

Occupational health and safety regulations for hazardous chemicals under the microscope

The Department of Labour recently published draft regulations under the Occupational Health and Safety Act to regulate the safe use, manufacture and storage of potentially hazardous chemicals. The department seeks public inputs in the second week of December (14th). Ordinarily, regulations of such a technical nature do not receive a great deal of public scrutiny because, frankly, very few members of the public are qualified to pass comments on such a technical piece of work – this author is no exception. Be that as it may, there are a number of legal and procedural issues which warrant further deliberation.

Draft regulations of this nature are supposed to pass through the Advisory Council for Occupational Health and Safety (ACOHS,) a multi-party advisory panel made up of stakeholders from business, labour and the Department of Labour. Aside from being capacitated by experts with considerable experience in occupational health and safety, the council is empowered to source additional technical expertise where required. Whilst this author cannot comment on the technical aspect of the regulations, it is surprising that the draft regulations managed to pass through ACOHS despite the overall approach not being aligned to the risk-based approach recommended by the Occupational Health and Safety Amendment Bill.

The Bill, which passed Nedlac as far back as 2015 but has still not been tabled in Parliament, signals a shift away from ad hoc hazard mitigation towards a more comprehensive risk-based system. The current Act, and indeed all regulations made in terms of the Act, place the emphasis on mitigating hazards as and when they apply, to the extent that it is reasonably practicable to do so. The Bill proposes that this approach be replaced by a comprehensive risk-assessment at regular intervals, accompanied by a risk mitigation plan. Instead of assessing whether the mitigation measures imposed were 'reasonably practicable' after an incident occurred, the new approach proposes that a proactive and comprehensive risk assessment is conducted, following which the employer and the occupational health and safety committee (or officer where no committee exists) agree on a plan to mitigate these identified risks. In this way, one can reduce disputes as the employer and employees agree on mitigation measures beforehand, opposed to looking back and deciding whether or not the mitigation measures were reasonable.

Although the Bill has not been passed into law yet, it seems strange that the Department of Labour would publish draft regulations that are not aligned to this risk-based approach. The other crucial aspect where no alignment exists relates to the enforcement mechanisms. The draft regulations, as was the case with the amendment Bill before the Nedlac process

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commenced, seeks to criminalise non-compliance with any obligation imposed by the Act. This is, with all due respect, a blunt instrument which would pose enormous difficulties in implementation. During the Nedlac process, a number of challenges were identified with this approach namely;

- Broad sweeping criminal provisions such as these could be constitutional as it violates the legality requirement – provisions creating crimes must be clear and concise so that people know exactly what they may and may not do;*
- Criminal sanction may not be justified for minor issues of non-compliance – i.e. why would you prosecute someone for small infringements such as failure to display the right warning signs at a workplace;*
- The burden of proof is very strenuous in criminal proceedings, and the onus rests wholly with the state;*
- The National Prosecuting Authority would have to weigh up the importance of following through on these prosecutions vis-à-vis other pressing matters; and*
- Finally, in the spirit of compliance, an employer should be given the opportunity to remedy a situation before being punished.*

With these factors in mind, the social partners at Nedlac agreed to introduce a system of compliance directives, administrative fines for minor infringements and to reserve the criminal sanction for instances of repeated non-compliance or intentional and/or fraudulent conduct.

The amendment Bill may not be in force yet, but the Department would do well to incorporate these principles into any regulations which they seek to make. As many agribusinesses store, manufacture and distribute potentially hazardous chemical substances, Agbiz is in the process of drafting comprehensive inputs with colleagues from other affected industries at BUSA.