

INTERPRETATION OF REGULATION 2.13.1 (a) OF THE MINERALS ACT REGULATIONS.

“Sum of - 2500 kilowatts machinery – appoint an engineer” – MHS Inspectorate Instruction

Members of the CBA have received an Instruction from their Regional MHS Inspectorate re the above Regulation. The Chief Inspector who issued the Instruction of 22 November 2005 lacks the power to issue such an instruction and it is thus invalid. If however the Chief Inspector rectifies this situation and get the same Instruction re-issued by the Minister, their interpretation of the Regulation is fatally flawed and the Instruction can again (for the majority of clay brick factories) be ignored – or argued – depending on your ‘style’.

The relevant parts of the Regulation provides as follows – *“At any mine or works where the designed rating of machinery **used in the generation of power**, together with the power supplied from outside sources, exceeds the equivalent of 2500 kilowatts....all machinery shall be under the general charge of an engineer....”*

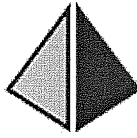
The term “machinery” is defined as follows – *“ Any engine, boiler or appliance or any combination of them..... for generating, developing, receiving,any form of power or energy..”*

It is clear from the reading of the Regulation that the drafter did not intend to use this definition extensive, but in fact limited the “machinery” by referring to “*machinery used in the generation of power*”. It would be wrong to include other forms of “machinery” as it clearly deals with machinery which is used in the generation of power. It does not deal with self-propelled machines. Diesel, gas or petrol driven self-propelled mobile machines cannot be included. Steam generators, boilers, gas or coal kilns are also excluded.

The words “*together with the power supplied from outside sources*” clearly refer to power which is supplied from outside (ESKOM) where: Kw – Kva and 1000 Kw = MVA. The interpretation which prescribes a method of calculating the supplied power as the guaranteed electrical power maximum demand from ESKOM appears to be reasonable and should be accepted. Emergency Generator sets cannot be included as they are not in regular use.

Some of our members might fall in the above (ESKOM) category and will have to comply with a valid (re-issued) Instruction. If you have more than one ‘mine or works’ – factory, the Regulation does not prohibit an individual engineer from being appointed at more than one mine or works.

In terms of practical advice on the way forward, each member must consider his circumstances and if threatened obtain further legal advice. The CBA has at its disposal a generic legal opinion addressing the matters raised above.



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13 September 2010

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Dear At

LEGAL OPINION: INTERPRETATION OF REGULATION 2.13.1(a) OF THE MINERALS ACT REGULATIONS, WHICH REMAINS IN FORCE IN TERMS OF SCHEDULE 4 OF THE MINE HEALTH AND SAFETY ACT, NO. 29 OF 1996 ("THE MHSA")

1 BACKGROUND

1.1 The above matter and our consultation on Wednesday, 25 August 2010 refer. We confirm that you represent the Claybrick Association ("*the Association*"), which in turn represents a number of manufacturers of clay bricks.

1.2 On behalf of the Association, you have instructed ourselves to provide a legal opinion in respect of the interpretation of Regulation 2.13.1(a) of the Minerals Act Regulations ("*the Regulation*"). You have specifically requested that we consider the instruction (Reference No. ME-4-2005) issued by the Mine Health and Safety Inspectorate of the Department of Mineral

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Resources ("*the Mine Health and Safety Inspectorate*") dated Tuesday, 22 November 2005 (hereafter referred to as "*the Instruction*"). The aforementioned Instruction pertains to the Mine Health and Safety Inspectorate's interpretation of the Regulation.

- 1.3 Subject to our advice, we shall provide recommendations to the Association relating to the manner in which it may proceed to address certain concerns and/or restrictions imposed on its members.

2 QUESTIONS POSED

- 2.1 The Instruction (see paragraph 3 thereof) provides an interpretation of "(t)he designed rating of machinery used in the generation of power together with the power supplied from outside sources..." The Instruction provides that the latter term means "*the sum of*" :

"3.1 Supplied power to the mine in kilowatts (transformer ratings in MVA or kVA);

Note: Assume a unity power factory, therefore kW – kVA and 1000 Kw = MVA

3.2 The power rating of any diesel, gas or petrol driven self-propelled mobile machine used for mining operations;

3.3 Power rating of an electric power station, if it exist at the mine, including emergency generator sets;

3.4 Power rating of steam generators (boilers) stationery and mobile, operated by coal, gas or oil;

3.5 Power rating of gas or coal kilns;

3.6 Power rating of hydro powered and wind operated generators".

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2.2 The first question to be addressed is whether an employer is legally bound to comply with the provisions of the Instruction? If the answer is in the negative, then you may consider to disregard the Instruction. If, however, the answer is in the affirmative and the employer is bound to comply with the provisions thereof, then we will consider, firstly, the legal validity of the interpretation as contained in the Instruction and secondly, to provide practical alternatives to the Association and its members relating to measures / methods to attempt to address the issues.

2.3 We set out hereinbelow our opinion in this regard.

3 THE LEGAL STATUS OF THE INSTRUCTION (REFERENCE NO. ME-4-2005)

3.1 Two questions arise in this regard. Firstly, whether the person who issued the Instruction had the power to issue the same. Secondly, if the person had such power whether the contents of the Instruction have legal validity.

3.2 The Instruction does not provide the names of the persons who drafted the Instruction nor is the Instruction signed. It appears to have been distributed by Ms MA Hermanus, the Chief Inspector of Mines at the time, in that there is a covering note providing that the Instruction must be distributed to all mines. This note is signed by Ms Hermanus. The note reflects the same reference number as the Instruction. Accordingly, one may assume that the Instruction furnished to us is the document that was distributed by Ms Hermanus at the time.

3.3 The Mine Health and Safety Inspectorate is a juristic person which was established in terms of section 47 of the Mine Health and Safety Amendment Act, No. 74 of 2008. The powers of the Mine Health and Safety Inspectorate are not relevant to this matter as the Instruction purports to have been issued by the Chief Inspector. Furthermore, it had been issued prior to the establishment of the Mine Health and Safety Inspectorate.

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3.4 Section 48 of the MHSA provides that:

*"(2)... the Chief Inspector of Mines must perform the functions entrusted to the Chief
Inspector Mines **by this Act**".*

The Chief Inspector of Mines is a creature of statute, and as such may perform only functions and exercise powers as contained in the MHSA (including the regulations promulgated thereunder).

3.5 Neither the provisions of the MHSA nor the regulations promulgated thereunder **specifically** contain any reference to any power of the Chief Inspector of Mines to issue an instruction relating to the interpretation of the MHSA or the regulations promulgated thereunder. However, the MHSA does contain provisions which furnish an Inspector and Principal Inspector with authority to issue certain instructions, e.g. an instruction may be issued, orally or in writing, by an inspector to a specific employer in terms of section 55 of the MHSA. Guidelines may be issued by the Chief Inspector of Mines in terms of section 9(3) of the MHSA, relating to codes of practice that are implemented and prepared by an employer.

The Instruction does not fall within the scope of either of the abovementioned sections.

3.6 Apart from the abovementioned provisions there are, however, provisions in the MHSA which grant the Chief Inspector of Mines with specific powers to act in the furtherance of health and safety matters at mines. For example, section 49 provides, amongst others as follows:

"49. Chief Inspector of Mines' functions

*(1) Without limiting any statutory duty of any other person in terms of this Act, the
Chief Inspector Mines must -*

...

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(k) ***perform any duties relating to health and safety at mines that the
Minister directs or prescribes;***

...

If the Minister directed or prescribed to the Chief Inspector to issue an interpretation of regulations, the Chief Inspector may rely on such prescription or direction as the source of her power to issue the instruction. We do not have knowledge of any such direction or presumption by the Minister.

3.7 Unless the instructions falls within the category referred to in par 3.6 above, it is invalid as the Chief Inspector would lack the power to issue the same.

4 THE INTERPRETATION OF REGULATION 2.13.1(a)

4.1 Regulation 2.13.1 of the Minerals Act Regulations provides as follows:

"At any mine or works where -

a) *the designed rating of machinery **used in the generation of power,**
together with the power supplied from outside sources, exceeds the
equivalent of 2 500 kilowatts; or*

b) *any winding plant intended for conveying persons is installed,*

*all machinery shall, subject to regulation 2.13.6.1, be under the general charge of
an engineer shall be appointed in writing by the manager" (own emphasis).*

4.2 The term "*machinery*" is defined in section 102 of the MHSA as follows:

*"Any engine, boiler or appliance or any combination of them, which is situated at a
mine and used or intended to be used:*

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- (a) *for generating, developing, receiving, storing, converting, transforming, transmitting or distributing any form of power or energy; or*
- (b) *for conveying persons, material or minerals."*

4.3 It is clear from a reading of Regulation 2.13.1 that the drafter of the Regulations did not intend to use this extensive definition, but in fact limited the "*machinery*" referred to in Regulation 2.13.1, by referring to "*machinery used in the generation of power*". For that reason, it would be wrong to include other forms of "*machinery*", in the interpretation of Regulation 2.13.1.

4.4 Regulation 2.13.1 requires that an engineer be appointed to be in general charge of "*all machinery*", in the following two instances:

4.4.1 where the designated rating of machinery used in the generation of power, together with a power supply from outside sources, exceeds the equivalent of 2 500 kilowatts;
or

4.4.2 any winding plant intended for conveying persons is installed.

The second category is not relevant in this instance. The first category deals with the situation when the total power generated by machinery used for the generation of power as well as power "*supplied from outside sources*", exceeds the equivalent of 2 500 kilowatts.

4.4.3 **The "*designated rating of machinery used in the generation of power*"**

The above wording is uncomplicated. It clearly deals with machinery which is used in the generation of power. It does, therefore, not deal with self-propelled machines.

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4.4.4 **The words "*together with the power supplied from outside sources*"**

These words clearly refer to power which is supplied from "*outside sources*" and which is not generated by "*machinery used in the generation of power*" at the "*mine or works*". Self-propelled machinery, amongst others, which is used on the mine is excluded from this class.

4.5 The appointment of an engineer is therefore mandatory, where the generation of power (internal and external) exceeds 2 500 kilowatts. The appointed engineer must be the holder of a mechanical or electrical engineer's certificate of competency.

5 **INTERPRETATION OF THE INSTRUCTION**

We set out hereinbelow an analysis and interpretation of the Instruction. We deal separately with the items included by the Chief Inspector to arrive at the criterion of exceeding the equivalent of 2 500 kilowatts.

5.1 ***"Supplied power to the mine in kilowatts (transformer ratings in MVA or kVA); Note: Assume a unity power factory, therefore kW – kVA and 1000 Kw = MVA"***

This is in accordance with the provisions of the Regulation and falls within the category of power supplied from outside sources. The Instruction goes further (see paragraph 4.1) and prescribes a method of calculating the supplied power as comprising the "*(t)he connected guaranteed electrical power maximum demand supplied from the ESKOM/REDS to the mine or works in kW*". This appears to be a reasonable interpretation of the Regulation. From our instructions, this calculation is not in dispute.

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5.2 ***"The power rating of any diesel, gas or petrol driven self-propelled mobile machine
used for mining operations"***

There is no basis to include "*diesel, gas or petrol driven self-propelled mobile machines*" in Regulation 2.13.1(a). These machines are not used to generate power, nor may such machinery be considered as supplying power from "*outside sources*". The point of the matter is that such machines supply power for themselves and they do not receive the power from "*outside sources*".

5.3 ***"Power rating of an electric power station, if it exist at the mine, including emergency
generator sets"***

5.3.1 An electrical power station is an industrial facility for the generation of electric power. If this facility exists at a mine, it must be taken into account for the purposes of the calculation.

5.3.2 The question whether "*emergency generator sets*" are included in the sources of power referred to in Regulation 2.13.1, is more complicated. Of importance in the interpretation of the Regulation in this regard is the word "*used*" (in the generation of power). The word "*used*" is not defined in the Regulations, nor in the MHSA. For that reason it must be given it's ordinary grammatical meaning. The word as a noun is defined in the **Concise Oxford Dictionary (Oxford University Press, South African, 10th Ed.)** as "*the action of using or state of being used*". As a verb it is defined as amongst others, "*utilise, turn to account, employ or make use of*". It is clear that the grammatical meaning of the word does not resolve the particular question.

5.3.3 Our Courts use presumptions of interpretation to interpret ambiguous wording (see in this regard G-M Cockram, **Interpretation of Statutes**, 3rd Ed. 77 and further; GE

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Devenish, **Interpretation of Statutes** (1st Ed., 2nd Impression), 290 and further. In this regard the presumption that the legislature (in this instance the drafter of the Regulations) did not intend to be unreasonable or to cause injustice, is relevant. If a standby generator with say, a capacity of 2 600 kilowatts is in place on a mine, it would mean, despite the fact that the designed rating of machinery used in the generation of power, is otherwise extremely low, that such mine must have an engineer, which requirement would be unreasonable. A more reasonable interpretation of the Regulation is to require the machinery referred to in this context to be in regular use and not to be available for use in the exceptional case. We are therefore of the view that a strong argument can be made out that the designated rating of standby generators must be excluded from an interpretation of Regulation 2.13.1.

5.4 ***"Power rating of steam generators (boilers) stationery and mobile, operated by coal, gas or oil"***

5.4.1 In terms of your instructions, a boiler or steam generator is a device used to create steam by applying heat energy to water. A boiler or steam generator is used wherever a source of steam is required. A boiler incorporates a furnace in order to burn fuel and generate heat.

5.4.2 You have further instructed that, on its own, a steam generator does not generate power, but rather produces steam by converting heat energy. The generation of power, occurs only in circumstances where an engine, turbine and alternator is connected to the steam generator and it is then the engine, turbine and alternator which generates such power. It is these "*steam engines*" which generate power, and not the steam generators itself. On its own, a steam generator is not capable of generating power.

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5.4.3 In view of the aforesaid, as well as the remarks referred to in par 4 above, steam generators (boilers) which are not used for the generation of power, would be excluded from Regulation 2.13.1(a).

5.5 ***"Power rating of gas or coal kilns"***

5.5.1 You have instructed that gas and coal kilns are not machinery that are capable of generating power but are rather thermal insulated chambers, or ovens, which are used to generate heat energy (as opposed to power) for the purposes of hardening, burning, or drying materials. Whilst the kiln is operational, the heat energy is neither converted nor transferred into power. Accordingly, no generation of power occurs.

5.5.2 In view of the aforesaid and the remarks referred to in par 4 above, gas and coal kilns must be excluded from the calculation of 2 500 kilowatts referred to in Regulation 2.13.1(a).

5.6 ***"Power rating of hydro powered and wind operated generators"***

You have not instructed ourselves to consider this category in the Instruction.

6 **PRACTICAL ADVICE REGARDING THE WAY FORWARD**

6.1 We propose that an application be made to the Chief Inspector of Mines, setting out the viewpoint of the Association concerning the interpretation of the instruction. Should the Chief Inspector persist with the interpretation of the Regulation as set out in the Instruction, you may consider to apply to the Labour Court for a declaratory order, in other words, to apply to the Labour Court to declare that the Instruction is invalid in that the Chief Inspector exceeded her powers when issuing the same (par 3 above); alternatively, if the Chief Inspector did not exceed her powers, to interpret the Regulation. The further alternative request when such an

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application is brought would be to request the Labour Court to declare that the Regulation is void for vagueness. See in this regard Section 82(1) of the MHSA.

7 THE APPOINTMENT OF THE SAME ENGINEER BY DIFFERENT OWNERS / EMPLOYERS OF MINES OR WORKS

7.1 The Regulation provides that an engineer must be appointed at "*any mine or works*" if the situation referred to in Regulation 2.13.1 pertains. The Regulation does not prohibit an individual engineer from being appointed at more than one mine or works.

7.2 Accordingly, different members of the Association may enter into an "*arrangement and/or agreement*", that an appropriately qualified person is appointed in the capacity of engineer at different mines or works owned by each member. We point out that, if the aforementioned appointment is to be implemented, the following practical considerations must be taken into account:

7.2.1.1 we propose that the engineer act as a "*external engineering consultant*" for each mine or works for which he is appointed. Dependant on the circumstances, the various owners / employers may enter into an "*arrangement and/or agreement*", whereby the terms of the engineer's appointments may be considered and set out e.g. remuneration, time period for inspections, duties and responsibilities;

7.2.1.2 the engineer would require a letter of appointment for each mine or works that fall within his responsibility, which appointment is to be made by the relevant responsible person at each mine or works;

7.2.1.3 the engineer must visit each mine or works, within his area of responsibility, within a specified time frame agreed upon (but at least on a monthly basis);

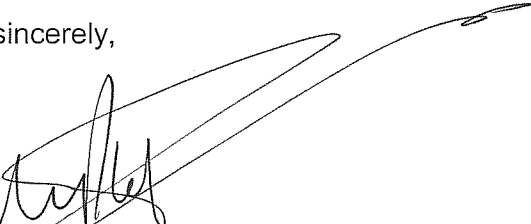
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7.2.1.4 the engineer must appoint competent persons, in terms of the Minerals Act Regulations, for each mine or works for which the engineer is appointed, to oversee the mines or works on his behalf. These competent persons must report directly to the engineer.

This may prove difficult to implement from a logistic point of view but it is particularly advantageous for the smaller clay brick manufacturers, who exceed the 2 500 kilowatt threshold. From a cost perspective, the cost of appointing an engineer at each mines or works is also significantly reduced and possibly shared amongst the particular members.

Your sincerely,



WILLEM LE ROUX / CELESTE COLES
BRINK COHEN LE ROUX INC