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EMPLOYMENT

Director liability – OHSA/NEMA

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This memo is intended to provide high level guidance on director liability under the National Environmental Management Act 107 of 1998 ("NEMA") and the Occupational Health and Safety Act 85 of 1998 ("OHSA"), and determine whether anything can be done commercially to limit the identified liability. It should be noted that the information contained herein is generic in nature and does not consider the specific circumstances of any client.

National Environmental Management Act

- In terms of Section 31A of NEMA offences listed under Section 49A of NEMA and the Specific Environmental Management Acts are considered as Schedule 1 offences under the Criminal Procedure Act 51 of 1997, that may result in the imposition of a fine or jail sentence on conviction for an offence. In terms of NEMA, directors may be held liable for environmental offences in the following manner:
    - Section 33 of NEMA facilitates private prosecution by any person when the matter relates to the protection of the environment or a breach or threatened breach of any duty which breach is an offence under NEMA. Section 49A contains the list of offences that can be committed in terms of NEMA, which offences range from commencement of unauthorised activities, failure to comply with condition in a license to operate, unlawful or intentional acts that lead to significant pollution and failure to comply with compliance orders or directives.
    - Any person may utilise Section 33 to initiate the prosecution of an entity, its directors or employees in their personal capacity. The person initiating prosecution does not require the public prosecutors permission and does not need to provide security for such action. The accused on conviction may be ordered to pay costs of the prosecution.
    - Section 49B provides that persons convicted of offences in terms of Section 49A may be liable to a fine and/or imprisonment.
    - Corporate officer liability under NEMA may be established in four different ways, with directors and officers being at risk if they are found to be:
        - the principle of an offence (liability will arise as a result of them being in control of the activity);
        - an accomplice, if the director was party to the offence committed by the corporate or its employees;
        - a co-conspirator, if it is alleged that the director was party to a conspiracy to commit and offence; and
        - prima facia guilty and liable on conviction to a penalty specified in law, if it is proven that the corporate committed an offence as described in Schedule 3. The director will automatically be cited as a party to the proceedings, and the evidentiary burden is on the director to prove they took reasonable measures to prevent or mitigate the offence (Section 34(7) NEMA).
- Schedule 3 contains a list of offences, which can be committed in terms of NEMA or any of the environmental management Acts. There are approximately 80 different offences listed in this Schedule.
- Offences committed in relation to a failure of a duty of care: should a corporate entity receive a Section 28 directive ordering it to take reasonable measures to prevent pollution and/or to rectify or minimise the pollution and degradation

and fail to take such measures, the authority may recover the cost of implementing the measures from any person who directly or indirectly contributed to the pollution or degradation or negligently failed to prevent the pollution. Directors may be cited as joint and severally liable for such claims in the event that they meet the requirements for associated liability (any person responsible for, or who directly or indirectly contributed to the pollution) with the amount being apportioned according to the degree to which each was responsible.

Occupational Health and Safety Act

- The purpose of the Occupational Health and Safety Act No.85 of 1993 ("OHSA") is to:
    - provide for the health and safety of persons in the workplace;
    - provide for the health and safety of persons in connection with the use of plant and machinery;
    - protect persons against hazards that arise in the workplace;
    - establish an advisory council for occupational health and safety and;
    - to provide for matters connected therewith.
- In general, an employer is required to provide and maintain (insofar as it is reasonably practicable) a working environment that is safe and without risk to the health of its employees. In addition, every employer is required to conduct his business in such a manner as to ensure (as far as this is reasonably practicable) that persons other than those in his employment who may be directly affected by his activities are not thereby exposed to hazards to their health and safety. This entails:
    - the provision and maintenance of systems of work, plant and machinery;
    - taking steps to mitigate or limit risks that are identified prior to providing personal protective equipment ("PPE");
    - making arrangements for ensuring the safety and absence of health risks in connection with production, processing, use, handling, storage or transport of articles or substances;
    - establishing what hazards are or may be associated with any task performed, article or substance that is produced, processed, used, handled, stored or transported and any plant or machinery used in the business. In addition, establishing such precautionary measures that should be taken and the provision of such precautionary measures to protect the health and safety of employees;
    - providing information, instruction, training and supervision as may be necessary to ensure the health and safety of the employees;
    - not permitting any employee to engage in any activity unless the requisite precautionary measures have been taken;
    - taking all necessary measures to ensure that the requirements of the OHSA are complied with by every person in the employer's employment or on the employer's premises;
    - enforcing such measures as may be necessary in the interests of health and safety;
    - ensuring that work is performed and that plant and machinery is used under general supervision of a person trained to understand the hazards associated with it and who has the authority to ensure that the precautionary measures taken by the employer are implemented;
    - ensuring all employees are informed as to:
        - the scope of their authority and are conversant with the risks associated with the work he must do;
        - the precautionary measures he must take;
        - their duty to inform the health and safety representative of any inspections, investigations or formal enquiries that may be received; and
        - their duty to inform the health and safety representative of the occurrence of any incident as soon as possible after the occurrence thereof.
- Depending on the nature of the operation, and in particular with reference to "listed work" as declared by the Minister in the Government Gazette, all employers undertaking listed work are liable to be exposed to listed work must establish and consult with a health and safety committee to:

    - identify the hazards and identify the risks associated with such work and the steps that are required to be taken in terms of OHSA;
    - as far as reasonably practicable, prevent exposure to the hazard identified or minimise such exposure;
    - depending on the nature of the work and the level of exposure of the employees to the hazards, carry out an occupational hygiene programme and biological monitoring including medical surveillance of the employees.
- The number of health and safety representatives and committees will depend on the number of employees.
- The obligation to ensure compliance with OHSA rests on the chief executive officer of the employer. While the chief executive officer may delegate or assign any duty imposed upon him, to any person under his control, such as a director, this does not derogate from the responsibilities or liability of the chief executive officer.
- Whenever an employee does or omits to do any act that would be an offence in terms of OHSA for the employer of such employee or a user to do or omit to do, then, unless it is proved that:
    - in doing or omitting to do that act, the employee was acting without the connivance or permission of the employer or any such user;
    - it was not under any condition or in any circumstance within the scope of 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;
    - all reasonable steps were taken by the employer or any such user to prevent any act or omission of the kind in question, then
- The position set out above, applies mutatis mutandis in the case of a mandatory of any employer or user, except where the parties have agreed in writing to the arrangements and procedures between them to ensure compliance by the mandatory with the provisions of OHSA.
- Where fault is found to lie with the employee or mandatory (in the circumstances set out above), then the employee or mandatory will be liable to be convicted and sentenced as though he was the employer or user. It is likewise possible for joint liability to ensue.
- The majority of offences under OHSA render the perpetrator liable to a fine not exceeding R50 000 and/or imprisonment not exceeding one year. This increases to a fine not exceeding R100 000 and/or imprisonment not exceeding two years in the event an employer's acts or omissions causes an employee to be injured at any place in the course and scope of his employment or a conviction of culpable homicide in the event of the death of an employee.
- Where the offence consists of a failure to comply with a provision of OHSA or of any direction or notice issued in terms of OHSA, the court convicting the guilty party may in addition to any punishment imposed for that specific offence, issue a compliance order in connection with the relevant provision to be completed within such time as determined by the court.
- OHSA contains a presumption that until the contrary is proved, any person present on the premises is an employee.

Directors Ability to Limit Liability in Terms of NEMA and OHSA

- NEMA does not assign the obligation of environmental management and protection to any particular corporate officer and unlike in OHSA, it doesn't cater for delegation of authority for these matters so as to allow for corporate officers such as directors to limit their liability.
- Liability of directors under NEMA is attracted on the basis of the director's position in the corporate entity (by association) and as a result of direct or indirect actions taken by the director for which the consequence was an offence under NEMA.
- Given that the liability ensuing out of NEMA and OHSA is statutory in nature and comprises fines and imprisonment, the Companies Act places very specific limitations on when a company may indemnify a director.
- If a director directly or indirectly participated in an activity that caused an offence in terms of OHSA and NEMA, breaching their statutory duty to act in good faith, with care, skill and diligence in the best interests of the company, they will have no recourse against or be entitled to an indemnity from the company.
- However, if a director was joined in an action arising from Section 34(7) of NEMA, wherein he is held prima facia liable for an offence committed by the company, the company may advance to a director expenses and indemnify him against these expenses. This would, however, be on the basis that the director is able to prove that they took reasonable measures to

prevent or mitigate the offence, and as a result cannot be held jointly liable for the offence. By the same token, where the company has appropriately delegated authority in terms of OHSA or the fault lies with the employee, the company will be in a position to assist the director in the defence of any claim and indemnify him.



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