

**AN ANALYSIS OF THE CONCEPT OF EMPLOYEE IN SOUTH  
AFRICAN LABOUR LAW**

by

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## Declaration by Supervisor

I hereby declare that this dissertation by candidate student number [REDACTED] for the degree Masters of Laws in the Department of labour Law, be accepted for examination.

.....  
Professor K.O. Odeku

.....  
Date

## Declaration

Student number: 

I, Mamabolo, LC declare that An analysis of the concept of employment in South African Labour Law is my own and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

.....

.....

Signature

Date

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## **Acknowledgment**

I would like to express my sincere gratitude and appreciation to the following individuals: My study promoter, Prof. KO Odeku, for his quality leadership and skills, excellent tireless guidance and encouragement. It was a privilege to have him as my promoter. All the sources which were cited in the text and referenced in the bibliography are acknowledged. Adv. MC Lebea, my previous promoter for having guided me during the time of confusion and ambivalence. He was a good advisor. Angela Makwela for typing this dissertation. She sacrificed a lot of efforts and time towards this dissertation.

## **Dedication**

I dedicate this work to members of my family, more specifically my children, namely; Angela, Jessica, Lilly, Nicky and Theo. You were all supportive during my studies. Angela in particular, you are a caring person. Keep it up! Mom loves you.

## **Abstract**

The definition of an employee in most protective labour legislations excludes various categories of workers. The definition of what an employee is, is different in labour legislation. A new presumption of what an employee is, is just a guideline and not exhaustive. The tests developed by our courts do not assist in defining an employee in borderline cases. It is not simple as it originally seemed. In the beginning it seemed certain but in the end the definition can no longer be valid.

The definition of an employee is a journey of a thousand miles which begins with the test step-with no end. The words of Francis Bacon seem to hold water regarding most definition of an employee. Francis Bacon said I quote ‘if a man will begin with certainties, he shall end in doubts, but if he will be content to begin with doubts, he shall end in certainties.’

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## **CHAPTER 1**

### **GENERAL INTRODUCTION**

#### **1.1 INTRODUCTION**

According to the recent development of the labour law in the South African, the relationship between the employee and the employer is regulated by the Labour Relations Act, hereinafter referred to as the LRA.<sup>1</sup> This legislation defines and specifically set boundaries according to how employees and individuals who are not regarded as employees should be categorised.

The definition of an employee in terms of s 213 of the LRA provide that an employee means “(a) any person, excluding independent contractors, who works for another person or for the state and who receives, or is entitled to receive, any remuneration, and (b) any other person who in a manner assist in the carrying on or conducting the business of an employer.”

#### **1.2 PROBLEM STATEMENT**

The South African courts of Law are experiencing a lot of difficulties in categorizing certain individuals as ‘employees’ especially concerning cases of occupational health and safety claims. It is against this difficulty that a clear definition of the concept of an employee should be provided so as to eliminate the confusion.

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<sup>1</sup>Labour Relations Act 66 of 1995.

### **1.3 RESEARCH QUESTION**

The research question for this study is formulated as follows: Who are the employees according to the South African labour law?

### **1.4 RESEARCH METHODOLOGY**

This research study is of qualitative nature.

Qualitative research provides the respondents freedom to explain the phenomenon they experience in their own words, language and style. This research is usually relevant when the researcher has little information about the problem being investigated.

Qualitative research uses naturalistic approach that seeks to understand phenomena in context-specific settings such as for example a 'real world' scenario in which the researchers seek to find out how the problem area should be described in the first instance. In this study, there will be no persons who will be involved during the data collection process, instead only documents, namely; the pieces of the South African labour laws, statutes, journals and case law others will be used.

## CHAPTER 2

### DEFINITION OF EMPLOYEE UNDER THE SOUTH AFRICAN LABOUR LAW

#### 2.1 DEFINITION OF AN EMPLOYEE

An employee is any person employed in a workplace.<sup>2</sup> The workplace is therefore an environment within which people are engaged in performing task necessary to provide others with services. On the other hand, an employee is a person who in terms of a contract of employment for remuneration makes available their services for a period under authority to an employer.<sup>3</sup> This definition further includes the element of a contract of employment the contents are determined by individual agreement between the employer and the employee.<sup>4</sup> Contract of employment is an important factor in the agreement of the employer-employee relationship.

##### 2.1.1 LABOUR RELATIONS ACT

In terms of section 213 of the LRA<sup>5</sup> an employee means “(a) any person, excluding an independent contractor, who works for another person or for the state and who receives, or is entitled to receive, any remuneration, and (b) any other person who in any manner assists in the carrying on or conducting the business of an employer.”

The fixed term is defined as the period in time that is mentioned in the contract of employment, that is, when services are rendered and for how long. The contract of employment comes into existence immediately when the employer and the employee agree to form a relationship and such a relationship can continue for a period as long as both parties agreed to be together.<sup>6</sup>

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<sup>2</sup> Bendix S, *Industrial relations in South African*(2006) at 123.

<sup>3</sup> Van Jaarsveld JF and Van Eck S, *Principles of labour law* (2002) at 47.

<sup>4</sup> Nel PS, *South African employment relations: Theory and practice*(2002) at 57.

<sup>5</sup> Labour Relations Act 66 of 1995.

<sup>6</sup> Bendix S (note 2 above) at100.

The legislation mentioned that the aspect of a fixed term must be included in the definition of an employee. The question is whether the term should be fixed at the time when the parties entered into an agreement or not. With regards, the researcher argues that there is therefore no use of the probation period that the employees are required to observe. Usually this is not the case because people are employed until they die, until they are fired for misconduct, until they resign due to ill-health or being recruited by other companies or find better jobs.<sup>7</sup> The White Paper on Human Resource Management in the Public Service (1997 Section 13) mentions that there are two types of employment contracts in the workplace, namely; the fixed-term contracts and the (ii) the short-term contracts. The short-term contract is replaced by the long-term contract upon its renewal and continued consideration.

### **2.1.2 OCCUPATIONAL HEALTH AND SAFETY ACT**

The second legislation from which the definition of employee is sought is called the Occupational Health and Safety Act hereinafter referred to as COIDA.<sup>8</sup> In terms of this Act, ‘employee means any person who receives or is entitled to receive any remuneration or who works under the direction or supervision of an employer or any other person.’ The definition of an employee by the Occupational Health and Safety Act is concentrated within the two main features, namely; of remuneration and supervision or direction. This therefore indicates that the employer does not just remunerate the employee, but that they tend to exert control upon them through specifying how they should perform their tasks and the quality of services and or products they expect from the performance by the employee. The concept of ‘entitlement to receive remuneration’ is an important determinant factor of employment of the employee.<sup>9</sup> On the other hand, employer-employee relationship is confined within the requirement of authority which includes three important aspects, namely; (i) services are rendered in respect of a subordinate relationship, (ii) under the control and supervision, and (iii) guidance of the employer. In a nutshell, the employee demands remuneration for the services they rendered on behalf

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<sup>7</sup> Labour Relations Act 66 of 1995.

<sup>8</sup> Occupational health and Safety Act 85 of 1993.

<sup>9</sup> Bendix S (note 2 above) 129.

of the employer, whereas the employer demands their obedience to their authority.<sup>10</sup> This was illustrated in *Rodrigues and others v Alves and others*.<sup>11</sup>

The researcher maintains that employees do not usually work for a profit and as such even if a certain desired result is not achieved they may not be penalized for the result. The employer-employee relationship is usually based upon the manner in which parties to an employment require each other. The boss pays and the others receive. The boss advertises the job and the ‘subordinates’ applies for the job. According to this explanation, the boss therefore sets out conditions and puts up specifications. All employees are dismissed by the employer who have the power to do so. Every employees are therefore ‘subordinate to the will’ of their employers. Employees have power to withhold their services from the employers if they feel so. The researcher maintains that both the employer and the employee have power to dismiss and to withhold services, respectively.

### **2.1.3 COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT**

The third Act that defines the concept ‘employee’ is Compensation for Occupational Injuries and Diseases Act<sup>12</sup> hereinafter referred to as COIDA. In terms of this Act, an employee means any person who entered into or works under the contract of service or of apprenticeship or learnership, with an employer whether the contract is expressed or implied, oral or in writing and whether the remuneration is calculated by time or by work done, or is in cash or kind.<sup>13</sup> The Compensation for Occupational Injuries and Diseases Act proceed to include a variety of individuals who were not mentioned in the above definitions, namely; that of the apprenticeship or learnership and other form of

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<sup>10</sup> Van Jaarsveld & van Eck (note 3 above) 53.

<sup>11</sup> (1978) (4) (AD) 835-B. the court held that for the plaintiffs to prove that Rodrigues was de facto servant of the other defendants they had to show (a) that the other defendants not only had the right to prescribe to Rodrigues what work he had to do, and the manner in which the work was to be done but also to show that the alleged employer had the right to control, “not only the end to be achieved by the others is labour and the general lines to be followed, but the detailed manner in which the work was to be performed.”

<sup>12</sup> Act 130 of 1993.

<sup>13</sup> Ibid.

remuneration except monetary payment. A contract that is entered by the employer and the employee may be written, verbal or it may be understood.<sup>14</sup>

The COIDA also takes into consideration that remuneration can be in kind rather than only in the monetary form. In this arrangement, employees can receive other benefits apart from money such as for example, food, shelter, education and training, skills development and others in return of the services they rendered on behalf of employers.

The Act provides that the concept of employee may include other individuals such as casual employees, a person who is under the control and remuneration of the labour broker, the dependant/s of the diseased employee, members of the South African Defence force<sup>15</sup> and members of the South African Police force.<sup>16</sup>

#### **2.1.4 UNEMPLOYMENT INSURANCE ACT**

The definition of an employee was also drawn from s5 of the Unemployment Insurance Act.<sup>17</sup> In terms of this Act hereinafter referred to as UIA, an employee means any natural person who receives remuneration or to whose remuneration accrues in respect of services rendered or to be rendered by that person, but excludes any independent contractor.

The researcher maintains that a contractor is someone who performs the services on behalf of the employer although not necessarily under the control of the employer. The relationship between the employer and a contractor is determined by the contractor undertaking to make services available with regards to the physical material to an employer for payment.<sup>18</sup>

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<sup>14</sup> Bendix S (note 2 above) at 100.

<sup>15</sup> Defence Act 44 of 1957.

<sup>16</sup> Police Service Act 1995 Act 68 of 1995.

<sup>17</sup> Unemployment Insurance Act 63 of 2001 Section 5.

<sup>18</sup> Van Jaarsveld & van Eck (note 3 above ) at 63.

In the view of the above explanation, independent contractors are notionally on equal terms with their principal, namely; the employers. In fact if one considers what notionally means it confirms that the equality is in name only. The relationship is usually that of who needs this relationship more than the other. In tendering process, there is always the boss who employs and remunerates others. The boss advertises the job and the ‘subordinates’ applies for the job. The boss sets out conditions and puts up specifications. Although the independent contractors are not classified as employees in our labour law, they most probably become employees when they apply for tenders or work for the state (employer) who can fire them on condition of poor performance and other reasons. For example, poor performance and failure to complete job can be a determining factor that an independent contractor cannot be employed in future.

This is not only to allow or have attorneys and advocates engaging in legal argument, but for the courts to establish the conducts of the parties and to have the intentions of the parties by traveling beyond the document. In terms of s 213 of the LRA an employee is ‘any person excluding an independent contractor, who works for another or for the state and who receives, or is entitled to receive any remuneration, and any other person who in any manner assists in carrying on or conducting the business of an employer.’ What is not clear in this definition is a concept of ‘any person.’ This definition does not differentiate between the natural and the juristic persons. The juristic person is most probably an employer, for example, the state. In this circumstance therefore, it is most probably for the non-governmental organizations and non-profit making organizations to be classified as employers.

### **2.1.5 BASIC CONDITIONS OF EMPLOYMENT ACT**

The Basic Condition of Employment Act<sup>19</sup> hereinafter to be referred to as BCEA states that an employee means (a) any person, excluding an independent contractor, who works for another person or for the state and who receives or is entitled to receive any

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<sup>19</sup> Basic Conditions of Employment Act 75 of 1997.

remuneration, and (b) any other person who in any manner assists in carrying on or conducting the business of an employer.

The Basic Condition of Employment Act<sup>20</sup> adds another category of individuals who are employees, namely; ‘a person who assists’ the employee when conducting the business of an employer. The Act does not specifically make a clarification as to who these individuals are. According to the BCEA, a person who assists can mean anybody who happens to be family or friend of the employee who assist the employee when performing its routines and classified as employees as well.

### **2.1.6 INCOME TAX ACT**

According to the Income Tax Act,<sup>21</sup> an employee means (a) any person, other than a company, who receives or is entitled to receive any remuneration or to whom any remuneration is accrued, (b) any person who receives any remuneration or to whom any remuneration accrues by reason of any services rendered by such person to or on behalf of a labour broker, (c) any person or class or category of persons whom the Minister of Finance by notice in the Government Gazette declares to be an employee for the purpose of the definition, (d) any personal service company, and (e) any personal service trust.

It is pertinent to mention that certain categories of individuals can obtain the status of ‘employee’ by virtue of a declaration by the Minister of Finance. According to the Income Tax Act, persons in any form of work activity except a one-person business are included in the definition of employer-employee relationship. Companies are not entitled to be defined as employees,<sup>22</sup> because they are entities which are composed of numerous individuals who occupy different positions such as managing directors, directors, board members and others. The definition also adds that the concept of employee does not only

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<sup>20</sup>See note 19 above section 2.

<sup>21</sup> Income Tax Act, 1962 (Act 58 of 1962).

<sup>22</sup> Nel PS (see note 3) 57.

necessarily mean ‘persons’, this can include certain organizations such as the personal service companies and the personal service trusts.<sup>23</sup>

### **2.1.7 SKILLS DEVELOPMENT ACT**

The Skills Development Act<sup>24</sup> entails that an employee means (a) any person, excluding an independent contractor who works for another person or for the state and who receives or is entitled to receive any remuneration, or (b) any other person, who in any manner assists in carrying on or conducting the business of an employer. This Act is clear in establishing who the ‘assistants’ are because it clearly states that they are individuals who assist in advising and counseling the workers, assessing the work-seekers, assisting employers and so on. Although these individuals are outside the ambit of employment, they are still regarded as employees by this Act.

The statutory definition of an employee in this Act provides that an employee is any person who in any manner assists in carrying or conducting the business of an employer.<sup>25</sup> This statement is highly confusing, and it is ambiguously stated. It is not known as to who are the persons who may assist others in conducting the business for the employer. Are they buddies of the employees? Even if they have to be compensated, the researcher argues that this does not fall within the ambit of a contract of employment.

The employee will typically be ‘at the beck and call of the employer to render personal service.’ This to a certain extent is true. It is a question of who pays the assistants. Do the assistants have any agreement with the employer? How independent can the contractor be in enlisting the assistants and who is responsible for their payment and who bears vicarious liability should any of the assistants be found liable?

In a nutshell, the expositions above indicate the issue of definition of an employee is subject to numerous debates by different statutes as jurists in South Africa. The researcher

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<sup>23</sup> See note 3 above at 57.

<sup>24</sup> Skills Development Act 97 of 1998.

<sup>25</sup> Ibid Section 1 (b).

is of the belief that such expositions are enough to set clearly defined boundaries especially in cases where the courts of law are faced with situations where they must decide and categorize people as employees or non-employees.

## **2.2 THE PRESUMPTION OF AN EMPLOYEE IN TERMS OF THE BASIC CONDITIONS OF EMPLOYMENT ACT (BCEA)**

Section 200 A (1) of the LRA which was inserted by s 51 of Act 12 of 2002 provides for a presumption as to who an employee is. Factors that brought the presumption into existence amongst others is the employer's right of supervision and control. This factor might as well be taken into account in deciding whether a person is an employee or not. This presumption applies only to persons any less than amounts to be determined from time to time by the minister.<sup>26</sup> The department of labour has now issued guidelines to which all persons determining whether a person is an employee must have a regard.<sup>27</sup> However the presumption can be rebutted if it can be shown that the impression test does not leave the impression that the person concerned is an employee.<sup>28</sup>

The provision of s83A of the BCEA creates a presumption that, regardless of the form of contract, a person is an employee if the person is "subject to control or direction of another person," such person forms part of the employer's organisation, or who has worked for other person for an average of at least 40 hours per month for the past three months, or is economically dependent on the other person, or works for only one person, or if the other person provides the tools of trade.

The person is provide with tools or equipment of trade by the other person, meaning that an employee is further dependent on the tools and equipment of trade provided to him or her by the employer.<sup>29</sup> This is not true as there are some instances where employers lack or insist on employees using their equipment as they avoid employees' abuse or not

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<sup>26</sup> *Currently R115 572,00* (See GN 356 dated 14 March 2003).

<sup>27</sup> *Code of good practice: who is an employee?* (GN 1774 2006).

<sup>28</sup> See *Linda Erasmus property Enterprises (Pty)Ltd v Mhlongo and others* (2007) 28 ILJ 1100 (LC).

<sup>29</sup> See note 19 above.

caring for employer's equipment. In some instances, employers rent employee's tools and equipment. For example, a security officer may be required to use own firearm.

Analysing the BCEA, the researcher maintains that this is mostly true for labourers and skilled workers where such tools may be very expensive. In other cases the employer assist the employee in maintaining such tools as ownership is with the employee. Where a vehicle is such a necessity the employers pay for petrol and maintenance.

However in section 82 (1) an employee is given a specific meaning. The provision of this section states that for the purpose of the Basic Conditions of Employment Act, a person whose services have been procured for or provided to a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person's employer.<sup>30</sup> In the case of *Mandla v LAD Broker (Pty) Ltd*,<sup>31</sup> where the court held that the interpretation by the Labour Appeal Court of section 198 of the LRA does not conflict with the intention reflected in section 82 of the BCEA. The court further pointed out that a contract between an employee and a temporary employment service creates "a unique and *sui generis* tripartite relationship" in which the employee renders personal service not to the employer but to the employer's client. But for the provision of section 198 such person might in most cases have qualified to be an 'employee' of both the temporary employment service and its client. As it is, the client is a relevant factor in establishing whether a person is an employee of the temporary employment service or an independent contractor.

In *LAD Broker (Pty) Ltd v Mandla*<sup>32</sup> the Labour Appeal said those s 82 ss (1) and (2) clearly refer to a person who renders services to the other as an employee. The deeming provision would not be necessary were the services rendered to the temporary employment service. It is only where the services are rendered to one person but another pays the remuneration that there is scope for uncertainty and need for a deeming provision. As the deeming provision of subsection (2) is in itself wide enough to include

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<sup>30</sup> Ibid section 82 (1).

<sup>31</sup> (2000) BLLR 1047 (LC) at 1056.

<sup>32</sup> (2000) BLLR 993 (LAC) at 1002.

independent contractors. Subsection (3) provides for their necessary exclusion. Further the provision of section 83 of the BCEA entails that a persons are regarded as employees, provides that:

(1) The Minister may, on the advice of the commission and by notice in the Gazette, deem any category of persons specified in the notice to be employees for the purpose of this Act or any sectoral determination.<sup>33</sup>

The principle of labour law defines an employee as “a person who, in terms of a contract of employment for remuneration, makes available his services for a period under authority, to an employer.” This definition does not make it clear whether such service is direct or indirect. For example, cleaners offer services to the institutions on behalf of someone who is contracted to such as institution. An employer can offer services to another through his employees. Some employees have own prerogative and discretion on what to do and when as well as how to do. They have authority, as they have some *pseudo* power to do what is necessary. The nature of direct or indirect type of services should be included in the definition of the concept of an employee. Direct services means those tasks that employees perform for the attainment of the employers’ goals and objectives, whereas on the other hand, indirect services means the tasks that are performed by people who are not in the employment of the employers, but are conducted on behalf of the employers through the process of outsourcing.

### **2.3 THE PRESUMPTION OF AN EMPLOYEE IN TERMS OF SECTION 200A OF THE LABOUR RELATIONS ACT (LRA)**

The presumption of an employee in terms of section 200A of the LRA provides that:-

(1) Until the contrary is proved, a person who works for, or renders services to any other person is presumed, regardless of the form of the contract, to be an employee, if any of the following factors are present:

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<sup>33</sup> Ibid 171 D-I.

- (a) the manner in which the person works is subject to the control or direction of another person,
- (b) the person's hours of work are subject to the control and direction of another person,
- (c) in the case of a person who works for an organization, the person forms part of that organization,
- (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months,
- (e) the person is economically dependent on the other person, for whom he or she works or renders services,
- (f) the person is provided with tools of trade or work equipment by the other person or,
- (g) the person only renders work for or renders services to one person.

However the application of the presumption does not necessarily mean that the principle of the relationship of the parties must not be gathered from the contract as illustrated in *Cartin v CCMA & other*.<sup>34</sup> In this case the court held that while some of the characteristics of the contract of employment have been incorporated in section 200A this does not do away with the principle that the relationship of the parties must be gathered from the contract. It is therefore necessary to look at the provision of the contract before applying the presumption set out in section 200A. If we accordingly refer to the contract of employment, the most important aspects will emerge, such as the services to be rendered, the employer and authority and the employee and remuneration, and a fixed term.<sup>35</sup> In essence the court meant that the terms of the contract should be considered in order to establish whether there is a need to invoke section 200A.

If the contract established conclusively that a party is an employee, then the provision of section 200A should not be invoked. This was illustrated in *Denel (Pty) Ltd v Gerber*.<sup>36</sup> In this case even though section 200A was not implemented, the court arrived at an identical criterion, contained in section 83A of the BCEA as a guide in determining

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<sup>34</sup> (2004) 8 BLLR 748 (LC) at par 15.

<sup>35</sup> Van Jaarsveld and van Eck (see note 3 above) 48.

<sup>36</sup> (2000) 9 BLLR 849 (LAC) at 858.

whether the respondent was an employee or not. This was also illustrated in *Andreanis v Department of Health*<sup>37</sup> where the arbitrator applied the criteria in section 200A and held that a medical practitioner had been an employee during her period of internship.

Both the presumptions of section 83A and section 200A of the BCEA and LRA respectively are meant to help to distinguish between the employee and an independent contractor in borderline cases. In *Medical Association of South Africa & others v Minister of Health & others*,<sup>38</sup> the court held that to define the word ‘employee in such a way that it is easy to make the distinction between an employee and an independent contractor or put it differently, to make a distinction between a contract of service and contract of work is one of the most difficult question which the courts have grappled with for decades.<sup>39</sup>

## **2.4 CONTRACTS OF EMPLOYMENT**

### **2.4.1 INTRODUCTION**

It has been indicated in the previous section that a contract of employment is an important aspect that is used to determine whether a person is defined as an employee or not. In this section, a detailed exposition of a contract of employment is discussed.

### **2.4.2 WHAT IS CONTRACT OF EMPLOYMENT**

The relationship between the employee and the employer is virtually stated in a contract of employment.<sup>40</sup> A contract can be viewed as an agreement that states the expected behavioural patterns amongst the role players in a relationship.<sup>41</sup> The researcher is of the view that the employee has the right to withhold its work and services from the employer whereas the employer on the other hand has the right to withhold its remuneration from

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<sup>37</sup> (2006) 5 BLLR 461 (PHWSBC).

<sup>38</sup> (1997) 18 ILJ 528 (LC).

<sup>39</sup> Ibid.

<sup>40</sup> Gibson JTR, Comrie RG, Visser C, Pretorius JT and Sharrock R and Carl Mischke, *South African Mercantile and Company Law* (1997) at 607.

<sup>41</sup> Ibid at 608.

the employees. All employees must have a written or verbal employment contract before they commence working.<sup>42</sup>

The employment contract is basically a document that is designed for the purpose of protecting the rights of the employees.<sup>43</sup> The contract of employment is basically aimed at protecting employees and persons seeking employment from exploitation by the employers.<sup>44</sup>

The fundamental rights of the employees are specifically stipulated in the Constitution of the Republic of South Africa in s27 as follows:<sup>45</sup>

- (1) Every person shall have the right to fair labour practice,
- (2) Workers shall have the right to form and join trade unions, employers shall have the right to form and join employer's organisation,
- (3) Workers and employers shall have the right to organise and bargain collectively,
- (4) Workers shall have the right to strike for the purpose of collective bargaining, and
- (5) Employers' recourse to the lock-out for the purpose of collective bargaining shall not be impaired, subject to section 33(1).<sup>46</sup>

The phrase 'the person's hours of work are subject to the control or direction of another person.' The difficulty here is that a group of worker may for the sake of progress, select a leader amongst them who take control of every activity. And this does not in any manner imply the employer-employee relationship that is specified in the definition of an employee. Skilled workers such as engineers, architects and designers experience a minimal control or direction by the employer. Does this condition entail that they cannot be classified as employee due to their lack of control and direction by the employer?

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<sup>42</sup> Bendix S (note 2 above)100.

<sup>43</sup> Gibson JTR, Comrie RG (note 40 above).

<sup>44</sup> Nel PS (note 4 above) 59.

<sup>45</sup> Constitution of the Republic of South Africa Act 108 of 1996.

<sup>46</sup> Ibid s33 (1).

According to Bendix,<sup>47</sup> a contract of employment come into life immediately the employer and the employee agree they have a relationship, in a contract, the employer states their control, management and supervision of the employee,<sup>48</sup> the contract of employment includes matters related to the remuneration of the employee for the services rendered on behalf of the employer,<sup>49</sup> and a contract of employment must include the period, that is whether a fixed-term contract or a short-term contract.<sup>50</sup>

The determination in the classification of employees and non-employees within the South African labour market is conducted through the application of three different types of tests that were created by the courts, namely; the control test, the organisation test and the dominant impression test. These are discussed below.

#### **2.4.2.1 IMPLEMENTATION OF THE TESTS IN DETERMINING THE CONTRACT OF EMPLOYMENT**

As mentioned above, the South African courts have formulated the three tests as follows: (i) the control test, (ii) the organisation test, and (iii) the dominant impression test, to establish whether certain persons fall within the ambit of labour legislation.<sup>51</sup>

#### **2.4.2.2 THE CONTROL TEST**

This test implies that the court looks at the extent to which one party exerts control upon the other party during the processing of rendering services on behalf of the former. The person who has control upon the other is said to have authority power and as such employees are expected to be subordinate to the employers, are controlled, supervised, directed and guided by the employers.<sup>52</sup> Employers use a variety of approaches in order

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<sup>47</sup>Bendix S (note 2 above) at 100.

<sup>48</sup> Swanepoel BJ *The management of employment relations: Organisational level perspectives* (2004) at 45.

<sup>49</sup> van Jaarsveld & van Eck ( note 3 above) 47.

<sup>50</sup> *White Paper on Human Resource Management in the Public Service*, 1997.

<sup>51</sup> Gibson JRT, Comrie RG (note 40 above) 610.

<sup>52</sup> Van Jaarsveld & van Eck (note 3 above) 53. See also *Colonial Mutual Assurance society Ltd v Mac Ronald* 1931 AD 412 at 434-435 where the court stated that while it may sometimes be a matter of extreme delicacy to decide whether the control reserved to the employer under the contract is of such a kind as to

to effectively control employees such as the withdrawal of remuneration and other incentives, threat to dismiss or demote and even to retrench, the extension of probation period and so on. Employees therefore do not have other option but to be subordinate to the employer.

The control test entails that there must be a full control towards the employee as illustrated in *Smit v Workmen's Compensation Commissioner*.<sup>53</sup> The court found that there was a total absence of the right to supervise and control an agent by the company. A person who is not controlled and supervised by the company is according to the control test not defined as an employee. In the context of this case, the workmen's commissioner repudiated that Mr. Smit was not a 'workman' as contemplated by the Workmen Compensation Act, 1941 (Act 30 of 1941). Mr. Smit was merely told 'to go out and get the business outside,' and this indicates that there was a minimized control over the agent. Indeed the court also dismissed the appeal on the ground that Mr. Smit was not a 'workman.'

The power of the employer to exert control upon the employee is regarded as a distinctive feature of the employment contract. This is also illustrated in the case of *Colonial Mutual Life Assurance Society Ltd v McDonald*<sup>54</sup> In this case; the court adopted the supervision test in determining whether an insurance agent was the employee of a life insurance society or an independent contractor. The court ruled that the control was evidenced in the relationship between the master and servant when it quoted that "the relation of master and servant cannot exist where there is a total absence of the right of supervising and controlling the workman under the contract." Another element of the control test that was highlighted in this case is when the court also suggested that the greater the degree of supervision and control to be exercised by the employer over the employee, the stronger the probability will be that it is a contract of service.

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constitute the employer the master of the workmen, one thing appear to be beyond dispute and that is that the relations of master and servant cannot exist where there is a total absence of such supervision and controlling the workmen. In other words unless the master only has the right to prescribe to the workmen what work has to be done, but also the manner in which that work has to be done.

<sup>53</sup> (1979 )1 SA 51(A) at 58.

<sup>54</sup> 1931 AD 412 at 418.

The researcher is of the conclusion that the control test is used for determining whether a person is regarded as an employee or a non-employee is closely associated with the control the employer tends to exert upon the employee. This therefore entails that the nature of control and direction of the employee by the employer in their relationship is an important element provided in the definitions of an employee within the South African labour law fraternity. This implies that the legislature gives the authority to another to control and guide the employee. The employer may control an employee with regards to how the products had to be produced, the quality of service delivery, the raw material used when products are produced and services rendered, and the determination of time the employee takes to do the work. The concept of an employee is therefore not complete without the inclusion of the aspects of authority, namely; control, direction and guidance.

Section 200 A(1) (e) of the LRA provides that in order for a person to be classified as an employee, the person need to economically dependent on the other person for whom that person works or render services. This aspect is disputable as there is a mutual economic dependence between an employer and employee. For the employer to economically thrive the employee must render adequate services and without rendering services the employer shall not be economically viable. An employee should not be regarded as a weak party in the employer-employee relationship because an employee has the power to withhold their work. Economical dependency is therefore misplace but could be best if replaced by the aspect of remuneration.<sup>55</sup>

Secondly, the economic dependence is a problematic aspect of the definition in that a party may be working for another party for purpose of gaining other amenities than money, for example, people who work in order to gain experience and the feel of being employed. Another analog entails a person offers services to another and this other person shares benefits with them on the agreed terms. In fact wages that are shared with the employees by the employer would accrue from the profits of the services or products

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<sup>55</sup> Bendix S (note 2 above) at 238.

they produced. The only difference is that in this case the share is neither dependent on the amount of income realised nor on whether the income is positive or negative.

#### **2.4.2.3 THE ORGANIZATION TEST**

The organisation test was developed as a result of the dissatisfaction with the nature of the control test. According to this test, a person is defined as an employee once they were fully integrated into another's business. This test is illustrated in *R v AMCA Services & another*.<sup>56</sup> The court ruled that the appellant were employees of the business in that they were "lower paid members of a business." The organisation test can be used to accurately measure whether someone is inside or outside the organisation. The court stated further that inside the organisation one may have persons whose work is subject to close control, supervision and inspection whereas outside the organisation entails persons' is subject to slight or no control, supervision and inspection. The mere fact that what the appellant were doing "was primarily the company's work; not merely their own" indicates that they must be defined as employees of the company.

According to the researcher, the organization test is effective in delineating whether a person is inside or outside the business, and indeed it seems more effective than the control test.

#### **2.4.2.4 THE DOMINANT IMPRESSION TEST**

The dominant impression test considers the complete relationship between the parties and then draws a conclusion on that basis.<sup>57</sup> The features of the contract which tend to indicate that the contract being one of employment are weighed against those features which argue otherwise in a different direction.<sup>58</sup> One of the most pertinent indications of an employment contract is the right of one party, the employer to control or supervise the work of the other party, the employee, the right to discipline, the payment of

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<sup>56</sup> 1959 (4) SA 207 (A) at 212 H.

<sup>57</sup> Grogan J, *Dismissal, Discrimination and Unfair Labour Practices* (2007) at 15.

<sup>58</sup> See note 57 at 15.

remuneration, hour of work and the provision of tools and equipment by the employer, and so on. This entails that the elements that are contained within the contract of employments are used to determine whether a person can be defined as an employee or not.

Our courts usually apply this test in order to determine whether a specific contractual relationship exists within the employer-employee relationship. This is explained in the case of *R v AMCA Services (Pty) Ltd.*<sup>59</sup> In this case, contract of employment in this case included features as follows: the collectors were not paid by time but by way of a commission on collection made by them, the basic allowance or retainer they had previously received having been abolished; they were not subject to any control by the company, they were not obliged towards the company to do the collection personally, and but entitled to and in fact sometimes did appoint others to do it for them.

The question before the court was whether the collectors were “employees” within the definition of the regulations which define an employee as any person employed by or working for any other person and receiving or being entitled to receive in respect of such employment or work any remuneration, and ‘employee’ and ‘employer’ have the corresponding meaning. In determining whether the collectors were employees within the definition of the regulations, the court did not apply the organization test as it was done by the court in *R v AMCA*.<sup>60</sup> The most important feature was that they were not “employed by or working for” other person within the meaning of the regulations. The above case scenario indicates therefore, that the organization test cannot be used to bring within the regulations persons who do not work for another. This was also the position in *Smit v Workmen’s Compensation Commissioner*<sup>61</sup> where the court stated that the organisation test is juristically speaking of such a vague and nebulous nature that more often than not no useful assistance can be derived from it in distinguishing between an employee (*locatio operum*) and an independent contractor (*conductio operis*) in our common law.

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<sup>59</sup>(1956) 4 SA 207(A) at 212 H-I.

<sup>60</sup> Ibid at 216 D.

<sup>61</sup> See note 53 above at 542.

The court in determining whether or not the collectors were employees used the test of master and servant. The court held that “from the feature mentioned above that the collectors in the present case are not obliged to render their personal services to the company, by their agreement with the company they are bound merely to produce a certain result either by their own labour or labour of others. It is basically the contract price from which they may derive a profit by assistance or labour of others and after allowing transport expenses”. They are therefore not employees.

The dominant impression test has since been followed consistently by the courts as illustrated in the case of *Ongevallekommisaris v Onderlinge Versekeringsgenootskap AVBOB*.<sup>62</sup> The court states that the words “*daarvolgens werk*” (working according to that) in the Afrikaans version of section 3 (1) of the Workmen’s Compensation Act<sup>63</sup> obviously mean “*of volgen ‘n dienskontrak werk,*” (work according to contract of service) and accordingly one must in each particular case determine what the contract is between the parties concerned. The contract does not have to be only in writing it can be verbal as well. What is of utmost importance to look for are ‘facts’ or ‘surrounding facts.’ Thus, the answer to the question as to whether a person is a ‘workman’ really depends on the question of whether a contract of service exists. In this approach, facts which do not contribute to proof of the nature and content of the contract between the parties are accordingly irrelevant. Where a relationship has elements of the master-servant interaction, one must try to determine the relationship in terms of the significant facts and the ‘dominant impression’ which the contract makes upon a person.<sup>64</sup>

The phrase that “the person who worked for the other person for an average of 40 hours per month of the last three months.”<sup>65</sup> This means that whoever have to show that they were under the control of another person and were paid thereafter are employees. He/she has to show that the employer was aware of his presence and that the person that engaged

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<sup>62</sup> 1979 (4) SA 446 (A) at 452.

<sup>63</sup> Workmen’s Compensation Act 30 of 1941.

<sup>64</sup> Van Jaarsveld & van Eck (note 3 above).

<sup>65</sup> See note 63 above.

him has power to engage him. It is also important that whatever he was doing was legitimate.

In terms of the LRA, there are some factors to be taken into consideration when determining whether a person is an employee or not, the supervision and control test is one of those factors. This shows that our labour courts are prepared to accept that even where control is massive there may be no contract of employment, such as for example; a state may in its tender determine material to be used and how the work has to be done. It may even decide the local content of labour to be used as well as time frame within which the project has to be finalised. It may even determine wages of employees and yet it is not the contract or is the employer. In the contrary, an employee may only be given budget and told what the final product has to be. It is imperative that a test applied cannot stand on only one element but on multiple elements. The researcher believe the animus that the two had on entering into the contract of employment should be the main factor that determined their relationship. In the context of this arrangement, once it is established that the intention in mind was that of employment the rest may follow. It is every employee's right to be paid for work done. It is the right of every employer to have his work carried out as agreed between the employer and the employee. It is the obligation of every employee to carry out the mandate of the employer that falls within the scope of their employment.<sup>66</sup>

The researcher is of the view that in some cases there are rights that are reserved for the third parties with regards to employment contract. This arrangement is meant to address the vicarious liability in which the damage caused by the employee is imputed to the employer if committed within the course and the scope of employment and in the business of the employer. Vicarious liability is designed to the conception that the employer is usually expected to have adequate knowledge and skills regarding the work they are directing and supervising. The supervisory test in this regard becomes inadequate as today there are large conglomerates and multi-national cooperatives that make it impossible for the employer to physically be present on the factory floor to

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<sup>66</sup> Gibson JTR, Comrie RG (note 40 above) at 619.

supervise. In fact very few employers these days have time and space to supervise. Even basic employees like domestic workers are no longer consistently supervised. In large companies the supervisory function is conducted by individuals who are placed on the lowest rank of the employment ladder. Those above them such as for example, foremen, junior managers, middle managers, senior managers, managing directors and the CEO's are also not classified as the employers.

According to the researcher's understanding, the control of the company is largely delegated to the CEO's and managing directors. These individuals are accountable to company directors and shareholders. They even get bonuses for performance, and yet they are not employers. They enter into contract with their employers for a specific time and they are expected to reach a certain level of performance. Despite the fact that they are controlling and managing the company activities, they are classified as employees.

These individuals are not controlled and supervised by the company directors and the shareholders, and yet they are regarded as employees. In fact they know more about the company than their respective employers. In most situations, some shareholders know little of matter relating to the performance of the companies. Directors and CEOs are employees on their own right because they can be dismissed on condition of ineffective and inefficient performance.

Secondly, the organisation or integration test is used to consider whether the person is integrated within the organisation. This used to set the clearly defined boundaries which delineate the nature and characteristics that define the employees within organisation. In recent period there is currently a need to introduce what is called the dominant impression test. In this test the courts attach different aspects that are available in employer-employee relationship. This includes the consideration of the intentions put forward by the parties when they entered into the contract. The legitimate expectation of employment by each party is not justifiable when one analysis the contract of employment. This dominant impression test amongst others takes into consideration the importance of control, supervision and integration that are reflected within a contract.

This test possible is holistic in nature. The major problem is that the ‘dominant impression’ like any other depends of the persuasion of an individual, for example; a judge or judges if on appeal or constitutional court,<sup>67</sup> may consider cases based on the influence they get from the environments within which they exist.

The services rendered are at the disposal of the employer and only he or she decided whether such services may be rendered or not. Independent contractors on the other hand are given a package for a certain amount on a fixed time that is determined by those who require their services. They have specific results and are at risk if such results are not achieved and the risk is not there in employment. In this view, independent contractors may lose tenders whereas employees are not affected by the poor service they rendered to the employer.

## **2.5 CONCLUSIONS**

The three tests that are applied by the courts of law in order to determine whether a person is an employee or not are the control test, the organization test, and the dominant impression test.<sup>68</sup> When the labour court of law decide on categorising individuals as employees or non-employees, they take into consideration whether they satisfy the control test and they seek to find out whether the employee and the employer had entered into a contract of employment in which the employee provides the employer with services in exchange of the remunerations; secondly, the organization test which informs them whether the employees are recorded in the employment registers of the organizations as employees and; thirdly, the dominant impression test which indicates that such individuals’ human rights are protected by clearly defined policies of the organizations. This eases the courts’ task and as such enables the courts to say who really employees or non-employees are.

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<sup>67</sup> Van Jaarsveld & van Eck (note 3 above) 51.

<sup>68</sup> Ibid.

## CHAPTER 3

### CATEGORIES OF EMPLOYEES AND NON-EMPLOYEES

#### 3.1 INTRODUCTION

Generally, not all employees are the same. In this regard, an employment relationship may be on casual, temporary or permanent basis. Section 13 of the White Paper on Human Resource Management in the Public Service provides that there are two types of employment contracts in the workplace, namely; the fixed-term contracts and the short-term contracts.<sup>69</sup> According to this legislation, permanent employees are covered in the former contract whereas the temporary employees or casual employees are catered for in the short-term contract. On the other hand, the legislation maintains that dependent contractors, piece-workers and employees of contractors are classified under a non-standard form of employment and are therefore not employees.

#### 3.2 APPLICANT FOR EMPLOYMENT

In terms of the LRA a person is an employee when such a person actually works for another person.<sup>70</sup> The employee must therefore have rendered service to another which services are not that of an independent contractor. In addition to working for another the employee must also 'receive' or 'be entitled to receive' remuneration.<sup>71</sup> The remuneration must correspondingly mean remuneration for work done or tendered to be done. In the circumstances where an offer is made to another and the offer is accepted, a contract of employment may come into existence but the parties to that contract do not enjoy the protection of the Act until such time as the offeree actually commence her performance or at least tenders performance in terms of the contract.<sup>72</sup>

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<sup>69</sup> *The white paper on Human Resource Management in the public service*, 1997.

<sup>70</sup> Grogan J (note above 57 ) 14.

<sup>71</sup> Section 213 of labour Relations Act 66 of 1995.

<sup>72</sup> See note 57 above at 20.

However applicants for employment are protected under section 5 of the LRA only in cases of victimisation.<sup>73</sup> They are also protected under section 9 against unfair discrimination<sup>74</sup> as illustrated in *McPherson v University of Kwazulu-Natal*,<sup>75</sup> the labour court ruled that although the advertised post was for permanent employees, Mr McPherson who was a fixed term contract employee had the right to apply for the post. The decision was taken on the basis that Mr McPherson was ‘rendering services’ to the university and the eligibility requirement was unfair discrimination towards fixed term contract employees.

The position was different in the case of *Whitehead v Woolworths (Pty) Ltd*,<sup>76</sup> the applicant having been interviewed, was offered a job of human resource information and technology generalist. She did not accept the offer because she considered the remuneration offered inadequate. The job was re-advertised amongst the applicants, one Dr Y applied. Whitehead displayed some interest in the position. The employer (Woolworths) indicated to her that there were still applicants to be interviewed before a final decision was made as to who should be offered the position. She was interviewed again and two days later the officer who interviewed her left a message on her voice mail which according to her gave the impression that she had been selected to the position. In a subsequent interview the officer indicated to her that Woolworths was concerned about the fact that she was pregnant. She was then offered a fixed term contract that would have expired on the expected date of her confinement. At that stage the said Dr Y had not been interviewed. Whitehead rejected the offer. Dr Y was appointed to the position after the his interview, Whitehead the claimed that she was unfairly dismissed, alternatively, that she had been unfairly discriminated against on the basis of sex.

The Labour court found that Whitehead could not claim to have been dismissed as she was not an employee as defined in section 213 of the LRA; her claim of an unfair dismissal was dismissed.

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<sup>73</sup> Ibid at 23.

<sup>74</sup> Employment Equity Act 55 of 1998.

<sup>75</sup> (2008) 2 BLLR 170 (LC).

<sup>76</sup> (1999) 20 ILJ 2133 (LC).

However this was not the position in *Jack v Director-General Department of Environmental Affairs*.<sup>77</sup> In this case Jack applied for position and had been told that his application was successful. Two weeks after being informed of success of his application, the department sent him a formal letter of appointment. On the basis of such letter Jack handed a notice to his erstwhile employer. Two days before he was due to commence working the department notified him that his appointment has been revoked. The question before court was whether Jack was an employee at the time of breach, the court considered the definition ‘irrational and constitutionally untenable.’

A similar decision was reached in *Wyeth SA (Pty) Ltd v Manqele and others*,<sup>78</sup> a written contract for the position of sales representative with the benefit of a new company car was entered into between Manqele and Wyeth SA (Pty) Ltd. However, prior to the commencement of work, Wyeth (Pty) Ltd advised him that they were no longer prepared to employ him for reasons of misrepresentation. The court concluded that the definition of an employee in terms of s123 of the LRA can be read to include a person or persons who has or have concluded a contract or contracts of employment or employments of which is or are deferred to a future date or dates. Further held that the construction the counsel for the appellant seeks to place on s 213 it is in the circumstance, untenable as it leads to manifest ambiguity, absurdity and hardship.

In this circumstance, the labour court ruled that Mr Manqele became an employee the moment he accepted the offer of employment. On these grounds, a person who has signed an employment contract but has not yet commenced work is regarded as an employee. Advising such person that he should not commence work is regarded as dismissal.<sup>79</sup>

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<sup>77</sup> (2003) 1 BLLR 28 (LC) at 30.

<sup>78</sup> (2005) 26 ILJ 749 (LAC).

<sup>79</sup> Grogan J *Workplace Law* (2005) at 105.

### 3.3 CASUAL AND TEMPORARY EMPLOYEES

Casual and temporary employees are those who have been taken into employment for finite period of relatively brief duration.<sup>80</sup>

Casual and temporary employees are aware that the relationship between them and the employer will continue for only as long as their services are required. However, casual and temporary employees are entitled to protection provided there is a contract of employment between them and the employer. Section 6(9) of the Employment Equity Act provides protection of unfair discrimination against these employees. The courts as well are prepared to stretch the definition of employee to include casual and temporary employees.<sup>81</sup>

Casual and temporary employees are entitled to some protection as illustrated in the case of *Wood v Nestle (SA) (Pty) Ltd.*<sup>82</sup> The rulings were that casual and temporary employees are expected to observe the rules and regulations that are observed by ordinary employees, they may not be unjustly and unfairly dismissed before the agreed date as provided in section 37 of the BCEA, their wages may not be unduly delayed or withheld and such individuals are entitled to remedies through the CCMA, labour courts and any other institution concerned with labour issues. Section 83 of the BCEA as well clearly categorises temporary and casual workers as employees.

### 3.4 PROBATIONARY EMPLOYEES

Probation can be seen as a testing period before engagement. The purpose of the probation period is not only to assess whether the employee has the skill and ability to perform a job. It also serves to establish the general suitability of employees such as, their ability to relate to customers and colleagues, their diligence, commitment and character,

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<sup>80</sup> Grogan J (see note 57 above) at 30.

<sup>81</sup> Grogan J (see note 57 above ) at 32.

<sup>82</sup> (1996) 17 ILJ 184 (IC) at 56, *NUCCAWU Transnet Ltd t/a Portnet* (2000) 21 ILJ 2288(LC) where the court held that casual employees of the company form a special class of employee, see also *Sibiya and others v Amalgamated Beverages Industries Ltd and others* (2001) BLLR 1171 (LC) the court held that as long as casual and temporary employees are in the employ of the employer, they are employees in the legal sense.

and their ‘compatibility’ with their colleagues supervisors.<sup>83</sup> Section 8(1) of the Code of Good Practice protects probationary employees from being deprived the status of permanent employment at the expiration of the probation period. In terms of this section, an employer may only decide to dismiss an employee or extend the probationary period after the employer has invited the employee to make representations and has considered any representations made. A probationary employee may not be dismissed for unsatisfactory performance unless the employer has:

- a) Given the employee appropriate evaluation, instructions, training, guidance or counselling; and
- b) After a reasonable period of time for improvement, the employee continues to perform unsatisfactorily.

In the case *Buthlezi v Amalgamated Beverages*,<sup>84</sup> the court ruled that during a careful appraisal of the employee’s performance, the employer must discuss its criticism with the employee, warn the employee of the consequences if there is no improvement in his/her part and give a reasonable opportunity to improve. The court suggested that an appraisal of this nature should include advice, guidance and additional training for the improvement of the employee’s performance. In context of this ruling, the employer is made to apply all the measures for the improvement of the employee’s performance before he/she attempts to consider the dismissal option.<sup>85</sup>

However the position probationary employee should not be equated with that of a permanent employee and the employer is entitled to dismiss a probationary employee

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<sup>83</sup> Grogan J (see note 57 above) at 32, see also *Amalgamated Beverages Industries (Pty) Ltd v Jonker* (1993) 14 ILJ 1232 (LAC).

<sup>84</sup> (1993) 9 BLLR 907 (LC) at 915.

<sup>85</sup> Ibid at 61-62, See also *Somyo v Ross Poultry breeders (Pty) Ltd* (1997) 7 BLLR 862(LAC) at 866 C-F, where the court commented, ‘an employer who is concerned about the poor performance of an employee is normally required to appraise the employee’s work performance; to warn the employee that if his/her performance does not improve, he might be dismissed; and to allow, the employee a reasonable opportunity to improve his/her performance.’

provided that it does not do so in a manner that is grossly unfair and arbitrary.<sup>86</sup> This was also illustrated in *Crawford v Grace Hotel*<sup>87</sup>

### 3.5 MANAGING DIRECTORS

Section 78 of the LRA states that an employee is a person who is employed in a workplace, except a senior managerial employee whose contract of employment or status confers the authority to employ and dismiss employees on behalf of the employer, to represent the employee in dealings with the workplace forum, and to determine policy and take decision on behalf of the employer. The LRA draws no distinction between managerial and other employees for the purpose of protection if they are unfairly treated and dismissed.<sup>88</sup> Managing directors are therefore employees to the extent that they serve the company in the capacity of employees.<sup>89</sup> The same is so for those who simultaneously occupy more than one position. In *Van Renen v Rhodes University*,<sup>90</sup> the court held that ‘a university house warden is an employee under the Labour Relations Act despite current appointment as a member of teaching staff.’ This was also illustrated in *August Lapple South Africa (Pty) Ltd v Jarrett & other*.<sup>91</sup>

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<sup>86</sup> *Amalgamated Beverages Industries (Pty) Ltd v Jonker* (1993) 14 ILJ 1232 (LAC).

<sup>87</sup> (2000) 21 ILJ 2315 (CCMA) at 2322, the court held that where an assessment of an employee by the employer is genuine, made in good faith and founded on objectively ascertainable criteria and the assessment converges to the interference by the arbitrator that the employee is not suitable for permanent appointment, the employee may be dismissed. Further held that all employees concerned must have been aware of the employer’s glaring losses and that their responsibility was to protect the employer’s interest and to display reasonable efficiency in their duties in terms of common law.

<sup>88</sup> *Long & others v Chemical Specialities Tvl (Pty) Ltd* (1987) 8 ILJ 523 (LC), see also *Whitcutt v Computer Diagnostics & Engineering (Pty) Ltd* (1987) 8 ILJ 356 (LC).

<sup>89</sup> Section 78 of Labour Relations Act 56 of 1995.

<sup>90</sup> (1989) 10 ILJ 926 (IC).

<sup>91</sup> (2003) 12 BLLR 1194(LC) The applicant contended that the respondent was an employee of LAG not that of LASA, that the mere fact that he was managing director of LASA did not make him an “employee.” The court ruled that the respondent had been a party to a contract of employment with LAG, he was also an “employee” of LASA within the meaning of section 213 of the Labour Relations Act.

## 3.6 CATEGORIES OF NON-EMPLOYEES

### 3.6.1 PRIESTS

In terms of LRA priests are not regarded as employees because they do not have recourse through labour institutions and are as well not protected either by the LRA nor the provision of the Constitution. This was illustrated in *Salvation Army (South Africa Territory v Minister of labour)*,<sup>92</sup> the applicant sought a declaratory order that clergies in its services were not employees for the purpose of the applicable religion. Upon ordainment, clergies or officers sign an undertaking that explicitly excludes an employee or employer relationship as follows:

“I give myself in response to the call of God and on my own free will to the Ministry of the Salvation Army, and in doing so; I acknowledge that as an officer I regard the fundamental nature of my relationship to the Army as spiritual. I understand that there is neither a contract of service or employment nor a legal relationship between me and the Army....I accept that any such allowance is not a wage, salary or payment for services rendered.”

In determining the nature of the relationship which exists between the applicant and its officers, the court had to look at Section 213 of the Act, as amended by section 51 of the Labour Relations Act 42 of 1996, the BCEA and EEA as well as the Skills Development Act and the UIA. The court ruled that the relationship between the applicant and its officers is of a spiritual nature and therefore there is no employer-employee relationship.

The same conclusion was reached in the case of *Church of Province South Africa (Diocese of Cape Town) v CCMA and others*.<sup>93</sup> An ecclesiastic's tribunal found the priest to have committed two acts of misconduct. As a result, his license to practice was revoked for 5 years and this deprived him of any financial benefits. The court considered

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<sup>92</sup> (2004) 12 BLLR 1262 (LC) at 1267.

<sup>93</sup> (2001) 11 BLLR 1212 (LC) at 1218.

if there was a valid employment contract between the church and the priest. After reviewing the contract, the court ruled that there was purely a spiritual relationship between the church and the priest and as a result the church had no financial obligations towards the priest.

However, a different approach was followed in *Schreuder v Nederduitse Gervormeerde Kerk*.<sup>94</sup> The court held that the complainant was an employee of NGK. In this matter, the court found evidence that there was a clear intention for employment. The appointment stated: “*dat ‘n predikant sy of haar.....werkgewer dien ingevolge ‘n dienskontrak soos wat die normalweg verstaan word*, (the priest work according to the contract of service). From this decision, it is clear that some relationships between the church and a priest may be of an employment nature whereas others may be of spiritual nature. Our courts will always, like in any other matter, consider the intentions when parties entered into agreements but not only intentions, also where necessary, approach the problem holistically because the churches like any other institution are governed by the rule of law.

### **3.6.2 MAGISTRATE AND JUDGES**

A magistrate is ‘a judicial officer appointed under section 9 of the Magistrate Court Act<sup>95</sup> read with section 10. In terms of the Act, magistrates should be independent of the public service and their appointment, discipline and discharge should be governed by recommendations of an advisory body consisting of judicial officers.’ In this context therefore, magistrates are not regarded as employees. An appointment by the minister therefore does not confer the status of an employee upon a judicial officer. Likewise, the minister’s role in regulating judicial officers’ conditions of service does not constitute an infringement of the institutional requirement of independence. It is the unique nature of the judiciary that renders it not to be an ‘employee’ of the state. Magistrates are subjected

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<sup>94</sup> (1999) 7 BLLR 713 (LC) at 720.

<sup>95</sup> Magistrates Court Act 32 of 1994.

to the Magistrate Commission as illustrated in the case of *Khanyile v CCMA & others*.<sup>96</sup> The facts of the case were that the applicant, with many years of experience as a magistrate and acting senior magistrate, had applied for a senior magistrate post. The minister, presumably acting on the advice of the Magistrates Commission chose not to promote him to the vacant senior position. The magistrate, who felt he was the most suitable candidate, sought legal action as he felt that the minister had committed an unfair labour practice by not promoting him. The court held that, the only appropriate finding in this matter is that a judicial officer is not an employee in terms of the Labour Relations Act or an officer employed in terms of the Public Service Act and hence is subject to Chapter 8 of the Constitution, the Magistrate Act of 1993, the Regulation for Judicial Officers on the lower courts and the jurisdiction of the Magistrate Commission as established by section 2 of the Magistrate Act of 1993 it follows that neither the CCMA nor the court has jurisdiction regarding the dispute.<sup>97</sup>

It should be noted at this point that magistrates and judges bind the state and government with the decisions they make. They are independent and such independency should not be interfered with. The president of the country in terms of the Constitution appoints them. On being so recommended, the president has no say as to their functionality and is also subject to their decisions. Like presidents, magistrates and judges may be impeached or recalled, but not fired, as they are not employees.<sup>98</sup>

### **3.6.3 INDEPENDENT CONTRACTORS**

The statutory definition of an ‘employee’ requires that a person has an obligation to render personal services in order to be regarded as an employee. A person can therefore ‘work for’ somebody if he/she is employed as an independent contract worker. According

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<sup>96</sup> (2005) 2 BLLR 138 (LC), the court reasoned that, though magistrates are employees their special constitutional role and independence rendered it inappropriate for CCMA Commission to pronounce their performance.

<sup>97</sup> See note 97 above.

<sup>98</sup> Grogan J (see note 57 above) at 37.

to the South African labour law, independent contractors are not classified as employees.<sup>99</sup> This was illustrated in *S v AMCA Services (Pty) Ltd*.<sup>100</sup>

An employee has a positive duty to provide its services in the manner, to the standard, and at the time and place agreed upon. However, with independent contractors, there are no such obligations. The only obligation that the contractor has to deliver the result or product. Independent contractors in essence have no obligation to render personal services and as such can hire other people to do the work. They have specific results that are required from them and run the risk if such results are not achieved.<sup>101</sup>

The person hiring them does not provide independent contractors with tools. Furthermore, the contract is not terminated by the death of the person rendering the service as is the condition in the employer-employee relationship but at the completion or achievement of a specific result,<sup>102</sup> as illustrated in *SA Broadcasting Corporation v McKenzie*.<sup>103</sup> In this case the court ruled that: “the provision of the written agreement reflected the acquisition by the respondent of the fruits of the applicant’s labour rather than the labour itself.”

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<sup>99</sup> Section 213 of Labour Relations Act 66 of 1995.

<sup>100</sup> (1963) 4 SA 637(A), in this case a builder who accepted a contract for the erection of A’s house, and in terms of which he is entitled to employ others to do the actual work. The court held that he cannot be said to be employed by or working for A, even though he may do part of the work himself. The reward he receives under the contract is not personal. It is the contract price from which he may derive a profit by the assistance and labour of others.

<sup>101</sup> Van Jaarsveld & Van Eck (see note 3 above) at 76.

<sup>102</sup> Grogan J. (see note 57 above) at 18.

<sup>103</sup> (1999) 20 ILJ 585 (LAC). In this case the court ruled that: “the provision of the written agreement reflected the acquisition by the respondent of the fruits of the applicant’s labour rather than the labour itself.”

### 3.6.4 ILLEGAL EMPLOYEES

In terms of statutory and common law, an illegal or immoral contract of employment is void and unenforceable. This is illustrated in the case of *Kylie v CCMA*.<sup>104</sup> Kylie was employed in a massage parlour which offered a variety of services. By her own admission, she contravened the Sexual Offences,<sup>105</sup> by performing sexual services for reward. She lived on the premises and was subject to rules and fines. She was dismissed on the basis that she breached the rules and as such approached the CCMA with an unfair dismissal dispute. The court stated that neither the Labour Relations Act 66 of 1995, nor section 23 of the Constitution applied to workers who did not have a valid and enforceable contract of employment. The court further indicated that Kylie's work was prohibited in terms of the Sexual Offences Act,<sup>106</sup> and that her contract of employment was therefore invalid. The CCMA concluded that it had no jurisdiction in this case.

Section 3(a) of the Sexual Offences Act contains a presumption that any person who resides in a brothel is presumed to keep a brothel. Section 20(1) (1A) provides that any person who is over the age of 18 who has "unlawful carnal intercourse" or commits an act of indecency with any other person for reward is guilty of an offence.<sup>107</sup>

In the case of *Discovery Health Ltd v CCMA*,<sup>108</sup> the respondent an Argentinean national presented that he was hired by the applicant, namely; Discovery Health. The company dismissed him upon discovering that he did not have a legal working permit as he alleged upon employment. The CCMA ruled that the respondent was an employee, and that it had a jurisdiction to determine his unfair dismissal dispute. Discovery Health then sought for review and set aside the commissioner's jurisdiction ruling. The court held that the respondent's contract was invalid only because Discovery Health had employed him in breach of section 38(1) of the Immigration Act, however, this did not automatically

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<sup>104</sup> (2008) 9 BLLR 870 (LC) at 881.

<sup>105</sup> Sexual Offences Act 23 of 1957.

<sup>106</sup> Sexual Offence Act 23 of 1957.

<sup>107</sup> Ibid.

<sup>108</sup> (2008) 9 BLLR 870 (ILC) at 639.

disqualify him from the status of an employee. The court therefore ruled that the respondent was an employee of Discovery Health.

## CHAPTER 4

### APPROACHES FROM OTHER JURISDICTIONS

#### 4.1 INTRODUCTION

In this chapter, the researcher defines and conceptualizes the concept of ‘employee’ within other jurisdictions, namely; Britain and Brazil. There are few differences between the British labour law’s definition and that of their counterpart, namely; the South African labour law fraternity. An important aspect that tends to differentiate the two is called employee engagement which gains a more favourable consideration within the British labour law. In this regard, employee engagement will be accordingly defined and discussed into detail in this regard. On the other hand, the Brazilian labour law is promulgated within the Brazilian Federal Constitution and the Consolidation of Labor Laws (CTL) which protect the rights of employees.<sup>109</sup>

#### 4.2 BRITISH APPROACH

##### 4.2.1 DEFINITION OF AN EMPLOYEE WITHIN THE BRITISH LABOUR LAW

In terms of the British labour law, an employee is an individual who has entered into or work under a contract of employment. Such an individual is subjected to what is termed the ‘employment engagement’ which is accordingly specified in that contract of employment. In this regard, therefore, an employee engagement is an expectation which both the employee and the employers regard each other so that the former provides services on behalf of the employer who on the other hand provides him/her with benefits and protection.<sup>110</sup>

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<sup>109</sup> NogueiraD, *Translation Journal: Legal Workshop, Working in Brazil* volume 3, No 2. 2 April 1999.

<sup>110</sup> The British Institute of International and Comparative law: *The International Journal of Comparative Labour Law and Industrial Relations* volume 14, 1988.

In this regard therefore, the most significant aspect in the definition of an employee within the British labour law is that of employee engagement, meaning that he/she is expected to provide the employer with expected benefits. This thus entails that an employee is a person who is singularly engaged into the employer's control and that the employee is expected to receive certain benefits from the employer in return of services rendered. Along this outstanding view therefore, employees' engagement is a 'bottom-up' approach,<sup>111</sup> meaning that he/she is still under the control of the employer per se.

Employee engagement is closely related to organizational outcomes like turnover and productivity.<sup>112</sup> This is subject to a high level of debate within the scholars of the labour law fraternity throughout the globe.

Employee engagement can be simply defined as a link between the way people are managed, employee attitudes and business performance.<sup>113</sup> This is about how people feel when they maximize the business of an employer.

On the other hand, employment engagement is the harnessing of organization members' selves to work their roles, in engagement, people employ and express themselves physically, cognitively and emotionally during role performance.<sup>114</sup> This definition closely resembles what the case between *Woolley v HH Robertson Ltd & others*<sup>115</sup> has encountered. In this case, there were various definitions of the concept 'employee' with regard to how it is viewed within the Employer's Liability (EL) and the Public Liability (PL), namely; (a) the Employer's Liability (EL) defined an employee as follows: is (a) any person under a contract of service or apprenticeship with Insured and any other party and who is borrowed by or hired to the Insured, (b) any labour master or person supplied by him, (c) any person supplied by a labour only subcontractor, (d) any self-employed

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<sup>111</sup> William H, Macey, and Schneider B, *Employee Engagement: tools for analysis, practice, and competitive advantage* (2009) at 4.

<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid at 4.

<sup>115</sup> [2003] All ER (D) 315.

person working for the Insured, (e) any person supplied to the insured under a contract or agreement the terms of which deem such person to be in the employment of the Insured for the duration of such contract or agreement.<sup>116</sup>

On the other hand, the concept of ‘employee’ is defined through the analogy of the British labour law fraternity which is subjected to the requirements of the Public Liability (PL). in this regard the EL and the PL almost have similar definitions of the employee with the later having the following differences: employee is (a) any person who is engaged under a contract of service with the Insured, and (b) any person supplied to, hired or borrowed by the Insured in the course of business, including but not limited to labour masters or persons supplied by them, labour only subcontractors and self-employed persons.<sup>117</sup>

Persons hired or borrowed by the insured must still be covered or protected against less favourable treatment when they are doing the business on behalf of the Insured. According to the definition of the employee within the British labour law, he/she is an individual who should be protected from occupational injuries and other health hazards within the workplace situation. This was indicated in a case, *Woolley v HH Robertson* which is recent within the British labour law fraternity. This case is an indication that even when a person is working under a subcontract provided to the principal contractor, he and the contractors must be regarded as employees in that the court ruled that they were employed and controlled by the employer of the first contractor because they were persons who ‘procure and supply labour to an employer.’

The dichotomy between the self-employed being excluded from labour law and employees being fully covered by labour law as maintained by the European labour law has never been generally accepted as a satisfactory solution.<sup>118</sup> The British labour law court ruled in *Woolley v HH Robertson* that these employees must be covered since they are doing the work that benefits the employer’s business. Even within the South African

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<sup>116</sup> *Woolley v HH Robertson Ltd & others* (see note 115 above).

<sup>117</sup> *Ibid.*

<sup>118</sup> Van Jaarsveld & van Eck (see note 3 above) at 66.

labour law, certain individuals who are self-employed are covered by some rules and principles of the labour law. They however are not covered by the labour law as a whole in that they enjoy protection envisaged by some of its sections, for example, such employees are not protected against dismissal.<sup>119</sup>

## **4.2.2 TYPES OF EMPLOYEES**

According to the British labour law, there are certain categories of individuals who should be classified as employees. The researcher would not enumerate all of these categories in this study, but she selects to identify and discuss the few, namely; the self-employed, employees of the employment agencies and the fixed-term employees.

### **4.2.2.1 SELF-EMPLOYED WORKERS**

The first type of employee mentioned within the British labour law is what was termed the self-employed employees.

Personal freedom is the main characteristic of self-employed<sup>120</sup> in that an employee does not rely on the supervision and control of the other person, namely; the employer. Employees who fall within this category of self-employment provide customers with quality service delivery in order to maximise their profit.

The concept of self-employed employee requires competence, knowledge, skills and attitudes in the part of individuals, so that the lack of such attributes will render the employee's business poor performance and a loss of profit. Employees in this regard are expected to be highly-skilled as against those who waste time and resources of the employer. Self-employed employees require less time on supervision because they tend to be self-driven and self-reliant.<sup>121</sup>

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<sup>119</sup> Grogan J (see note 57 above) at 107.

<sup>120</sup> Grogan J (see note 79 above) 121.

<sup>121</sup> Ibid.

The self-employed employee falls beyond the traditional view of someone who is obliged to work for somebody else on the basis of a private contract on a relationship based upon personal subordination.

Since the self-employed workers enjoy some certain levels of personal freedom, this entails that they are not entirely subject to the ‘master-employee’ relationship. In this context therefore, the judge was of the opinion that the concept of ‘master’ in relation to the definition of employee is outdated because it has an archaic or Victorian ring to it.<sup>122</sup> But the ‘master-employee’ connotation of the definition of an employee within the British labour law if concentrate within the person (who is a master) who procures and supplies labour to another, namely; an employee and still controls the latter by supervising him/her to an extent of supplying them with the all related aspects of health and safety and specialist tools, parts and materials.<sup>123</sup>

#### **4.2.2.2 EMPLOYEES OF AN EMPLOYMENT AGENCY**

The British labour law has another type of employees, namely; the employee of an employee agent.

An agent worker whose contract of employment is with an employment agency but who is supplied to work for a client of the agency may be classified as an employee of the employment agency, an employee of the client of the employment agency, and classified as self-employed.<sup>124</sup>

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<sup>122</sup> *Woolley v HH Robertson Ltd & others* (see note 115 above) at 318.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*

#### 4.2.2.3 FIXED-TERM WORKERS

The British labour law classifies the fixed-term workers as employees. Like their South Africa counterparts, they regard the fixed-term workers as having the same minimum rights as permanent workers.

In order for one to be classified as a fixed-term employee, he/she must meet the following two conditions: (i) they must have an employment contract with the business they work for, and (ii) their employment contract must be 'fixed-term,' meaning it must end on a particular date after a certain event or on completion of a task.<sup>125</sup>

The following are the examples of employees who are categorized as fixed-term employees, seasonal or casual staff who are only engaged to work for a period not exceeding six months during a peak period for example, agricultural workers or seasonal shop workers, a specialist employee taken on for the duration of a project and someone employed to cover another employee's maternity leave.<sup>126</sup>

- **PROTECTION OF FIXED-TERM WORKERS AGAINST LESS FAVOURABLE TREATMENT**

Fixed-term employees enjoy the same occupational protection as those enjoyed by the permanent employees. It is warned that employers must not treat fixed-term employees less favourably than permanent employees doing the same job unless there is good reason to do so<sup>127</sup> this was illustrated in *Webley v Department of Works and pensions*.<sup>128</sup>

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<sup>125</sup> Smith I, Thomas G, *Smith & Woods Employment Law* (2007) at 81.

<sup>126</sup> Ibid at 86.

<sup>127</sup> Ibid at 89.

<sup>128</sup> [2005] IRLR 288 CA, the court stated that fixed-term employees have the right not to be less favourably treated in relation to any period of service Qualification for a condition of service, the opportunity to receive training and the opportunity to secure any permanent position in the establishment. With regard to the last, the employee has the right to be informed by the employer of available vacancies in the establishment by writing or other form of reasonable notification.

- **RIGHTS OF FIXED-TERM WORKERS**

The following rights are accorded the fixed-term employees, (i) the same pay and conditions, (ii) the same or equivalent benefit package, (iii) access to occupational pension scheme when the fixed-term contract is for more than two years, (iv) the fixed-term employees must be informed about permanent employment opportunities in the organization, and (v) the fixed-term employees must be protected against redundancy or dismissal because they are fixed-term.<sup>129</sup>

The employers are according to the British labour law expected to consider whether it is possible to offer fixed-term employees certain benefits in proportion to the time period they will be working for them, this also known as pro rata.<sup>130</sup>

- **PROCEDURES FOLLOWED WHEN THE FIXED-TERM EMPLOYEES FEEL THE ARE UNFAIRLY TREATED**

The fixed-term employees have the same rights that are enjoyed by the permanent employees. In case they feel they were unfairly treated by their respective employers, they should raise a complaint which is followed in a sequence of steps as follows: (i) they firstly raise the complain with their respective manager and/ or human resource contact, if that does not provide them with positive results, (ii) they must secondly as their employers for a written statement explaining why they are treating them less favourably, (iii) the fixed-term employees will then move to another step of making a written complaint under their respective employer's standard grievance procedure, and (iv) lastly, if the fixed-term employees could not resolve the matter with their respective employers, they should complain to an Employment Tribunal.<sup>131</sup>

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<sup>129</sup>Smith I (See note 125 above) at 84.

<sup>130</sup> Ibid at 86.

<sup>131</sup> Ibid at 87.

- **OBJECTIVE JUSTIFICATION OF LESS FAVOURABLE TREATMENT**

Less favourable treatment of fixed-term employees is only allowed when the employer can show that there is a good reason to do so, this is known as ‘objective justification’. Otherwise less favourable treatment of fixed-term employees can be objectively justified if it can be shown that (i) it is aimed at achieving a legitimate objective of the organization, (ii) it is shown that there is a dire necessity to achieve that organizational objective, and (iii) that the less favourable treatment is an appropriate way to achieve that organizational objective.<sup>132</sup>

In this section of the chapter, the research study indicated that even when some of the employees are not categorized as the permanent employees within an enterprise, they can according to the British labour law be covered and protected against certain unfavourable work conditions. The British labour law fraternity regards anyone who is ‘engaged’ in the business of the enterprise as an important element since the tasks they perform are to the benefit of the enterprise.

Employee engagement has become a hot topic in recent years in that there is no consistency in its definition and as such this condition presents a confusion of what this concept is all about. Employment engagement is about employees’ beliefs about the organization, its leaders (employees having the positive and negative attitudes towards the leaders and the organization as a whole) and the working conditions. Employment engagement is simply a ‘passion for work.’<sup>133</sup>

On the other hand, employee engagement can be viewed as a job satisfaction, organizational commitment, psychological empowerment and job involvement.<sup>134</sup> Employee engagement includes a variety of important aspects such as the combination of

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<sup>132</sup> Smith I( See note 125 above) at 89.

<sup>133</sup> Mackintosh A & Lehman K, *Integrating UK and European Social Policy: the complexity of Europeanisation* (2009) at 124.

<sup>134</sup> Macey & Schneider B (note 111 above) at 17.

commitment, loyalty, productivity and ownership.<sup>135</sup> In a nutshell, it must be concluded that employee engagement is a factor that drives certain individuals to work even harder in order to attain the goal and objectives of the organization.

#### **4.2.3 CONCEPTUALISATION OF EMPLOYEE ENGAGEMENT**

Employee engagement is an aspect that can be used for the purpose of measuring whether an individual, such as a casual worker, a self-employed and others who performed tasks on behalf of an entity in the manner he/she can be provided with protection and accessed certain benefits that are enjoyed by the traditional individuals who are categorized as permanent worker.

Employee engagement is a desirable condition, has an organizational purpose and connotes involvement, commitment, passion, enthusiasm, focused effort and energy.<sup>136</sup> This indicates that once individuals are adequately engaged in the tasks they perform for an organization, they can be classified as employees in that whatever they do benefits the organization in return.

The concept of employee engagement encompasses emotions and behaviors in part of the employees. The emotional state of people is their happiness when they feel they have to continue working for the benefit of an organization. On the other hand the behavioural state is defined by how individuals perform their respective tasks, the manner in which they save the organizational resources and even treating customers in a way that will make business grow.

Employee engagement is closely associated with satisfaction. In this context therefore, employee engagement and the satisfaction of employees consist of the following attributes: (i) job involvement, (ii) organizational commitment, resource availability, (iv) opportunity for development, and (v) clarity of expectations.<sup>137</sup>

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<sup>135</sup> Ibid at 20.

<sup>136</sup> Macey & Schneider B, (see note 111 above) at 7.

<sup>137</sup> Ibid at 8.

This shows that, within the British labour law fraternity, there are individuals whose personal freedom is limited by means of subordination to the employer, and those who are free from this subordination.

This also shows that within the British labour law fraternity, employee engagement should include all the aspects under which people work including the basic loyalty to the employer that, is the willingness to invest oneself and expend one's discretionary effort to help the employer succeed.<sup>138</sup> In the context of this view therefore, levels of employee engagement nationally were low, but that high levels of engagement were associated with a host of positive outcomes for individuals and their employers that, is the value of employee engagement.<sup>139</sup>

Employee engagement is advantageous in that engaged employees have been found to outperform their disengaged counterparts, because there are more disengaged employees than there are engaged employees in the organizations today.<sup>140</sup> This analogy seems to encourage that employers within other labour law fraternities, including the South African labour law should consider all individuals who by means of their engagement tend to drive the enterprises or organizations towards the attainment of their respective goals and objectives as the most important elements, thus providing them with favourable treatment. Employee engagement has been identified as the most important element that is closely associated with good business.

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<sup>138</sup> Macey & Schneider B (see note 111 above) at 8.

<sup>139</sup> Ibid at 10.

<sup>140</sup> Ibid.

#### **4.2.4 LIMITATIONS WITH REGARDS TO THE INTRODUCTION OF EMPLOYEE ENGAGEMENT WITHIN THE BRITISH LABOUR LAW**

Perhaps the theoretical approach of considering individuals within the fraternity of ‘employee engagement’ could be the most effective measurement the labour courts could apply in their task of deciding whether a person is indeed an employee or a non-employee. This approach is still associated with numerous problems because it is still new within the literature review and research practice worldwide. To support this, employee engagement is currently receiving less consideration in that there are more employees who are disengaged or not engaged than there are engaged employees.<sup>141</sup> This is against an analogy which entails that employee engagement is a dominant source of competitive advantage in that there has been identified a strong link between employee engagement, employee performance and business outcomes. In this regard, the approach should gain an utmost consideration in most countries’ labour law courts when they are faced with the challenge of making informed decisions.

### **4.3 THE BRAZILIAN LABOUR LAW**

The Brazilian labour law is based on the Consolidation of Labour Law also called the CLT that was masterminded by a dictator leader called Getulio Vargas in 1943.<sup>142</sup> This legislation is outdated in the nature that will be discussed in this study in detail.

#### **4.3.1 THE CONSOLIDATION OF LABOR LAW (CTL)**

The CTL is the Brazilian labour law. The CLT was in existence for the past seven decades (70 years) although the Brazilian legal and political elements regularly and continually update it. This enterprise is outdated. The C.L.T is outdated as it was only promulgated way back in 1943 by a dictator president Getulio Vargas when the Brazilian

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<sup>141</sup> Macey & Schneider B (note 111 above) at 11.

<sup>142</sup> Dennis Campbell *comparative law year book of international business* (2007) at 430.

society was developing from rural to urban.<sup>143</sup> The C.L.T. was initially developed as a mouthpiece to protect the rights of the employees (workers) then. Today, it is outdated in that many developments have taken place. The recent developments that are not considered by the C.L.T. are such as urbanization, demographics, technology and others. The C.L.T consolidates the Labour Justice in Brazil. In this regard, there is therefore a high need for the CLT to be developed in order to meet the recent challenges within the Brazilian society.<sup>144</sup>

### **4.3.2 THE BRAZILIAN FEDERAL CONSTITUTION**

The Brazilian Federal Constitution according to its labour laws is aimed at protecting the human rights of employees, namely; to improve their social conditions including the labour rights.<sup>145</sup> This Constitution takes into consideration the importance of an employment contract entered into between the employees and their respective employers. The limitation in the Brazilian Federal Constitution with regards to the protection of employees from all forms of discrimination is that the legislation does not specifically state how this can be maintained. On the other hand, the Constitution maintains that the labour courts in Brazil are a separate set branch of the Brazilian judiciary, governed by a separate set of rules similar to those applicable to civil courts.<sup>146</sup> The judiciary deals with matters affecting the relationship between employees and their respective employers. In Brazil, the Labour Justice applies, namely; that the judge litigates between two disputants as the employee and the employer, respectively.<sup>147</sup>

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<sup>143</sup> Shahid Amjad Chuadbry , Gary James Reid, & Waleed Haider Malik, *Civil Service Reform in Latina American and Caribbean* (1994) at 129.

<sup>144</sup> Dennis Campbell (See note 142 above) at 432.

<sup>145</sup> Shahid Amjad, (see note 143 above) 131.

<sup>146</sup> Dennis Campbell, (see note 142 above) 432.

<sup>147</sup> Shahid Amjad, (see note 143 above) at 132.

### **4.3.3 EMPLOYEE, DEFINED WITHIN THE BRAZILIAN LABOUR LAW**

If someone (employer) regards another person as an employee, then the latter is employee.<sup>148</sup> According to the Brazilian labour law, an employee can simply be defined as a person who is hired, salaried and a wage earner.<sup>149</sup> It can also mean that an employee is differentiated from the independent contractor who is not covered by the labour legislation, the independent contractor being an individual who has independence to perform the work and is not subordinate to the employer's directives and regulations.<sup>150</sup>

Another definition of an employee within the Brazilian labour law can be regarded as every individual that personally renders services on a non-eventual basis (continuity) under employer subordination which includes the obedience to rules and orders given by the employer and receives a salary. The concept of subordination suggests that the employee is under the control of the employer otherwise if he/she cannot be controlled by the latter then the employer is free to terminate their employment contract.

### **4.3.4 TYPES OF EMPLOYEES**

According to the Brazilian labour law, there are various categories of individuals who can be classified as employees, such as women, minors and nationals.<sup>151</sup> The Brazilian labour law has an advantage of catering for people coming from other countries whereas on the other hand it also considers minors who are involved in the music, theater and so on as employees.

Another measurement used to consider whether individuals are employees in their own regard within the Brazilian labour law is their 'indefinite term.' This concept means that

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<sup>148</sup> Dennis Campbell , (see note 142 above) at 433.

<sup>149</sup> Jane Moffatt *Employment law* (2007) at 137.

<sup>150</sup> Ibid.

<sup>151</sup> Shahid Amjad, (see note 143 above) at 132.

individuals are engaged in their employment for a long time. In this instance, the agreement for an indefinite term must be in writing.<sup>152</sup>

Casual employees were also recognized within the Brazilian labour law approach in that Jane Moffatt contends that they should be categorized as definite term employees. These employees are treated by means of the following important conditions according to the author: (i) the maximum of two years provided that the nature of the work justifies the transitory nature, or if the contract of employment is for the performance of temporary business activities, and (ii) a probationary or trial period cannot exceed 90 days.<sup>153</sup>

The employees who are hired by someone else rather than the employer and treated as such are employees in their own rights.<sup>154</sup>

The Brazilian labour law considers an importance of the employment contract that is signed between to parties, namely; the employee and the employer which the authorities regard as a common procedure and a good practice.<sup>155</sup> The employment contract is also highly regarded within the South African labour law fraternity.<sup>156</sup> An employee within the Brazilian labour law can be regard as individuals who have entered into an employment contract with their respective employers.

In Brazil, the employment contracts are determined by two most important legal pieces, namely; the Brazilian Federal Constitution and the Consolidation of Labour Laws (C.L.T.).

The Brazilian labour law does not concern itself in the enforcement of the legislation necessary to protect employees from victimization by their respective employers, instead it puts forward a drawing line that the employment contract entered between the two

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<sup>152</sup> Jane Moffatt, (see note above 149) at 138.

<sup>153</sup> Ibid.

<sup>154</sup> Dennis Campbell (see note 142 above) at 434.

<sup>155</sup> Jane Moffatt, (see note 149 above) 139.

<sup>156</sup> Nel PS, (see note 4 above) at 59.

parties must maintain that ‘there is no breach to the legal disposition about labour protection.’<sup>157</sup>

The Brazilian labour law denounces the discrimination within the employment situation. Likewise their South Africa counterpart, the Brazilian legislation enshrines the protection of employees against all forms of discrimination in its Brazilian Federal Constitution. Accordingly, discrimination in the workplace such as any difference in salary or unequal treatment in relation to recruitment and employment is prohibited.<sup>158</sup>

#### 4.4 CONCLUSIONS

The British labour law concentrates much on what is termed the self-employed rather than on an employee as compared to the South African labour legislation.<sup>159</sup> The British labour law has a strong contribution in that it tends to downplay the personal subordination characteristic which violates the freedom of the employees that is available within the traditional labour practice in other developing and developed countries, including South Africa. The British labour law on the other hand fails to protect all the rights of employees within the labour market, whereas the South African labour law does. The British labour law considers the importance of the concept of employee engagement into classifying individuals as employees and non-employees. In this study, the researcher identified the self-employed, employees hired by employment agencies and the fixed-term as types of employees. On the other hand, the Brazilian labour law is enshrined within the Brazilian Federal Constitution and the Consolidation of Labor Laws (CLT), both legislations aimed at the protection of employees’ rights. Otherwise all the jurisdictions, namely; the South Africa, the Britain and the Brazil consider the casual workers and independent contractors as employees and non-employees, respectively.<sup>160</sup>

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<sup>157</sup> Shahid Amjad, (see note 143 above) 132.

<sup>158</sup> Jane Moffatt, (see note 149 above) 140.

<sup>159</sup> Neal A, *European Labour Law and Social Policy: Cases and Materials* (2002) at 115.

<sup>160</sup> *Ibid* at 292.

## CHAPTER 5

### CONCLUSIONS AND RECOMMENDATIONS

#### 5.1 INTRODUCTION

In the previous chapters, the researcher defined and conceptualized the concept of ‘employment’ according to both the South African labour law and its respective counterparts, namely; Europe, Sweden and Mexico. The most important factors that emerged during the definitions and descriptions are that employees are individuals who accept the job offer which is contained within an agreement they enter into with the employers in what is referred to as a contract of employment.<sup>161</sup> Basically, all the diverse definitions and descriptions identified in this study clearly showed that employees are individuals whose rights must be protected within the labour market fraternity.<sup>162</sup>

#### 5.2 CONCLUSIONS

Certain conclusions and recommendations regarding the identification and selection of the most important aspects that are relevant for inclusion in the definition of a concept employee within the South African labour law fraternity. The definitions stated in both the LRA and BCEA are identical in nature in that they tend to share similar characteristics. Statutory definition of this concept should at least be revisited for the purpose of reformulating a single definition of an employee that enable the tribunals, courts and labour lawyers to adequately consider and make informed decisions regarding the protection of the rights of employees.

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<sup>161</sup> *Mexican Labour and Social Security Laws*. 1972.

<sup>162</sup> Grogan J (see note 79 above) at 106.

### 5.3 RECOMMENDATIONS

There are several aspects which the courts of law within the South African labour law fraternity should consider in order to decide on cases and also categorize individuals as employees and non-employees. Some of the most important aspects are recommended in this study as follows:

- Employees are all individuals who are in the employment basis of their respective employers and work within the workplace of the employer,<sup>163</sup>
- Employees are individuals who have signed a contract of employment with the employer,<sup>164</sup>
- Employees are individuals who are not in any way categorized as independent contractors,<sup>165</sup>
- Employees are individuals who render services on behalf of the employers who have the right to supervise their activities,<sup>166</sup>
- Employees are individuals who are protected from occupational injuries and diseases whilst they are within the workplace, and are accordingly remunerated for the services they render to the employer,<sup>167</sup>
- Employees can become certain entities other than individuals who are defined as such by the Minister of Finance,<sup>168</sup>

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<sup>163</sup> Bendix S (see note 2above) at 123.

<sup>164</sup> Ibid at 124.

<sup>165</sup> Labour Relations Act 66 of 1995.

<sup>166</sup> Occupational Health and Safety Act 85 of 1993.

<sup>167</sup> Compensation for Occupational Injuries and Diseases Act 130 of 1993.

<sup>168</sup> Unemployment Insurance Act 63 of 2001.

- Employees are individuals with human rights who can exercise these rights by means of affiliation to the trade unions of their choice,<sup>169</sup> and
- Employees can be casual workers (temporary workers),<sup>170</sup> applicants for employment,<sup>171</sup> and managing directors.<sup>172</sup>

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<sup>169</sup> Grogan J, (see note 79 above) 107.

<sup>170</sup> Ibid.

<sup>171</sup> Bendix S, (see note 2 above) at 103.

<sup>172</sup> Grogan J (see note 79 above) at 107.

## **BIBLIOGRAPHY**

### **BOOKS**

- Alan c Neal. European Labour Law and Social Policy: Cases & Materials. (2002) 3<sup>rd</sup> ed
- Bendix, S. Industrial relations in South Africa. (2006) 4<sup>th</sup> ed
- Dennis Campbell. Comparative law year book of international business (2007) 4<sup>th</sup> ed
- Gibson JTR, Comrie RG, Visser C, Pretorius JT & Carl Mischke. South African Mercantile & Company law. (1997) 7<sup>th</sup> ed.
- Grogan J. Dismissal, Discrimination& Unfair Labour Practice (2007) 2<sup>nd</sup> ed
- Grogan, J. *Workplace law* (2005) 8<sup>th</sup> ed
- Jane Moffatt Employment Law (2007)
- Mackintosh A& Lehman K. Integrating UK & European Social Policy (2009)
- Nel PS. South African employment relations: Theory & practice (2002) 2<sup>nd</sup> ed
- Shahid Amjad Chuadbry, Gary James Reid & Waleed Haider Malik. Civil services Reform in Latin American and Carribean (1994)
- Smith I, Thomas G. Smith & Woods Employment Law (2007)
- Swanepoel, BJ. The management of employment relations: Organisational level perspectives (2004)
- Van Jaarsveld, JF & van Ecks, S. *Principles of labour law*. (2002)
- William H, Macey & Schneider B. Employee Engagement: Tools for Analysis, Practice and Comparative Advantage

## ARTICLES

Albertyn Cathi & Goldblati Beth. Facing the challenge of transformation: Difficulties in the Development of Indigenous Jurisprudence of Equity. *South African Journal on Human Rights* 1998

Blanplain, R. Labour law in motion: *Diversification of the labour force & the scope of labour law and the notion of employee* 2005.

British Institute of International and Comparative Law: *The International Journal of Comparative Labour Law and Industrial Relations*. 1988 Volume 4 .

Bureau of National Affairs. *BNA Labour Relations Reference Manual* 1945.

Fagan, A. *Dignity and unfair discrimination: A value misplaced and a rights* 1997.

ILO Equality in Employment and Occupation. 1998.

International Labour Office. *Bureau of Library and Information Services. International Labour Documentation* 1999 Volume 3.

Leuterpacht, E. *International Law Report*, 1942 Volume 89.

Naidu, M. The inherent job requirement defence: Lessons from abroad. *South African Mercantile Law Journal* 1998

Neal A. *European labour law and social policy: Cases and material* 2002 Volume 1.

Nogueira, D. Working in Brazil. *Translation Journal. Legal Workshop* 1999 Volume 3, No. 2.

*North Western Reporter*. Second series. N.W. Cases argued and determined in court. 1997 Volume 566.

Van Niekerk, A. Discrimination in selection and recruitment: An applicant's rights to equality of treatment. *Contemporary Labour Law* 1999 Volume 4 No. 10.

## **THE STATUTES**

Basic Conditions of Employment Act 75 of 1997

Compensation for Occupational Injuries and Diseases Act 130 of 1993

Defence Act 44 of 1957

Employment Equity Act 55 of 1998

Income Tax Act 58 of 1962

Labour Relations Act 56 of 1995

Magistrates Court Act 90 of 1993

Magistrates Court Act 32 of 1944

Manpower Training Amendment Act 39 of 1990

Occupation for Health and Safety Act 85 of 1993

Police Act, 1995 Act 68 of 1995

Skills Development Act 97 of 1998

The Constitution of the Republic of South Africa Act 108 of 1996

Unemployment Insurance 63 of 2001

## TABLE OF CASES

*Amalgamated Beverages v Jonker* (1993) 14 ILJ 1232 (LC)

*Andreanis v Department of Health* (2006) 5 BLLR 461 (PHWSBC)

*August Laple South Africa (Pty) Ltd v Jarrett & others* (2000) 12  
BLLR 1194 (LC)

*Buthelezi v Amalgamated Beverage* (1993) 9 BLLR 907 (LC)

*Cartin v CCMA & others* (2004) 8 BLLR 748 (LC)

*Church of Province of South Africa (Diocese of Cape Town) v CCMA &  
others* (2001) 11 BLLR 1212 (LC)

*Colonial Mutual Life Assurance Society v MacDonald* 1931 AD 412

*Crawford v Grace Hotel* (2002) 21 ILJ (CCMA)

*Denel (Pty) Ltd v Gerbert* (2005) 9 BLLR 849 (LAC)

*Department of Correctional Services v Van Vuuren* (1999) 20 ILJ

*Discovery Health Limited v CCMA & others (JR 2877/06)* (2008) LC

*Jack v Director-General Department of Environmental Affairs* (2003) 1 BLLR 28 (LC)

*Khanyile v CCMA & others* (2005) BLLR 138 (LC)

*Kylie v CCMA* (2008) 9 BLLR 870 (LC)

*LAD Brokers (Pty) Ltd v Mandla (2001) 9 BLLR 993 (LAC)*

*Linda Erasmus Properties Enterprise (Pty) Ltd v Mhlongo and others (2007)  
6 BLLR 530 LC*

*Long & others v Chemecal Specialities Tyl (Pty) Ltd (1987) 8 ILJ 523(LC)*

*McPherson V University of Kwazulu-Natal & others (2008) 2 BLLR  
170 (LC)*

*Mandla v LAD Brokers (Pty) Ltd (2000) 9 BLLR 1047 (LC)*

*McLaughlin v GNK Mills (Pty) Ltd (1986) 7 ILJ (IC)*

*Medical Association of S v Minister of Health (1970) 18 ILJ 528 (LC)*

*NUCCAWU v Transnet t/a Portnet (2000) 21 ILJ 2288 (LC)*

*Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB  
1976 (4) SA 446 (A)*

*R v AMCA Services & others 1959 (4) SA 207 (A)*

*R v AMCA Services & others 1962 (4) SA 537 (A)*

*R v Feun 1954 (1) SA 58 (T)*

*R v Seligon 1926 TPD 27*

*Rodrigues & others v Alexis & others 1978 (4) SA 834 (AD)*

*S v AMCA 1963 (4) SA 637 (A)*

*SA Broadcasting Corporation v McKenzie (1999) 20 ILJ 585 (LAC)*

*Salvation Army of South African Territory v Minister of Labour (2004) 12 BLLR 1262 (LC)*

*Schreuder v Nederduits Gerformeerde Kerk Wilgespruit & others (1999) 7 BLLR 713 (LC)*

*Sibiya & others v Amalgamated Beverages Industries Ltd and others (2001) 10 BLLR 1171 (LC)*

*Smit v Workmen's Compensation Commissioner (1979) 1 SA 51 (A)*

*Somyo v Ross Poultry Breeders (Pty) Ltd (1997) 7 BLLR 862 (LAC)*

*Van Renen v Rhodes University (1989) 10 ILJ 926 (LC)*

*Webley v Department of Works & Pansions [2005] IRLR 288 CA*

*Whitehead v Woolworths (Pty) Ltd (1999) 20 ILJ 2133 (LC)*

*Wood v Nestle (SA) (Pty) Ltd (1996) 17 ILJ 184 (LC)*

*Woolley v HH Robertson Ltd & others [2003] AII ER (D) 315*

*Woolworths v Whitehead (2002) 6 BLLR 640 (LAC)*

*Wyeth SA (Pty) Ltd v Mangele and others (2003) 26 ILJ 749 (LC)*