

Last year the media covered an inspection blitz by the Department of Employment and Labour (DEL) on the hospitality industry. DEL inspectors proudly posed before the cameras – obviously tipped off for maximum impact – flashing a variety of Contravention Notices. A common thread appeared to be the alleged failure by owners of structures to conduct annual inspections of the structures as required by construction regulation (CR) 11(2). This publicity stunt by DEL prompted me to examine and opine of CR11(2). In particular its validity and rationality within a set of regulations that apply to construction work in progress as opposed to inspections of completed structures. Naturally there are valid inspection requirements during the construction process. A second issue relates to the competency of the structural inspector with DEL seemingly insisting on expensive annual inspections by structural engineers.



Photo. Department of Employment and labour inspectors Simanga Mabaso and Lennie Samuels.

DEL is on record stating that CR 11(2) has no place in the construction regulations since it contradicts the scope of application of the construction regulations. The idea has been mooted that it be removed and placed in the General Safety Regulations (GSR). To date it has not been done but, since it is a regulation as opposed to an Act of Parliament, it can readily be done by the Minister of DEL.

CR 11(2). Structures

(2) An owner of a structure must ensure that -

(a) inspections of that structure are carried out periodically by competent persons in order to render the structure safe for continued use;

(b) that the inspections contemplated in paragraph (a) are carried out at least once every six months for the first two years and thereafter yearly;

(c) the structure is maintained in such a manner that it remains safe for continued use;

(d) the records of inspections and maintenance are kept and made available on request to an inspector.

CR 2. Scope of Application

(1) These Regulations are applicable to all persons involved in construction work.

(2) Regulations 3 and 5 are not applicable where the construction work carried out is in relation to a single storey dwelling for a client who intends to reside in such dwelling upon completion thereof.

"construction work" means any work in connection with -

(a) the construction, erection, alteration, renovation, repair, demolition or dismantling of or addition to a building or any similar structure; or

(b) the construction, erection, maintenance, demolition or dismantling of any bridge, dam, canal, road, railway, runway, sewer or water reticulation system; or the moving of earth, clearing of land, the making of excavation, piling, or any similar civil engineering structure or type of work.

It is obvious that CR11(2) falls outside the scope of application of the construction regulations and is potentially irrational. Rationality is the foundation of legislation and it is probable that a court would strike it down if challenged. However, it remains on the statutes until such time.

A potential point of concern may be the level of 'competency' of the structural inspector, considering the definition of a competent person in the construction regulations. DEL may have their own interpretation and there is no guidance from DEL or the courts in this regard.

"competent person" means a person who -

(a) has in respect of the work or task to be performed the required knowledge, training and experience and, where applicable, qualifications, specific to that work or task: Provided that where appropriate qualifications and training are registered in terms of the provisions of the National Qualification Framework Act, 2000 (Act No.67 of 2000), those qualifications and that training must be regarded as the required qualifications and training; and

(b) is familiar with the Act and with the applicable regulations made under the Act.

It would be irrational to equate the competency of an in-house 'structural inspector' with that of persons performing hazardous construction work coupled with the numerous compulsory legal appointments required in construction work where a high level of competency is required. This

cannot be the intention of the legislator based on accepted principles of interpretation of statutes.

I mention this only should a DEL inspector query the competency of the 'structural inspector'. I would recommend that owners of structures utilise the services internally of the equivalent of a maintenance manager to conduct these inspections.

Also worth noting that all provisions of the OHS Act and regulations are subject to reasonability and practicability as defined in section 1 of the OHS Act.

"reasonably practicable" means practicable having regard to -

- (a) the severity and scope of the hazard or risk concerned;
- (b) the state of knowledge reasonably available concerning that hazard or risk and of any means of removing or mitigating that hazard or risk;
- (c) the availability and suitability of means to remove or mitigate that hazard or risk; and
- (d) the cost of removing or mitigating that hazard or risk in relation to the benefits deriving therefrom.**

In Pikitup (SOC) Limited v South African Municipal Workers' Union obo members and others [2014] (LAC) the Labour Appeal Court stated:

*'Sections 8 and 9 therefore place a duty on the employer to act proactively to avoid any harm or injury to its employees and others. There is no standard as to what is reasonably practicable. Each case will have to be determined on its own facts and circumstances. As can be seen from the definition of reasonably practicable it involves weighing different considerations from risk evaluation, means of removing or avoiding the risk, **resource availability and a cost-benefit analysis.***

*In Edwards v National Coal Board, Lord Justice Asquith stated: "Reasonably practicable as traditionally interpreted, is a narrower term than 'physically possible' and implies that a computation must be made in which the quantum of risk is placed in one scale and the sacrifice, **whether in money, time or trouble** involved in the measure necessary to avert the risk is placed in the other; and that, if it is shown that there is a gross disproportion between them, the risk being insignificant in relation to the sacrifice, the person upon whom the duty is laid discharges the burden of proving that compliance was not reasonably practicable."*

I would argue that it would be unreasonable and impracticable to expect the owner of a structure to engage the services of an expensive high level competent person to conduct visual annual walkabout inspections of structures. The cost obscenely outweighs the benefit.

A structural engineer should only be required should an (in-house maintenance manager) inspector of a structure detect a structural issue which would require further expert evaluation or forensic testing.

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