Corporate Criminal Liability for Deaths, Injuries and Illnesses: Is South Africa’s Mining Sector Ready for Change?

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1 INTRODUCTION

When an individual negligently causes the death of another, we easily accept that culpable homicide\(^1\) may have occurred. However, when corporations do the same, we are quick to refer to these as “ghastly accidents or unavoidable misfortunes”.\(^2\) This is despite the fact that the individual may have caused a single death, while the corporations may have caused multiple deaths. We are, however, living in times when corporate activities surpass activities of individuals, and therefore have a greater impact on the lives of people. In South Africa, mining activities are responsible for the deaths of many people.\(^3\) This begs the question whether the time has not yet come for South Africa to enact legislation or, at least, a provision that specifically deals with deaths, injuries, and illnesses caused by the failure to adhere to the Mine Health and Safety Act.\(^4\)

South Africa has no separate legislation that deals specifically with the criminal liability of corporations for deaths caused by negligent commercial activities.\(^5\) The Criminal Procedure Act contains a provision that generally governs the criminal liability of corporations.\(^6\) It is not limited to specific crimes, however, and it caters for all types of criminal activities that may possibly be

\(^*\) B.Proc, LLB, LLM (UNISA).
\(^3\) In 2008 there were 171 deaths and 3 750 injuries; in 2009 there were 167 deaths and 3 672 injuries emanating from accidents and illnesses occurring during legal mining activities in South Africa’s mines.
\(^4\) The Mine Health and Safety Act 29 of 1996 is a comprehensive regulatory piece of legislation that provides for health and safety measures as well as monitoring systems in the mining sector.
\(^5\) This is in contrast with countries such as England and Canada which have such legislation (England’s Corporate Manslaughter and Corporate Homicide Act 2007 and Canada’s Bill C-45).
\(^6\) Section 332 of the Criminal Procedure Act 51 of 1977.
caused by corporations, including those that require mens rea in the form of negligence.\textsuperscript{7} The question whether this provision is an appropriate, adequate and effective means of curbing corporate crime has been raised by some academics, who are of the opinion that this area of the law is in need of reform.\textsuperscript{8} With that in mind, the question arises as to whether deaths and injuries of people in the mining sector should not be treated as a separate offence. Section 26 of the Mine Health and Safety Amendment Act\textsuperscript{9} has been introduced, but it has not yet been proclaimed.\textsuperscript{10} If proclaimed, it will insert section 86A into the Mine Health and Safety Act,\textsuperscript{11} which will regulate criminal liability for deaths, injuries, and illnesses caused by failure to adhere to the provisions of the Mine Health and Safety Act.

In this article, the current provision dealing with corporate criminal liability will be discussed. This will be followed by a discussion of section 26 of the Mine Health and Safety Amendment Act,\textsuperscript{12} with the aim of establishing whether the provision provides a better alternative to the current law, with regard to deaths, injuries, and illnesses caused by the failure to comply with the Mine Health and Safety Act. An attempt is then made to answer the question whether South Africa’s mining sector is ready to take this step towards holding corporations, albeit limited to mines, liable specifically for deaths, injuries, and illnesses caused by failure to comply with the Mine Health and Safety Act.

2 \hspace{1em} CORPORATE CRIMINAL LIABILITY UNDER SECTION 332 OF THE CRIMINAL PROCEDURE ACT

Section 332 of the Criminal Procedure Act provides a dual approach to corporate criminal liability. Firstly, it provides for the criminal liability of the corporation for crimes committed in

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{7} Section 332(1) of the Criminal Procedure Act 51 of 1977 refers to “any offence, whether under any law or at common law…performed with or without particular intent”.
\item \textsuperscript{8} Jordaan “New Perspectives on the Criminal Liability of Corporate Bodies” 2003 Acta Juridica 48, 70; Rycroft “Corporate Homicide” 2004 SACJ 141; Farisani “Corporate Homicide: What can South Africa Learn from recent Developments in English Law” 2009 XLII CILSA 210, 226; Borg-Jorgensen and Van der Linde “Corporate Criminal Liability in South Africa: Time for change (part 1)” 2011 TSAR 452.
\item \textsuperscript{9} Mine Health and Safety Amendment Act 26 of 2008.
\item \textsuperscript{11} Mine Health and Safety Act 29 of 1996.
\item \textsuperscript{12} Mine Health and Safety Amendment Act 74 of 2008. This section inserts section 86A into the Mine Health and safety Act 1996.
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furthering or in endeavouring to further the interests of the corporation. Secondly, it provides for the criminal liability of individuals within the corporation, who are responsible for the crimes committed.

2.1 The Liability of the Corporation
The Criminal Procedure Act, as stated above, deals with corporate crime in general. According to s 332(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, with or without a particular intent, by or on instructions or with permission, express or implied, given by a director or servant of that corporate body; and
(b) the omission, with or without a particular intent, 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 (and with the same intent, if any) by that corporate body or, as the case may be, to have been an omission (and with the same intent, if any) on the part of that corporate body.”

From this, it is clear that a corporation will be held liable for any act or omission that is regarded as a crime, irrespective of whether it is regarded as such by legislation or by common law. The specific mention of the phrase “under any law or at common law” serves to eliminate confusion regarding the laws that can be contravened by corporations. It is submitted that the legislature has avoided prescribing a list of specific offences that can be committed by a corporation, as

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13 Section 332(1) of the 1977 Act.
14 Substantive law provides for the acts and omissions that are regarded as offences. All offences regardless of whether they fall under common law or statutory law have been included. The corporation can thus be held liable for any act or omission that is by law regarded as a crime.
15 Section 332(1).
doing so would require the constant revision of the provision to keep up with ever-changing and increasing corporate activities.

The importance of section 332(1) lies in the fact that it makes it possible to impose liability on a juristic person, despite its physical inability to think and act.\(^\text{16}\) It does so by referring to acts and omissions that take place “with or without a particular intent”.\(^\text{17}\) The criminal liability of a corporation therefore caters for intentional and negligent acts.\(^\text{18}\) Since intention and negligence are human attributes, the corporation is held criminally liable by imputing the \textit{mens rea} of its directors or servants to the corporation.\(^\text{19}\) Holding a corporation criminally liable by imputing the fault of its directors or servants to the corporation\(^\text{20}\) has led to a situation where a corporation may also be convicted of crimes that could only be committed by natural persons.

Although it has been said that section 332(1) appears as though it refers to intentional acts or omissions only,\(^\text{21}\) Rycroft points out that one of the types of offences that a corporation may be held liable for is culpable homicide,\(^\text{22}\) a crime with negligence as an element that needs to be proven. In interpreting this provision, case law has shown us that it is possible for a corporation to be convicted for culpable homicide. This is confirmed by the judgments in \textit{R v Bennett}\(^\text{23}\) and \textit{S v Joseph Mtshumayeli}.\(^\text{24}\) In \textit{R v Bennett}, a person who was working for the accused corporation had negligently operated machinery and thereby caused the death of another employee. Both the company and the negligent worker were charged with and convicted of culpable homicide. In \textit{S v Joseph Mtshumayeli},\(^\text{25}\) the driver of a bus owned by the accused company allowed one of the passengers in the bus to drive the bus. The passenger lost control of the bus, which in turn overturned, causing the death of another passenger. The negligence of the employee was imputed

\(^{16}\) “removes the obstacle to imposing criminal liability upon an artificial person that could not be found guilty of a crime requiring fault since it has no mind”. See fn 2565.

\(^{17}\) This refers to culpability. See fn 1 149.

\(^{18}\) “The act or omission, whether intentional or negligent, is deemed to have been performed by the corporate body”. Bailes “Watch your Corporation” 1995 \textit{JBL} 24.

\(^{19}\) “a corporation … possesses no \textit{mens rea} of its own, and any mental element can exist on the part of some other individual such as a director”. \textit{R v Bennett & Co. (Pty) Ltd} 1941 TPD 194, 200.

\(^{20}\) Kidd “Corporate Liability for Environmental Offences” 2003 \textit{SAPL} 1, 3.

\(^{21}\) See fn 18 24.

\(^{22}\) As illustrated by \textit{S v Joseph Mtshumayeli} (Pty) Ltd 1971 1 SA 33 (RA) and \textit{R v Bennett & Co}. See fn 19 194 and fn 8 (Rycroft) 150.

\(^{23}\) \textit{R v Bennett & Co}. See fn 19 194.

\(^{24}\) \textit{S v Joseph Mtshumayeli} See fn 22 33.

\(^{25}\) \textit{S v Joseph Mtshumayeli} See fn 22 33.
to the corporation and the corporation was found guilty of culpable homicide. Both decisions are in line with section 332(1) that regards the act and the culpability of the corporation’s directors and servants as the act and culpability of the corporation.26

In *S v Suid Afrikaanse Uitsaai Korporasie*,27 the court interpreted section 332(1) as excluding crimes committed negligently.28 This judgment was, however, subsequently overruled by the Appellate Division in *Ex parte Minister van Justisie: In Re S v Suid Afrikaanse Uitsaai Korporasie*,29 in which the judgment in *R v Bennet* was approved. The court also answered in the affirmative the question of whether section 332(1) applied to negligent acts or omissions.30 The current position is that the *mens rea* of the person who committed the crime is imputed to the corporation.31

### 2.2 The Liability of individuals within the corporation

The liability of individuals within the corporation for corporate crime was regulated by section 332(5) until it was repealed as a result of the judgment in *S v Coetzee*.32 The situation is currently regulated by common law. Although section 332(5) has been repealed,33 it still plays an important role with regards to the development of corporate criminal liability in South Africa. In terms of section 332(5):

> “Where an offence has been committed, whether by the performance of any act or by the failure to perform any act, 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 he did not take part in the commission of the offence, and that he could not have prevented it, and shall be liable to prosecution therefore, either jointly with the

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28 *S v Suid Afrikaanse Uitsaai Korporasie*. See fn 27 698; See fn 8 (Jordaan) 52.
30 *Ex parte Minister van Justisie: In Re S v Suid Afrikaanse Uitsaai Korporasie*. See fn 29 804.
31 *S v Dersley* 1997 2 SA 951 (T).
32 *S v Coetzee* 1997 1 SACR 379.
33 In *S v Coetzee* the order made by Langa J for the majority was that the provisions of “s 332(5) of the Criminal Procedure Act 51 of 1977 are inconsistent with the Republic of South Africa Constitution Act 200 of 1993 and are, with effect from the date of the judgment, invalid and of no force or effect”. See fn 32 397.
A director or servant of a corporate body could therefore be convicted for a crime committed by the corporate body (in other words by other directors/servants) unless he/she could prove that he/she did not take part in the commission of the crime and that he/she could not have prevented it. In essence, section 332(5) allowed for the conviction of a director or servant for crimes that have been committed by other directors or servants in the same corporate body, if these were committed in furthering or endeavouring to further the interests of the corporation. Where a corporation could be held liable for an offence in terms of s 332(1), a director or servant could also be held liable in his personal capacity for the same offence. The challenge posed by section 332(5) read together with s 332(1) was that it placed the onus that is normally borne by the prosecution, on the accused director or servant. In this way, the provision imposed a reverse onus: where an innocent director or servant is unable to prove that he did not take part in the commission of the offence and that he could not have prevented it, such director or servant would be found guilty without further ado. This is despite the fact that there may have been a reasonable doubt about his guilt.

Although in Herold, N.O. v Johannesburg City Council it was stated that the onus of proving that the director or servant did not take part in the commission of the crime and that he could not have prevented it, is on a preponderance of probability, s 332(5) still has the effect of ensuring the conviction of a person who finds himself in this position merely as a result of the office he holds within the corporation. In S v Moringer the court confirmed that in terms of s 332(5), as soon as the prosecution has proven that the corporation had committed an offence, the burden of proof shifts from the prosecution to the accused (servant) to prove that he did not

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34 Section 332(5).
35 “If a corporate body is therefore, liable to prosecution in terms of section 332(1), a director or servant at the time will be liable to prosecution either jointly with the corporate body or separately in terms of section 332(5)”. See fn 18 25.
36 Instead of being presumed innocent, the accused is presumed guilty and the accused bears the onus to prove that he did not take part in the commission of the offence, and that he could not have prevented it.
37 See fn 8 (Borg-Jorgensen & Van Der Linde) 459.
38 Herold, N.O. v Johannesburg City Council 1947 2 SA 1257 (A) 1257.
40 S v Moringer 1992 4 SA 452 (W); 1993 2 SACR 268 (W).
participate in the commission of the offence and that he could not have done anything to prevent it.\textsuperscript{41} In \textit{R v Limbada},\textsuperscript{42} Steyn JA emphasized the fact that the provision places the onus of proof on the accused and leaves the court with no option but to convict the accused if he fails to discharge the onus of proof.\textsuperscript{43}

\textit{In S v Klopper}\textsuperscript{44} it was held that as long as the accused is able to prove that he was not aware of the commission of the offence, the accused would escape conviction, regardless of the fact that he may have been negligent in not knowing of the offence.\textsuperscript{45} The test used is a subjective test.\textsuperscript{46} Kahn’s view is that section 332(5) as interpreted in \textit{Klopper} “provides an escape hatch”.\textsuperscript{47} It is submitted that this is correct as the accused director or servant will be able to escape liability despite his negligence in not knowing about the commission of the offence. In \textit{Klopper}, the focus was on the question of negligence\textsuperscript{48} and the outcome of \textit{Klopper} was that where the accused had failed to exercise reasonable care, the accused could not be held liable.\textsuperscript{49}

\textit{S v Coetzee} was a Constitutional Court case that dealt with, \textit{inter alia}, the constitutionality of section 332(5) of the Criminal Procedure Act. The section’s contravention of the constitutional

\textsuperscript{41} In this case, there had been a contravention of Exchange Control Regulations. In applying s 332(5), the court found that “because of the provision of s 332(5) of the Criminal Procedure Act 51 of 1977, a servant of the corporation was deemed to be guilty of the offence unless it was proved that he did not take part in commission of the offence”. See fn 39 454G. Du Toit also states that “the onus is on the servant, if the state proves that the corporation has committed an offence, to bring himself within the exemption contained in the subsection”. See fn.26 - 7.

\textsuperscript{42} \textit{R v Limbada} 1958 2 All SA 493 (A).

\textsuperscript{43} “What it does is to deem an accused in the circumstances described therein to be guilty of an offence committed by another, if he does not prove that he had no part in that offence and could not have prevented it. In the circumstances so described, it casts an onus of proof upon the accused and in effect directs the court to find him guilty if he does not discharge that onus”. See fn 41 496.

\textsuperscript{44} \textit{S v Klopper} 1975 4 SA 773 (A).

\textsuperscript{45} “For the Appellate Division of the Supreme Court held in \textit{S v Klopper} that so long as the accused can prove that he did not know of the commission of the crime, however negligent he was in not knowing of it, he gets out”. Kahn “Can a Company be found Guilty of Murder? The Criminal Liability of a Corporation – II” 1990 \textit{Businessman’s Law} 175, 176.

\textsuperscript{46} ‘See fn 26 33-7. Kahn states that “the test is a subjective one: actual ignorance of the offence carries with it non-participation in the offence and inability to prevent it. (Ignorance flowing from deliberate abstention from making inquiries will, however, probably not avail the accused.) For the prosecution to establish that he had been negligent in not knowing of the commission of the offence, will not on its own be sufficient for conviction”. See fn 44 176.

\textsuperscript{47} See fn 44 176.

\textsuperscript{48} “The director was unable to prevent an offence through negligence – such negligence was insufficient to justify a conviction under s 381”. See fn 43 773.

\textsuperscript{49} See fn 43 774G.
right to be presumed innocent in section 25(3)(c) of the Constitution was challenged. It was averred that the presumption is a direct violation of the right to be presumed innocent as it made it possible for a director or servant to be convicted in spite of the fact that there could be reasonable doubt regarding his or her guilt. In making a finding regarding the constitutionality of section 332(5), the Constitutional Court judges made important observations and relevant contributions towards a clearer understanding of the reverse onus and the need to either retain it or remove it from section 332 of the Criminal Procedure Act.

The majority judgment was delivered by Langa, J. In his judgment he looks at the argument in defence of the constitutionality of s 332(5), that the reverse onus in s 332(5) did not operate as severe as it was made out to be, as the effects of the decision such as in Klopper had to be taken into account. For that reason, the limitation was justifiable. Langa J disagrees with the contention that in terms of that section the onus of proving the accused’s knowledge is actually on the prosecution. He states that the “plain meaning” of s 332(5) is that when the prosecution has proved that a corporate body committed a crime, a person who was a director or servant of the corporate body at the time of commission of the crime will be convicted. The only way in which he can avoid conviction is by providing proof that he or she did not take part in the offence and could not have done anything to prevent it. He refers to, inter alia, Limbada and Klopper and states that in those cases the plain meaning was found to be the same as he had

50 “The applicants attacked the provision on the basis that it requires a director or servant of a corporate body that has committed an offence to prove, on a balance of probabilities, that he or she did not take part in the commission of the offence and could not have prevented it. It was argued that the onus cast upon the accused relates to an essential element of the offence created by the section, and that the reversal of the onus meant that the accused could be convicted despite the existence of a reasonable doubt with regard to his or her guilt. This reverse onus was therefore said to violate the right to be presumed innocent as enshrined in s 25(3)(c) of the Constitution, as well as the ‘cluster of rights associated with it’”. See fn 32 447 D-E.

51 See fn 32 445D.

52 I will only deal with the majority judgment as it captures the essence of what I would like to highlight regarding this repealed provision.

53 See fn 32 448A.

54 “It was argued that because the prosecution had to prove that the accused had knowledge of the commission of the offence, the effect of the violation on the right to be presumed innocent is not severe and the limitation of the right is in any event justifiable”. See fn 32 447I to 448A.

55 See fn 32 448A

56 See fn 32 448B.

57 “The plain meaning of the words is that once the prosecution proves that an offence has been committed by a corporate body of which the accused was a director or servant at the time of commission, the latter can escape conviction only by proving that he or she did not take part in and could also not have prevented the commission of the offence”. See fn 32 448B and C.
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stated it.\textsuperscript{58} In examining the meaning of s 332(5), Langa J looks at how Steyn JA and Schreiner JA in \textit{Limbada} construed the meaning of s 332(5) to be and comes to the conclusion that it provides a reverse onus, which is a direct infringement of the presumption of innocence.\textsuperscript{59} He then identifies two questions of constitutionality: i) whether the reverse onus is an infringement of the presumption of innocence; and ii) “whether the form of liability imposed on the director is an infringement of the right to freedom and security of the person…as well as the right to property”\textsuperscript{60}

He finds that s 332(5) does infringe upon the constitutional right to be presumed innocent and emphasizes the fact that s 332(5) “involves elements which have to be proved by the accused and which form the substance of the offence”.\textsuperscript{61} He states that the “provision imposes an onus on the accused to prove an element which is relevant to the verdict”.\textsuperscript{62} Langa J explains that the requirement by s 332(5) for the accused to provide proof (that he or she did not take part in the offence and could not have prevented it) or face conviction provides a reverse onus, as failure to adduce the proof required will result in a conviction, even though there may be a reasonable doubt regarding the accused’s participation in the crime and his or her ability to have prevented the commission of the crime.\textsuperscript{63} Langa, J’s finding is that s 332(5) is unconstitutional and that it is not necessary to impose a reverse onus on the accused director. He explains that “the objection which is fundamental to the reversal of onus in this case is that the provision offends against the principle of a fair trial which requires that the prosecution establish its case without assistance from the accused”.\textsuperscript{64}

Langa J further explains that the aim of s 332(5) is not the creation of liability without fault on the part of the accused.\textsuperscript{65} Its actual aim is to ensure that directors who participate in the commission of offences, or who are able to prevent the offence from being committed but fail to

\textsuperscript{58} See fn 32 449B.
\textsuperscript{59} See fn 32 450F and G.
\textsuperscript{60} See fn 32 451A.
\textsuperscript{61} See fn 32 454B.
\textsuperscript{62} See fn 32 454B.
\textsuperscript{63} See fn 32 454E.
\textsuperscript{64} See fn 32 454F and G.
\textsuperscript{65} See fn 32 456C.
An important observation made by Langa J is that:

“what causes the provision to fall foul of the presumption of innocence here is the effect of merely changing the form of the provision to require the accused, rather than the prosecution, to prove elements which are essential to his or her guilt or innocence. There is manifest unfairness where the legislature, having created an offence potentially entailing very grave penalties, goes on to subvert an important constitutionally protected right by requiring crucial elements of the offence to be proved or disproved by the accused on pain of conviction should the onus not be discharged”.

Having found that s 332(5) does infringe upon the presumption of innocence, Langa, J moves on to consider the question as to whether s 332(5) is a justifiable limitation in terms of s 33(1) of the interim Constitution. In doing so, he emphasizes the importance of protecting corporate bodies and society at large from directors who fail to prevent the commission of crimes. In this regard, he mentions alternative measures that can be used by the legislature to meet the policy objectives intended by s 332(5) without imposing a reverse onus on the accused director.

Although the judgment was not unanimous, one issue that all the judges seemed to agree on in S v Coetzee was that the section had gone too far by extending liability to servants. They all agreed that the inclusion of “servant” to the subsection is not justifiable.

There was a suggestion that section 332(5) could be saved through the severance of certain words and phrases. O’Reagan J states that the Court should be “loath to declare statutory provisions invalid where the result of such declaration would be to invalidate aspects of a
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statutory provision which are without constitutional blemish”. The majority rejected this and concluded that severance was not a solution. O’Regan J, with Mokgoro J concurring, concluded that if the word “or servant” and the phrase “it is proved that he did not take part in the commission of the offence” were severed, the subsection would be constitutional. Kentridge J argued against declaring section 332(5) unconstitutional. He further stated that “to strike out section 332(5) would leave a considerable gap in the mechanisms available for ensuring the honest conduct of corporate institutions”. The solution, in his opinion, was the severance of the words “it is proved”. In the absence of these words the section would read as “unless he did not take part in the commission of the offence and could not have prevented it”, which would not have the effect of infringing upon the presumption of innocence.

Madala J also held the view that the subsection was not unconstitutional. In his judgment Madala states that “the mere fact that a section provides that an accused person may be convicted in circumstances in which there is a reasonable doubt is not in itself a sufficient reason for regarding such section as unconstitutional. There may be circumstances in which the reverse onus provision is necessary and justifiable.” He further states that despite its importance, the presumption of innocence is not an absolute right. In his judgment, Sachs raises various issues and points out that section 332(5) violated the presumption of innocence and has been used to simply facilitate conviction.

72 See fn 32 491H.
74 See fn 32 451.
75 He states that “it has been consistent legislative policy to impose a strict vicarious criminal liability on those who control companies or other corporate bodies…There is nothing before us to show that the operation of the present subsection or its predecessors has in practice given rise to injustices”. See fn 32 487E-F.
76 See fn 32 487G.
77 See fn 32 487I.
78 See fn 32 449.
79 See fn 32 493I.
80 “The presumption of innocence is violated, not as a matter of overwhelming practical convenience, or to prove maintenance of standards for a licensed activity, but simply to facilitate conviction. Indeed the very purpose of the strong deeming provision is to invert the normal relationship between prosecution and defence. A nexus of easily inferred fact, which in practice would aid a finding of guilt according to the normal onus of proof criteria, is converted into a nexus of law, opening the very real possibility of a finding of guilt followed by severe punishment, even though the trial court had real doubts about the matter”. See fn 32 521H-522B. For a more detailed discussion of Sachs J’s judgment, see Farisani “S v Coetzee: Judge Albie Sachs and Issues which ‘the Court is obliged to confront’” 2010 S A Public Law / PL 210
It is submitted that the Coetzee judgment was a welcome development in South African law. Despite its revocation, the invalidity of section 332(5) has not hampered the prosecution of officers of corporations that have been found guilty of crimes. The current common law position is that “a director may be held liable for offences committed by the corporation ‘only if he took part in that crime or on the basis of vicarious liability or agency’”. 81

3 CORPORATE CRIMINAL LIABILITY UNDER THE PROPOSED SECTION 86A OF THE MINE HEALTH AND SAFETY ACT

A call for the criminalisation of certain activities that result in the deaths of people while working in the mines resulted in the proposal of a provision in the Mine Health and Safety Amendment Bill 82 that would regulate criminal liability for deaths, injuries, and illnesses in the mining sector resulting from failure to comply with the Mine Health and Safety Act. 83 The Mine Health and Safety Amendment Act became operational in May 2009 84 and have since increased the regulatory powers that the Department of Minerals and Energy used to enjoy under the Mine Health and Safety Act. 85 The department now has the powers to, inter alia, impose fines for non-compliance that can be as high as R1 million; ensure that deadlines set for companies to produce accident reports are complied with; decide whether health and safety permits should be issued or revoked; and see to it that minefields that have become sites of accidents are shut down until such time that the department is satisfied that the safety standards have been complied with. 86 In addition to that, senior officers within a corporation face the possibility of spending at least five years in prison if there is a death and they are found to have been negligent. 87

Despite the coming into being of the Mine Health and Safety Amendment Act, there is still a need for a way to be found to ensure that the deaths, injuries, and illnesses resulting from mining activities are dealt with adequately and properly. 88 The Bill proposed the insertion of section 86A

81 See fn 2 567.
82 Mine Health and Safety Amendment Bill 54D of 2008.
84 See fn 10.
86 See fn 84.
87 Schedule 8 of the Mine Health and Safety Act.
88 “In May 2009, the Inspectorate introduced critical amendments to the Mine Health and Safety Amendment Act 74 of 2008, which enhanced the ability of the State to address the challenges of the high rate of injuries, ill-health, and
into the Act. Although this proposal later became section 26 of the Mine Health and Safety Amendment Act,\(^8^9\) which inserted section 86A into the Mine Health and Safety Act,\(^9^0\) the insertion was not approved and does not form part of the amendments that were effected by the Amendment Act. Section 86A\(^9^1\) provides for criminal liability for the deaths, injuries, and illnesses of people within the mining sector. It provides as follows:

(1) An employer, chief executive officer, manager, agent or employee commits an offence if he or she contravenes or fails to comply with the provisions of this Act thereby causing-

(a) a person’s death; or

(b) serious injury or illness to a person.

(2) If a chief executive officer, manager, agent or employee of the employer commits an offence by performing or omitting to perform an act and such performance or omission would have constituted an offence had it been done by the employer, that employer is equally committing an offence if the act or omission fell within the scope of the authority or employment of the chief executive officer, manager, agent or employee concerned and the employer –

(a) connived at or permitted the performance or an omission by the chief executive officer; or

(b) did not take all reasonable steps to prevent the performance or an omission.

(3) For the purposes of subsection (1) the –

(a) fact that the person issued instructions prohibiting the performance or an omission is not in itself sufficient proof that all reasonable steps were taken to prevent the performance or an omission;

(b) defence of ignorance or mistake by any person accused cannot be admitted; or

(c) defence that the death of a person, injury or illness or endangerment was caused by the performance or an omission of an act falling within the scope

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\(^8^9\) Mine Health and Safety Amendment Act 74 of 2008.

\(^9^0\) Mine Health and Safety Act no 29 of 1996.

\(^9^1\) As it appears in section 26 of the Mine Health and Safety Amendment Act 74 of 2008.
of authority or employment of any individual within the employ of the employer may not be admitted.

This provision specifies that it deals with the criminal liability of the employer, the employee, the chief executive officer, the agent, as well as the manager. The net is cast even wider than that of section 332 of the Criminal Procedure Act, which referred only to the corporation, its directors, and servants. Moreover, the Mine Health and Safety Act places upon the employer the responsibility of ensuring that mines are safe and that mine employees are in a position to carry out their duties without endangering their health and safety.\(^\text{92}\) By including managers, agents and employees, the umbrella of possible wrongdoers is opened, and thus making it difficult for the mine to escape liability on account of the inability to pinpoint the culprit. Furthermore, the situation where liability is escaped as a result of the inability to identify a particular senior person who is responsible for the death, injury or illness, is also avoided.\(^\text{93}\) On the other hand, in Coetzee the application of the section to include servants was rejected by the judges. One wonders whether this broad application in section 86A will not pose problems.

Similar to section 332 of the Criminal Procedure Act, the provision also envisages a situation where both the employer and individuals within the mining sector are held criminally liable. In other words, the individual who commits the offence will be charged and prosecuted. The mine, as the employer, will also be charged and prosecuted for the same crime.

This provision specifically deals with criminal liability for deaths, injuries, and illnesses resulting from failure to comply with the provisions of the Mine Health and Safety Act. These may be caused by, \textit{inter alia}, the falling of the ground, machinery, fires, and heat sickness. The provision does not provide a list of the circumstances, but clearly requires that there must be a link between


\(^{93}\) In England, one of the main reasons for the failure of corporate criminal prosecutions was that the identity doctrine demanded that a specific senior person had to be responsible for the wrongful act before the corporation could be held liable. In huge corporations, this was problematic and hampered the successful prosecution of large corporations. It was easier to prosecute the smaller companies, particularly the ones with a single shareholder, as they “did not provide the challenge that the large modern corporations bring to criminal law” Wells \textit{Corporations and Criminal Responsibility} 2 ed (2001) 107.
the death, injury or illness and the failure to comply with the provisions of the Mine Health and Safety Act.

The provision further states that the liability is for acts and omissions. Employers would be held liable for acts and/or omissions that took place within the scope of the other party’s employment. In addition to that, the employer would also be held liable for those acts and/or omissions where the employer “connived at or permitted the performance or an omission”, and where reasonable steps to prevent the offence had not been taken. Subsection 3 of the provision makes it difficult for the accused to rely on possible defences, as it indicates clearly the defences that cannot be relied on: the issuing of instructions forbidding the particular offence is not an indication that all reasonable steps had been taken to prevent the offence; ignorance or mistake may not be relied on as a defence; and the defence that the act causing the death, injury or illness is an act that falls within the scope of employment is unacceptable.

4 SHORTFALLS OF THE PROPOSED PROVISION
When the Chamber of Mines commented on the Bill, it raised the fact that employers were extremely worried about what they referred to as a “shift away from a system that is finely balanced between preventative and punitive measures, to a system strongly emphasizing punitive measures”. 94

The employers were also not pleased about the wording of the proposed provision95 as it seemed to focus more on the criminal liability of employers.96 Section 86A(1) is clear, but because of its wide ambit, it is submitted that it may lead to people being loathe to take up positions in the mines for fear of being held criminally liable.

The wording of the section 86A(2) echoes sentiments that have already been declared unconstitutional in S v Coetzee. Section 86(3) of the provision effectively deprives the accused of

95 Section 86A as it appears in section 26 of the Mine Health and Safety Amendment Act 74 of 2008.
the possible defences that he may rely on to refute the charges against him. It prevents the accused employer from relying on the fact that, as proof that all reasonable steps were taken to prevent the performance or omission, the employer had issued instructions prohibiting the performance or an omission. Disallowing this defence will have far-reaching consequences, as employers who genuinely make an effort to prevent the crime, are nevertheless held liable. Moreover, mistake and ignorance cannot be raised successfully. The provision is also flawed in that it prohibits the defence that “the death of a person, injury or illness or endangerment was caused by the performance or an omission of an act falling within the scope of authority or employment of any individual within the employ of the employer”.

By preventing the accused from making use of defences, the provision is presumptive in nature and appears to infringe upon the accused’s presumption of innocence. In *S v Coetzee*, the Constitutional Court declared section 332(5) unconstitutional. Given the judgment in Coetzee, the wording of the proposed provision is highly unlikely to pass constitutional scrutiny.97 The idea of a separate provision dealing with criminal liability for deaths, injuries, and illnesses caused by failure to adhere to the Mine Health and Safety Act, is a good one. There is, however, a need to revise the wording thereof.

5 THE FUTURE OF CORPORATE LIABILITY FOR DEATHS, INJURIES AND ILLNESSES IN SOUTH AFRICAN MINES

As stated above, when the Mine Health and Safety Amendment Act was passed, section 2698 was not approved and therefore section 86A does not form part of the amendments that were effected by the Amendment Act. It is submitted though, that this provision is a milestone in the development of corporate homicide in South Africa and serves as confirmation that the legislature has recognized the need for corporate homicide as a way to deal properly and adequately with corporate offenders. For the first time, we have a proposal that specifically calls for the introduction of the concept of “corporate homicide” to South African law. An avenue for open discussion regarding this concept was made available.

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97 Many of the issues raised by the judges in *S v Coetzee* may also arise as a result of the similarities between section 86A of the Mine Health and Safety Act and section 332(5) of the Criminal Procedure Act.

98 See discussion above in the introduction.
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There were fears regarding this provision and at the end of the day section 86A did not come into being, but the fact remains that the Legislature has shown that it is prepared to provide a provision that specifically addresses the liability of a corporate body for deaths, serious injuries, and illnesses of people. Although in this case the proposal is specifically aimed at mines, the proposal is an indication that South Africa does take seriously the deaths and injuries caused by corporations and there is a realization that the current law is inadequate.

The rejected proposal may still be revived and reformulated in such a way that (a) it is not limited to the mining sector, but is rather an all-encompassing provision that will deal with all deaths, injuries, and illnesses caused by corporations; (b) it addresses all the shortcomings of the current provision; and (c) it makes it possible for corporations to be properly and adequately punished for deaths, injuries, and illnesses caused by them.

In England and Canada, where there is separate legislation dealing specifically with corporate homicide, it is now easier to hold corporations criminally liable for corporate homicide.

6 CONCLUSION

It is clear that corporate criminal liability is a concept that needs to be taken seriously and South Africa has made a serious effort to ensure that corporations are held criminally liable for offences committed in their name. However, in spite of that, this area of the law has not developed steadily in South Africa. As a result, South Africa is way behind countries like England, which are able to convict a corporation for manslaughter. Accordingly, South Africa is in need of a new provision that will deal specifically with the criminal liability of corporations for deaths and injuries caused by corporate commercial activities.

It is submitted that the introduction of a provision that provides for the criminal liability of mine operating companies for deaths, injuries, and illnesses caused by failure to comply with the Mine

99 See fn 84.
100 A comparison of the same provision in the Criminal Procedure Act 1955 and in the Criminal Procedure Act 1977 shows in that the latter Act, for the most part, the earlier provision was merely restated without any further/serious developments being included. Despite the fact that it is more than thirty years since the present provision was enacted, the law has uncannily remained stagnant, even though corporations continue to cause deaths, injuries, and illnesses.
Health and Safety Act only as an offence will compel corporations to comply with safety regulations and to avoid negligent acts and omissions that may possibly lead to deaths and injuries.

Although the proposed provision was rejected, it is submitted that unless there is a move towards the more punitive system of dealing with deaths, injuries, and illnesses arising from corporate activities, it will continue to be difficult to curb such deaths, injuries, and illnesses.