

**INVESTIGATION IN TERMS OF SECTION 31 OF THE
OCCUPATIONAL HEALTH AND SAFETY ACT NO 85 OF 1993 AS
AMENDED INTO THE FATAL ACCIDENT AT ACME (PTY) LTD ON
14 AUGUST 2008 IN WHICH MR. JOE SOAP DIED.**

WRITTEN SUBMISSION ON BEHALF OF ACME (PTY) LIMITED

Represented by Advocate R H Looch

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INTRODUCTION

It is common cause that Mr. Joe Soap died on 14 August 2008 on the premises of ACME (Pty) Limited in the magisterial district of Johannesburg.

Further that Mr Soap was an employee of ACME (Pty) Limited a corporate body.

Further that his dependants have been compensated in terms of the Compensation for Occupational Injuries and Diseases Act No 130 of 1993 as amended..

Further that his body was found inside a confined space at approximately 12h00 on 14 August 2008 having been last seen alive by a fellow employee at approximately 12h45.

Further that the Post Mortem Report reflects that he died of suffocation.

Further that a Vessel Entry Permit System was in place.

Further that he had received Induction and ongoing training by ACME (Pty) Limited including the procedure to be followed for vessel entry.

The Occupational Health and Safety Act No. 85 of 1993 as amended.

Section 8. General duties of employers to their employees

- (1) 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.

- (2) Without derogating from the generality of an employer's duty under subsection (1), the matters to which those duties refers include in particular -
 - (a) the provisions and maintenance of systems of work, plant and machinery that as far as is reasonably practicable, safe and without risks to health.

It is submitted that the system of work that was utilised was safe and without health risks in that the vessel had been indentified as a confined space as defined in the General Safety Regulation 5 and that a Vessel Entry Permit System was in place and enforced.

- (b) taking such steps as may be reasonably practicable to eliminate or mitigate any hazard or potential hazard to the safety or health of employees, before resorting to personal protective equipment.

It is submitted that the hazard of suffocation could not reasonably be eliminated and that the required Personal Protective Equipment in the form of self contained breathing apparatus, approved by the Chief Inspector, was provided and maintained for vessel entry purposes..

- (c) making arrangements for ensuring, as far as is reasonably practicable, the safety and absence of risks to health in connection with the production, processing, use, handling, storage or transport of articles or substances.

It is submitted that reasonable steps were taken to ensure there was no risk to health and safety while within the confined space. The deceased had access to such personal protective equipment in the form of self contained breathing apparatus, was trained into its usage and was familiar with the Vessel Entry permit System which he was required to complete before entry. The permit would have ensured that General Safety Regulation 5 was complied with in that persons, trained in resuscitation and equipped with a harness, would have been in attendance during entry.

- (d) establishing, as far as is reasonably practicable, what hazards to the health or safety of persons are attached to any work which is performed, any article or

substance which is produced, processed, used, handled, stored or transported and any plant or machinery which is used in his business, and he shall, as far as is reasonably practicable, further establish what precautionary measures should be taken with respect to such work, article, substance plant or machinery in order to protect the health and safety of persons, and he shall provide the necessary means to apply such precautionary measures.

It is submitted that a Risk Assessment was conducted for all work performed at ACME (Pty) Limited in particular work in confined spaces and that the risk of suffocation due to lack of oxygen was determined via scientific testing. The Risk Assessment resulted in a Vessel Entry System being introduced and enforced.

- (e) providing such information, instructions, training and supervision as may be necessary to ensure, as far as is reasonably practicable, the health and safety at work of his employees.

It is submitted that proper supervision was exercised at all reasonable times. The deceased was trained to obtain a Vessel Entry Permit from his immediate supervisor who would then ensure compliance with General Safety Regulation 5.

- (f) as far as is reasonably practicable, not permitting any employee to do any work or to produce, process, use, handle, store or transport any article or substance or to operate any plant or machinery, unless the precautionary measures contemplated in paragraphs (b) and (d); or any other precautionary measures which may be prescribed, have been taken.

It is submitted that the deceased was only allowed to enter the confined space after approaching his immediate supervisor for the required Vessel Entry Permit which would have activated the required precautionary measures in the form of self contained breathing apparatus and constant supervision outside the confined space..

- (g) taking all necessary measures to ensure that the requirements of this Act are complied with by every person in his employment or on premises under his control where plant or machinery is used.

- (h) enforcing such measures as may be necessary in the interest of health and safety.

The deceased was trained into the provisions of the Act which apply to his scope of authority. He received training into the hazards of Vessel Entry and the importance of completing the required Vessel Entry Permit before entering the confined space. These measures are enforced via the company's Disciplinary Code..

- (i) ensuring that work is performed and that plant or machinery is used under the general supervision of a person trained to understand the hazards associated with it and who have the authority to ensure that precautionary measures taken by the employer are implemented; and
- (j) causing all employees to be informed regarding the scope of their authority as contemplated in section 37 (1)(b).

It is submitted that the deceased was informed regarding the scope of his authority. He was trained not to enter the confined space without completing the required Vessel Entry Permit which would have prompted his immediate supervisor to test its contents, monitor his entry and enforce the usage of self contained breathing apparatus. The supervisor was also trained to fully understand the hazards of vessel entry and was authorised to enforce usage of self contained breathing apparatus. The only reasonable possible conclusion is that the deceased disobeyed a lawful order given in the interests of safety by failing to approach his supervisor in order to inform him that he intended to enter the confined space. Had he done this, the supervisor would then have ensured compliance with the required Vessel Entry Permit.

Section 13 of the Occupational Health and Safety Act No. 85 of 1993 as amended.

Duty to inform

Without derogating from any specific duty imposed on employers by this Act, every employer shall -

- (a) as far as is reasonably practicable, cause every employee to be made conversant with the hazards to his health and safety attached to any work he has to perform, any article or substance which he has to produce, process, use, handle, store or transport and any plant or machinery he is required or permitted to use, as well as with the precautionary measures which should be taken and observed with respect to those hazards.

It is submitted that the deceased was fully conversant with the hazards of suffocation from lack of oxygen inside the confined space. He received training into the hazards of confined spaces as well as the required precautionary measures to be used when entering such a space. Proof of such training is attached.

General Safety Regulation 5. Work in confined spaces.

- (1) An employer or user of machinery shall take steps to ensure that a confined space is entered by an employee or other person only after the air therein has been tested and evaluated by a person who is competent to pronounce on the safety thereof, and who has certified in writing that the confined space is safe and will remain safe while any person is in the confined space, taking into account the nature and duration of the work to be performed therein.
- (2) Where the provisions of subregulation (1) cannot be complied with, the employer or user of machinery, as the case may be, shall take steps to ensure that any confined space in which there exists or is likely to exist a hazardous gas, vapour, dust or fumes, or which has or is likely to have, an oxygen content of less than 20 percent by volume, is entered by an employee or other person only when -
 - (a) subject to the provisions of subregulation (3), the confined space is purged and ventilated to provide a safe atmosphere therein and measures necessary to maintain a safe atmosphere therein have been taken; and
 - (b) the confined space has been isolated from all pipes, ducts and other communicating openings by means of effective blanking

other than the shutting or locking of a valve or a cock, or, if this is not practicable, only when all valves and cocks which are a potential source of danger have been locked and securely fastened by means of chains and padlocks.

- (3) Where the provisions of subregulation (2)(a) cannot be complied with, the employer or user of machinery shall take steps to ensure that the confined space in question is entered only when the employee or person entering is using breathing apparatus of a type approved by the chief inspector and, further, that -
 - (a) the provisions of subregulation (2)(b) are complied with;
 - (b) any employee or person entering the confined space is using a safety harness or other similar equipment to which a rope is securely attached which reaches beyond the access to the confined space, and the free end of which is attended to by a person referred to in paragraph (c);
 - (c) at least one other person trained in resuscitation is and remains in attendance immediately outside the entrance of the confined space in order to assist or remove any person or persons from the confined space, if necessary, and
 - (d) effective apparatus for breathing and resuscitation of a type approved by the chief inspector is available immediately outside the confined space.
- (4) An employer or user of machinery shall take steps to ensure that all persons vacate a confined space on completion of any work therein.
- (5) Where the hazardous gas, vapour, dust or fumes contemplated in subregulation (2) are of an explosive or flammable nature, an employer or user of machinery shall further take steps to ensure that such a confined space is entered only if -
 - (a) the concentration of gas, vapour, dust or fumes does not exceed 25 percent of the lower explosive limit of the gas, vapour, dust or fumes concerned where the work to be performed is of such a nature that it does not create a source of ignition, or
 - (b) such concentration does not exceed 10 percent of the lower explosive limit of the gas, vapour, dust or fumes where other work is performed.

- (6) The provisions of this regulation shall mutatis mutandis also apply, in so far as they can be so applied, to any work which is performed in any place or space on the outside of and bordering on or in the immediate vicinity of, any confined space, and in which place or space, owing to its proximity to the confined space, any hazardous article, oxygen-deficient atmosphere or dangerous concentration of gas, vapour, dust or fumes may occur or be present.

It is submitted that the employer complied with this regulation in every respect. A Vessel Entry Permit was developed which would have resulted in the contents of the confined space being tested and, where a lack of oxygen was determined, the use of approved self contained breathing apparatus supplied and usage enforced while a person trained in resuscitation and armed with a harness would have been in attendance.

Section 14 of the Occupational Health and Safety Act.

General duties of employees at work

Every employee shall at work -

- (a) take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions;
- (b) as regards any duty or requirement imposed on his employer or any other person by this Act, co-operate with such employer or person to enable that duty or requirement to be performed or complied with;
- (c) carry out any lawful order given to him and obey the health and safety rules and procedures laid down by his employer or by anyone authorised thereto by his employer, in the interest of health or safety;

- (d) if any situation which is unsafe or unhealthy comes to his attention, as soon as practicable report such situation to his employer or to the health and safety representative for his workplace or section thereof, as the case may be, who shall report it to the employer; and
- (e) if he is involved in any incident which may affect his health or which has caused an injury to himself, report such incident to his employer or to anyone authorized thereto by the employer, or to his health and safety representative, as soon as practicable but not later than the end of the particular shift during which the incident occurred, unless the circumstances were such that the reporting of the incident was not possible, in which case he shall report the incident as soon as practicable thereafter.

It is submitted that the deceased was in contravention of subsections 14(a) in that he failed to take reasonable care for himself as well as subsection 14(c) in that he failed to carry out a lawful order given in the interests of safety to wit he entered the tank without authority or informing his supervisor and completing the required Vessel Entry Permit. He was also provided with a copy of section 14 which he signed.

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As regards the potential crime of culpable homicide, it is submitted that there is no evidence to suggest that the supervisor or vicariously the employer ACME (PTY) Limited as regards the death of Mr. Joe Soap . Unlawfulness is closely linked in these scenarios to a contravention of section 8 of the Occupational Health and Safety Act where a fatality is the result. Since there is no evidence of unlawfulness *vis-à-vis* section 8 of the Occupational Health and Safety Act in the sense that the employer did not contravene any of its provisions, it is submitted that this element is also lacking as regards the potential charge of culpable homicide.

There is also no causal connection between an act or omission on the part of the employer and the death of the deceased. In fact the deceased's own unexpected and unauthorized decision to enter the confined space, led to this fatal accident. Even if a causal connection existed in the sense that the deceased was not conversant with the hazards of vessel entry or was unsure of the scope of his authority, and it is submitted that such connection does not exist, his behavior amounts to a classic *novus actus interveniens* as stated by

Steyn CJ in State v Grotjon 1970 (2) SA 355 AD. He must have been conversant with the hazards of vessel entry in view of his training. His decision to enter the tank amounts to abnormal and unexpected behaviour on his part. It is thus submitted that the employer was not negligent *vis-à-vis* the incident and passed the test of a *diligens paterfamilias* as stated in **Kruger v Coetzee 1966 (2) SA 428 (A)**. It is submitted that section 332 of the Criminal Procedure Act is not applicable and that criminal liability cannot be imputed onto the corporate body.

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