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The Brief.

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Can a person claim against (cause legal expenses and defence costs to be incurred by) a building owner (owner of a structure) for their failure to comply with the Occupational Health and Safety Act 1993 and / or associated Regulations (e.g. Asbestos Regulations) and the Construction Regulations in particular?

Corollary to this question is, 'Does the Owner of a Structure have any duties in terms of this legislation in their role as either:

- a) Owner of a structure directly employing a Construction Contractor to work on that structure (i.e. Client)*
- b) Owner of a structure employing a Facility Manager who in turn employs a Construction Contractor to work on that structure (with or without the owners knowledge)? (i.e. Client: person for whom construction work is performed)*
- c) A tenant (and possible User) of the Owner employs a Construction Contractor to work on that structure (with or without the Owners knowledge)*

Our understanding is that yes, any person can try and claim damages from any other person, and in particular, it is foreseeable that an OH&S act or omission on the part of a building owner may result in harm or material loss to others.

In particular, there are situations when the following may be triggered:

- a) An owner employing a Construction Contractor may have certain obligations in terms of the Construction Regulations (2014) et. al;*
- b) An owner employing an FM who appoints a Construction Contractor is an employer of a mandatory, with associated OHSAct responsibilities. The owner in this case may well also be the Construction Client and Principal, acting through a Principal Agent, and in any event, is still an Employer of a Mandatory (Agent), with associated responsibilities; and*
- c) The Owner must ensure that a structure remains safe for continued use, including inspections. Specific examples include:
 - i. A contractor of a tenant may (permanently or temporarily) obstruct an emergency egress route;*
 - ii. A contractor moves an electrical service in a wall which an adjacent tenant is unaware of when drilling from their side of the wall;*
 - iii. A contractor of a tenant is exposed to asbestos of which the tenant was unaware.**

In a nutshell: 1.) Does the owner of a structure have any legal OHS Responsibilities which in failing to perform may lead to claims and / or charges being levelled against them.

Legal Opinion.

Liability – whether civil or criminal - is a very difficult topic as it depends on a myriad of factors particularly the evidence presented. Firstly, except where valid indemnities apply or section 35 of the COID Act, anyone can be sued for damages if the plaintiff can prove negligence – on a balance of probabilities – and there is a link (nexus) between the negligent act /omission and a result. (Injury, death / damage / prejudice). The test for negligence is objective and would be tested against the ‘reasonable person’ test.

While no-one is immune to criminal prosecution in terms of the OHS Act, the Act does have a built-in bias against employers and users of plant and machinery in view of the presumption-in-law contained in section 37 of the Act. The vast majority of OHS Act contraventions have negligence as its form of fault and a contravention of the Act would be unlawful. To be convicted of a contravention of the OHS Act the State would have to prove negligence beyond a reasonable doubt after the accused / employer / user has rebutted the presumption-in-law as contained in section 37 – if applicable. The onus to rebut presumptions-in-law falls to the accused on a balance of probabilities. (Section 37 presumes acts or omissions of employees and mandataries to be that of the employer).

Owners of structures can naturally be employers or users of plant in machinery in their own right and are often clients as defined in the construction regulations. Naturally owners of structures would then have those respective employer / user / client duties.

There is only mention of a structure owner’s duties in construction regulation 9(4) & (5)(2003) and construction regulation 11(2) is there mention of owners of structures.(2014).

Construction Regulation 9. Structures 2003.

(4) Any owner of a structure shall ensure that inspections of that structure upon completion are carried out periodically by competent persons in order to render the structure safe for continued use: Provided that the inspections are carried out at least once every six months for the first two years and thereafter yearly and records of such inspections are kept and made available to an inspector upon request.

(5) Any owner of a structure shall ensure that the structure upon completion is maintained in such a manner that the structure remains safe for continued use and such maintenance records shall be kept and made available to an inspector upon request.

Construction Regulation 11. Structures 2014.

(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.

For purposes of this brief I will focus on the construction regulations 2014 which now have applicability. It is clear that owners of structures have a duty of maintaining the structure to ensure the structure is and remains safe for continued use. This infers that an owner must put measures in place to discharge this duty. Statutory criminal liability emanates from failing to discharge a fixed statutory legal duty. The opposite of a duty is a right. If owners of structures have a duty to ensure a structure is safe, then the occupants of the structure have a right to a safe structure. Civil liability emanates from the infringement of a right and, provided, for example, a collapse of the structure which causes injury, death or damage was objectively reasonably foreseeable, a successful civil suit for damages is possible. A criminal conviction is not a prerequisite for a successful civil suit but will greatly assist. Considerations such as contributory negligence are also not considered in criminal matters but could be considered in mitigation of sentence.

If it can be shown beyond a reasonable doubt in a criminal matter that an owner of a structure contravened a provision of the OHS Act – essentially the duties placed on owners of structures and this contravention can be linked to a result (death / injury / damage / any other prejudice) then a successful civil suit for damages is probable. The plaintiff will have to prove on a balance of probabilities that the owner should, for example, have known as a reasonable person that his structure was not being maintained in a safe manner. His failure to conduct periodic inspections could strengthen the plaintiff's case. If, for example, no reasonable person / owner could have foreseen a collapse of a structure which resulted in death / injury / prejudice, the chances of a successful law suit would be minimal. Obviously a mere administrative contravention of the OHS Act by an owner of a structure, for example, failure to do proper maintenance inspections and keep records will not provide adequate grounds for a civil suit as a plaintiff will have difficult proving prejudice.

In summary a successful civil suit against an owner of a structure is feasible depending on the evidence. An unlawful act or omission by the owner in the form of a contravention and conviction of the OHS Act – read construction regulation 11 (2014 regulations) – resulting in prejudice to a plaintiff will assist the civil matter. A Prohibition or Contravention Notice by an inspector from the Department of Labour would also assist even without a criminal conviction.

An owner of a structure will not incur any civil liability merely because of the presence of asbestos in the structure. If the owner himself carries out work on the structure and this exposes third persons to asbestos dust and the linkage can be proved to asbestosis a civil suit is possible. Bear in mind that the occupational disease / infestation would most probably take decades to manifest itself. Effected employees would have to resort to the Compensation Fund. The owner would naturally have to comply with the Asbestos Regulations. The same applies to a contractor of the employer in this scenario as regards a civil action and criminal prosecution. An employer of the contractor can also be charged criminally for the acts or omissions of the mandatary in terms of section 37 of the OHS Act where, for example, the evidence shows that the owner /client / employer condoned unlawful behaviour by the mandatary. The owner / client should inform a contractor in the Health and Safety Specifications / Baseline Risk Assessment of the presence of asbestos if it could reasonably be foreseen although this will not exempt the contractor from establishing the presence of asbestos as part of the risk assessment.

Where an owner of a structure engages a contractor to perform construction work as defined, the owner becomes the client with comprehensive duties as listed in construction regulation 5. (Barring the exemptions regarding permit to perform construction work and the SACPCMP accredited agent.) The same principle applies as above regarding civil suits. If a client fails in their duty of care or statutory duties as contained in construction regulation 5, a civil suit is feasible if the plaintiff suffers prejudice linked to a negligent act or omission on the part of the client. (The appointment of a

competent agent, by the client could however, buffer the client against both civil and criminal liability). For example. An owner of a sewerage works engages a contractor to perform construction work at the works. The owner / client fails to inform the contractor in the client's Health and Safety Specifications / Baseline Risk Assessment of the potential risk of hepatitis B - which immunisation could have prevented – and a worker contracts hepatitis B and dies. His dependants could potentially sue the client for damages despite being compensated by the Compensation Fund. The client will not be indemnified by section 35 of the COID Act since the employer would be the contractor or even labour broker. *Rieck vs Crown Chickens SCA 2005*.

The situation with tenants can be more complicated. A different scenario could play out for owners of structures depending on whether the tenancy is residential or commercial. Commercial tenants are employers in their own right and must discharge all OHS Act employer duties such as fire precautions and means of egress. Owners are not entirely exempt particularly if the structure does not comply with the relevant building regulations or by-laws in the first instance. Again a civil suit is possible by third parties depending on the facts presented by the plaintiff. The Lease Agreement should clearly define the limitations of a tenant. I could argue that, in the absence of a contract circumscribing the powers of a tenant, an owner could even be held vicariously liable for the acts or omissions of the tenant. If a tenant breaches the Lease Agreement and conducts construction work without knowledge of the owner, the tenant will in my view face the full wrath of the law if it harms persons or damages property.

A Facility Manager can be defined as a mandatary / agent / employee of an owner. The owner is the employer of the Facilities Manager. The criminal acts or omissions of the Facility Manager can be imputed onto the owner in terms of section 37 of the OHS Act. A civil suit is also possible against an owner for the unlawful conduct of a Facilities Manager which causes harm or damage to third parties. In all likelihood a plaintiff would list both as respondents in a civil matter. If a Facilities Manager engages a contractor unilaterally and an incident occurs to third parties linked to a negligent act or omission on the part of the contractor, it could still be argued that the owner / employer should have prescribed the powers of the Facility Manager properly in the Employment Contract to avoid vicarious civil liability.

An owner may be a juristic or natural person and the same principles apply.

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