

AMEU TECHNICAL MEETING – UPINGTON – Monday 30TH SEPTEMBER 2002

PAPER: ADVOCATE RAYNARD LOOCH - (14h00)

TITLE:

THE OCCUPATIONAL HEALTH & SAFETY ACT (OHS ACT) NO.85 OF 1993, AS AMENDED:
RELATED LEGISLATION, THE CIVIL AND COMMON LAW

DESCRIPTION:

POTENTIAL EMPLOYER LIABILITY FOR OHS BREACHES IN TERMS OF THE OCCUPATIONAL HEALTH & SAFETY ACT NO. 85 OF 1993, MINE HEALTH & SAFETY ACT NO. 29 OF 1996, THE COMMON AND CIVIL LAW, INCLUDING THE ELECTRICITY ACT NO. 41 OF 1987.

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POTENTIAL EMPLOYER LIABILITY FOR OCCUPATIONAL HEALTH AND SAFETY BREACHES IN TERMS OF THE OCCUPATIONAL HEALTH & SAFETY ACT NO. 85 OF 1993, THE MINE HEALTH & SAFETY ACT NO. 29 OF 1996, THE COMMON AND CIVIL LAW, INCLUDING THE ELECTRICITY ACT NO. 41 OF 1987.

Presented by:

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Advocate Raynard Looch obtained his BA LLB at Pretoria University and has 20 years specialised experience, both prosecutorial & defence, in Occupational Health and Safety Legislation. He headed the Occupational Safety Court before founding KLASS LOOCH ASSOCIATES in 1986 and has a sound record in criminal litigation, delivers frequent lectures & seminars (in-house & open) on the Act and regularly contributes articles to a variety of publications. He is also author of THE GUIDELINE TO THE OHS ACT. (Refer to the Klass Looch website: www.klasslooch.com)

Klass Looch Associates offers a variety of innovative and attractive products which include In-House Seminars, Open seminars All-Costs Retainers (Legal Representation & Advice), Guideline to the OHS Act and an On-Line Legal Advice Subscription Service.

INTRODUCTION

For purposes of this talk, I have decided to tackle the thorny issue of employer liability, both criminal and civil, for either contraventions of the statutory criminal law, common law as well as civil suits against employers for damages arising from occupational health and safety. The emphasis throughout will be on ESKOM as an undertaker as defined.

Employer liability can be either in terms of the criminal law where, if convicted, punishment is metered out or in terms of the civil law where compensation is given. Liability, in turn can be divided in corporate liability or personal liability.

CRIMINAL LAW

Statutes

Occupational Health & Safety Act / Mine Health & Safety Act

In terms of these statutes, criminal liability is established when one of their provisions is contravened, whether such a contravention results in an incident or not. Nobody is immune to prosecution but both Acts have a built in bias against employers or users of plant and machinery. The rationale being that employers or users of plant and machinery have the necessary resources to furnish their employees with a safe and healthy working environment and, if this is not accomplished, *as far as is reasonably practicable*, they may be may incur criminal liability.

The bias against employers, both corporate bodies and individuals, is particularly true of the OHS Act where criminal liability is potentially artificially imputed onto employers for the wrongdoings of both employees and mandataries (Contractors). This presumption-in-law is contained in section 37 of the OHS Act. Employers, both corporate bodies and individuals, may be held criminally liable since they are *presumed* to have committed the offence of either their employees or outside independent contactors. It is, however, a rebuttable presumption.

/ It reads ...

It reads: -

1. *"Whenever an employee does or omits to do any act which it would be an offence in terms of this Act for the employer of such employee or a user to do or omit to do, then, unless it is proved that –*
 - a) *in doing or omitting to do that act the employee was acting without the connivance or permission of the employer or any such user;*
 - b) *it was not under any condition or in any circumstances within the scope of the authority of the employee to do or omit to do an act, whether lawful or unlawful, of the character of the act or omission charged; and*
 - c) *all reasonable steps were taken by the employer or any such user to prevent any act or omission of the kind in question, the employer or any such user himself shall be presumed to have done or omitted to do that act, and shall be liable to be convicted and sentenced in respect thereof; and the fact that he issued instructions forbidding any act or omission of the kind in question shall not, in itself, be accepted as sufficient proof that he took all reasonable steps to prevent the act or omission.*
2. *The provisions of subsection (1) shall mutatis mutandis apply in the case of a mandatary of any employer or user, except if the parties have agreed in writing to the arrangements and procedures between them to ensure compliance by the mandatary with the provisions of this Act.*
3. *Whenever any employee or mandatary of any employer or user does or omits to do an act which it would be an offence in terms of this Act for the employer or any such user to do or omit to do, he shall be liable to be convicted and sentenced in respect thereof as if he were the employer or user.*
4. *Whenever any employee or mandatary of the State commits or omits to do an act which would be an offence in terms of this Act, had he been the employee or mandatary of an employer other than the State and had such employer committed or omitted to do that act, he shall be liable to be convicted and sentenced in respect thereof as if he were such an employer.*
5. *Any employee or mandatary referred to in subsection (3) may be so convicted and sentenced in addition to the employer of user.*
6. *Whenever the employee or mandatary of an employer is convicted of an offence consisting of a contravention of section 23, the court shall, when making an order under section 38(4), make such an order against the employer and not against such employee or mandatary."*

The Mine Health & Safety Act does not contain this presumption-in-law and, with the envisaged merging of the two Acts, we may see it disappear altogether since the courts are particularly wary of such mechanisms in law.

Corporate liability is established in terms of section 332(1) of the Criminal Procedure Act, essentially it is created through the wrongdoings of its servants or directors while working for the corporate body or furthering its interests. Human employers' liability is normally directed at persons "appointed" in terms of section 16 of the OHS Act (CEO and assignees) for general contraventions of the Act and competent persons for machinery related contraventions. In terms of the Mine Health & Safety Act, potentially also the CEO and his team of managers or appointees. Machinery related contraventions would potentially create liability for the competent persons appointed in terms of the Minerals Act.

/A unique ...

A unique crime, namely that of "negligent injury" has been created by both these acts. (It does not exist in our common law). A person has been imprisoned for this offence in the past. *State v Lambert 1996*. This crime is found in section 38(2) of the OHS Act and reads:-

"Any employer who does or omits to do an act, thereby causing any person to be injured at a workplace, or, in the case of a person employed by him, to be injured at any place in the course of his employment, or any user of plant or machinery who does or omits to do an act in connection with the use of plant or machinery, thereby causing any person to be injured, shall be guilty of an offence if that employer or user of plant or machinery, as the case may be, would respect of that act or omission have been guilty of the offence of culpable homicide had that act or omission caused the death of the said person, irrespective of whether the injury could have led to the death of such person, and on conviction be liable to a fine not exceeding R100 000 or to imprisonment not exceeding 2 years or to both such fine and such imprisonment."

and in section of the Mine Health and Safety Act and reads:-

1. *"Any person, who, by a negligent act or by a negligent omission, causes serious injury or serious illness to a person at a mine, commits an offence.*
2. *Any person, other than an employer or employee, who, by a negligent act or by a negligent omission, endangers the health and safety of a person at a mine, commits an offence."*

Common Law

The common law is unwritten law, essentially inherited from Roman Dutch Law. Murder, rape and culpable homicide are examples of common law crimes. In the occupational health and safety arena, culpable homicide will come into play when there is a fatal accident at the workplace. It's a serious crime and can result in imprisonment. It generates a criminal record with all the negative consequences that accompanies such a criminal record.

The principle used by the courts to establish liability for this common law crime is the "employer's duty of care", an objective criteria which is essentially the test for negligence. The court would be guided, in establishing negligence, by contraventions of the statutes which resulted in a fatality and, as far as the OHS Act is concerned, by the guidelines as contained in the definition of "reasonably practicable". (Most duties placed on employers are tempered with "reasonability and "practicability". 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 there from.*

Civil Law and the Electricity Act

Most case studies in South Africa emanate from civil suits against employers where persons, for example, persons are injured or killed due to the activities of employers. ESKOM, along with other undertakers, has recently been feeling the brunt of these civil suits as more and more legal organisations are prepared to act *pro bono* for plaintiffs. Civil action undertakers is compounded by the Electricity Act which presumes the undertaker to be negligent in any civil suits brought by a plaintiff. (The opposite applies in any other civil matters). Section 26 reads' *In any civil proceeding against an undertaker arising out of damage or injury caused by induction or electrolysis or in any other manner by means of electricity generated or transmitted by or leaking from plant or machinery, such damage or injury shall be presumed to have been caused by the negligence of the undertaker, unless the contrary is proved."*

/ Employees ...

Employees are prohibited from suing their employers (corporate bodies) and certain individuals in terms of section 35 of the Compensation for Occupational Injuries and Diseases Act (COID Act). This prohibition on civil suits by employees against employers was challenged in *Jooste v Score Supermarket Trading (Pty) Ltd* and held to be constitutional. Section 35 of the COID Act reads: -

1. *No action shall lie by an EMPLOYEE or any dependant OF AN EMPLOYEE for the recovery of damages in respect of ANY OCCUPATIONAL INJURY or disease resulting in the DISABLEMENT or death of such employee against such employee's employer, and no liability for compensation on the part of such EMPLOYER shall arise save under the provisions of THIS ACT in respect of such DISABLEMENT or death.*
2. *For the purposes of subsection (1) a person referred to in section 56(1)(b), (c) (d) and (e) shall be deemed to be an employer"*

The following "human" employers also enjoy a civil indemnity vis-à-vis employees:

- a) *An EMPLOYEE charged by the employer with the management or control of the BUSINESS or of any branch or department thereof;*
- b) *An employee who has the right to engage or discharge employees on behalf of the employer;*
- c) *An engineer appointed to be in general charge of machinery) or of a person appointed to assist such engineer in terms of any REGULATION made under the MINERALS ACT, 1991 (Act 50 of 1991); or*
- d) *A person appointed to be in charge of machinery in terms of any regulation made under the Occupational Health & Safety Act, 1993 (Act 85 of 1993), the employee may, notwithstanding any provision to the contrary contained in THIS ACT, apply to the COMMISSIONER for increased COMPENSATION in addition to the compensation normally payable in terms of this Act.*

OHS CASE STUDIES

Shkosana v Eskom 1999

Grootboom v Graaff-Reinet Municipality 2001

Spoornet V Serfontein ans Another 1999

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