INTERPRETATION OF SECTIONS 37(2) AND 10(4) OF THE OCCUPATIONAL HEALTH AND SAFETY ACT NO 85 OF 1993, SECTION 21(2) OF THE MINE HEALTH AND SAFETY ACT NO 29 OF 1996.

Section 37 of the Occupational Health and Safety Act.

Acts or omissions by employees or mandataries.

(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 circumstance 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 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, of 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 such employee or mandatary referred to in subsection (3) may be so convicted and sentenced in addition to the employer or user.

(6) Whenever the employee or mandatary of an employer is convicted of an offence consisting of a contravention referred to in section 23, the court shall, when it makes an order under section 38 (4), make such an order against the employer and not against such an employee or mandatary.

Section 37 of the Occupational Health and Safety Act contains a presumption which potentially imputes criminal liability onto employers / principals for the crimes of their mandataries / contractors. A classic presumption is contained in the Road Traffic Act where the registered owner of a vehicle is presumed to be the driver of a the vehicle. If, for example, a driver is caught speeding on camera, the summons will be issued to the registered owner who is presumed to be the driver and the registered owner must rebut the presumption on a balance of probabilities.

The presumption in section 37 of the Occupational Health and Safety Act equally applies to employees but for purposes of this brief I will focus on mandataries. The term mandatary (originally mandatory) has its origins in the old Machinery and Occupational Safety (MOS) Act of 1983 as amended. It was never defined and that in itself created a host of interpretational guess work. More importantly it never gave any indication of what employers could do to minimise the risk of imputed liability for the offences of mandataries. (The Occupational Health and Safety Act offers an insight in section 37(2) below). The practice developed of virtually OHS auditing contractors in order to prevent imputed liability and continues today. In fact the Construction Regulations of 2003 do require vetting of the OHS credentials of contractors and principal contractors, casting a question mark over the necessity of embracing a section 37(2) Written Agreement when construction work is being performed.

With the promulgation of the Occupational Health and Safety Act in 1994, a mandatary is defined as:

including an agent, a contractor or a subcontractor for work, but without derogating from their status as employers in their own right.

As with all presumptions, they create a reversal of onus of proof, away from the State or prosecution and onto the accused. The accused must then rebut the presumption-in-law on a balance of probabilities. This, as opposed to the State's obligation of normally proving a criminal matter beyond a reasonable doubt.

The Employer has to prove three things in order to rebut (counter) the presumption as contained in section 37 of the OHS Act. Failure to rebut any of the three 'hurdles' could 'activate' the presumption-in-law and the employer could be held criminally liable for the wrongful acts or omissions of the mandatary.

Firstly the employer must prove that permission was not given to the mandatary to act or fail to act in a manner which has obviously resulted in the flouting of the law. Connivance with the mandatary to circumvent any provision of the Occupational Health and Safety Act is mentioned in the same breathe as being an element that would create criminal liability for the employer. (Section 37(1)(a).

Secondly, the employer must prove that the mandatary was acting outside the scope of his or her authority and that the conduct of the mandatary was not a condition laid down by the employer. (Section 37(1)(b).

The last and most problematic hurdle for an employer to scale is to show it took reasonable steps to prevent the conduct of the mandatary. To confuse matters even further, the legislator added that explicit instructions, designed to prevent any unlawful behaviour by a mandatary, would not automatically be regarded as being sufficient

reasonable steps taken by the employer. (Section 37(1)(c). I label this last 'hurdle' or 'leg' as problematic because the term 'reasonable steps' is very broad and open to interpretation. The Legislator may have realised the vagueness / broadness of this leg and states in section 37(2) of the Occupational Health and Safety Act – albeit in rather vague terms – that a Written Agreement concluded between the employer and the mandatary would be regarded as reasonable OHS behaviour by an employer vis-à-vis a mandatary.

Section 37(2) reads…. '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'.

The Legislator tells us that a Written Agreement, concluded between the employer and mandatary, containing arrangements and procedures between the employer and the mandatary to ensure the mandatary's compliance with the provisions of the OHS Act, would be considered only as reasonable steps. The legislator does not say it in so many words but, in my opinion, that is what it entails. In other words, if post an incident involving a mandatary, the evidence shows that the employer permitted certain unsafe acts by the contractor, there would be a possibility of the employer being charged in terms of the Occupational Health and Safety Act despite the Written Agreement. The words, mutatis mutandis, signify that the Written Agreement would not necessarily be an employer's salvation in the event of contravention involving a mandatary. The Written Agreement is essentially an OHS contract which is encouraged by the Legislator to promote good OHS practice between employers and mandataries. It is not an indemnity against prosecution of the employer and, as mentioned above, other factors such as permitting unsafe practices by mandataries may 'activate' the first leg of the presumption as per section 37(1)(a) and create criminal liability for an employer despite a Written Agreement being concluded .

It is also not a one-sided Written Undertaking by the mandatary to comply with the provisions of the OHS Act since a mutual arrangement between the employer and mandatary is implied. (There is reference to a Written Undertaking in Section 10(4) of the Occupational Health and Safety Act below). A Section 37(2) Written Agreement may contain anything as long as the other party is able to perform and its not against the good morals of society (contra bonos mores). Naturally, compliance with the provisions of the OHS Act must be a requirement as well as compliance with an employer's in-house standards or procedures. One could even insist on compliance with certain international standards that may not have been incorporated into the Occupational Health and Safety Act as (SANS) standards. It is imperative, however, that it has an element of mutuality, in essence an arrangement and procedure to ensure OHS compliance by the mandatary.

Once the other party (mandatary) signs, the Written Agreement is a lawful enforceable OHS contract and breach will have the same consequences as breach of any other lawful contract. The added bonus, from a criminal (OHS) law perspective, is that it will be regarded as 'reasonable steps' taken by the employer and a strong deterrent to vicarious criminal liability. No such provision exists in the MHS Act where all contractors are regarded as employees of the mine and are appointed into the mine management structure.

The Construction Regulations compel employers (clients) as well as principal contractors (employers) to conclude legally binding OHS arrangements with their mandataries when undertaking construction work. Clients are compelled to furnish their principal contactors or contractors with health and safety specifications and principal contractors likewise vis-à-vis their contractors. They are compelled to make various written appointments, to audit the construction work in order to ensure compliance with the health and safety plans. The health and safety specifications must be discussed, incorporated in health and safety plans which contractors compile and which finally end up in a health and safety file which must be kept by the client (employer). These specifications and plans are not guidelines which the Legislator encourages as is the case with the section 37(2) Written Agreement. They are legally binding obligatory documents and, once acceded to by other parties, are contractually binding.

There is, however, no prejudice in concluding a section 37(2) Written Agreements with construction mandataries since there is no conflict between it and the more rigid requirements of the construction regulations. It can be used as an umbrella contract to embrace all the requirements of the construction regulations. Health and safety specifications can form part of the Written Agreement via cross reference. Obligatory periodic OHS auditing can be regulated in the Written Agreement as well. In fact the Written Agreement can be the legal instrument which introduces all of the requirements of the construction regulations. By utilising the section 37(2) Written Agreement employers can formalise their contractor's legal obligations contractually in order to create criminal legal relief if required and civil law restitution if breach occurs.

The Construction Regulations are specifically designed to force inter-action between the various role players in construction work. The effect of this is to create a 'Domino Criminal Liability Effect' where the sins of one party can be visited upon all other role-players similar, and more readily achieved, than the presumption-in-law as created by section 37(2) of the OHS Act. An example could be a scenario where a serious incident occurs involving a contractor and the evidence brings to light that the client or principal contractor had failed to carry out any OHS audits or failed to obtain written risk assessments and, where applicable, written fall protection plans from the contractor. In my view that could create a strong enough link or nexus to hold the client or principal contractor criminally liable individually or jointly with the contractor, particularly if it is argued that approval of those health and safety plans, coupled with periodic audits, could have prevented the accident.

SECTION 10(4) OF THE OCCUPATIONAL HEALTH AND SAFETY ACT NO 85 OF 1993 AS AMENDED.

Section 10. General duties of manufacturers and others regarding articles and substances for use at work.

(1) Any person who designs, manufactures, imports, sells or supplies any article for use at work shall ensure, as far as is reasonably practicable, that the article is safe and without risks to health when properly used and that it complies with all prescribed requirements.

(2) Any person who erects or installs any article for use at work on or in any premises shall ensure, as far as is reasonably practicable, that nothing about the manner in which it is erected or installed makes it unsafe or creates a risk to health when properly used.

(3) Any person who manufactures, imports, sells or supplies any substance for use at work shall -

(a) ensure, as far as is reasonably practicable, that the substance is safe and without risks to health when properly used; and

(b) take such steps as may be necessary to ensure that information is available with regard to the use of the substance at work, the risks to health and safety associated with such substance, the conditions necessary to ensure that the substance will be safe and without risks to health when properly used, and procedures to be followed in case of an accident involving such substance.

(4) Where a person designs, manufactures, imports, sells or supplies an article or substance for or to another person and that other person undertakes in writing to take specified steps sufficient to ensure, as far as is reasonably practicable, that the article or substance will comply with all prescribed requirements and will be safe and without risks to health when properly used, the undertaking shall have the effect of relieving the first-mentioned person from the duty imposed upon him by this section to such an extent as is reasonable having regard to the terms of the undertaking.

This section is offers designers, manufacturers, importers, supplies, and sellers of articles for use at the workplace an opportunity of transferring their statutory duties onto another person or corporate entity. Note that the potential legal relief offered by section 10(4) of the Occupational Health and Safety Act does not include installers and erectors of articles that are used at the workplace. Their duties of ensuring an article is safety installed and erected can thus not be transferred via this Written Undertaking. Employers who are entitled to utilise the Written Undertaking can also not transfer their statutory duties without listing the specified steps which the recipient would be required to take to make it safe, healthy and compliant. The legislator has also indicated that the Written Agreement would be subjected to scrutiny to ascertain whether it is reasonable. In theory a designer may design, a manufacturer may manufacture, a supplier may supply and a seller may sell any unsafe and non-compliant article for use at work provided he furnishes the recipient with the specified steps that are required to make it safe and compliant.

MINE HEALTH AND SAFETY ACT NO 29 OF 1996.

Section 21. Manufacturer's and supplier's duty for health and safety.

(1) Any person who -

(a) designs, manufactures, repairs, imports or supplies any article for use at a mine must ensure, as far as reasonably practicable -

(i) that the article is safe and without risk to health and safety when used properly; and

(ii) that it complies with all the requirements in terms of this Act;

(b) erects or installs any article for use at a mine must ensure, as far as reasonably practicable, that nothing about the manner in which it is erected or installed makes it unsafe or creates a risk to health and safety when used properly; or

(c) designs, manufactures, erects or installs any article for use at a mine must ensure, as far as reasonably practicable, that ergonomic principles are considered and implemented during design, manufacture, erection or installation.

(2) Any person who bears a duty in terms of subsection (1) is relieved of that duty to the extent that is reasonable in the circumstances, if -

(a) that person designs, manufactures, repairs, imports or supplies an article for or to another person; and

(b) that other person provides a written undertaking to take specified steps sufficient to ensure, as far as reasonably practicable, that the article will be safe and without risk to health and safety when used properly and that it complies with all prescribed requirements.

(3) Any person who designs or constructs a building or structure, including a temporary structure, for use at a mine must ensure, as far as reasonably practicable, that the design or construction is safe and without risk to health and safety when used properly.

(4) Every person who manufactures, imports or supplies any hazardous substance for use at a mine must -

(a) ensure, as far as reasonably practicable, that the substance is safe and without risk to health and safety when used, handled, processed, stored or transported at a mine in accordance with the information provided in terms of paragraph (b);

(b) provide adequate information about -

(i) the use of the substance;

(ii) the risks to health and safety associated with the substance;

(iii) any restriction or control on the use, transport and storage of the substance, including but not limited to exposure limits;

(iv) the safety precautions to ensure that the substance is without risk to health or safety;

(v) the procedure to be followed in the case of an accident involving excessive exposure to the substance, or any other emergency involving the substance; and

(vi) the disposal of used containers in which the substance has been stored and any waste involving the substance; and

(c) ensure that the information provided in terms of paragraph (b) complies with the provisions of the Hazardous Substances Act, 1973 (Act No. 15 of 1973).

The Mine Health and Safety Act contains a similar provision to section 10(4) of the Occupational Health and Safety Act but is extended to include repairers. Manufacturers, repairers, suppliers, importers or designers of any article for use at a mine can avail themselves of this legal relief as contained in section 21(2). As with section 10(4) of the Occupational Health and Safety Act, the proviso is that specified steps, to make the article compliant and safe, must be furnished to the recipient mine. It goes without saying that the Undertaking must be in writing.

As mentioned currently mines do not have the equivalent of section 37(2) of the Occupational Health and Safety Act as contractors are appointed into the mine safety structure. This is destined to change once the draft National Occupational Health and Safety Bill is promulgated into law. It will apply to all employers.

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