

## Successful prosecution in the Mining Industry (South Gauteng)

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### Introduction

Prosecution is defined as “legal proceedings in which a person accused of a criminal offense is tried in a court by the government (state) appointed public prosecutor” (Oxford dictionary). The purpose of the criminal justice is to deliver justice for all, by convicting and punishing the guilty and helping them to stop offending, while protecting the innocent (Garson 2008). Prosecution in the mining industry of South Africa is used to enforce compliance to the Mine Health and Safety Act (MHSA). Enforcement measures are necessary for controlling and gaining compliance with statutory requirements at mines. Prosecution should be applied fairly to everyone who commits an offence, in the mining industry; an offence as described in Section 86 of the MHSA refers to the act of negligence causing serious injury or illness to a person at a mine. Although considered contentious; prosecution is part of the preventative and punitive system that currently exists in the mining industry as stipulated by the enforcement pyramid see Figure 1. According to Seymour (2009) the threat of prosecution will ensure that decision makers are more cautious about people’s lives and “cowboy operators” and “rogue contractors” are eliminated making the mining industry safer.

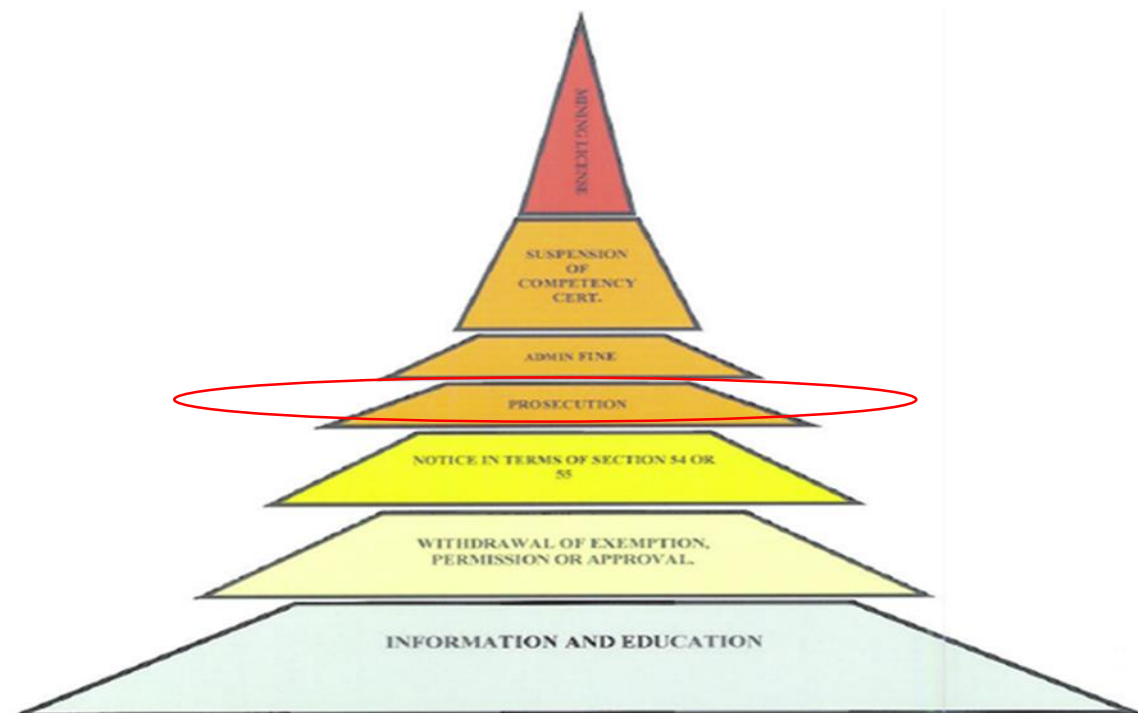


Figure1: Enforcement pyramid

Pre 1994 a number of people lost their lives at mines see Figure 2 and there was minimal accountability from the employer.

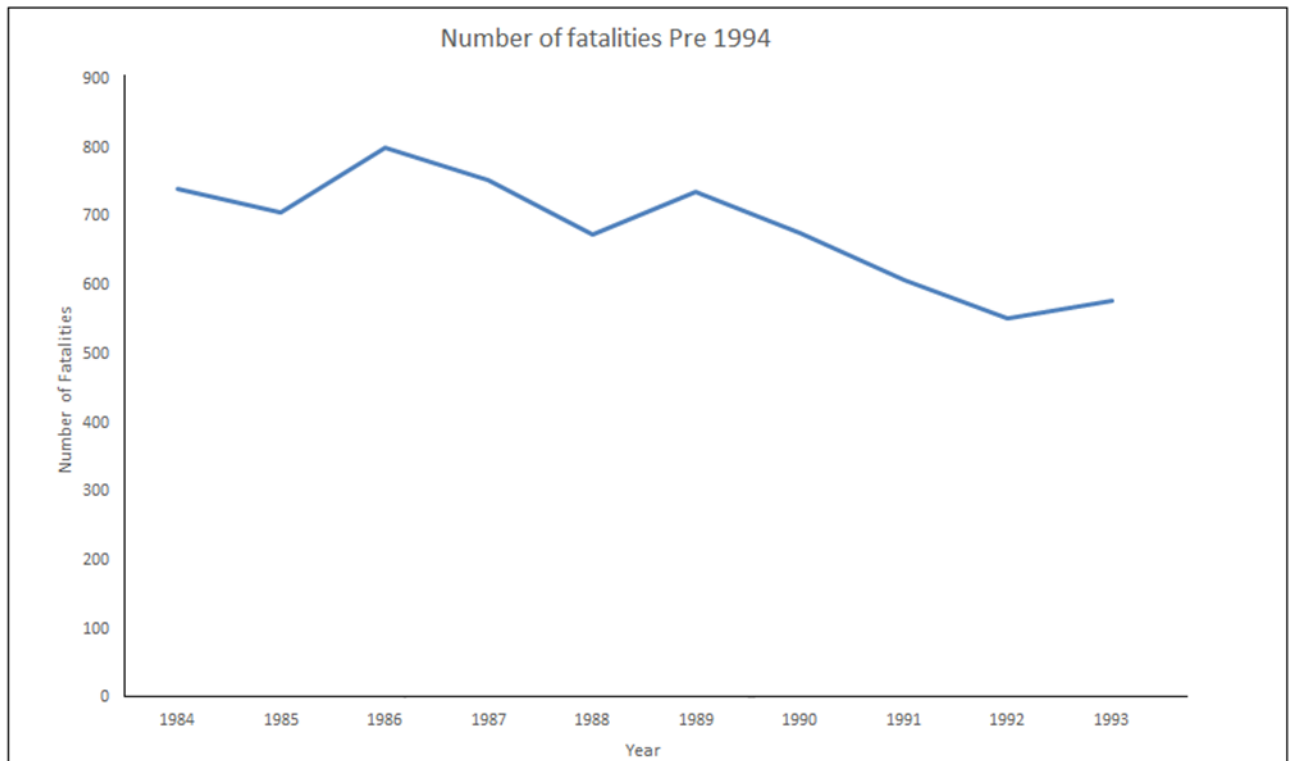


Figure 2: Pre 1994 Mine Fatalities

When former President Nelson Mandela came into office he requested that an investigation be conducted on all the aspects of the legal regulations of mine health and safety. To also provide recommendations to the state president on improvements to the existing regulations and implementation thereof in the light of the circumstances prevailing in the industry at the and also of international standards. A Commission of inquiry was set up after this request was made, and that commission was called the Leon's Commission of Inquiry. The commission amongst others recommended against the re-introduction of the mining court. It further concluded that "its recommendations concerning the inspectorate, the introduction of a legal section therein, as well as a stronger regulation with regards to actual inquiries, should be sufficient to serve a purpose of a mining court".

The afore mentioned recommendations led to the introduction of a number of Sections in the MHSA. For example, Section 60 states that; "the chief Inspector of Mines must instruct an Inspector to conduct an investigation into any accident that resulted to the death of any person". This is followed by the application of Section 65 which instructs the Chief Inspector of Mines to direct an Inspector to conduct an inquiry into any accident or occurrences at a mine, that results in the death of any person. A Section 72 (1) (b) follows where, at the conclusion of the inquiry a person presiding must prepare a written report of the findings, recommendations and any remedial steps. Section 72 (3) then states that, "the Chief Inspector of Mines may submit a copy of the report to the appropriate Attorney-General" (MHSA, 1996).

This study investigates the impacts that the above mentioned recommendations have on prosecution as a compliance enforcement tool. This study focuses on the mines in the Southern Gauteng Province, and highly acknowledges that mine fatalities may have negative impacts on all mining stakeholders especially families.

## **Study Objectives**

This paper investigates how the Leon's Commission of Inquiry's decision not to re-introduce mining courts impacts on prosecution and the success of conducting it. This study explores how effective South Africa's enforcement strategies as stated by the enforcement pyramid focusing mainly on prosecution as a tool that can be used to enforce compliance in the mining industry in South Africa.

## **Methodology**

A combination of qualitative and quantitative approaches were used in this research and the steps are as follows:

- a) The review of Leon's Commission of inquiry Report.
- b) The National Union of Mineworkers and the Chamber of Mines were interviewed
- c) The Mine Health and Safety Act was reviewed and all steps that follows Section 60 were critically analysed in terms of how they are implemented.
- d) The researchers paid a visit to the offices of National Prosecution's Authority (NPA) dealing with Occupational and Safety cases in the South of Gauteng.
- e) Data was collected from the NPA
- f) Interested parties like Mining lawyers (Hogan Lovells and Pheelo Dikane Inc. Attorneys) were also consulted and their views on the current state of prosecution in mining related fatalities were heard.

## **Study Area**

The research was limited to the Mining houses that fall under the Johannesburg Regional Court those include Westonaria, Randfontein, Kempton Park and Springs. The Johannesburg Regional Court was selected as the first Court where the research in this topic can be conducted; and with that came all the mining houses falling under this Court.

## **Results and discussion**

Based on the information that was given by the prosecutor from the NPA, a graph of prosecution against Section 72 (1) (b) reports could be drawn as reflected in Figure 3. It can be seen from the graph that there has been no successful prosecution for period 2005 to 2015 all these cases are still pending.

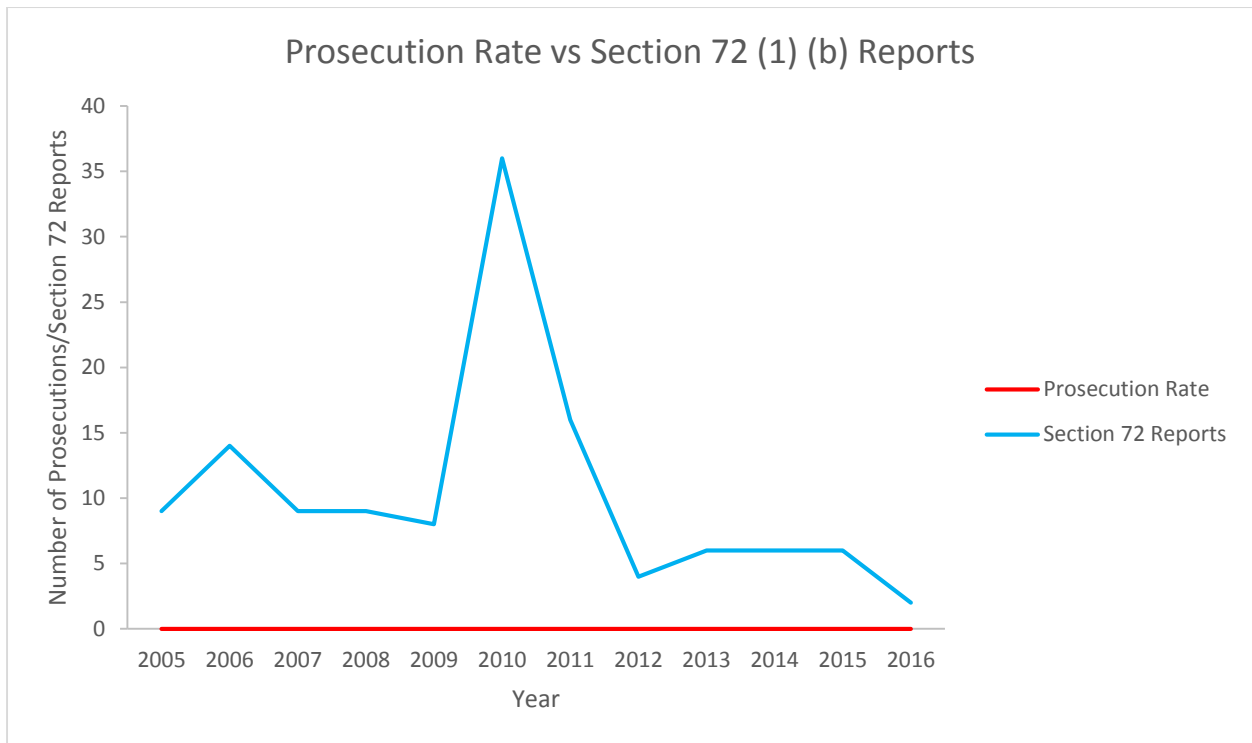


Figure 3: Prosecution against the received Section 72 9 (1) (b) Reports

The prosecutor gave the following reasons for failure to prosecute:

- 1) Lack of understanding of technical mining terms used in the reports.
- 2) Lack of involvement from the DMR in the process of prosecution.
- 3) The recommendations from the DMR are sometimes vague and lack the direct link with the appropriate law.

The initial thought that came to mind when all the above reasons were stated was that; the Leon’s Commission of Inquiry should have re-introduced the Mining Courts. Research was conducted on the viability of Mining Courts to solve the above problem, listed below is what this study found to be the key challenges associated with Mining Courts:

- 1) A court requires that a Lawyer must be a representative of the accused, mining companies will have money to afford Lawyers while ordinary employees will not be able to afford a lawyer.
- 2) All the information will not be revealed as people will fear prosecution and a court environment is not conducive.
- 3) The problem that was identified by the Leon’s Commission that there is a shortage of Inspectors still exists, and with a mining court existing Inspectors will mostly spend their time in that court as witnesses while neglecting their other duties.

The Authors are in agreement with the Leon’s Commission’s decision to not re-introduce the Mining Courts.

Consideration of the procedure leading to possible prosecution became the main focus of the study to further investigate failure to prosecute. There is no doubt that all stakeholders from the employer, employees, DMR and NPA do what is required from them in terms of the MHSA; all the relevant Sections in the MHSA are applied fully as required.

The problem only starts on the application of Section 72 (1) (b), see Table 1 below for how the findings, recommendations and remedial steps are written in some of the inquiry report submitted to the NPA.

Table 1 Typical Recommendations in a Section 72 (1) (b) report

Type	Recommendation
Case 1	Section 55A Admin penalty to be imposed to the employer, Case to be referred to the Director of Public Prosecutions;
Case 2	Mine Overseer and the shift boss to be criminally charged, Section 55A fine to be imposed to the employer and Case to be referred to the Director of Public Prosecutions;
Case 3	Case to be referred to the Director of Public Prosecutions;
Case 4	No prosecution is recommended, the case to be referred to the Director of Public Prosecutions
Case 5	Section 55A administration penalty to be imposed to the employer

Section 72 (1) (b) does not clearly stipulate how should the findings, recommendations and remedial steps be written, therefore it is up to the Presiding officer to decide how He/she wants to write them; hence the different styles of writing from Case 1- Case 5 above. Furthermore, the recommendations stated in the reports are in fact remedial steps, since only an instruction is issued.

According to Martha Tlale (personal communication, 2016) Head of the NUM legal department, the application of Section 74 of MHSA is another challenge. She mentions that it takes time for the National Prosecution Authority to approve the application she also added that it is frustrating to sit in an inquiry/inquest and listen to someone who does not understands little about mining.

According to Wessel Badenhorst who is a mine safety law expert *“clumsy prosecutions took place under the previous version of the Act (Section 86). We can expect the rate and efficiency of prosecutions to increase once the amendments to the Act are approved”*

As it stands now Section 86 is still in the previous version, the Section 86A amendment never came to being due to the resistance from stakeholders; the Chamber of Mines expressed their deepest worry about what they referred to as a *“shift away from a system that is finely balanced between preventative and punitive measures, to a system strongly emphasizing punitive measures”*

## Conclusion

When taking the Leon’s Commission into consideration, it is clear that all of the recommendations concerning the inspectorate, the introduction of a legal section therein, as well as a stronger regulation with regards to actual inquiries, are insufficient with regards to conducting successful prosecution. Firstly, the inspectorate lacks the legal knowledge, this was deduced from the manner in which they write and present the recommendations, remedial actions and steps to initiate successful prosecution. Secondly, the NPA prosecutors lack the mining background, thus they find it difficult to understand the Section 72 (1) (b) report for the initiation of the inquest. Lastly it appears that Section 74 fails to be implemented due to lack of judicial personnel who understands mining to preside over inquiry/inquest. It seems that too much legal responsibility is granted to the inspectors, while they have minimal knowledge of law.

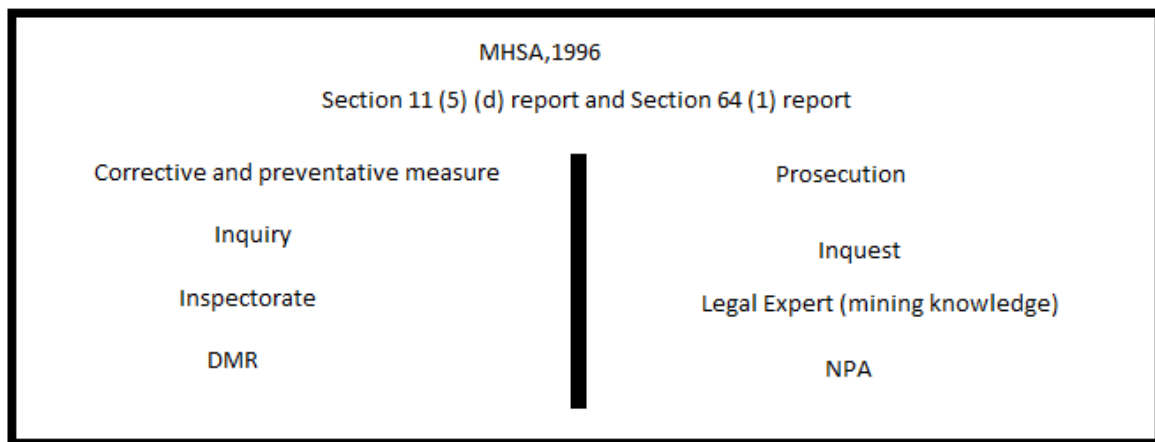
The Leon’s Commission of Inquiry recommendations pertaining to the Inspectorate, as well as the stronger regulations with regards to inquiries has fallen short on achieving the primary objectives of preventing repetition and ensuring that corrective measures are undertaken by the Inspectorate. This is due to the fact that the inquiry, is used as a tool to initiate prosecution amongst other things. Therefore, most witnesses are reluctant to tell the truth, because of the fear of being prosecuted.

## Recommendations

- It is clear that the manner in which the recommendations are written is insufficient for the prosecutor to understand and initiate successful prosecution. Therefore, the Inspectorate must not in any way be involved with initiating prosecution. The Inspectorates should focus on their main functions as stipulated below:

*The main functions of the Mine Health and Safety Inspectorate are the provision of policy inputs for the establishment and application of mine safety standards at mining operations, and promote the application thereof; policy inputs towards the establishment and application of mine equipment safety standards at mining operations, and promote their application; the establishment and application of mine health standards at mining operations and the promotion of these applications; and ensuring an effective support and inspection service (DMR, 2016).*

- The NPA's main function is to institute and conduct criminal proceedings, therefore in mining related cases, they should ensure that successful prosecution is achieved where deemed necessary. They can do this by obtaining the relevant mining knowledge to assist them to conduct successful prosecution.
- The aim of an inquiry is to seek the truth, help prevent repetition and implement corrective measures. While an inquest's aim is to legally ascertain the facts relating to an accident for the purpose of prosecution.
- This study highly recommends that the inquiry and inquest be conducted separately. Where the inquiry uses the MHSA Section 11 (5) (d) and Section 64 (1) reports and similarly the inquest should directly use the afore mentioned reports as shown in the diagram below.



- The DMR Inspectorate should be proactive in education and information, which is the base of the Enforcement Pyramid.
- The University of Johannesburg's Mining Engineering department forwards an invitation to the NPA, for all mining related courses and knowledge in general.

## **References**

DMR (2016). The Inspectorate duties. [online] <http://www.dmr.gov.za/home.html> accessed 11-08-2016.

Farisani D. M (2013). Corporate Criminal Liability for deaths, Injuries and Illness: Is South Africa's Mining Sector Ready for Change.

Garson D (2008). Definition of Prosecution in legal terms.

Gunningham N (2007). Prosecution for OHS Offences: Deterrent or Disincentive.

Lazenby H. (2010). Multimillion-rand plan to improve enforcement, prosecution.

Leon's Commission of inquiry Report; 1994. Mine Health and Safety Inspectorate: Enforcement Guidelines, 2011.

Mine health and Safety Act, 1996.

Seymour C. (2009). Mining Safety Prosecutions.

Tlale M. (2016). Head of Legal Department NUM.

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