



Occupational Health and Safety in community schemes

In this post, we refer to trustees of a body corporate and directors of a homeowners' association as the "scheme executives" of a community scheme.¹

Scheme executives are responsible for ensuring compliance with the Occupational Health and Safety Act² ("the OHS Act") and its Regulations, however in order to determine what their obligations and duties are, the scheme executives need to determine the capacity in which the community scheme is acting in any given situation.

Where a community scheme is acting in its capacity as an employer, by instructing its own employees to undertake given work on the common property or estate, the scheme executives should familiarise themselves with the obligations and duties of an employer contained in the OHS Act itself, together with any other relevant Regulations. In this regard, an employer is someone who employs or provides work for any person and remunerates that person or undertakes to remunerate that person.³ An employee is a person who is employed by, or works for, an employer for remuneration.⁴

When scheme executives appoint service providers to undertake maintenance, repairs or building works on the common property or estate, or to perform other works on the common property or estate, the community scheme would be acting in its capacity as a client to a contractor. A client is any person for whom construction work is being performed⁵ and a contractor means an employer who performs construction work.⁶ In this context, the scheme executives should familiarise themselves with the obligations and duties of a client as set out in the Construction Regulations⁷ to the OHS Act ("the Construction Regulations").

Where the community scheme acts in its capacity as an employer

Section 8 of the OHS Act sets out the duties and obligations of employers toward the health and safety of their employees.

Where a community scheme has one or more employees, the community scheme (as the employer) has the obligation to, amongst other things, provide and maintain a working environment that is safe and without risk⁸ to the health of its employee(s).⁹

¹ See the definition of "scheme executive" in Regulation 1 of the CSOS Regulations, 2016.

² Act 85 of 1993, a copy of which can be found here https://www.stsolutions.co.za/wp-content/uploads/2023/07/85-OF-1993-OCCUPATIONAL-HEALTH-AND-SAFETY-ACT_1996.11.11-to-date.pdf.

³ Section 1(1) of the OHS Act.

⁴ Section 1(1) of the OHS Act.

⁵ Regulation 1 of the Construction Regulations.

⁶ Regulation 1 of the Construction Regulations.

⁷ Construction Regulations No. R. 84 7 February 2014, a copy of which can be found here https://www.stsolutions.co.za/wp-content/uploads/2023/07/85-OF-1993-OCCUPATIONAL-HEALTH-AND-SAFETY-ACT_Regs-GNR-84_2014.02.07-to-date.pdf.

⁸ Risk is defined in section 1 of the OHS Act as meaning the probability that injury or damage will occur.

⁹ Section 8(1) of the OHS Act.



Where a community scheme does or omits to perform an act, which causes any person to be injured at a workplace,¹⁰ or which causes an employee to be injured, at any place, during the course of their employment, the community scheme, as an employer, would be guilty of an offence.¹¹ The OHS Act therefore extends the obligation for safety on the common property to any person who may be impacted by the work performed by an employee or contractor of the community scheme, such as visitors, owners and other residents in the community scheme.

Criminal liability of scheme executives

Scheme executives could be held criminally liable for acting in contravention of certain provisions of the OHS Act.

To determine whether a scheme executive may be held criminally liable, one has to first determine whether the scheme executive falls within certain definitions provided for in the OHS Act. For example, in terms of the OHS Act and its regulations, can it be said that scheme executives are responsible to ensure that the duties of the community scheme are properly discharged? The answer is not as straightforward as one might think.

In terms of the Sectional Titles Schemes Management Act¹² (“the STSMA”), for example, the functions and powers of a body corporate are performed and exercised by the trustees.¹³ For homeowners’ associations, the business of the homeowners’ association is generally carried out by its directors in terms of its constitution or memorandum of incorporation, as the case may be.

The OHS Act defines a chief executive officer as the person who is responsible for the overall management and control of the business/body corporate/enterprise.¹⁴ Trustees’ powers are however limited by the STSMA and any restrictions placed on them at an annual general meeting and in terms of the rules.¹⁵ Arguably then, the overall management and control of the body corporate lies with the members, but the day-to-day business is run by the trustees, to the extent that they are not restricted. Case law does not seem to be definitive in this regard and therefore section 16 of the OHS Act could apply if the trustees are interpreted to be in control of the overall management of the body corporate. This same analogy can be extended to homeowners’ associations and their directors. Section 16 may therefore not apply to all community schemes as it would for ordinary companies.

Further to the above, in terms of section 16(1) of the OHS Act, a chief executive officer has to have an employer (i.e. to be a chief executive officer one would have to be an employee), but a scheme executive does not ordinarily fall within the definition of an employee unless they are remunerated or entitled to remuneration (which as a general rule, they are not unless this is specifically provided for and the community scheme has complied with applicable laws to enable remuneration of the scheme executive). Therefore, this provision, which places the obligation on a chief executive officer to ensure that the duties of the employer (possibly, the community scheme) are properly discharged may only apply if the scheme executives are professional scheme executives being paid by the scheme for their services.

Section 16(1) of the OHS Act may then also apply to an executive managing agent, considering that an executive managing agent steps into the shoes of the trustees (subject to whether or not an executive managing agent could be

¹⁰ In the context of community schemes, the common property would be considered the “workplace” because it is a place where a person performs work in the course of their employment.

¹¹ Section 38(2) of the OHS Act.

¹² No. 8 of 2011.

¹³ Section 7(1) of the STSMA.

¹⁴ Section 1(1) of the OHS Act.

¹⁵ Section 7(1) of the STSMA.



said to be responsible for the overall management and control of the body corporate) and is generally remunerated by the body corporate for its services. The same could possibly be said of court-appointed administrators in terms of section 16 of the STSMA.

Scheme executives, especially those who are members of the community scheme, cannot always be said to be employees as, generally speaking, they do not receive, nor are they entitled to, remuneration for the work they perform. Scheme executives can, however, be classified as agents which have the power to bind the community scheme (the principal).

It is submitted that scheme executives therefore, generally speaking, fall into the definition of a mandatory, at least insofar as the community scheme falls within the definition of an employer.¹⁶ As a result of this, where a scheme executive performs, or omits to perform, an act which is a contravention of the OHS Act, the scheme executives could potentially be held criminally accountable.¹⁷ This criminal accountability would be over and above any potential civil liability as a result of a breach of their fiduciary duty.¹⁸

For effective health and safety control on the common property of a community scheme, the roles and responsibilities of the scheme executives should be clearly set out, defined, recorded and distributed/disseminated, within the context of occupational health and safety requirements. These occupational health and safety requirements may be particular for that community scheme, or a set of standard protocols across multiple community schemes. As a scheme executive, it is important to familiarise yourself with the requirements of the OHS Act and its various Regulations, as they may apply in a given scenario. Not adhering to this set of legislation may result in a fine or imprisonment or both.¹⁹

Where the community scheme acts in its capacity as a client

A community scheme which contracts with a contractor has duties as a client and not as an employer.

The Construction Regulations place duties on a number of parties including the client,²⁰ the designer²¹ and the contractor.²²

The scheme executives, on behalf of the community scheme, carry a duty and a responsibility to implement certain actions when construction takes place on the common property. The scheme executives must therefore be aware of what type of work is covered by the Regulations to the OHS Act, such as the Construction Regulations, and not just use the OHS Act itself as broad coverage for all types of work. Construction work means any work in connection with:²³

- i. The construction, erection, alteration, renovation, repair, demolition or dismantling of, or addition to, a building or any similar structure; and

¹⁶ A mandatory is defined in section 1(1) of the OHS Act as meaning an agent, a contractor or a subcontractor for work, but without derogating from his status in his own right as an employer or a user.

¹⁷ Section 37 of the OHS Act.

¹⁸ Section 8 of the STSMA. 2.

¹⁹ Section 38 of the OHS Act.

²⁰ Regulation 5 of the Construction Regulations.

²¹ Regulation 6 of the Construction Regulations. A "designer" is defined in Regulation 1 to the Construction Regulations.

²² In general most of the obligations and duties in the Construction Regulations apply to the contractor, from Regulation 7 though Regulation 31.

Note however that not all of these duties may be applicable for every construction work.

²³ Regulation 1 of the Construction Regulations.



- ii. 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 marking of excavation, piling, or any similar civil engineering structure or type of work.

It is important to note that the definition of construction work specifically refers to a structure, which itself has quite a broad definition and means:²⁴

- i. any building, steel or reinforced concrete structure (not being a building), railway line or siding, bridge, waterworks, reservoir, pipe or pipeline, cable, sewer, sewage works, fixed vessels, road, drainage works, earthworks, dam, wall, mast, tower, tower crane, bulk mixing plant, pylon, surface and underground tanks, earth retaining structure or any structure designed to preserve or alter any natural feature, and any other similar structure;
- ii. any falsework, scaffold or other structure designed or used to provide support or means of access during construction work; or
- iii. any fixed plant in respect of construction work which includes installation, commissioning, decommissioning or dismantling and where any construction work involves a risk of a person falling.

Community schemes and their scheme executives must comply with various laws and by-laws in a given locality, and in relation to the common property. For example, this is a statutory function of a body corporate in terms of the sectional title laws.²⁵

One of the obligations on community schemes, in their capacity as clients, is to prepare a health and safety specification²⁶ for the intended construction work based on the baseline risk assessment which it also has to prepare, for the intended construction work project.

An occupational health and safety plan²⁷ must then be created by the contractor,²⁸ in consultation with the community scheme. The community scheme must then take reasonable steps to ensure that the contractor's health and safety plan is implemented and maintained.²⁹

The creation and implementation of the occupational health and safety plan depend on the type of work being performed in the context of the community scheme or common property in question. The specific safety measures or mitigation steps to avoid injury, death or damage will depend on the type of activity being performed and the measures reasonably available to prevent injuries, death or damage.

As a result of the potential civil liability which may arise out of construction work on the common property, the community scheme would be well-advised to have a conspicuously placed indemnity declaration (disclaimer notice) at the entrance

²⁴ Regulation 1 of the Construction Regulations.

²⁵ Section 3(1)(p) of the STSMA.

²⁶ "health and safety specification" is defined in Regulation 1 of the Construction Regulations and means a site, activity or project specific document prepared by the client pertaining to all health and safety requirements related to construction work.

²⁷ "health and safety plan" means a site, activity or project specific documented plan in accordance with the client's health and safety specification.

²⁸ Regulation 7(2)(a) of the Construction Regulations.

²⁹ Regulation 5(1)(i) of the Construction Regulations.



to the common property for` public indemnity (and as many other places as is practicable), and to check these indemnity notices with their insurers for confirmation or acceptance. This indemnity should also be incorporated into agreements between the community scheme and any service providers, contractors or employees of the community scheme. Some such disclaimer notices have been inserted into the messages received for codes to enter and exit the complex, or on a laminated notice handed to the visitor on arrival and handed back on exit. Gross negligence or wilful, reckless actions are not possible to be included in disclaimers, as this would be unenforceable. The community scheme's public liability insurer should be contacted for more information in this regard.³⁰

The scheme executive could procure an indemnity form, appropriately worded, to be completed by each contractor, whether appointed by the community scheme or whether entering the common property on invitation from an owner for given work to be conducted. This could also form part of the written agreement with the contractor. The form would indemnify the community scheme from any death, bodily injury, illness, or other damage caused by or during the contractors' duties. This indemnity form should also be contained in the rules of the community scheme (as is often the case). It is also sometimes found in the application form for consent to renovations and alterations. Most community schemes conspicuously place a disclaimer notice at the entrance to the complex, and at other relevant areas in the complex, as mentioned above.

The community scheme is not exempt from the application of the OHS Act and its Regulations. The scheme executives must ensure compliance with all of the statutory and common law obligations. This will ensure that the common property is maintained so that it is safe for owners, visitors, contractors and employees entering on the common property.

Scheme executives should consult with health and safety professionals to assist and advise them regarding specific requirements of the OHS Act and its Regulations, and with the development of any health and safety specification, should the need arise.

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*****END OF ARTICLE*****

³⁰ In terms of Prescribed Management Rule 23(6) of the STSMA Regulations, 2016, it is compulsory for a Body Corporate, to take out public liability insurance to cover the risk of liability the Body Corporate may incur to pay compensation for any illness, bodily injury or death which occurs on or in connection with the common property and any damage or loss of property as a result of an occurrence or happening in connection with the Common Property. The Rules regulate that the minimum amount of public liability insurance must not be less than R10 million. There is however no equivalent obligation on Homeowners' Associations, other than what may perhaps be contained in the relevant memorandum of incorporation or constitution of such associations.