in terms of section 111(3) as follows:

‘An appeal under s 111(3) of the LRA is an appeal in the wide sense ... In consequence, the court is empowered to consider the correctness of the registrar’s decision, with or without additional evidence or information, and may take into account reasons, objections and facts not placed before the registrar at the time when the decision to refuse registration was made.’

[13] In the end, and as said in *Public Servants Association on behalf of Members v Minister of Health and Others*¹³:

‘Insofar as the OHSA is concerned, s 35(3) provides that this court is constituted as an appellate court in respect of decisions taken by the chief inspector in terms of s 35(1). The mechanisms of enforcement established by the OHSA, in broad terms, provide for reports to be made to inspectors, investigations or formal enquiries to be conducted by inspectors, and written reports to be produced by inspectors. Section 30 confers broad and far-reaching powers on inspectors, including the right to issue directions and prohibition notices whenever the inspector is of the opinion that an employer has failed to comply with any applicable regulation. Section 35(1) establishes a right of appeal to the chief inspector by any person aggrieved by any decision taken by an inspector. Section 35(3), as I have indicated, provides that any person aggrieved by decision taken by the chief inspector either on appeal or in the exercise of any power under the Act, may appeal to this court. This court is empowered by s 35(3) to confirm, set aside or vary the decision or substitute for such decision any other decision which the chief inspector in the opinion of the court ought to have taken.’

¹² (2023) 44 ILJ 2021 (LC) at para 24. See also *Municipal and Allied Trade Union of SA v Crouse NO and Others* (2015) 36 ILJ 3122 (LC) at paras 9 – 10; *Servworx (Pty) Ltd v Registrar of Labour Relations and Another* (2014) 35 ILJ 3476 (LC) at para 16.

¹³ (2019) 40 ILJ 193 (LC) at para 9.

[14] In the light of the above, I am confident in concluding that an appeal under section 35(3) of OHSA is an appeal in the wide sense. The inspectorate under OHSA is given a broad range of extensively infringing powers, the exercise of which could have a dire and / or material impact on employers and their operations, and can even lead to criminal prosecution¹⁴. The exercise of these kinds of powers, in order to ensure even handedness, lawfulness, justice and legitimacy, must be subject to the monitoring and supervision of the Labour Court. An appeal to the chief inspector in terms of section 35(1) does not have any prescribed appeal process, and there is certainly no appeal record accompanying such appeal. Ultimately, the chief inspector is not required by section 35(1) of OHSA to even give reasons for making a particular decision. There is equally no formal record kept of the activities of the inspectorate or decisions made by them. As such, the Labour Court should be entitled to rehear the entire cause of complaint, *de novo*, and even accept further evidence and legal grounds in doing so.

[15] The above being the basis of the appeal in this case, it is now appropriate to return to deciding the grounds of appeal as raised by the appellant, as set out above. I will start by setting out the relevant background in this matter.

The relevant background

[16] Before setting out the actual factual matrix in this case, which was fortunately largely either undisputed or common cause, it is perhaps appropriate to first summarize the regulatory framework under OHSA that would be applicable in this case. In terms of section 43(1) of OHSA, the Minister¹⁵ is authorised to make regulations on any matter or issue pertaining to workplace health and safety.¹⁶ In particular, section 43(1)(b)(iii) provides for regulations relating to: *'the training, safety equipment or facilities to be provided by employers or users, the persons to whom and the circumstances in which they are to be provided and the application thereof*.

¹⁴ See section 38 of OHSA.

¹⁵ Referring to the Minister of Employment and Labour.

¹⁶ Section 43(1)(b) reads: *'The Minister may make regulations ... which in the opinion of the Minister are necessary or expedient in the interest of the health and safety of persons at work or the health and safety of persons in connection with the use of plant or machinery, or the protection of persons other than persons at work against risks to health and safety arising from or connected with the activities of persons at work'*.

[17] The provisions of OHSA and accompanying regulations are enforced by way of an inspectorate. In terms of section 28(1) of OHSA the Minister designates such inspectors, and in terms of section 28(2): *'Each inspector designated under subsection (1) shall be furnished with a certificate signed by or on behalf of the Minister and stating that he has been designated as an inspector: Provided that if his designation as inspector is limited to any particular function or functions, his certificate shall state such limitation'*. In terms of section 28(3), any affected person present at the time of an inspection may demand the production of the inspector's certificate.

[18] The functions of the inspectors are wide ranging, and stipulated in section 29 of OHSA. This includes a right of access to premises, questioning persons, demanding discovery / disclosure of documents, inspecting premises, machinery and equipment, and the power of seizure. Under section 30(1), an inspector may even, in the case where in the opinion of an inspector the health or safety of any person is threatened or is likely to be threatened, in writing prohibit any action, conduct, or the use of plant or machinery, which would be the cause of such risk. In particular, and in terms of section 30(3):

'Whenever an inspector is of the opinion that the health or safety of any person at a workplace or in the course of his employment or in connection with the use of plant or machinery is threatened on account of the refusal or failure of an employer or a user, as the case may be, to take reasonable steps in the interest of such person's health or safety, the inspector may in writing direct that employer or user to take such steps as are specified in the direction within a specified period.'

[19] Where a person is aggrieved by any decision taken by an inspector, such person may appeal to the chief inspector in terms of section 35(1), and the chief inspector has the power to *'...confirm, set aside or vary the decision or substitute any other decision which the inspector in the chief inspector's opinion ought to have been taken.'* Any person dissatisfied with the decision of the chief inspector may then appeal to the Labour Court in terms of section 35(3), as discussed above.

[20] It was common cause that pursuant to the rights afforded to the Minister under section 43(1) of OHSA, various sets of Regulations have indeed been issued. Not all of these regulations would be applicable to this case, and I only intend to deal with those that are. Applicable *in casu* would be the Facilities Regulations (FR)¹⁷. In particular, section 8 of the FR provides:

‘Every employer shall-

- (a) where reasonably practicable, provide an ergonomically sound seat for every employee whose work can be effectively performed while sitting;
- (b) where reasonably practicable, permit an employee whose work is normally performed standing to take advantage of any opportunity for sitting which may occur, and for this purpose the employer shall provide seating facilities; and
- (c) provide seats with backrests where the nature of work performed by the employees is such that such seats can be used.’

Any contravention of the FR is dealt with in section 10, which provides that *‘Any person who contravenes or fails to comply with any provisions of regulation 2(1), 2(3), 2(4), 2(5), 3(1), 3(2), 4, 5, 6, 7, 8 or 9 shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months’*.

[21] Turning now to the facts at hand, the appellant conducts business as a clothing retailer, in a large number of retail stores distributed throughout the country. In this instance, the applicable stores are two of the appellant’s stores located in the Kwa Guqa Shopping Mall situate in Emalahleni, Mpumalanga province. The two stores are the appellant’s Truworths store and Identity store, situate in this mall.

[22] On 9 September 2021, one of the first respondent’s inspectors, Hlenglwe Ngcobo (Ngcobo) conducted an inspection of the Truworths store, and following such inspection, issued the appellant with a Direction Notice: Contravention, which notice was also accompanied by an inspection report (both dated 9 September 2021). In this Direction Notice: Contravention, it was stipulated that the appellant had failed to comply with the FR, in particular section 8(b) thereof, and the appellant was directed to *‘Provide seats with back rests at the cash desk.’* In turn, the report also reflected

¹⁷ Issued by way of GN R924 as contained in GG 26636 dated 3 August 2004.

that the appellant was non-compliant with regard to section 8(b) of the FR and further recorded that:

'Employer was found to be not complying with the minimum requirements of Occupational Health and Safety Act Regulation. ...

3.1.2.1.3 There were no seating facilities provided at the cash desk for opportunity sitting.' (sic)

And in such report the appellant was directed to:

'3.1.3.1.1 To provide seating facility to permit an employee whose work performed while standing to advantage of an opportunity sitting.' (sic)

[23] The appellant was dissatisfied with the Direction Notice: Contravention and report issued by Ngcobo on 9 September 2021. As a result, and on 16 September 2021, the appellant noted a written appeal to the chief inspector in terms of section 35(1) of OHSA. In this appeal letter, the appellant disputed that there was non-compliance with section 8(b) of the FR, and recorded the following:

'Subsection b makes it clear that the provision of seats is only where it is 'reasonably practicable'. It is not practicable to have seats behind the cash desks, not only because staff are not able to properly serve customers from a seated position, but to have chairs behind the desk will cause an obstruction to staff being able to move freely behind or in/out of the cash desk area.

We do provide seating facilities elsewhere in the workplace for staff to use and can therefore show compliance with the subsection.' (sic)

[24] The appellant's appeal to the chief inspector was not successful. On 20 October 2021, the chief inspector, Tibor Szana (Szana) refused the appeal, and gave the following reasons for doing so:

'The employer has not provided that it is reasonably practicable, in terms of the definition in the Occupational Health and Safety Act, act 85 of 1993, as

amended, for seating facilities not to be provided for employees working at the cash desk; and

The risk assessment provided by the employer does not assess the hazard of the cash desk employee having to stand for periods of their shift.'

[25] Similar events took place where it came to the appellant's Identity store. On 14 October 2021, inspector Ntombifuthi Mabena (Mabena) carried out an inspection at the store. This inspection also resulted in a Direction Notice: Contravention and an accompanying report, both issued on 14 October 2021. In the Direction Notice: Contravention, Mabena issued a directive to the appellant to the effect that it failed to comply with section 8(b) of the FR, and the appellant was directed to: *'Permit an employee whose work is normally performed standing to take advantage of any sitting opportunity that may occur and for this purpose, provide seats at the tellers'*.

[26] The inspection report by Mabena of 14 October 2021 also recorded that the appellant had failed to comply with section 8(b) of the FR, in that:

'3.1 There were no seats at the tellers and during the walkthrough with the manger he explained how they get so tired as there are no chairs to take advantage of seating if opportunity occurs.'

Mabena then directed the appellant:

'3.1.3.1.1 To permit an employee whose work is normally performed standing to take advantage of any opportunity for sitting which may occur and for that purpose seating facilities at the tellers.'

[27] Similarly dissatisfied with this outcome, and on the same date, being 14 October 2021, the appellant noted a written appeal in terms of section 35(3) of OHSA to the chief inspector. The grounds of appeal raised in this letter were identical to those raised in respect of the Truworths store. And in an identical fashion, the chief inspector also on 20 October 2021 refused the appeal in respect of the Identity store, for the same reasons as those applicable to the Truworths store.

[28] The aforesaid then led to the current appeal now before this Court.

Analysis

[29] The ground of appeal that must first be dealt with is the ground of appeal relating to the authority of the inspectors under section 28 of OHSA. As summarized above, when the Minister designates a person as an inspector, that person must be issued with a certificate under section 28(2), signed by or on behalf of the Minister. Section 28(2) further provides that any limitations in the functions of an inspector must be reflected in such certificate.

[30] But what are the consequences where an inspector has not been issued with such a certificate? This is the nub of the issue raised by the appellant. *In casu*, and in the course of filing its appeal, the appellant has called for the respondents to produce the certificates issued to Ngcobo and Mabena. The respondents have however been unable to produce such certificates, despite undertaking to do so in their heads of argument. The respondents have produced the identity cards of Ngcobo and Mabena, however this would not be certificates as contemplated by section 28(2), even though it was suggested by the respondents that these identity cards were such certificates. Ironically, these identity cards reflect that Ngcobo and Mabena are appointed as inspectors in terms of section 63(1) of the BCEA, and not that they are designated as inspectors in terms of section 28(2) of OHSA.

[31] It must be added that the respondents never offered an explanation relating to the missing certificates, such as the fact that they may have been misplaced or lost. Crucially, the respondents could have offered evidence that Ngcobo and Mabena were properly designated by the Minister and had in fact been issued with certificates. Surely there must be some record of this happening, considering it is statutorily prescribed. The respondents are the only parties that would have knowledge of how Ngcobo and Mabena came to be designated as inspectors, and would have a duty to provide such information in the current appeal. The only inference that can be drawn from these failures by the respondents is that Ngcobo and Mabena were not issued with certificates as contemplated by section 28(2).

[32] The respondent did object to the issue of the lack of certificates now being raised by the appellant for the first time in the appeal, when it was never raised before the chief inspector. This objection however cannot be sustained, because of the nature of the appeal in this case. Being a wide appeal, the appellant would be entitled to raise any issue as part of the appeal, and may even introduce new grounds and new evidence. The appellant was therefore entitled to raise this point, and this Court is entitled to consider it.

[33] In my view, there are a number of important reasons for the requirement of inspectors being issued with a certificate as contemplated by section 28(2). First and foremost, such a certificate would be conclusive proof of a proper designation of a qualified person to act as an inspector. This is evident from the fact that any affected person may at any time under section 28(3) demand the production of such certificate. In effect, it is this certificate, as proof of designation, that would establish the *locus standi* of a person seeking to exercise the functions of an inspector under sections 29 and 30 of OHSA, to any affected person. It may well be that where an affected person asks for such certificate to be produced, and the inspector is unable to do so, that the affected person would justifiably be entitled to decline, for example, that the inspector accesses or inspects the premises of the affected person.

[34] Secondly, I do not consider this certificate to be some or other mere administrative formality. This is because of the wide-ranging powers afforded to properly designated inspectors, and that the exercising of such powers could have materially adverse consequences for affected persons. For example, an inspector may even call upon an employer to cease production / business activity and prohibit employees carrying out certain tasks, if an inspector believes this to constitute a safety hazard. Added to this are virtually unfettered powers of access, investigation and seizure. All this contemplates a properly qualified inspectorate, who are certificated as such. That is why section 28(2) is there. If there is any doubt about this, it must be dispelled by the fact that section 28(2) makes specific provision for the limitation of functions of inspectors in the certificate if appropriate, which surely confirms its importance. In the end, it is this certificate that determines the proper designation of a person as an OHSA inspector, and what the certified functions of that inspector would be.

[35] Thirdly it also cannot be ignored that the execution of the functions by an inspector may directly give rise to and / or serve to substantiate criminal prosecution of an allegedly errant employer. In this context, surely proper certification, just as would the case with police officers, would be important. In simple terms, inspectors are not simply administrative officials. They can be seen to be investigative officers as well, whose investigations can competently lead to criminal prosecution.

[36] There surely has to be a reason why the legislature thought it important to specifically require a designated inspector to be issued with a certificate, and then prescribe that such certificate had to be signed by or on behalf of the Minister. To simply effectively ignore this requirement as having no consequence, should a particular inspector not be issued with a certificate under section 28(2), would run counter the trite principle that it is presumed the legislature does not *per incuriam* legislate superfluous statutory provisions.¹⁸ It must always be supposed that a statutory provision is of use, or fulfils a purpose.¹⁹ As succinctly held in *Wellworths Bazaars Ltd v Chandler's Ltd and Another*:²⁰

'... a Court should be slow to come to the conclusion that the words are tautologous or superfluous. It was said by the Privy Council in *Ditcher v Denison* (11 Moore P.C. 325, at p. 357): -

'It is a good general rule in jurisprudence that one who reads a legal document whether public or private, should not be prompt to ascribe - should not, without necessity or some sound reason, impute - to its language tautology or superfluity, and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use.'

[37] In summary, the manner in which the provisions of section 28(2) of OHSA must interpreted, construed and then applied was aptly described by Cameron J in *National Credit Regulator v Opperman and Others*²¹ in the following manner:

¹⁸ See *Attorney-General Transvaal v Additional Magistrate for Johannesburg* 1924 AD 421 at 436; *Commissioner for Inland Revenue v Golden Dumps (Pty) Ltd* 1993 (4) SA 110 (A) at 116F-117B.

¹⁹ As said in *Rex v Standard Tea and Coffee Co (Pty) Ltd and Another* 1951 (4) SA 412 (A) at 416F-G: '...It is a cardinal rule of interpretation of legislative enactments that they 'should be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant'. See also *National Union of Metalworkers of SA v Staman Automatic CC and Another* (2003) 24 ILJ 2162 (LC) at 2168E-F.

²⁰ 1947 (2) SA 37 (A) at para 43.

²¹ 2013 (2) SA 1 (CC) at para 99.

'A longstanding precept of interpretation is that every word must be given a meaning. Words in an enactment should not be treated as tautologous or superfluous. This is for good reason. Interpretation is a cooperative venture between legislature and judge, bounded by mutually understood rules, in which the latter seeks to give meaning to the text enacted by the former. The mutual suppositions, and the constraints of principle and constitutional precept on the judge's role, enable the joint process to reach a coherent and practical outcome. For this, it has to be assumed that the legislature's enacted text includes only words that matter. For to enact words that do not would violate the most basic supposition of the shared enterprise. Hence none can be ignored.'

[38] In the end, the specific prescript that a designated inspector '*shall*' be furnished with a certificate signed by or on behalf of the Minister must have an objective, or differently put, a purpose. That purpose / objective, in my view, is firstly to ensure the designation of a suitably qualified person. Secondly, it establishes the validity of the designation and bestows *locus standi* on the inspector to fulfill all, or only some, of the tasks allocated to inspectors under OHSA. Thirdly, it also serves to protect affected persons facing an inspector, as the certificate must be produced on request. To effectively contend, as the respondents appear to do, that even if no certificate is issued, it does not detract from the validity of the functions carried out by inspectors, negates why this is specifically provided for in the statute and simply does not make sense.²²

[39] It therefore must follow that the inspections carried out by Ngcobo and Mabena, on 9 September 2021 and 14 October 2021 respectively, at the appellant's Truworths and Infinity stores in the Kwa Guqa Shopping Mall, is invalid and unauthorised, and consequently the Direction Notice: Contravention of 9 September 2021 and the Direction Notice: Contravention of 14 October 2021 issued by them, is equally invalid, and of no force and effect. This is for the simple reason that they are not properly and lawfully designated inspectors in terms of section 28(2) of OHSA, as they have not been furnished with a certificate as contemplated by section 28(2) of OHSA. On this basis alone, the appellant's appeal must succeed.

²² Compare *Advertising Regulatory Board NPC and Others v Bliss Brands (Pty) Ltd* 2022 (4) SA 57 (SCA) at paras 22 – 23.

[40] I will nonetheless, assuming I am not correct in the conclusion reached above, deal with the appellant's remaining grounds of appeal, because I believe these grounds have merit as well.

[41] There can be no doubt that inspectors under the OHSA would have the power to determine, following an inspection, whether there has been compliance by the appellant with the FR. However, this does not give an inspector the power to prescribe to the appellant how it should lay out or structure its store, just because of what the inspector believes to be a better or more suitable way of achieving the objectives of the FR. What the inspector needs to do, as a point of departure, is to assess what the appellant has in fact done where it comes to the layout / structure of the store, and then determine whether this meets the objectives of section 8 of the FR, in the context of what is reasonably practicable considering the confines and nature of the retail store. So, and in the context of section 8(b) of the FR specifically, where an employee normally performs his or her work whilst standing, the inspector must determine whether, at a reasonably practicable level, the employees are given the opportunity to rest by being seated, and whether seating facilities are provided for that purpose.

[42] At this juncture it would be appropriate consider what '*reasonably practicable*' as contemplated by section 8(b) of the FR would entail. In section 1 of OHSA, '*reasonably practicable*' is defined as:

'... means practicable having regard to-

- (a) the severity and scope of the hazard or risk concerned;
- (b) the state of knowledge reasonably available concerning that hazard or risk and of any means of removing or mitigating that hazard or risk;
- (c) the availability and suitability of means to remove or mitigate that hazard or risk; and
- (d) the cost of removing or mitigating that hazard or risk in relation to the benefits deriving therefrom'

[43] The consideration of what is reasonably practicable features prominently throughout OHSA, and it is thus understandable why it also specifically features in section 8 of the FA. For example, section 8(1) of OHSA, which deals with the general

duties of employers towards their employees, provides that: *'Every employer shall provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of his employees'*. Section 8(2) then provides specific particularity with regard to those duties, using the phrase *'reasonably practicable'* throughout.

[44] In *Afriforum and Another v University of the Free State*²³ the Court dealt with the phrase *'reasonably practicable'* in the context of section 29(2) of the Constitution.²⁴ Similar to the definition in section 1 of OHSA, *'reasonably practicable'* under section 29(2) also has defined sub considerations, for the want of a better description. In this regard, the Court said:²⁵

'No sound legal basis exists for the isolation of parts of s 29(2) in seeking to understand the totality of the requirement of 'reasonable practicability.' As was stated in Ermelo, different parts of this subsection are mutually reinforcing.'

[45] In *Pikitup (SOC) Ltd v SA Municipal Workers Union on behalf of Members and Others*²⁶ the Court came to consider what is meant by *'reasonably practicable'* as contemplated by sections 8 and 9 of OHSA, and had the following to say:

'Sections 8 and 9 therefore place a duty on the employer to act proactively to avoid any harm or injury to its employees and others. There is no standard as to what is reasonably practicable. Each case will have to be determined on its own facts and circumstances. As can be seen from the definition of 'reasonably practicable' it involves weighing different considerations from risk evaluation, means of removing or avoiding the risk, resource availability and a cost-benefit analysis. In Edwards v National Coal Board, Lord Justice Asquith stated:

'Reasonably practicable as traditionally interpreted, is a narrower term than "physically possible" and implies that a computation must be made in which

²³ 2018 (2) SA 185 (CC).

²⁴ The section reads: *'Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account (a) equity; (b) practicability; and (c) the need to redress the results of past racially discriminatory laws and practices.'*

²⁵ *Id* at para 45.

²⁶ (2014) 35 ILJ 983 (LAC) at para 42

the quantum of risk is placed in one scale and the sacrifice, whether in money, time or trouble involved in the measure necessary to avert the risk is placed in the other; and that, if it is shown that there is a gross disproportion between them, the risk being insignificant in relation to the sacrifice, the person upon who the duty is laid discharges the burden of proving that compliance was not reasonably practicable. This computation falls to be made at a point of time anterior to the happening of the incident complained of."

[46] A final reference is to *University of South Africa v Stapelberg NO and Others*²⁷, where the Court had the following to say in describing what may be 'reasonably practicable':

'In *Ledwaba v Laxness (Pty) Ltd* the court referred to the dictionary definition of 'practicable' as being 'capable of being effected, done, or put into practice; feasible', and 'reasonable' as being 'within the bounds of common sense, not excessive, extreme or fair', and concluded:

'So to my mind the phrase *reasonably practicable* means that which is effectively fair. An objective value judgment predicated on some evidence is thus required. ...'

[47] All considered, it is my view that follows from the above is a balanced assessment of the interests of both employer and employee, where it comes to deciding what is 'reasonably practicable'. Even though the primary focus would obviously be to ensure the health and safety of employees, the interests of the employer cannot be completely discounted. To simply describe, it is not about what is the best way the health and safety of the employees can be achieved. It is about whether, feasibly considered, the health and safety of the employees can be ensured by what has been implemented by the employer. The concept of feasibility means that issues such as costs, resources, capability and whether there are alternative means available to achieve the objective must also be considered. This will all be an objective factual enquiry, dependent on the factual circumstances of each individual case.

²⁷ (2019) 40 ILJ 2610 (LC) at para 48.

[48] Applying the above principles, I believe that *in casu*, when Ngcobo and Mabena carried out their inspections at the appellant's two stores, they unfortunately misconstrued the provisions of section 8(b) of the FR. What they did was to dictate to the appellant where seating had to be provided, namely behind the cashiers (tellers) desk(s). It was even prescribed in one instance that the appellant provides seats with backrests. In doing so, it was never considered whether what was directed would be reasonably practicable to the appellant as employer. It was also never considered whether the employees actually had the opportunity to sit to rest, and whether seating had in fact been provided. To describe it as simply as possible, it is not for the two inspectors to say where the seating must be provided. It would however be up to them to say that seating must be provided where it is not, unless it is not reasonably practicable to do so. This misconstruction calls the very foundation of the two Direction Notice: Contravention into question.

[49] In addition, it is unclear what hazard the employees may suffer if they are not able to sit at the cashiers' desk(s) when they want to rest, and instead be required to sit elsewhere. The inspectors needed to consider this and identify such a hazard in their reports. By not considering the actual availability of seating, even if not behind the cashiers' desks, the inspectors did not consider this as an alternative means to mitigate any hazard. Also, there was no consideration of the costs, or better put in this case the disruption, caused by the envisaged measures. And lastly, there was no evaluation of the benefits of having chairs behind the cashiers' desks themselves instead of somewhere else in the store. In short, there was no proper reasonably practicable assessment. This was rather a case of the personal preference of the inspectors, which is not what is envisaged by section 8 of the FR.

[50] In its appeals to the chief inspector, the appellant sought to emphasize the aforesaid anomalies. The appellant explained why it was not reasonably practicable to have chairs behind the cashiers' desks, as it would cause a disruption and unduly hinder movement in and out of the cash desk area. It would also make it difficult to serve customers. There was simply nothing to gainsay these contentions. This would be the kind of 'reasonably practicable' consideration as envisaged by section 8(b). But added to that, the appellant further explained that seating is in fact available to employees that want to sit to rest. This also appears not to have been considered by

the two inspectors, or the chief inspector, despite it being in line with what is prescribed in terms of section 8(b) of the FA.

[51] With regard to the stipulation by one of the inspectors that seats with backrests be provided, this appears to be a misconstruction of clause 8(c) of the FA, which prescribes that an employer should provide seats with backrests, where the nature of the work performed by employees is such, that these kinds of seats can be used. *In casu*, the nature of the work is not such that the employees can use such seats whilst working, and this provision would simply not be applicable.

[52] In refusing the appellant's appeals under section 35(1), the chief inspector indicated that the appellant had failed to prove that it is reasonably practicable not to have seating facilities available at the cash desks. This approach is erroneous. It places an onus on the appellant that does not exist. It is not for the inspectors to decide where seating must be placed, and the appellant must then prove it is not reasonably practicable to do so. All that the appellant must show is that it has implemented means that are reasonably practicable to provide seating to the employees in the store if they want to sit to rest. That it did. The chief inspector had nothing to contradict the explanations provided by the appellant, and there was no basis not to accept the same. Overall considered, this reason proffered by the chief inspector for rejecting the appellant's appeals is unfounded, and clearly in error.

[53] However, the chief inspector goes even further and provides another reason for refusing the appeal, being that the appellant did not assess the hazard of the cash desk employee having to stand for periods of their shift. The problem with this is that this is not a requirement under the FR. It was also never a cause of complaint raised against the appellant, by the inspectors themselves, that the employees are somehow subjected to a hazard because they would be required to excessively stand when executing their duties. The issue raised in the inspections was only about providing seating to the employees. It is not permissible for the chief inspector to refuse the appeal on the basis of an issue never in issue, so to speak.

[54] In summary, and what the two inspectors needed to consider, when conducting an inspection in the stores of the appellant, relating to compliance with section 8 of the FA, were the following factors. First, are employees that perform their

work whilst seated provided with an ergonomically sound seat? The answer is that this is not applicable, as the employees do not ordinarily perform their work whilst seated. Second, are the employees that ordinarily perform their work standing in the store provided with an opportunity to sit in order to rest? The answer to this question was in the affirmative. And finally, are seats with backrests provided where the work performed by employees allow for such seats to be used? The answer to this last consideration is also that it is not applicable, because the employees do not perform their work whilst seated. It follows that section 8 of the FA was not contravened. The inspectors did not seem to understand what their duties actually were, and gave unfounded directions based on a misapplication of the FR. The chief inspector materially erred by similarly misapplying the FR, placing an onus on the appellant that did not exist, and relying on an irrelevant consideration. The appellant's appeal must thus succeed.

Costs

[55] Both parties have contended that costs must follow the result. Nonetheless, in terms of section 162(1) of the LRA, I have a wide discretion where it comes to the issue of costs. Even though this is not an employment dispute under the LRA, this is still an issue having its roots in what can generally be described as employment law and is an employment relations issue. I therefore believe the guidance provided by the Constitutional Court when exercising my costs discretion under section 162(1), in LRA disputes, still has value. In this respect, and in *Union for Police Security and Corrections Organisation v SA Custodial Management (Pty) Ltd and Others*²⁸ that Court said:

'In the labour context, the judicial exercise of a court's discretion to award costs requires, at the very least, that the court must do two things. First, it must give reasons for doing so and must account for its departure from the ordinary rule that costs should not be ordered. Second, it must apply its mind to the dictates of the fairness standard in s 162, and the constitutional and statutory imperatives that underpin it ...'

[56] What is required is a proper consideration of the dictates of fairness to both parties. This is the first appeal under section 35(3) of OHSA that I am aware of. The

²⁸ (2021) 42 ILJ 2371 (CC) at para 35.

issues raised were novel and deserved the attention of this Court. None of the parties conducted themselves the course of the litigation in a manner that may be considered to be worthy of censure. I also consider that the inspectors concerned were simply carrying out their tasks as they saw it, albeit wrongly, without malice or mala fides. Costs should also not be too readily afforded where it comes to such functionaries fulfilling their tasks, as it may cause trepidation on the part of such functionaries to do what is expected, out of fear of incurring costs awards if challenged. An overall consideration of all of the facts of this case, together with the aforesaid principles, leaves me convinced that no order as to costs is appropriate and fair.

[57] For all the reasons set out above, I make the following order:

Order

1. The appellant's appeal in terms of section 35(3) of the OHSA is upheld.
2. The Direction Notice: Contravention dated 9 September 2021 issued by Inspector Hlenglwe Ngcobo is set aside.
3. The Direction Notice: Contravention dated 14 October 2021 issued by Inspector Ntonbifuthi Mabena Ngcobo is set aside
4. There is no order as to costs.

S Snyman

Acting Judge of the Labour Court of South Africa

Appearances:

For the Appellant:	Advocate A Redding SC
Instructed by:	Govender Patel Dladla Inc Attorneys
For the Respondents:	Advocate F A Darby
Instructed by:	The State Attorney Pretoria