A Follow-up: Occupational Health and Safety in Community Schemes

In our previous article we discussed the following topics:

1. The duties and obligations of a community scheme in its capacity as an employer;
2. Criminal liability of scheme executives; and
3. The duties and obligations of a community scheme in its capacity as a client.

While civil liability was mentioned in respect of both section 8[1] of the Sectional Titles Schemes Management Act[2] (the "STSMA") and in respect of indemnity declarations (disclaimer notices), we did not delve any deeper than that.

Before proceeding further, we would like to thank George Kahn of Richard Spoor Attorneys[3] who provided us with a link to the case of *Joubert v Buscor Proprietary Limited*[4] (the "*Joubert* case").

The *Joubert* Case added an important insight into the way in which the way in which the Occupational Health and Safety Act[5] (the "OHS Act") and the Construction Regulations[6] (the "Construction Regulations") are to be interpreted in respect of the civil liability of employers or clients toward independent third parties.

The *Joubert* case:

The applicant/plaintiff (the "applicant") in the *Joubert* case was the spouse of an apprentice electrician who was working on the premises of the respondent/defendant (the "respondent"), for a sub-contractor (i.e. the respondent was not the employer, but the "client" in terms of the Construction Regulations to the OHS Act).

The application was instituted to amend certain portions of the pleadings to include a claim for strict liability.

The applicant pleaded that in terms of section 9 of the OHS Act[7] read with regulation 5 of the Construction Regulations,[8] a duty of care was placed on the respondent and that the respondent should be held strictly liable for damages suffered by the applicant and her children.

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[1] Section 8 of the STSMA provides for potential personal liability of a trustee of a Body Corporate where that trustee breached their fiduciary duty.
[2] Act 8 of 2011.
[3] Richard Spoor Attorneys acted for the applicant in the matter.
[4] (2013/13116) [2016] ZAGPPHC 1024 (9 December 2016), accessible at https://www.saflii.org/za/cases/ZAGPPHC/2016/1024.html.
[5] 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-OCCUPATIONALHEALTH-AND-SAFETY-ACT_1996.11.11-to-date.pdf.
[6] Construction Regulations No. R. 84 7 February 2014, a copy of which can be found here https://www.stsolutions.co.za/wpcontent/uploads/2023/07/85-OF-1993-OCCUPATIONAL-HEALTH-AND-SAFETY-ACT_Regs-GNR-84_2014.02.07-to-date.pdf.
[7] Section 9 of the OHS Act provides for the duty of care of an employer.
[8] Regulation 5 of the Construction Regulations provides for the duty of care of a client.

The Duty of Care:

In terms of the duty of care owed, the court:

1. reviewed the common law position, which predated the OHS Act, that the duty of care does not extend to workers of a contractor unless the terms of a contract contain such a duty;[9]
2. looked at s 9(1) of the OHS Act and held that it was wide enough to extend the duty of care of an employer to subcontractors and the public at large, "*if they may be affected by the employer's activities*";[10]
3. referred to the case of *Health Resource Group and others v Minister of Labour and others*[11] where the court interpreted s 32 of OHS ACT and held that a "*reference to 'any person' in the Act [sic] means that the provisions are not directed at employees only*".[12]
4. referred to ss 37(1) and (2) of the OHS Act and noted that the sections created a rebuttable presumption that if a prohibited act or omission occurs, it is an act or omission of an employer or user. The court went on to explain that the sections introduce vicarious liability of an employer or user in the context of health and safety injuries and hazards;[13]
5. explained that the provisions of s 35 of the Compensation for Occupational Injuries and Diseases Act[14] ("COIDA") expressly prevented an employee or their dependents from instituting a civil claim against an employer for recovering a loss flowing from occupational injury or disease in the civil courts;[15]
6. held that the respondent's argument that the applicant was precluded from instituting a claim based on the common law breach of duty of care and, in the alternative, a breach of the OHS Act was not defensible as it would create a situation where neither employees, nor the public at large (e.g. subcontractors) would be able to institute a claim against an employer for workplace-related health and safety injuries. As a consequence, the court held that the applicant (as a third party who is not an employee) enjoyed protection under the OHS Act and that, consequently, the right to institute a claim against an employer was not limited;[16] and
7. held further that s 9(1) of the OHS Act covered the applicant and she could therefore institute proceedings against an employer (like the respondent) in this case.[17]

[9] Para 16 of the *Joubert* case. The court referred to the case of *PeriUrban Areas Health Board v Munarin* 1965 (3) SA 367 (A) as authority for the common law position.
[10] Para 17 of the Joubert case.
[11] 2015 (4) All SA 78 (GP).
[12] Para 18 of the Joubert case.
[13] Para 19 of the Joubert case.
[14] Act 130 of 1999.
[15] Para 20 of the Joubert case.
[16] Para 21 of the Joubert case.
[17] Para 22 of the Joubert case.

Strict Liability:

The court then turned to deal with the question as to whether or not the OHS Act creates strict liability for employers. The court:

8. held that "*The hallmark and accepted principles of strict liability is a reference to and a finding of liability or guilt despite the absence of fault. It arises in respect of civil and criminal claims disputes. Strict liability offences are generally of a regulatory nature and where it is particularly important to maximise compliance, for example, public safety or protection of the environment.;*"[18]

9. cited various cases which dealt with the interpretation of statutes in order to reiterate that where the legislation is clear, the court must determine the intention of the Legislature from the language used and further, "*that legislation must be interpreted purposively, having due regard to context, in a manner consistent with and that preserves constitutional validity*";[19]

10. then utilised these principles in interpreting s 9(1) of the OHS Act, together with regulation 5(1) of the Construction Regulations. In this regard the court held "*In my view, the effect is that the section and regulation have not only imposed a duty of care on the employer. They have, also, hard-wired the standard of care. In this regard, the liability of an employer flows directly from the* malum prohibitum *conduct of the breach of the duty as well as the breach of the prescribed standard imposed by…*"[20] the OHS Act;

11. referred to s 37(1) of the OHS Act and held that in interpreting this provision, it is not enough that an employer forbids a certain act or omission, it must be able to show that it met the standard of care which is prescribed by the OHS Act by being able to demonstrate the actual measures it put in place to prevent or minimise a workplace health and safety risk or hazard;[21] and

12. held that because the OHS Act regulated foreseeable risk which was inherent in the activities of the employer, if the employer was unable to prove that it acted with the prescribed standard of care for its particular type of activity or operation, that liability would flow naturally therefrom. As a result of the fact that the OHS Act places a duty of care and also regulates the standard of care in "*absolute terms*", the liability of an employer would fall under the category of strict liability.[22]

Having found that strict liability does apply to employers under the OHS Act, the Court then looked at what the applicant would need to prove in order to succeed with a claim against the respondent.

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[18] Para 23 of the *Joubert* case.
[19] Para 25 of the *Joubert* case. The court cited the case of *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC), accessible at: http://www.saflii.org/za/cases/ZACC/2014/16.html.
[20] Para 30 of the *Joubert* case.
[21] Para 31 of the *Joubert* case.
[22] Para 32 of the *Joubert* case.

What would an applicant need to prove to successfully claim against an employer or client:

The court held that the elements that would need to be proved by the applicant (and any applicant - excluding an applicant precluded therefrom in terms of COIDA) against the respondent (an employer or client) are as follows:[23]

1. The respondent owed a duty of care to the deceased as a foreseeable third party or bystander contemplated in the OHS Act.
2. There existed a breach of that duty. Put differently, the respondent's conduct fell below the applicable standard of care provided for in Regulation 5 of the Construction Regulations in relation to the activity and operations in which it was engaged.
3. The injury to the deceased (and in turn, an injury to the applicant would need to be proved), as well as the fact that the breach of the duty (as mentioned above) was the cause of the injury to the deceased.
4. Lastly, the applicant would need to prove the damages which were suffered as a result of the injury.

The court then dealt with the respondent's argument that if the applicant was allowed to amend her pleadings to include strict liability, it would remove the ability of the respondent to argue against negligence, as in the case of strict liability, negligence was irrelevant.[24] The Judge in the *Joubert* case made short work of this argument by explaining that negligence was tested by whether an employer's measures were reasonable and that the respondent's argument could not succeed because of the fact that the applicant would need to prove that the respondent's measures fell below the standard of care required in terms of the OHS Act and that there had been a breach of the duty of care owed by the respondent.[25] It was therefore inherent that, if the applicant was able to prove that the respondent's measures fell below a prescribed standard of care, that the respondent would have failed the test and would have been negligent.[26]

The court in *Joubert* finally looked at whether a claim at common law could be pleaded, in the alternative, with a claim of a statutory breach.[27] The court crystalised the question as, "*the question is whether the codification of the duty and standard of care excludes a claim in delict based on common law*".[28] The court held that the OHS Act did not exclude or limit a common law claim and therefore that the applicant could plead in the alternative, as she was seeking to do.[29]

How does this analysis apply to Community Schemes?

A community scheme, in its capacity as either an employer or client, could be held civilly liable by a third party under the OHS Act and the Construction Regulations. A community scheme, in its capacity as either an employer or client, could be held civilly liable by a third party under the OHS Act and the Construction Regulations. It is therefore foreseeable, at least in theory, that a scheme executive could also be held personally liable for a breach of a duty created by the OHS Act and the Construction Regulations. Whether that liability could extend directly to the third party or merely to the community scheme itself would depend wholly on the circumstances. Practically, it is uncertain whether

[23] Paras 33 to 33.4 of the *Joubert* case.
[24] Paras 33 to 35, read with para 11 of the *Joubert* case.
[25] Para 35 of the *Joubert* case.
[26] Para 35 of the *Joubert* case.
[27] Paras 36 to 38 of the *Joubert* case.
[28] Para 38 of the Joubert Case.
[29] Paras 38 to 39 of the *Joubert* case.

such relief would mean that third parties could "pierce the corporate veil" so to speak and sue directors or trustees directly. Time will tell.

For example, if the community scheme has some kind of construction (or activity that falls within the scope of the OHS Act and/or the Construction Regulations) and a third party service provider (or the public at large) is injured or dies as a result of the failure of the community scheme to adhere to the standard and duty of care provided for by the OHS Act and the Construction Regulations, then the community scheme could be held liable for the damages suffered as a result of that failure.

Insurance:

While the community scheme could utilise disclaimer notices at entrance points or ensure that indemnity agreements are signed by each member of the public, this may not be sufficient in all cases to avoid the liability of compensation of damages to an injured party or their dependents. You would be well-advised to consult your insurance company in this regard.

It is therefore advisable that scheme executives[30] of community schemes have adequate insurance for public liability for their community schemes and that this insurance does not exclude any potential claim which may arise due to a breach of the OHS Act or the Construction Regulations.[31]

Given that scheme executives can be held personally liable if they are found to have breached their statutory duty, it is also advisable that they ensure that their community scheme has the adequate and appropriate cover for scheme executives.[32]

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SANDTON

END OF ARTICLE

[30] Directors of Homeowners Associations and Trustees of Bodies Corporate.
[31] In respect of Bodies Corporate, Prescribed Management Rule 23(6) of the Sectional Titles Schemes Management Regulations , 2016 is peremptory and provides that a Body Corporate must take out public liability insurance to cover the risk of liability which that Body Corporate may incur to pay compensation for bodily injury, death or illness to a person and any damage or loss to property, which occurs in connection with the common property.
[32] See Pienaar, R, “Insurance for home owners associations and sectional schemes”, found at https://www.paddocks.co.za/paddocks-press-newsletter/insurance-for-home-owners-associations-and-sectional-schemes/ and Addison, M, De Waal A, Styles, D, “insurance and the home owners association”, found at https://www.paddocks.co.za/paddocks-press-newsletter/insurance-and-the-home-owners-association/.