

## **BRIEF OPINION: POTENTIAL CRIMINAL LIABILITY OF SECTION 16.2 ASSIGNED PERSONS.**

While it is difficult to opine about potential criminal liability in terms of the OHS Act since must depends on evidence adduced, there are two types of criminal liability. The first is personal criminal liability which is normally triggered by personal contraventions of section 14 of the Act which applies to all employees.

### **OHS Act. Section 14. 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.

The second type of liability is representative criminal liability – also known as vicarious liability – where a person or juristic person / company is charged because of perceived failures in an oversight role. Section 332 of the Criminal Procedure Act imputes liability onto a company through the wrongdoings of its directors and employees. This is usually the type of liability visited upon section 16.2 Persons. Over the past two decades I have never encountered a criminal prosecution against section 16.2 Persons in their personal capacities. This could be possible but only if there is evidence of reckless or gross negligent behaviour on the part of the section 16.2 Person. This aligns with section 14 of

the Act. Thus, the greatest exposure to personal criminal liability for a section 16.2 Person would be a contravention of section 14 of the Act which applies to all employees irrespective of their rank. There will have to be a clear link to an act or omission on the part of the section 16.2 Person and a particular contravention. An example could be where employees complain persistently and tangibly about unsafe or unhealthy conditions to a section 16.2 Person who fails to react. Even here, DEL is usually reactive and would only intervene if a reportable incident occurs.

There is much propaganda, usually by politicians edged on by unions, about individuals such as the CEO and the section 16.2 team being charged personally for contraventions of the OHS Act. While the law (criminal Procedure Act) does provide for this, in practice the chances of a successful personal conviction of the OHS Act or even the common law (culpable homicide) is virtually zero. The propaganda is usually aimed at a certain constituency based on a lack of understanding of the law. The NPA also has no appetite for OHS matters. Spectacular multiple fatality incidents such as the Paarl Print Fire (11 fatalities) never found their way to court despite recommendations for prosecution by the previous chief inspector who presided over the section 32 Formal Inquiry. Also the Grayston Bridge collapse. The list goes on.

While the OHS Act uses the term employer or user consistently when listing OHS duties, section 16 applies to corporate body / company employers. The duty of ensuring these duties are discharged is placed on the CEO who is defined in section 1 of the Act.

"chief executive officer", in relation to a body corporate or an enterprise conducted by the State, means the person who is responsible for the overall management and control of the business of such body corporate or enterprise.

This is essentially an oversight role and, acknowledging that a CEO cannot alone discharge these duties, section 16.2 provides for a CEO to create a team of persons to assist in this task. It is not compulsory for a CEO to assign duties down the managerial stream but it is obviously beneficial since failure to assign means the CEO is exposed and alone.

### **Section 16. Chief executive officer charged with certain duties.**

(1) Every chief executive officer shall as far as reasonably practicable ensure that the duties of his employer as contemplated in this Act, are properly discharged.

(2) Without derogating from his responsibility or liability in terms of subsection (1), a chief executive officer may assign any duty contemplated in the said subsection, to any person under his control, which person shall act subject to the control and directions of the chief executive officer.

(3) The provisions of subsection (1) shall not, subject to the provisions of section 37, relieve an employer of any responsibility or any liability under this Act.

(4) For the purpose of subsection (1), the head of department of any department of State shall be deemed to be the chief executive officer of that department.

It is vital to mention the words 'reasonably practicable' where discussing potential liability since this is the legal standard which a CEO or section 16.2 Person will be tested.

**"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.

If, for example, it is shown that it was reasonably impracticable for a CEO or section 16.2 Person to foresee a particular hazard and address it, the company, CEO and section 16.2 Person exercising oversight of that particular area would not be criminally liable personally or in their representative capacity.

In summary, persons in oversight OHS roles are virtually never charged in their personal capacities. If it is found that they failed in this role, liability is imputed onto the company who is charged as a juristic person accused.

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