

WHEN THE DESIRE TO WEAR NICE SHOES OVERRIDES HEALTH AND SAFETY

I have, over several years represented mining companies in inquiries that must held in terms of section 65 of the Mine Health and Safety Act, No. 29 of 1996 (MHSA) where persons have passed away, after they have sustained injuries from a slip, trip or fall incident which can be attributed to wearing inappropriate footwear in the workplace. Mining infrastructure on surface, including offices, do present slipping, tripping and falling risks, and every single mine that I am aware of, has a rule in place that appropriate footwear as identified by the employer, must be worn at the mine, including, on surface.

This workplace rule relating to the surface infrastructure, most typically requires the footwear to be flat and not loose. Strapless footwear such as “slops”, high heels, and shoes which expose the wearer to injury should something fall, are typically prohibited.

The workplace rule is not implemented on a whim – the injury statistics on mines are freely available and even the most basic hazard identification and risk assessments that are carried out in compliance with section 11 of the MHSA typically identify inappropriate footwear as a leading cause of slip, trip and fall incidents, with the most common control or mitigation measure, being the workplace rule which requires appropriate footwear to be worn.

The MHSA requires the employer (the entity which holds the right to prospect or mine) to ensure that the mine is designed, constructed and equipped, and that it is commissioned, operated and maintained in such a way that the workplace is safe and without risk to the health of employees. A failure by an employer to comply with these responsibilities exposes the employer to criminal prosecution and administrative fines under the provisions of the MHSA.

The objectives of the MHSA, supported by the responsibilities which are placed on the employer, are to, amongst others, protect the health and safety of persons at mines, commonly referred to as the commitment to “zero harm”.

The responsibilities placed on the employer are balanced by responsibilities which are placed on employees in terms of section 22 of the MHSA, typically referred to as “brother’s/sister’s/keeper” which requires employees to take reasonable care to protect their own health and safety and of other persons.

All stakeholders in the mining industry including the employers, trade unions, the Department of Mineral Resources and Energy, and industry bodies such as the Minerals Council of South Africa, regularly reconfirm commitment to “zero harm”, and the health and safety of persons at mines.

Within this context, I was particularly concerned to read the judgment of the Labour Court of South Africa in the matter between ***Litshani Sylphia Mofokeng and the CCMA, Lazarus Matlala N.O. and Tharisa Minerals Proprietary Limited***, case number JR1200/18 which was delivered on 27 June 2022 (the Mofokeng Judgment).

In summary, Tharisa Minerals Proprietary Limited (Tharisa) implemented a workplace rule providing that high heels and open shoes were not allowed. This workplace rule was amended on 21 September 2017 stating that only flat shoes may be worn at work on Tharisa’s premises and no sleepwear is allowed. On 22 September 2017 all employees of Tharisa were notified that a risk assessment had been done, and were instructed to only wear flat shoes when entering the mine premises and safety boots had to be worn where applicable. It stated that this would reduce the risk of slip, trip and fall

incidents and that non-compliance with the instruction could lead to disciplinary action. Prior to this, on 11 September 2017 a director of Tharisa observed Ms Litshani Sylphia Mofokeng (Ms Mofokeng) wearing high heels. The director highlighted the dangers of wearing high heels to a manager. On 21 September 2017, Ms Mofokeng was again spotted wearing high heels. The instruction was discussed with Ms Mofokeng, and a senior manager at Tharisa shared his experiences at previous mines, with Ms Mofokeng whereafter she complied with the mine rule and the instruction. However, Ms Mofokeng was apparently disgruntled by the workplace rule and instruction, and wanted to continue wearing high heels. According to the Mofokeng Judgment, Ms Mofokeng then attempted to round up support for her cause that employees should be permitted to wear high heels at the workplace. Tharisa instituted disciplinary action against Ms Mofokeng and charged her with insubordination and incitement. Ms Mofokeng was dismissed.

Ms Mofokeng challenged her dismissal at the CCMA, and the CCMA found in favour of Tharisa namely that Ms Mofokeng's dismissal was procedurally and substantively fair.

Ms Mofokeng then took the CCMA award on review to the Labour Court, which resulted in the Mofokeng Judgment.

The judge essentially found that the CCMA award was unreasonable, and that Ms Mofokeng's dismissal, while procedurally fair, was substantially unfair.

There are likely to be contrary views on whether or not this aspect of the Mofokeng Judgment, is correct.

What is however concerning, are two aspects of the Mofokeng Judgment. Firstly, the judge seemed to suggest that because the workplace rule had not been consistently enforced before the instruction was issued on 22 September 2017, the issuing of the instruction to comply with the mine rule was a "sudden change" which "provoked" Ms Mofokeng to action.

Employers who may have inconsistently applied workplace rules in the past, can of course require full compliance, after communication to employees of the need to comply with the specific workplace rule, and indicating what consequences may apply, for non-compliance, going forward. The judge appears to have ignored this most basic principle – to apply the Mofokeng Judgment would mean that employers may never enforce workplace rules in future, just because they may not have enforced them, consistently, in the past. To the extent that Tharisa may not have carried out a hazard identification risk assessment in compliance with section 11 of the MHSA, in the past, "justifying" the workplace rule regarding flat shoes and high heels, Tharisa did conduct a hazard identification and risk assessment on 20 September 2017, which underpinned the instruction issued on 22 September 2017. Two material aspects were therefore addressed namely the hazard identification and risk assessment which underpinned the instruction, and communication of the instruction and consequences for non-compliance.

Secondly, the judge seems to suggest that because an employee is disgruntled about a workplace rule, this constitutes "provocation", which in turn means that an employee who challenges the workplace rule cannot be guilty of insubordination, particularly if the employee believes that the workplace rule is unlawful and/or unreasonable. Taking into account the responsibilities placed on the employer in terms of the MHSA, the employer is entitled to implement workplace rules, and it is inconceivable that a workplace rule which requires appropriate footwear to be worn, could be unlawful in these circumstances. It cannot be said that the workplace rule is unreasonable, taking into account the hazard identification and risk assessment carried out by Tharisa, and the reality that there are

numerous examples within the mining industry of persons slipping, tripping, falling and sustaining injuries, which could be life threatening.

What is correct in the Mofokeng Judgment, is that employees, individually or collectively, have various avenues available to them, to challenge decisions which they believe are unfair, unreasonable, or unlawful, and employees can embark on protected industrial action in support of their demands.

It is interesting that none of the trade unions appear to have supported Ms Mofokeng. Trade unions are key stakeholders and are vital to ensuring health and safety at mines. Trade unions regularly commit themselves, publicly, to “zero harm”, and it is possibly, for this reason, that Ms Mofokeng did not receive support from any of the recognised trade unions.

Key lessons to be learnt from the Mofokeng Judgment include: workplace rules in respect of health and safety must be underpinned by a proper hazard identification and risk assessment which is carried out in compliance with section 11 of the MHSA, workplace rules must be applied consistently, if workplace rules are not being applied consistently, there must be clear communication that the workplace rule will be enforced, going forward, and what the consequences are, and disciplinary charges must always be carefully considered. While Ms Mofokeng was disgruntled, and was rounding up support of her cause, the fact that Ms Mofokeng complied with the workplace rule, after being instructed to do so, appears to have influenced the outcome, substantially.

The Mofokeng Judgment is being taken on appeal, and hopefully, a more balanced judgment will be forthcoming, in support of the CCMA award which was well reasoned.

Sitting across from families of employees who have been fatally injured at mines is a daunting and emotional experience – workplace rules that promote health and safety in the workplace should always come before being able to wear “nice shoes”.