

Advocate Raynard Looch

Klass Looch Associates

raynard@klasslooch.com

www.klasslooch.com



South African Institute of
Occupational Safety and Health

**Debunking sections 16 and 37 of the OHS
Act with emphasis on the potential
criminal liability of section 16(2)
Assignees and the legal impact of the
section 37(2) Written Agreement.**

Agenda

**Section 16 Original Draft / Current / Proposed /
DEL Interpretation**

Reasonably Practicable

SAIOSH Proposed Section 16(3)

The Section 37(2) Written Agreement

Criminal & Civil Liability

Case Study : The Grayston Bridge Collapse



Current OHS Act. Section 16. Chief executive officer charged with certain duties

(1) Every chief executive officer shall **as far as reasonably practicable**, ensure that the duties of his employer as contemplated in this Act, are properly discharged.

(2) Without derogating from his responsibility or liability in terms of subsection (1), a chief executive officer **may assign** any duty contemplated in the said subsection, to any person under his control, which person shall act subject to the control and directions of the chief executive officer.

*"chief executive officer", in relation to a **body corporate** or an enterprise conducted by the State, means the person who is responsible for the **overall management and control** of the business of such body corporate or enterprise.*

The section 16(1) must reside in SA. Automatic. Not an appointment.
Can be found in a subsidiary corporate body Ltd. Pty Ltd. CC.
Not in a business unit.
Shareholding academic

Draft 1993 OHS draft Bill. Section 16. Chief executive officer charged with certain duties

(1) Every chief executive officer shall **as far as reasonably practicable**, ensure that the duties of his employer as contemplated in this Act, are properly discharged.

(2) Without derogating from his responsibility or liability in terms of subsection (1), a chief executive officer **may delegate, including the power of further delegation**, any duty contemplated in the said subsection, to any person under his control, which person shall act subject to the control and directions of the chief executive officer.

Why was this draft changed? **'Delegate'** is rigid. **'Assign'** has no legal baggage. ***Delegare non delegatus potest.***

A person to whom something has been delegated cannot delegate further, i.e. one to whom powers and duties have been entrusted cannot entrust them to another.

Interpretation of Statutes. What was the intention of legislator? The current OHS Act must be interpreted with its draft as guidance.

DEL VIEW ON SECTION 16(2)

'You are aware that i.t.o. section 16(2) only the CEO has the legal option of assigning someone to assist him/her to discharge the employer's duties to discharge the employer's duties as contemplated in the OHS Act. Certainly, if the legislature had intended otherwise, such a provision would have made in the legislation. It is therefore our view that any section 16(2) assignee does not have the same legislative right to make another section 16(2) appointment, as that person will no longer be under the **direct** control and **direct** supervision. DEL does not have any objections when an organisation assigns persons to assist both the section 16(1) and 16(2) appointees. We, however, do not agree with a section 16(2) designation given to anyone other than a person who is **under the supervision and direct control of the CEO'**.

T Lamati

2009

DEL's opinion is just that. An opinion. Only courts can determine lawfulness.

Draft OHS Amendment Bill. Section 16

15(1) A CEO shall ensure, ~~as far as is reasonably practicable,~~ that the duties of his or her employer as contemplated in this Act, are properly discharged.

(1A) The CEO shall develop, implement and continuously review the health and safety management system as the employer may be directed in terms of section 7(1);

(2) Without derogating from his or her responsibility or liability in (1A), a CEO may **in writing, delegate** any duty contemplated in the said subsections, to any person under his or her control, which person shall act subject to the control and direction of the CEO, in the interest of occupational health and safety;

(2A) A person so delegated in terms of subsection (2) may not further delegate the duty to any other person."; and

DEL maintains only the 'Direct Reports' can be delegated i.t.o. section 16(2) of the Act / Bill.

Reasonably Practicable. (The Bill retains the definition?).

"reasonably practicable" means practicable having regard to –

- (a) the severity and scope of the hazard or risk concerned;
- (b) the state of knowledge reasonably available concerning that hazard or risk and of any means of removing or mitigating that hazard or risk;
- (c) the availability and suitability of means to remove or mitigate that hazard or risk; and
- (d) the cost of removing or mitigating that hazard or risk in relation to the benefits deriving therefrom.

Why do you retain the definition – only to omit it in the bulk of the Bill?? Every country that the SAIOSH Technical Committee researched retained 'reasonably practicable' plus the definition is embraced by LAC.

ILO C155 (Occupational Safety and Health Convention 1981) Article 4. SA is a signatory to this Convention:

Pikitup (SOC) Limited v South African Municipal Workers' Union obo members and others [2014] (LAC)

'Sections 8 and 9 therefore place a duty on the employer to act proactively to avoid any harm or injury to its employees and others. There is no standard as to what is **reasonably practicable**. Each case will have to be determined on its own facts and circumstances. As can be seen from the definition of reasonably practicable it involves weighing different considerations from risk evaluation, means of removing or avoiding the risk, resource availability and a cost-benefit analysis.

In *Edwards v National Coal Board*, Lord Justice Asquith stated: "**Reasonably practicable** as traditionally interpreted, is a narrower term than 'physically possible' and implies that a computation must be made in which the quantum of risk is placed in one scale and the sacrifice, whether in money, time or trouble involved in the measure necessary to avert the risk is placed in the other; and that, if it is shown that there is a gross disproportion between them, the risk being insignificant in relation to the sacrifice, the person upon who the duty is laid discharges the burden of proving that compliance was not reasonably practicable."

SAIOSH Technical Committee proposes the inclusion of Section 16(3)

Section 16(3). 'Except where specific written appointments are prescribed in terms of any regulation promulgated in terms of the Act and without derogating from his or her liability or responsibility or liability in terms of section 16(1) and section 16(2), a chief executive officer or a person appointed in terms of section 16(2) of the Act may in writing, appoint one or more competent persons to assist in discharging their duties as envisaged in the Act in the interests of occupational health and safety'.

- The rationale behind this proposal is to address the vacuum currently experienced as regards so-called 'statutory' appointments. Save where written appointments are required in terms of the regulations e.g. General Machinery Regulations and Construction Regulations, the Bill is silent on managerial and supervisory appointments that cascade down and closer to the realities of the workplace.

- Managers and supervisors are an integral and essential part of an employer's health and safety management system and deserve **statutory recognition.**
- The CEO and 16(2) appointed persons are often **too far removed from the realities of the workplace** to properly discharge their statutory duties without managerial and supervisory assistance, resulting in employers having to resort to so-called 'in-house' appointments - often labelled Section 16(2) Assistants, section 8(2) appointments and section 8(2)(i) (supervisory) appointments.
- While it can be argued that these so-called 'in-house' appointments carry the same weight in law as the so-called 'statutory' appointments since they constitute a lawful order as envisaged in section 14(c) of the Act, managers and supervisors should be given statutory status along the lines of the construction regulations.
- A statutory appointment does increase potential criminal liability

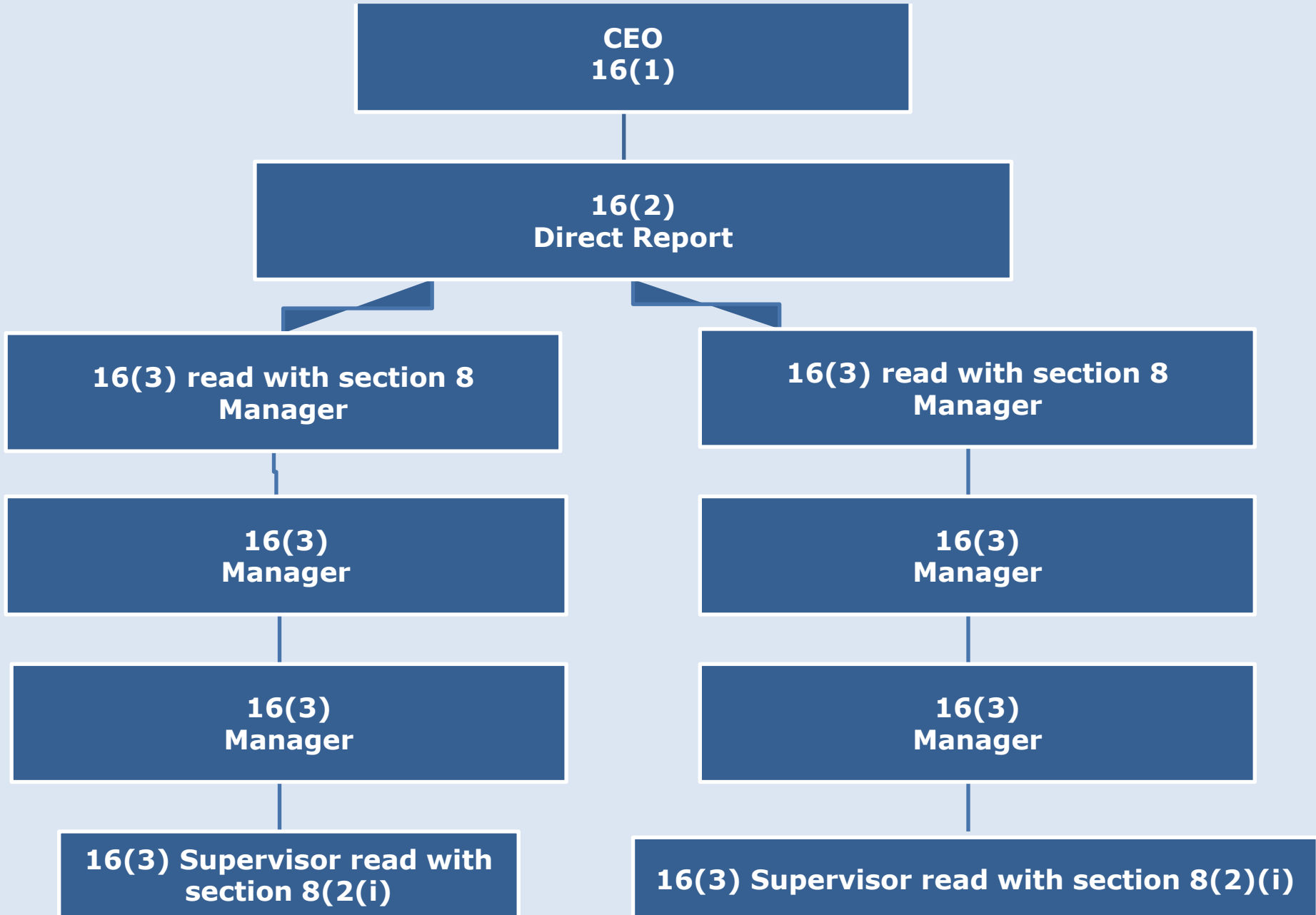
- This aligns with the **Mine Health & Safety Act & Construction Regulations** where provision is made for managerial and supervisory statutory appointments. No restrictions placed on mine managers to appoint subordinate mine managers with no mention of direct control.
- Section 8 does also not provide for appointments and merely contains the duties of employers to their employees.

The **UK legislation** also recognises the importance of such devolved statutory appointments where, in the equivalent of section 8, it reads:

'7.(1) Every employer shall appoint one or more competent persons to assist him in undertaking the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions.'

(3) The employer shall ensure that the number of persons appointed under paragraph (1), the time available for them to fulfil their functions and the means at their disposal are adequate having regard to the size of his undertaking, the risks to which his employees are exposed and the distribution of those risks throughout the undertaking'.

SAIOSH Proposed Section 16 Structure



The OHS Act ignores a larger issue for business namely the crucial role played by middle managers. 'In general, I think the senior executives are the only ones who can and should set broad direction — and be held accountable. But when it comes to execution, all businesses are effectively in the hands of their middle managers. The CEO conceives and middle managers implement. Without either, you are stuffed.

Middle managers have a far trickier job than most people imagine, because they are in the odd position of being managers and the subject of management. They are both leaders and led. To me, middle managers are a little like middle children: consummate pleasers, because they are always being called on to mediate between older and younger siblings.

The biggest failing of middle managers is pushing their problems upwards while at the same time failing to find solutions downwards. The natural desire to push your problems upwards means there is a huge incentive to keep on the good side of senior managers. And that explains why there is quite a lot of arse-creeping involved in corporate structures'. DM

Criminal Liability

Difficult to opine about potential criminal liability as much depends on the facts of each case and evidence adduced.

Personal Criminal Liability

Personal criminal liability which is normally triggered by personal contraventions of sections 14 & 38 of the Act which applies to all employees / persons.

Representative Criminal Liability

Also known as vicarious liability – where a person or juristic person / company is charged because of perceived failures in an **oversight role**. Section 332 of the Criminal Procedure Act imputes liability onto a company through the wrongdoings of its directors and employees.

This is usually the type of liability visited upon section 16.2 Persons.

Civil Liability

Restricted to third parties including labour broker personnel.

Section 35 COIDA. Crown Chickens v Rieck SCA / Jooste v Score Supermarket Trading CC



ALS
PARAMEDICS
SERVING THE COMMUNITY

News24 : It has been nearly three months since the release of a report into the explosion at the Rheinmetall Denel Munition (RDM) factory in Somerset West - but there has, so far, been no consequences. DEL was appointed to investigate the events of September 2018. The department established a **section 32 inquiry** into the explosion, which killed eight people. A total of 26 witnesses, which included technical experts, former employers and current staff and investigators, testified during the inquiry. **9 employees were killed in the explosion.** The report details several contraventions, including the "**failure to conduct the risk assessment** when installing a new iris valve, which is deemed as the modification by the employer". RDM specialises in developing, designing and manufacturing large- and medium-calibre ammunition.

The inquiry's chairperson made a recommendation for criminal prosecution and said "the incident was caused by an act of omission of criminal nature on the part of Rheinmetall Denel Munition (Pty) Ltd, as represented by Norbert Schultze, the chief executive officer at the time of the incident."

Can the failure to conduct a RA be enough for culpable homicide charges by the NPA?

Criminal Procedure Act. Section 332.

Prosecution of corporations and members of associations

(1) For the purpose of imposing upon a corporate body criminal liability for any offence, whether under any law or at common law -

(a) any act performed given by a director or servant of that corporate body; and

(b) the omission of any act which ought to have been but was not performed by or on instructions given by a director or servant of that corporate body,

in the exercise of his powers or in the performance of his duties as such director or servant or in furthering or endeavouring to further the interests of that corporate body, **shall be deemed to have been performed by that corporate body.**

(5) When an offence has been committed for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, a director or servant of the corporate body **shall be deemed to be guilty of the said offence**, unless it is proved that:

1. he did not take part in the commission of the offence and
2. that he could not have prevented it, and shall be liable to prosecution therefor, either jointly with the corporate body or apart therefrom, and shall on conviction be personally liable to punishment therefor.

Corporate bodies / juristic Persons / companies can only be fined upon conviction.

Normally the CEO is listed as representative of a company. (CIPRO).

CEO can be replaced via a Board Resolution handed to magistrate.
(Get some other sucker to stand in the dock)!

Criminal liability can only be determined by the NPA. Admission of Guilt (fine) = conviction.

Section 37. 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 itself 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.

"mandatary" includes 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.

Not compulsory. Encourages OHS due diligence on mandataries.

Is the Written Agreement the equivalent of an Indemnity?

Written Agreement often contain indemnities. Legally technically they should not be part of a criminal law instrument.

Can one accept the Written Agreement without interrogating the facts e.g. post an incident linked to a mandatary?

DEL regards it as a 'transfer of liability'.

Is the Written Agreement superfluous in construction?

NOTICE

The owner, Management and Members of Staff shall not be Liable to any visitors for any accident, damage, or injury of whatsoever nature occasioned or suffered by them whilst on these premises, whether or not such loss is the result of any intentional, reckless or negligent act or omission on the part of the owner, management or staff member.

Visitors to the Lifestyle Family Garden Centre enter these premises at their own risk





<http://klasslooch.com.www77.jnb2.host-h.net/The-Grayston-Bridge-Collapse/>

Two deceased. Five injured.

City Press. 'The Grayston Bridge Collapse report has been kept under wraps until now. **DEL has refused to release the report**, but the Johannesburg Development Agency (JDA) provided it to City Press on request, **because it is in the public interest**. According to the report, the MRC (Murray & Roberts Construction) entrusted the project to a candidate engineer, as site engineer and to the contract manager. Both were inexperienced and lacked the expertise for this specific project. The candidate engineer should have worked under the supervision of a registered (ECSA) engineer who had experience in building bridges or erecting temporary structures. Some of the other deviations include:

At the median support, in the middle of the highway, which the entire structure effectively rested on, 21 of 33 diagonal supports had been left out.

On both the east and the west side of the highway, reinforcements to the scaffolding were omitted. The deviations from Form-Scaff's sketch weakened the structure to such an extent that it could not withstand the force of the wind on the afternoon it collapsed. That is why it collapsed, the department found'.

It is recommended that **JOHANNESBURG DEVELOPMENT AGENCY ("JDA") (PTY) LTD**, herein identified as the "**Client**" in terms of the Government Notice R 84: Construction Regulations, 07 FEBRUARY 2014, **as represented** by their Directors are prosecuted for having contravened the Occupational Health and Safety Act, 1993 : Construction Regulations 2014, Regulation 3, 5(1)(a), 5(1)(d), 5(1)(e), 5(1)(h), 5(1)(i), 5(1)(q), 5(7)(b) and 5(8), or alternatively Section 38 (2) of the Occupational Health and Safety Act, 1993.

21.2 It is recommended that **MURRAY AND ROBERTS (PTY) LTD** herein identified as the "**principal contractor**" in terms of the Government Notice R 84: Construction Regulations, 07 FEBRUARY 2014, represented by their Directors are prosecuted for having contravened the Occupational Health and Safety Act, 1993 Sections 8(1); 8(2)(b), (d), (e), (f), (h) and 13(a). The Occupational Health and Safety Act, 1993 : Construction Regulations 2014, Regulations 6(2), 9(1), 9(3), 11(1) (a) (b) (c), 12(1); 12(2), 12(3)(a), 12(3)(b), 12(3)(n) and 12(3)(q), and/or Section 38(2) of the Occupational Health and Safety Act, 1993.

It is recommended that **FORM-SCAFF (A DIVISION OF WACO AFRICA (PROPRIETARY) LIMITED ("FORM-SCAFF")**, identified as a **"contractor" (supplier?)** in terms of Government Notice R. 84: Construction Regulations 07 February 2014, represented by their Directors and Chief Executive Officer (CEO) are prosecuted for having contravened **Section 10(1) and (10)(4)?** of the Occupational Health and Safety Act, 1993, or alternatively (?) **Section 38(2)** of the Occupational Health and Safety Act, 1993.

It is recommended that **NEMAI CONSULTING (PROPRIETARY) LIMITED** ("NEMAI) identified as a **"agent"** in terms of Government Notice R. 84: Construction Regulations 07 February 2014, represented by their Director are prosecuted for having contravened the Occupational Health and Safety Act, 1993: Construction Regulations 2014, Regulation 3, 5(1)(a), 5(1)(d), 5(1)(e), 5(1)(h), 5(1)(i), 5(1)(q), 5(7)(b) and 5(8), or alternatively (?) **Section 38(2)** of the Occupational Health and Safety Act, 1993.

Client Contraventions:

CR 3. Application for Construction Work Permit

CR 5. Duties of Client (1) A client must -

- (a) prepare a baseline RA for an intended construction work project;
- (d) ensure that the designer takes the prepared H & S Spec into consideration during the design stage;
- (e) ensure that the designer carries out all responsibilities contemplated in regulation 6;
- (h) ensure that the PC to be appointed has the necessary competencies and resources to carry out the construction work safely;
- (i) take reasonable steps to ensure co-operation between all contractors appointed by the client to enable each of those contractors to comply with these Regulations;
- (q) stop any contractor from executing a construction activity which poses a threat to the health and safety of persons which is not in accordance with the client's H & S Specs and the PC's H & S Plan for the site;

(7) An agent contemplated in subregulations (5) and (6) must
(b) be registered with a statutory body approved by the Chief Inspector as qualified to perform the required functions;

(8) When the chief inspector has approved a statutory body as contemplated in subregulation (7)(b), he or she must give notice of that approval in the Gazette. ?

Principal Contractor Contraventions:

Section 8 Duty of employers to Employees.

(b) taking such steps to eliminate or mitigate any hazard or potential hazard to the safety or health of employees, before resorting to PPE.

(d) **establishing what hazards** to the health or safety of persons are attached to any work which is performed, and he shall, further establish what **precautionary measures** should be taken with respect to such work, in order to protect the health and safety of persons, and he shall provide the necessary means to apply such precautionary measures. RA.

(e) providing such information, instructions, training and supervision as may be necessary to ensure the health and safety at work of his employees;

(f) not permitting any employee to do any work unless the precautionary have been taken;

(h) enforcing such measures as may be necessary in the interest of health and safety.

13(a) Duty to inform

Every employer shall cause every employee to be **made conversant with the hazards** to his health and safety attached to any work he has to perform as well as with the precautionary measures which should be taken and observed with respect to those hazards.

CR6(2) The designer of temporary works must ensure that -

(a) all temporary works are adequately designed so that it will be capable of supporting all anticipated vertical and lateral loads that may be applied;

(b) the designs of temporary works are done with close reference to the structural design drawings issued by the contractor, and in the event of any uncertainty consult the contractor;

(c) all drawings and calculations pertaining to the design of temporary works are kept at the office of the temporary works designer and are made available on request by an inspector; and

(d) the loads caused by the temporary works and any imposed loads are clearly indicated in the design.

CR 9(1) A contractor must, before the commencement of any construction work and during such construction work, have **risk assessments** performed by a competent person appointed in writing, which risk assessments form part of the health and safety plan to be applied on the site, and must include -

(a) the identification of the risks and hazards (b) an analysis and evaluation of the risks and hazards identified based on a documented method; (c) a documented plan and applicable safe work procedures to mitigate, reduce or control the risks and hazards that have been identified; (d) a monitoring plan; and (e) a review plan.

CR 9(3) A contractor must ensure that all employees under his or her control are **informed, instructed and trained** by a competent person regarding any hazard and the related work procedures and or control measures before any work commences, and thereafter at the times determined in the risk assessment monitoring and review plan of the relevant site.

CR 11. Structures

(1) A contractor must ensure that -

(a) all reasonably practicable steps are taken to prevent the uncontrolled collapse of any new or existing structure or any part thereof, which may become unstable or is in a temporary state of weakness or instability due to the carrying out of construction work;

(b) no structure or part of a structure is loaded in a manner which would render it unsafe; and

(c) all drawings pertaining to the design of the relevant structure are kept on site and are available on request to an inspector, other contractors, the client and the client's agent or employee.

CR 12. Temporary Works

(1) A contractor must appoint a temporary works designer in writing to design, inspect and approve the erected temporary works on site before use.

(2) A contractor must ensure that all temporary works operations are carried out under the supervision of a competent person who has been appointed in writing for that purpose.

(3) A contractor must ensure that -

(a) all temporary works structures are adequately erected, supported, braced and maintained by a competent person so that they are capable of supporting all anticipated vertical and lateral loads that may be applied to them, and that no loads are imposed onto the structure that the structure is not designed to withstand;

(b) all temporary works structures are done with close reference to the structural design drawings, and where any uncertainty exists the structural designer should be consulted;

(n) a temporary works drawing or any other relevant document includes construction sequences and methods statements;

(q) the temporary works drawings are approved by the temporary works designer before the erection of any temporary works.

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 that the article is safe and without risks to health when properly used and that it complies with all prescribed requirements.

(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 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.

Section 38(2) Any employer who does or omits to do an act, thereby causing any person to be **injured** at a workplace, or, in the case of a person employed by him, to be injured at any place in the course of his employment, thereby causing any person to be injured, shall be guilty of an offence if that employer or user of plant or machinery, as the case may be, would in respect of that act or omission have been **guilty of the offence of culpable homicide had that act or omission caused the death of the said person**, irrespective of whether the injury could have led to the death of such person, and on conviction be liable to a fine not exceeding R100 000 or to imprisonment not exceeding 2 years or to both such fine and such imprisonment.

Unique OHS Crime. Section 38(2) has the same elements as culpable homicide.

Elements: Unlawful Act / Omission Fault (Negligence) Causal Connection (Nexus) Result (Injury). The NPA should consequently charge for culpable homicide!

Would a section 37(2) be valid? Did the employer 'permit' various contraventions by mandataries & take reasonable steps to prevent them?