



Martin Ferguson, SAPOA's HR, Education, Training and Development Manager, collaborates with thought leaders in South Africa's property sector

# Safety first

In light of new construction regulations, former Occupational Safety Court Prosecutor, Founder of Klass Looch Associates and Director of ComPrac Holdings (Pty) Ltd, Advocate Raynard Looch, provides legal comment on the liability implications emanating from contraventions of construction regulations for clients, client developers and owners of structures

The appointment of a competent construction health and safety agent by the client could buffer the client against both civil and criminal liability. This appointment will become obligatory in certain circumstances from August 2015

All construction works in which physical construction began after 7 February 2014 must comply with Construction Regulations 2003, and such construction works are exempted from complying with Construction Regulations 2014 until 7 August 2014, six months after the commencement of these Regulations. Thereafter Construction Regulations 2014 shall apply, with the exception of Regulation 3 and 5(7)(b), which will come into effect on 7 August 2015, 18 months after the commencement of these Regulations.

In terms of Construction Regulation 11 of the Occupational Health and Safety Act, owners of structures have a fixed legal duty of maintaining the structure to ensure it is and remains safe for continued use.

This infers that an owner must put measures in place to discharge this duty. Statutory criminal liability emanates from failing to discharge a fixed statutory legal duty.

The opposite of a duty is a right. If owners of structures have a duty to ensure a structure is safe, the occupants of the structure have a right to a safe structure. Civil liability emanates from the infringement of a right, and if this right is infringed, a civil suit for damages may be instituted against the owner.

If tenants and other third parties suffer injury or death as a result of the owner's failure to ensure the structure is (and remains) safe for occupancy, a criminal prosecution will be instituted against the owner in terms of the Occupational Health and Safety Act No 85 of 1993, or the common law (culpable homicide) in the event of fatalities. A criminal conviction is not a prerequisite for a successful civil suit but will greatly assist.

An owner's failure to conduct periodic inspections and keep records of the inspection as required by the construction regulations is in itself a criminal offence – even in cases where there is no threat to health and safety of persons. If, however, this omission can be linked to an incident such as a collapse of the structure, resulting in injury and death, a criminal conviction is virtually guaranteed and a plaintiff in a civil matter for damages will have a solid case.

A criminal prosecution can be brought against juristic persons as well as natural persons and, if the latter are directors of companies, they may be removed from the board of directors upon conviction in terms of the Companies Act.

Where an owner of a structure engages a contractor to perform construction work,

the owner becomes the client, with comprehensive duties as listed in Construction Regulation 5 (barring the exemptions regarding the permit to perform construction work and a South African Council for Project and Construction Management Professions accredited agent).

Similarly, where the registered owner of land intends to develop the property on which a structure or structures are to be erected, irrespective as to whom the eventual owner may be, such owner will be regarded as the client and will be required to fully comply with the statutory requirements of the Occupational Health and Safety Act.

If a client fails in their statutory duties as contained in Construction Regulation 5, and a link can be established between the clients' omission and a result (injury or death), a prosecution against the client would in all likelihood be instituted as well as opening the way for a civil suit for damages against the client.

For example, an owner of a sewerage works engages a contractor to perform construction work at the works. The owner now becomes the client as defined in the construction regulations. The client fails to inform the contractor in the Health and Safety Specifications/

Baseline Risk Assessment of – the potential risk of hepatitis B – which immunisation could “have prevented – and a worker contracts hepatitis B and dies.

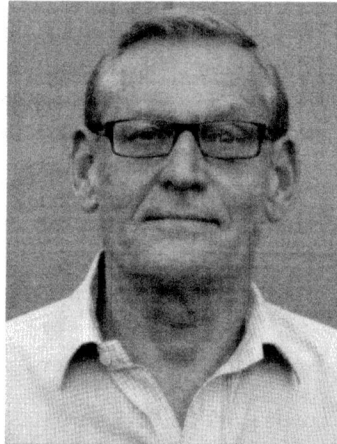
There would a prima facie case of various contraventions of the construction regulations, the Occupational Health and Safety Act in general, and the common law (culpable homicide). The worker’s dependants could potentially sue the client for damages.

The appointment of a competent construction health and safety agent by the client could, however, buffer the client against both civil and criminal liability. This appointment will become obligatory in certain circumstances from August 2015.

Owners of structures routinely employ a facility managing entity or an individual to discharge, inter alia, their construction regulations duties. These entities or individuals are regarded as either employees or mandatories of the owner.

Their acts or omissions can result in criminal liability being imputed onto the owner in terms of Section 37 of the Occupational Health and Safety Act.

A civil suit is also possible against an owner for their unlawful



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conduct, which causes harm or damage to third parties. An owner may be a juristic or natural person, and the same principles apply.

SAPOA has recently engaged with the ComPrac Group to prepare and present a series of workshops that address this important and sensitive matter.

These workshops will be rolled out nationally to assist SAPOA members on a broad base, from client developers to facility managers and other professional groups.

### About the ComPrac Group

**F**ounded in 1994, the ComPrac Group provides health and compliance safety solutions for large industries. The group boasts a presence countrywide, with headquarters in Gauteng, office facilities in the Western Cape and KwaZulu-Natal, and satellite offices across South Africa. With a focus on the mining, construction, manufacturing, agriculture and marine sectors, the ComPrac Group enjoys a close association with the legal fraternity and other industry sectors that are committed to global best practice in health and safety management.

The group has been delivering legal compliance health and safety risk management services to the South African market for more than a decade. Effectively improving efficiency, managing risk and adding real value are the three prevalent cornerstone philosophies in the ComPrac Group of companies.

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