

**THE DEFINITION OF AN “EMPLOYEE” UNDER LABOUR LEGISLATION: AN ELUSIVE
CONCEPT**

by

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submitted in accordance with the requirements
for the degree of

MASTER OF LAWS - WITH SPECIALISATION IN COMMERCIAL LAW

at the

UNIVERSITY OF SOUTH AFRICA

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NOVEMBER 2015

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I, **TAPIWA GIVEMORE KASUSO** declare that my limited dissertation entitled **THE DEFINITION OF AN “EMPLOYEE” UNDER LABOUR LEGISLATION: AN ELUSIVE CONCEPT** is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

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CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND TO THE STUDY

The protections afforded by labour legislation apply only to those persons who fall within the ambit of an “employee” as defined in the LRA 66 of 1995.¹ Apart from excluding members of the National Defence Force and the State Security Agency², the LRA does not apply to workers who are not defined as employees in terms of the LRA. An employee is defined in section 213 of the LRA as,

- (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 carrying on or conducting the business of an employer;
and “employed” and “employment” have meanings corresponding to that of “employee”³.

Part (a) of the definition is rooted in the common law contract of employment, whilst part (b) provides an inclusion to the effect that the person must assist another person in any other manner to conduct his or her business. The LRA explicitly excludes independent contractors from the ambit of protection of labour legislation. It draws the line between employment and other commercial relationships but does not define the term independent contractor.

Though the definition of employee appears banal and simplistic, within it, it conceals a complex debate on how to distinguish an employee from an independent contractor. The definition does not state how to draw the line between employment and independent contracting. As argued by Grogan,⁴ the definition begs as many questions as raised by the common law definition which has been there since time immemorial. Others have argued that though part (b) of the definition would indicate “*an intention to extend the definition beyond common law employees, it has been interpreted narrowly*”.⁵ Thus, debate has centred on whether the definition must be interpreted narrowly or ebulliently.⁶ The erosion of the archetypal employee has resulted in certain groups of

¹ Such protections include an array of labour rights such as the right against unfair dismissal, right against unfair labour practices and social security benefits.

² Section 2 of the LRA.

³ An identical definition of employee is also found in sections 1 of the BCEA, EEA and SDA.

⁴ Grogan J, *Workplace Law* (2011) 16.

⁵ Benjamin P, “An accident of history: Who is (and who should be) an employee under South African labour law,” (2004) 25 *ILJ* 787 at 789 (hereinafter “An accident of history”).

⁶ Du Toit D *et al*, “*Labour Relations Law: A Comprehensive Guide*,” (2006) 74.

workers who are employees for purposes of labour legislation escaping regulation. This is so since the definition of an employee is premised on the setaceous distinction between a contract of employment and that of an independent contractor. This is the same definition which was applicable thirty four years ago which was described by Mureinik⁷ as resulting in labour statutes occupying “*a loose and ill-defined ground*”. If a similar definition was not clear thirty four years ago, then the changed nature of employment in modern day world of work poses significant challenges.

Historically, our courts developed a number of tests,⁸ to identify an employee in indecipherable cases. These tests include the control test, integration test, economic reality test and dominant impression test. Regrettably, these tests have struggled to adequately capture the diversity of the labour market and the atypical forms of employment arising today. Inconsistencies in their application have led to the absence of a unified approach when determining whether one is an employee or not.⁹ This has resulted in courts looking beyond the wording of employment contracts and examining the underlying reality in a bid to determine whether one is an employee or not. Such an approach has resulted in workers who are not employees in the full contractual sense but because their employment mirrors that of persons under a contract of employment being classified as employees for purposes of labour legislation.¹⁰ Despite such a purposive interpretation, it has been argued by Benjamin¹¹ that “*the jurisprudential basis for identifying reality of an employment relationship in our law remains unclear*”. The courts have not yet developed an adequate policy driven approach in dealing with what has become a significant challenge to the efficacy of employment legislation.

In 2002 the legislature fashioned responses to these problems of interpretation and disguised employment through amendments to the LRA and the BCEA, by introducing a rebuttable presumption of employment in sections 200A of the LRA and 83A of the BCEA. As noted by Van

⁷ Mureinik E, “The Contract of Service: An Easy Test for Hard Cases,” (1980) 97 *SALJ* 246 at 58.

⁸ See e.g. *Liberty Life Association of Africa Ltd v Niselow* (1996) 17 *ILJ* 673 (LAC); *SABC v McKenzie* (1999) 20 *ILJ* 585(LAC).

⁹ Zondo AJ in *Medical Association of South Africa v Minister of Health* (1997) 18 *ILJ* 528 (LC) at 536.

¹⁰ See *SITA v CCMA* (2008) 7 *BLLR* 611 (LAC); *Murray v Minister of Defence* [2008] 6 *BLLR* 513 (SCA).

¹¹ Benjamin P “An accident of history” at 794.

Niekerk¹² the presumption does not change the statutory definition of an employee, it merely codifies the common law tests. In 2006 NEDLAC issued a code titled, “Code of Good Practice: Who is an employee? (“the Code”). The purpose of the Code is to promote clarity and certainty as to when an employment relationship exists and combat disguised employment.¹³

Despite a plethora of intercessions by the courts and the legislature, drawing the line between employment and other commercial relationships has always remained a challenge. Today’s labour market has given rise to a stupefying array of atypical and disguised forms of employment – some for reasons driven by new forms of work organisation and others to avoid labour legislation.¹⁴ This erosion of the archetypal employee has resulted in the distinction between an employee and independent contractor becoming increasingly blurred. Though they have been changes in the world of work, the definition of employee in labour legislation is still rooted in the common law and has been around for ages. It is now questioned whether the definition is still germane.

1.2 PROBLEM STATEMENT

Though courts and the legislature have attempted to resolve the debate on how to interpret the statutory definition of employee, the definition has not been amended and is still rooted in the common law. Put simply, labour legislation has maintained the problematic common law distinction between employment and independent contracting, without attention being given to either uncertainty of the operation of the common law or the disparity between the often fictitious line that is drawn between independent contractors and employees. The erosion of the archetypal employee is another contemporary threat to the existence of labour law.¹⁵ This is so given that for one to enjoy the protections afforded by labour legislation he or she must be defined as an

¹² Van Niekerk A, “Employees, Independent Contractors and Intermediaries”, (2005) *CLL* 15 (2) at 12.

¹³ A brief discussion of few cases provides a contemporary insight: *General Industries Workers Union of SA obo Members/Ntombi Weavers* [2013] 8 BLLR 843 (CCMA) (weavers who delivered completed products to family business were found not to be employees); *Kaingane/Trio Data Business Risk Consultant* [2004] 12 BALR 1538 (CCMA) (security guard paid per report submitted found not to be an employee); *UPUSA obo Mpanza/Soetra Creations Workers Co-operative Ltd* [2010] 6 BALR 608 (NBCCMI) (a member of a co-operative was deemed employee for purposes of the LRA because the co-operative was formed merely to escape obligations under labour legislation).

¹⁴ Benjamin P, “Decent work and non-standard employees: Options for legislative reform in South Africa: A discussion document” (2010) 31 *ILJ* 845.

¹⁵The dilemma is summed up by Supiot M, “The transformation of work and the future of labour law in Europe” (1999) 138 (1) *International Labour Review* 31 at 34.

employee. The statement by Van Niekerk¹⁶ that, “*the labour market is dynamic, and for that reason, labour legislation is never immune from critical reflection, and when necessary, revision,*” is apposite.

There is need to re-evaluate the statutory definition of employee and ascertain whether it is still germane with modern day work arrangements, international labour standards and constitutional framework. This would inevitably raise several questions relating to the interpretation of the statutory definition of employee. These questions include the following: When does one become an employee for purposes of labour legislation? Is the statutory definition of employee underpinned by the common law contract of employment? Should the definition be interpreted narrowly or expansively? Does the definition presuppose the existence of a valid contract of employment? Does the constitutional right to fair labour practices in section 23(1) of the Constitution expand the ambit of the statutory definition? Is the definition still apt and consistent with international labour standards?

1.3 AIMS AND OBJECTIVES

Identifying one as an employee is the avenue for enjoying the statutory protections and rights afforded by labour legislation. For this reason it is important that the confusion, which usually arise as a result of lack of precision on the definition of employee be clarified. The vertical disintegration of production has placed many vulnerable workers beyond the protective ambit of labour and social security legislation.¹⁷ The study will therefore determine the exact scope of the statutory definition of employee and its objectives can be summarised as follows:

- (a) To determine when one becomes an employee for purposes of application of labour legislation.
- (b) To distinguish an employment relationship from other commercial relationships.
- (c) To determine whether labour legislation only applies if the contract of employment is valid.
- (d) To evaluate whether the statutory definition of employee is rooted in the common law contract of employment and capable of covering all forms of employment.

¹⁶ Van Niekerk A *et al Law @ Work* (2012) at 15.

¹⁷ See also Mills SW, “The situation of the elusive independent contractor and other forms of atypical employment in South Africa: Balancing equity and flexibility?”(2004) 25 *ILJ* 1203 at 1210.

(e)The study will clarify the jurisprudential basis and rationale for interpreting the statutory definition of employee purposively and expansively.

(f)The study is also aimed at establishing whether the statutory definition of employee is apposite and consistent with the constitution and international labour standards.

1.4 LITERATURE REVIEW

Identifying who is an employee for purposes of labour legislation has always been labour's perennial problem. Most writers are of the view that the problem is not in the definition of employee but the manner in which it has been interpreted by the courts. Benjamin¹⁸ argues that the definition is open to an expansive interpretation, but historically it has been interpreted restrictively. He recognises that the labour market is changing and has been characterised by casualisation and externalisation of labour. As a result of these changes Benjamin argues that the continued application of the traditional common law tests in distinguishing an employee from an independent contractor has resulted, "*in a situation in which boundaries of labour law are poorly defined resulting in a number of employees being denied protection*".¹⁹ It is for this reason that he advocates for a purposive and expansive interpretation of the definition which is in the line with the Constitution and the purpose of the LRA. Similarly Brassey,²⁰ is also of the opinion that the definition must be interpreted expansively.

Vettori²¹ starts by questioning the viability of the requirement of a valid contract of employment for one to qualify as an employee for purposes of labour protection. She posits that the existence of an employment relationship is not dependent solely on the conclusion of a valid and enforceable contract. Her position is motivated by the court decisions in *Discovery Health*²² and *Kylie*,²³ and she argues that there is need to interpret the definition broadly so as to cast the net of labour law protection more widely. Emphasis should be on the existence of an employment relationship as

¹⁸ Benjamin P "An accident of history" at 787.

¹⁹ Benjamin P "An accident of history" at 789.

²⁰ Brassey M, "The Nature of Employment" (1990) 11 *ILJ* 889 at 979.

²¹ Vettori S, "The Extension of Labour Legislation Protection to Illegal Immigrants" (2009) 21 *SA Merc LJ* 818-830.

²² *Discovery Health Ltd v CCMA* (2008) 29 *ILJ* 1480 (LC).

²³ *Kylie v CCMA* (2008) 29 *ILJ* 1918 (LC).

opposed to its form. This is not only in line with the statutory definition but also section 23 of the Constitution²⁴.

Van Niekerk²⁵ and Du Toit²⁶ acknowledge that the statutory definition of employee though wide, non-descriptive and rooted in the common law, there is need of formulating a definition premised on the employment relationship rather than the contract of employment. It is for this reason that these writers argue that emphasis should be on the existence of an employment relationship. The definition of employee must be interpreted widely so as to include *de facto* (statutory) employees who do not have valid and binding contracts of employment.²⁷ Cheadle²⁸ also supports an expansive interpretation of the definition. Inspired by findings of the CC in *SANDU v Minister of Defence*²⁹, he argues that if the constitutional labour rights extend beyond the confines of the contract of employment to include contracts “*akin*” to such contracts, then the definition of employee should be generously interpreted and the exclusion of independent contractors narrowly construed. Unlike the above jurists, Norton³⁰ and Selala,³¹ argue that only common law employees should be afforded protections offered by labour legislation. In answering the question of whether labour legislation only applies if the contract of employment is legal, the writers argue that contracts of employment, which are illegal are null and void and cannot be enforced at all. In other words these writers advocate for a narrow interpretation of the statutory definition and argue that the constitutional right to everyone must be qualified and only restricted to common law employees.

The lodestar for this research will be the position that the statutory definition of an employee must be interpreted expansively and in line with the Constitution and purpose of the LRA. All writers are of the view that the problem is not in the definition of employee but the manner in which it has

²⁴ Le Roux R, “The Worker, Towards Labour Laws New Vocabulary”, (2007) 124 *SALJ* 469.

²⁵ Van Niekerk A *et al Law @ Work* (2015) at 79.

²⁶ Du Toit D *et al Labour Relations Law: A Comprehensive Guide* (2006) at 73.

²⁷ These are different with common law employees where a valid contract of employment is essential.

²⁸ Cheadle H, “*Labour Relations*” in Cheadle, Davis and Haysom *South African Constitutional Law: The Bill of Rights* (2006) at 18-3.

²⁹ 1999 (4) SA 469 (CC).

³⁰ Norton D, “Workers in the Shadows, An international comparison on the law of dismissal of illegal migrant workers” (2010) 31 *ILJ* 1521.

³¹ Selala KJ, “The enforceability of illegal employment contracts according to the Labour Appeal Court: Comments on *Kylie v CCMA* 2010 (4) SA 383 (LAC) (2011) 14 *PER/PELJ* 207.

been interpreted. The research shall build on and extend this argument by questioning the reason for clinging to a definition of employee borrowed from the 1956 LRA and the continued use by the courts of the common law tests. The research will endeavour to critique the jurisprudential basis for identifying reality of an employment relationship as opposed to its form.

1.5 SCOPE OF STUDY

The definition of employee in social security legislation such as the UIA, COIDA and OHSA differ in material respects with the statutory definition of employee in principal labour legislation. This research will only be limited to the statutory definition of employee as provided for in principal labour legislation, namely, the LRA, BCEA and SDA. Logistical constraints preclude examination of the equally problematic issue of identifying who is the employer or employing entity especially in triangular employment relationships.³² Further, the doctrine of vicarious liability will not be dealt with in detail. It will only be referred to in passing in an attempt to distinguish an employee from an independent contractor.³³

1.6 ASSUMPTIONS

The study is based on the following assumptions:

- (a) That the statutory definition of employee is still rooted in the common law.
- (b) Though rooted in the common law the statutory definition of employee does not presuppose the existence of a valid contract of employment.
- (c) The definition of an employee is open to an expansive interpretation and must be interpreted in light of the Constitution, purpose of the LRA and international labour standards.

1.7 RESEARCH METHODOLOGY

This study entails a doctrinal analysis of the definition of employee under labour legislation. Its focus will be on the world of work and the distinction between employment relationships from other commercial relationships. It will attempt to determine the exact scope of the definition of employee. This will be done through legal research from statutes, international labour standards,

³² These relationships are discussed in detail by Harvey S, Labour brokers and workers' rights: Can they co-exist in South Africa? (2011) 128 (1) *SALJ* 100.

³³ For serious reflection: Okpabula C & Osode P *Government Liability: South Africa and the Commonwealth* (2010) 293-360.

texts, articles, journals and case law authorities. It will adopt a descriptive, analytical and critical approach to desk, electronic and other materials available on the topic under study.

1.8 OUTLINE OF CHAPTERS

Chapter 1 introduces the study and deals with the subject matter of the study, statement of the problem, the research questions, aims and objectives of the study, literature review, assumptions, research methodology and outline of chapters.

Chapter 2 will give a background of the establishment of the employment relationship under the common law and will outline the various forms of work. It will then deal with the development of the dichotomy between an independent contractor and an employee under the common law. It will also evaluate and critique the various common law tests developed by courts to identify the elusive employee.

Chapter 3 will start by giving a brief historical background of the statutory definition of employee from 1909. It will give a critique of the current legislative framework of the definition of employee. In doing so, the thesis will attempt to answer questions raised in the problem statement. International labour standards will be dealt with so as to ascertain whether what South Africa has is best practice.

Chapter 4 will address possible reforms and recommendations before conclusions are made.

CHAPTER TWO

IDENTIFYING THE ELUSIVE EMPLOYEE UNDER COMMON LAW

2.1 INTRODUCTION

A meaningful study of labour law is not complete without at least a rudimentary understanding of the common law contract of employment. The common law remains applicable in the realm of labour law unless ousted by clear, unequivocal and express provisions of statute or by necessary implication. It is therefore necessary that the origins of the distinction of an employee from an independent contractor be traced. This would entail a reflection on the history and context under which the duality developed and a general background of the establishment of the employment contract. A study of these developments does not only explain the past, but it also provides an insight into the present problems of identifying an employee from an independent contractor.

2.2 THE COMMON LAW

The common law is the basis on which the employment relationship is founded and is relevant to labour law. Relevance of the common law is reflected in sections 8 (3) (a) and 39 (2) of the Constitution which demand that the common law be developed to bring it in line with the Constitution.³⁴ Though the Constitution compels a mind shift from a linear common law approach to a polycentric socio-economic approach, it remains a relevant source of labour law.³⁵ It is therefore essential to consider the legal nature of the employment relationship under the common law. In South Africa, the common law is made up of rules and principles reflected in the body of law called Roman – Dutch law and a collection of rules and principles made by Judges in previous cases. Roman-Dutch law which has its roots in Roman law was imposed by early European settlers and adulterated by English law as it was being developed by the courts.

2.3 ROMAN DUTCH LAW

The modern contract of employment owes its origins to the Roman law *locatio servi*, the law which regulated the hire of slaves. Since work was performed by slaves no contract of employment

³⁴ Cohen T, “Implying Fairness into the Employment Contract,” (2009) 30 *ILJ* 2271.

³⁵ *Jonker v Okhalamba Municipality* (2005) 26 *ILJ* 782 (LC).

existed. The relationship between a slave and his master was governed by the law of property.³⁶ From this relationship the *locatio conductio*- letting and hiring of services was developed. This *locatio* was applicable where a master permitted his slave to work for another person in return of remuneration which did not accrue to the slave but the master.³⁷ The contract of lease (*locatio*) in terms of which services could be hired out was categorised in three distinct classes, namely, *locatio conductio operarum*, *locatio conductio operis* and *locatio conductio rei*. This distinction was based on the type of performance rendered for the payment of money.³⁸

(a) *Locatio conductio operarum*

Basson³⁹ defines it as a consensual contract in terms of which a free men (*liberi*) agreed to let his personal services (*oparae suae*) to another person (*conductor operarum*) for a certain period of time, in exchange for remuneration.

(b) *Locatio conductio operis*

It is an independent contract in terms of which a person was engaged to perform specific work on behalf of the hirer in consideration for a fixed amount of money and involved work such as training of a slave or doing artisanal work.

(c) *Locatio conductio rei*

This contract regulated the letting and hiring of some physical object or thing such as land, a horse or a slave for payment. The hirer gained the temporary use of a thing for a fee.

The modern contract of employment was developed from the *locatio conductio operarum* and was distinguished from other forms of work. It gained popularity during the industrialisation era in Britain. This distinction was assimilated in South African legal system in companion of cases: *Colonial Mutual Life Assurance v MacDonald*,⁴⁰ *Smit v Workmen's Compensation Commissioner*⁴¹ and *R v AMCA Services*. The distinction is fundamental to labour law because of the different legal consequences which flow from the various forms of contracts. For instance, under the common law only employees could render their employers vicariously liable for unlawful acts committed

³⁶ Thompson C and Benjamin P, *South African Labour Law* (2006) at E1-2. As noted in the case of *De Beer v Thompson and Son* 1918 TPD 70 it was for this reason that the relationship between employer and employee was always referred to as that of a master and servant.

³⁷ Thompson C and Benjamin P *supra* at E1-2.

³⁸ Du Plessis JV and Fouche MA, *A Practical Guide to Labour Law* (2006) at 9.

³⁹ Basson AC *et al Essential Labour Law* (2005) at 19.

⁴⁰ 1931 AD 412.

⁴¹ 1979 (1) SA 51 (A).

in the course and within the scope of their employment.⁴² Moreover, an employer owes employees the duty to take reasonable care of their health and safety whereas this duty is limited in respect of independent contractors. Though South African courts followed the Roman law distinction and adopted the *locatio conductio operarum* as the foundation of the employment relationship, they also inherited the problems associated with drawing the line between the contract of employment and the contract of work.⁴³ Thus, the debate on who is an employee is not new, it owes its origins to the disputation under the common law on how to distinguish the *locatio conductio operarum* from the *locatio conductio operis*.

2.4 ESTABLISHMENT OF THE EMPLOYMENT RELATIONSHIP

The basis of the distinction between an employee and an independent contractor under the common law is the contract of employment. It is the foundation of the employer – employee relationship and Mischke⁴⁴ submits that it is only by looking at the contract of employment that it can be determined if one is in an employment relationship or not. Grogan,⁴⁵ defines a contract of employment as,

“a contract between two persons, the master (employer) and the servant (employee), for the letting and hiring of the latter’s services for reward, the master being able to supervise and control the servant’s work.”

Though Rycroft and Jordaan⁴⁶ acknowledge the existence of different definitions of a contract of employment, the common denominator evident from all the definitions indicative of an employment relationship are: voluntary agreement, between two parties namely the employer and employee, the employee places his or her labour potential at the disposal and under the control of the employer and remuneration in money or in kind. Denudated to its bones a contract of employment is not different with any other contract. It can be constituted in writing or orally and it can also be inferred from conduct of the parties.⁴⁷ Since the common law is premised on the principles of freedom to contract and work under any conditions parties are free to agree on any terms and conditions of employment. These terms can either be express, tacit or implied.

⁴² See Grogan J *Workplace Law* (2011) at 15.

⁴³ Brassey M “The Nature of Employment” (1990) 11 *ILJ* 889 at 893.

⁴⁴ Mischke C in Basson AC *et al* “*Essential labour law*” (2002) at 38.

⁴⁵ Grogan J *Workplace Law* (2011) at 16.

⁴⁶ Rycroft A and Jordan B, *A Guide to South African Labour Law*, (1992) at 34-44.

⁴⁷ *Mackay v Comtec Holdings (Pty) Ltd* (1996) 7 BLLR 863 (IC); *Grahamstown Municipality v Saunders* 1906 EDC 197.

2.4.1 Requirements for a valid employment contract

The general formalities applicable to any contract under the law of contract are also applicable for a valid employment contract to be consummated. If the contract does not comply with these requirements such contract is void. In *Jafta v Ezemvelo KZN Wildlife*⁴⁸ it was held that for a contract of employment to come into existence the common law requirements for an acceptance of an offer must be satisfied. If an offer and acceptance of employment is subject to fulfilment of a future event, then the contract of employment will only come into operation upon fulfilment of the suspensive condition.⁴⁹ There must be agreement on the subject matter and contents of the contract and the performance of the parties' obligations in terms of the contract must be possible. The parties to the contract of employment must have the capacity to contract. An employee can only be a natural person, though the employer can either be a natural or juristic person. The conclusion of a contract of employment and obligations arising thereof must be lawful. Contracts of employment which are tainted with illegality are void and of no force. Persons under such illegal contracts are not regarded as employees and are not entitled to any rights.⁵⁰ Once the employment contract is concluded, the employer has a duty to pay the employee remuneration⁵¹ which is subject to agreement by the parties.

2.4.2 Who is the employee under the common law?

Under the common law, the nature of the legal relationship between the parties is gathered primarily from the terms and conditions of the agreement concluded by the parties.⁵² The essential elements of a contract of employment are sufficient to identify an employee as distinct from an independent contractor. In order for a court to establish whether someone is an employee it has to determine whether or not a contract of employment is in existence. This is a fundamental jurisdictional fact, as common law rights on employment only apply to employees under a contract of employment. Thus, an employee under the common law can be defined as a person who

⁴⁸ (2009) 30 ILJ 131 (LC).

⁴⁹ See *Wyeth SA (Pty) Ltd v Mangele* (2005) 26 ILJ (LAC); *Bayat v Durban Institute of Technology* (2006) 27 ILJ 188 (CCMA); *SITA (Pty) Ltd v CCMA* (2008) 7 BLLR 611 (LAC).

⁵⁰ *Dhlamini v Protea Assurance Co. Ltd* 1974 (4) SA 906 (A); *Chambers v Process Consulting Logistics (Pty) Ltd* [2003] 4 BALR 405 [CCMA]; *Moses v Safika Holdings (Pty) Ltd* (2001) 22 ILJ 1261 (CCMA). For further reflection: Christie C & Bradfield D "Christie's The Law of Contract in South Africa" 6thed (2011) 406-417.

⁵¹ On the other hand, the reciprocal duties of an employee under the common law are, duty to provide service, duty of subordination, duty of good faith and duty competency and efficiency.

⁵² *Liberty Life Association of Africa v Niselow* (1996) 17 ILJ 673 (LAC); *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A).

performs work or services under the supervision and control of another in exchange for remuneration or reward on such terms and conditions as agreed upon by the parties. However, it must be noted that not everyone who works is an employee under a contract of employment. One unique category is that of independent contractors who work under a contract of work. Mischke⁵³ defines an independent contractor as a person who is hired by another to do a specific task, with the person letting out the work being the principal and the one doing the work being the agent. He or she undertakes to produce a result within a specified period.⁵⁴

2.5 THE COMMON LAW TESTS

In an attempt to distinguish an employee from an independent contractor the common law developed a number of tests. These tests as noted by Benjamin⁵⁵ were formulated by courts as they sought for “*a single definitive touchstone to identify the employment relationship*”. The tests include the following, the control test, organisation test, economic realities test and the dominant impression test. As shall be demonstrated herein below the approach followed by South African courts in developing these tests closely resemble that of the English courts.

2.5.1 The Control Test

This test is premised on the principle that the employer’s right of control with regard to the work which has to be done by an employee, when it is to be done and the manner in which it has to be done, is the sole determining factor of the existence of an employment relationship.⁵⁶ Early English law cases adopted this test when dealing with vicarious liability of an employer for the delicts committed by an employee. Only a worker who was subject to the supervision and control of his master could render his or her employer vicariously liable for unlawful acts committed in the scope of employment. The basis of liability was the employer’s ability to supervise and control an employee.⁵⁷ South African courts first applied this test in *Colonial Mutual Life Association v*

⁵³ Mischke C in Basson AC *et al Essential Labour Law* (2002) at 27.

⁵⁴ *Opperman v Research Surveys (Pty) Ltd* (1997) 6 BLLR 807 (CCMA); *Borcheds v CW Pearce and F Sheward t/a Lubrite Distributors* (1993) 14 ILJ 1262 (LAC); *R v AMCA Services Ltd* 1959 (4) SA 207 (A).

⁵⁵ Benjamin P, “An accident of history” at 787.

⁵⁶ *Yewens v Noakes* (1880) 6 QBD 530 and Selwyn N Selwyn, *s Law of Employment* (2011) at 47-48.

⁵⁷ Rycroft A and Jordaan B *A Guide to South African labour law* (1992) at 41.

*McDonald*⁵⁸ in which it was held that due to the absence of the right to control and supervise an insurance agent, Colonial Mutual was not vicariously liable for his negligence.⁵⁹

Unfortunately, the major drawback of this test was that it was based on control as the sole determining factor for the existence of a contract of employment and nothing else. It failed to cope with the emergence of semi and highly skilled professionals who had significant latitude to determine the work they had to do and how they had to do it. Le Roux⁶⁰ also criticised this test on the basis of its limited scope since it was developed within the context of vicarious liability under the law of delict and not employment law. Grogan⁶¹ takes the argument further and posits that to prescribe a contract of employment on the basis of control alone is pleonastic since control is a consequence of a contract of employment. Furthermore, it was too wide and difficult to measure the degree of control sufficient to qualify one as an employee or not. Though authorities are in agreement that control is not the sole determining factor they acknowledge that it is relevant as one of the factors which a court must take into account in distinguishing a contract of employment from that of an independent contractor.⁶² The control test met its Waterloo in the mid 1970's in the case of *Ongevallekommissaris v Onderlinge Versekerings Genootskap Avbob*.⁶³

2.5.2 Organisation/ Integration Test

This test was first developed in English law by Kahn-Freund⁶⁴ in an effort to address the inadequacies of the control test. The test identifies an employee by questioning if that individual is part of the employer's organisation. Lord Denning in the English case of *Stevenson, Jordan and Harrison Ltd v McDonald and Evans*,⁶⁵ described the test in the following words,

“One feature which seems to run through the instances is that under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business, whereas under a contract for services, his work, although done for the business is not integrated into it but is only accessory to it.”

⁵⁸ 1931 AD 412.

⁵⁹ See *R v Feun* 1954 (1) SA 58 (T); *R v AMCA Services Ltd* 1954 (4) SA 208 (A).

⁶⁰ Le Roux R “The Evolution of the Contract of Employment in South Africa” (2010) 39 *ILJ* 139 at 149.

⁶¹ Grogan J *Workplace Law* (2011) at 17-18.

⁶² See *J and JN Freeze Trust v The Statutory Council for the Squid and Related Fisheries of South Africa* (2011) 32 *ILJ* 2966 (LC); *Mandla v LAD Brokers (Pty) Ltd* (2000) 5 LLD 457 (LC).

⁶³ 1976 (4) SA 446 (A).

⁶⁴ Kahn-Freund O, ‘A note on Status and Contract in British law’ (1951) 14 *Modern LR* 504.

⁶⁵ [1952] 1 TLR 101 at 11.

In South Africa it was adopted in the case of *R v AMCA*⁶⁶ as an experimental test in response to the deficiencies of the control test. In England it was rejected in *Ready Mix Concrete (South East) v Minister of Pensions and National Insurance*⁶⁷ followed by a similar disapproval in South Africa in *S v AMCA Services*⁶⁸ on the basis that it begged more questions than it answered and failed to shed any light on the legal nature of the integration. It was difficult to gauge one's degree of integration in an organisation. It was held to be vague, nebulous and of no useful assistance, it presented more problems than solutions.⁶⁹ Despite its apparent shortcomings, integration in the employers' organisation still remains one of the relevant criteria indicating the existence of an employment relationship.⁷⁰

2.5.3 Economic Realities Test

This test was developed in the English case of *Montreal v Montreal Locomotive Works*⁷¹ in which it was held that the main question to be asked was whether “*one is in business on his own*” or “*whose business it is?*” The test raises the following questions; does the person provide his own equipment? Does he hire his own assistants? Who takes financial risk? Does he pay taxes? Is he paid a wage or commission? And whether he can delegate work? The million dollar question is whether one is economically dependent on the employer or self-employed?⁷² This test was designed to address the shortcomings which were inherent in the control test but also proved to be unsatisfactory. South African courts never adopted this test. They simply acknowledged that economic dependence was one of the three primary criteria which a court had to look at in identifying an employee from an independent contractor.⁷³

2.5.4 Dominant Impression Test (DIT)

This test was developed by English courts in the case of *Ready Mixed Concrete v Minister of Pensions*⁷⁴ in which it was held that no single factor was determinative of the employment

⁶⁶ 1954 (4) SA 208 (A).

⁶⁷ (1968) 2 QB 497.

⁶⁸ 1962 (4) SA 537(A).

⁶⁹ *Smit v Workmen's Compensation Commissioner* 1979 SA 51 (A).

⁷⁰ See *Kambule v CCMA* [2013] 7 BLLR 682 (LC); *NEHAWU v Ramodise* (2010) 31 ILJ 695 (LC).

⁷¹ [1947] 1 DLR 161; *Market Investigators Ltd v Minister of Social Security* [1968] 3 All ER 732; *Lithers v Flackwell Health Football Supporters Club* [1981] 1 RLR 307 EAT.

⁷² Grogan *J Workplace Law* (2011) at 21.

⁷³ See *SITA (Pty) Ltd v CCMA* (2008) 29 ILJ 2234 (LAC); *NEHAWU v Ramodise* (2010) 31 ILJ 695 (LC).

⁷⁴ (1968) 2 QB 497.

relationship and all relevant circumstances had to be considered. South African courts follow suited the English courts. The DIT was developed as a hybrid test in terms of which the approach was to look at the relationship as a whole and then draw a conclusion from the entire picture. The test was then reaffirmed in *Smit v Workmen's Compensation*⁷⁵ in which factors characteristic of an employment contract and a contract of work were identified.⁷⁶ The scheme underlying the test is to consider indicia tending to portray the existence of a contract of employment as opposed to those signalling an independent contractor. The main factors identified by the South African courts⁷⁷ include among others: The right to supervise and control, extent to which employee depends on employer for the performance of his or her work, whether the employee is allowed to work for other persons, whether he has to perform his duties personally, whether the employee is allowed to delegate or perform tasks through others, whether he is paid by commission or a wage, whether he provides his own tools, right to discipline the worker and terminate contract and whether the employee is integrated into the organisation. The list of relevant factors is non exhaustive.

Though the DIT has been accepted as the standard test, it is without its critics. The theme underlying the test is that no single factor can conclusively indicate the existence of a contract of employment. It is this principle which has been identified by several authors as its chief drawback. As early as 1980 the test was under attack. Mureinik⁷⁸ lampooned the test in the following words, “to say that an employment contract is a contract which looks like one of employment sheds no light whatsoever on the “legal nature” of the relationship between a master and his servant.” The same sentiments were echoed by Brassey.⁷⁹ The criticism did not end there, Benjamin⁸⁰ noted that the test provided no guidelines on what weight should be attached to the individual factors and it is difficult to gauge the importance of each factor.

⁷⁵ 1979 SA 51 (A).

⁷⁶ These factors were also restated in *SABC v McKenzie* (1999) 20 ILJ 585 (LAC).

⁷⁷ See also *Borcheds v C W Pearce and J Sherward t/a Lubrite Distributors* (1993) 14 ILJ 1262 (LAC); *Board Executors Ltd v McCafferty* (1997) 18 ILJ 949 (LAC).

⁷⁸ Mureinik E “The Contract of Service: An Easy Test for Hard Cases” (1980) 97 SALJ 246 at 258.

⁷⁹ Brassey M “The Nature of Employment” (1990) 11 ILJ 889 at 919.

⁸⁰ Benjamin P “An accident of history” at 789.

Admittedly, the DIT discombobulates similar problems as all the other tests in that it describes consequences of a contract of employment rather than the causal indications thereof.⁸¹ The test merely relies on the common law characteristics of employment and nothing else. Indeed it is nothing more than merely a shorthand of saying the decision must be taken in light of all relevant factors. Courts have also noted the inadequacies inherent in this test. Zondo AJ in *Medical Association of South Africa v Minister of Health*⁸² berated the test for its unsatisfactory results and uncertainty. He held that some of the factors taken into account are of little value in distinguishing an employee from an independent contractor and do not offer any guidance.⁸³ Despite severe criticism from legal writers and the courts, the common law has failed to evolve and respond. The DIT is still the favoured standard test employed by the courts to distinguish an employee from an independent contractor.

2.6 CONCLUSION

Identifying the elusive employee under the common law has not always been easy. Several tests were developed by the courts but these tests never produced satisfactory results. The preferred DIT has struggled to adequately capture the diversity of the modern labour market. Inconsistencies in its application has led to the development of an incoherent jurisprudence in distinguishing an employee from an independent contractor. Admittedly, the courts have failed to come up with a lasting solution to labour law's perennial problem hence the need for statutory intervention. Thus, the thesis now turns to the various ways in which the legislature has intervened in identifying the elusive employee.

⁸¹ Le Roux R and Jordaan B, "Contract of Employment," Thompson W & Benjamin P 1965 E1-8, 2009.

⁸² (1997) 18 ILJ 528.

⁸³ See also *De Greeve/ Old Mutual Employee Benefits/ Life Assurance Co. (SA) Ltd* [2004] 2 BALR 184 (CCMA); *Apsey v Babcock Engineering* [1995] 5 BLLR 17 (10).

CHAPTER THREE

THE STATUTORY AND INTERPRETIVE FRAMEWORK

3.1 INTRODUCTION

The intervention by the legislature in the realm of labour law was three pronged. Firstly, it created fundamental rights of employees by providing minimum conditions of employment which parties to an employment relationship cannot contract below. Secondly, the state guaranteed the rights to collective bargaining and collective job action. Lastly, specialised dispute resolution forums to deal with labour matters were created. Over and above these interventions, the legislature identified and defined employees as the only beneficiaries of the rights guaranteed by labour legislation and litigants who could access dispute resolution mechanisms established by these statutes. It is therefore necessary to investigate the definition ascribed to an employee in previous statutes and the manner in which the courts interpreted such definition before reviewing the current statutory framework. This is so since the current debate owes its origins to the interpretation of the definition in early industrial relations legislation.

3.2 HISTORICAL BACKGROUND AND DEVELOPMENT

In the early twentieth century labour law underwent notable changes which laid the foundation of today's statutory framework. The first legislation in South Africa to define the term employee was the Transvaal Industrial Disputes Prevention Act No. 20 of 1909. This Act was territorial and only applied to the Transvaal. It was followed by the first detailed national labour legislation, the ICA No. 11 of 1924.⁸⁴ The definition was a mirror reflection of the 1909 Act. Early definitions of employee did not exclude independent contractors. Exclusions were based on race and form of work. In 1937 the ICA of 1924 was finally repealed by the ICA No. 36 of 1937.⁸⁵ The definition

⁸⁴ It defined an employee in section 24 as;

“any person engaged by an employer to perform, for hire or reward, manual, clerical, or supervision work in any undertaking, industry, trade or occupation to which this Act applies, but shall not include a person whose contract of service or labour is regulated by any Native Pass Laws and Regulations.”

⁸⁵ An employee was defined in section 1 of this Act as;

“any person employed by, or working for any employer, and receiving, or being entitled to receive, any remuneration, and any other person whatsoever who in any manner assists in the carrying on or conducting of the business of the employer but does not include a person, whose contract of service or labour is regulated by any Native Pass Laws.”

of employee in section 1 of the ICA of 1937 was amended by section 36 of the Native Labour (Settlement of Disputes) Act No. 48 of 1953.⁸⁶ It was followed by the ICA 28 of 1956 which was later renamed LRA 28 of 1956. The definition of employee in section 1 of the LRA, 1956 was a replica of the 1937 Act and the only difference with earlier legislation was that these Acts now included a reference to persons assisting an employer. However, the dual industrial system premised on racial segregation involving political, economic and legal discrimination against people who were not white was maintained.⁸⁷

Another notable development during this period was the reference by the courts to the common law contract of employment by implication as they interpreted the statutory definition. An employee though not defined in terms of contract was being contrasted with an independent contractor. This development started in the early 1930's when courts relied on the control test in distinguishing an employee from an independent contractor.⁸⁸ This resulted in the development of an incoherent jurisprudence on the interpretation of the statutory definition of employee as illustrated in Chapter 2. In 1979 the government appointed Wiehahn Commission of Inquiry into Labour Legislation recommended various reforms that changed South African labour law landscape. Through section 1 (c) of the ICAA 94 of 1979, as amended by section 1 (f) of the LRAA 57 of 1981 and section 1 (a) of the LRAA 2 of 1983, the definition of an employee by reference to race was abolished.⁸⁹ This period coincided with the introduction of a specialist IC and the development of unfair labour practices jurisprudence. These developments, as acknowledged by Le Roux,⁹⁰ resulted in an upsurge in workers suing under labour legislation. This in turn led to the IC being often called to decide on whether one was an employee or not before assuming jurisdiction. In distinguishing an employee from an independent contractor the courts relied on the DIT. It was by application of this test that the courts played a significant role in instilling the common law employee-independent contractor duality into labour legislation by implication.⁹¹

⁸⁶ Du Toit D *et al Labour Relations Law: A Comprehensive Guide* (2006) at 8.

⁸⁷ Le Roux R "The Evolution of the Contract of Employment in South Africa" (2010) 39 *ILJ* 139 at 161.

⁸⁸ *R v Chaplin* 1931 OPD 172; *Colonial Mutual Life Assurance v MacDonald* 1931 AD 412; *R v AMCA Services* 1954 (4) SA 208 (A); *R v Feun* 1954 (1) SA 58 (T).

⁸⁹ Section 1 (a) of the 1983 Amendment Act defined an employee as;

"any person who is employed by or working for an employer and receiving or entitled to receive any remuneration, and, subject to subsection (3), any other person whomsoever who in any manner assists in the carrying on or conducting of the business of an employer."

⁹⁰ Le Roux R "The Evolution of the Contract of Employment in South Africa" (2010) 39 *ILJ* 139 at 163.

⁹¹ Le Roux R *supra* at 163.

Through this approach courts inherited the inadequacies inherent in the common law tests discussed in the previous chapter.

As a result of the shortcomings apparent in early legislation which owed its origins to apartheid, a new dispensation was ushered 1994. It started with an interim Constitution, which guaranteed labour rights. This was followed by the enactment of the current LRA which was complemented by the BCEA, EEA and the SDA. The 21st century brought with it several amendments to the LRA and the BCEA. In 2006, the Code was also introduced. The current legislative framework is constituted by these statutes and they are the subject of the next discussion.

3.3 IDENTIFYING THE ELUSIVE EMPLOYEE

3.3.1 Definition of Employee under the LRA, 66 of 1995

The LRA, 1995 applies to all employees in the private sector and public sector. Excluded from its application are members of the National Defence Force, members of the State Security Agency and South African Secret Service.⁹² Section 213 of the LRA defines an employee as

- “(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 carrying on or conducting the business of an employer,
- and “employed” and “employment” have meanings corresponding to that of employee.”⁹³

Though substantially similar with the 1956 LRA definition, the LRA, 1995 specifically excludes independent contractors.

3.3.2 Interpreting the definition of employee

3.3.2.1 Part (a) of the definition

The statutory definition of employee consists two parts, part (a) and part (b). Le Roux⁹⁴ states that the first part of the definition has three requirements, namely, a person who works for another person, the person is not an independent contractor and receives or is entitled to receive remuneration. The definition does not differentiate the diverse categories of employees such as

⁹² See section 2 of the LRA, section 3 (1) of the BCEA, section 4 (3) of the EEA and the SDA.

⁹³ A similar definition is also found in sections 1 of the BCEA, EEA and the SDA.

⁹⁴ Le Roux R, “The Regulation of Work, Wither the Contract of Employment? An Analysis of the Suitability of the Contract of Employment to Regulate the Different Forms of Labour Market Participation by Individual Workers”, Unpublished Phd Thesis, UCT, 2008 at 195.

part time, full time or permanent, casual, fixed term or probationary employees. Benjamin⁹⁵ posits that the terminology of contract is introduced through the exclusion of independent contractors in part (a) of the definition. However, it must be noted that this exclusion was introduced by the courts during the 1930s when interpreting early industrial legislation. Part (a) also excludes persons performing work for which they do not receive, or are entitled to receive remuneration from the definition.⁹⁶

From the foregoing, it is clear that volunteer workers who undertake work without remuneration are not employees as defined by the LRA.⁹⁷ Also excluded from the definition are students undergoing vocational training and students on attachment. The work they undertake is for educational purposes and not in exchange for remuneration. However, it must be noted that in terms of section 3 (2) of the BCEA, the Act applies to persons undergoing vocational training. Despite the fact that they are not employees they are protected in respect of conditions of work. The definition also excludes from its application family members of the employer performing unpaid work in the employer's business.⁹⁸ Part (a) of the definition also excludes members of the clergy.⁹⁹ Due to the spiritual nature of their work there is no contractual intention such that they are not employees.¹⁰⁰ Courts have also extended the scope of the statutory exclusions to include magistrates, judges,¹⁰¹ presidential appointments, parliamentarians,¹⁰² ministerial appointments and members of statutory boards.¹⁰³ It can therefore be concluded that part (a) of the definition is premised on the common law contract of employment and the common law requirements discussed in Chapter 2 must be satisfied for the existence of an employment relationship. Despite this position, the definition does not use the language of contract or define a contract of employment.

⁹⁵ Benjamin P "An accident of history" at 789.

⁹⁶ Sections 213 of the LRA and 1 of the BCEA define the term remuneration.

⁹⁷ See section 3 (1) (b) of the BCEA; *Northern Cape Provincial Administration v Hambidge NO* [1999] 7 BLLR 698 (LC).

⁹⁸ Du Toit D *et al Labour Relations Law: A Comprehensive Guide* (2006) at 73.

⁹⁹ See *Church of the Province of Southern Africa Diocese of Cape Town v CCMA* (2001) 22 ILJ 2274 (LC); *Schreuder v NGK, Wilgespruit* (1999) 20 ILJ 1936 (LC); *Salvation Army (South African Territory) v Minister of Labour* [2004] 12 BLLR 1264 (LC).

¹⁰⁰ *Universal Church of the Kingdom of God v Myeni, Mxolosi Justice* [2014] 3 BLLR 295 (LC).

¹⁰¹ See *Hannah v Government of the Republic of Namibia* [2000] (4) SA 940 (NMLC); *President of South Africa v Reineck* (2014) 35 ILJ 1485 (SCA); Van Eck and Diedericks, "Are Magistrates without Remedy in Terms of Labour Law?" (2014) 33 ILJ 111.

¹⁰² *Parliament of the Republic of South Africa v Charlton* [2010] 10 BLLR 1024 (LAC).

¹⁰³ *Van Zyl v WCPA C Department of Transport and Public Works* (2004) 25 ILJ 2060 (CCMA).

3.3.2.2 Part (b) of the definition

Prima facie it can be argued that part (b) includes everyone who works including independent contractors, volunteers, clergy, judges, and magistrates' members of the security services in the definition of employee. However, to adopt a literal interpretation would result in absurdity.¹⁰⁴ To avoid this fatuity, courts have held that part (a) must be read conjunctively with part (b) and by applying the DIT to determine the existence or otherwise of an employment relationship.¹⁰⁵ The second part is not circumscribed by the requirement of remuneration and is preceded by the statement “*and any other person*”. Le Roux¹⁰⁶ submits that the “*other person*” relates to a person other than the one referred to in the first part of the definition. Since part (a) and part (b) must be read together, part (b) covers a person, excluding an independent contractor who assists the employer. In *Borcheds v CW Pearce and F Sherwood t/a Lubrite Distributors*,¹⁰⁷ the requirements a person assisting in conducting the business of an employer must satisfy to qualify as an employee were stated as: the person must not perform work or services which have the effect of providing assistance but assist in the carrying on or conducting of a business, assistance should be rendered regularly, there must be a legal obligation to render such assistance arising *ex contractu* or *ex lege*, and assistance should not be at the will and at the sole discretion of the one assisting.¹⁰⁸ Since a person who does not receive or is entitled to remuneration is not explicitly excluded under part (b) it is accepted that this is an indication that the definition is not necessarily rooted in the common law contract of employment or the conclusion of a valid and enforceable contract.¹⁰⁹ The focus shifts from the existence of a contract of employment to the existence of an employment relationship which is established by reference to the common law criteria under the DIT.¹¹⁰ On this basis, courts have had to look at the realities of the relationship as opposed to the label given to it by the parties. This has resulted in workers without contracts of employment being held to be

¹⁰⁴ *Liberty Life Association of Africa v Niselow* (1996) 17 ILJ 673 (LAC).

¹⁰⁵ Van Niekerk A *et al Law @ Work* (2015) at 63.

¹⁰⁶ Le Roux R, “The Regulation of Work, With the Contract of Employment? An Analysis of the Suitability of the Contract of Employment to Regulate the Different Forms of Labour Market Participation by Individual Workers” Unpublished Phd Thesis, UCT, 2008 at 197.

¹⁰⁷ (1991) 12 ILJ 383 (IC); *Oak Industries (SA) (Pty) Ltd v John NO* (1987) 8 ILJ 756 (N); *Niselow v Liberty Life Association of Africa Ltd* (1998) 19 ILJ 752 (SCA).

¹⁰⁸ Conradie M, A critical analysis of the right to fair labour practices; Unpublished LLM Thesis, University of Free State, 2013 at 112.

¹⁰⁹ Vettori S, “*The Extension of Labour Legislation Protection and illegal Immigrants*”, (2009) 21 SA Merc LJ at 825-828.

¹¹⁰ Van Niekerk A, “Personal Service Companies and the Definition of “Employee”, (2005) 26 ILJ 1909 at 1909.

employees for purposes of the LRA. But one might ask, why interpret the definition of employee widely and focus on existence of an employment relationship? How can an employment relationship be identified? Why the definition is not necessarily rooted in the common law contract? The jurisprudential basis for answers to these questions requires further contemplation and is discussed herein below.

3.3.3. The Constitutional Perspective

The Constitution is the supreme law of the land and guarantees labour rights in section 23.¹¹¹ One of the primary objects of the LRA is to give effect to and regulate the fundamental rights conferred by the Constitution.¹¹² Furthermore, section 3 (a) and (b) of the LRA demand that its provisions be interpreted so as to give effect to its primary objects and in compliance with the Constitution. Thus, the definition of employee must be interpreted and considered against the backdrop of the Constitution. Section 23 of the Constitution does not identify employees as bearers of the right but identifies workers, employees, trade unions and employer organisations. Relevant to this discussion is the identity of “*everyone*” and “*workers*” and their impact on the definition of employee. Cheadle¹¹³ argues that the term “*everyone*” must be construed with reference to “*labour practices*.” He states that;

“Although the right to fair labour practices in subsection (1) appears to be accorded everyone, the boundaries of the right are circumscribed by the reference in subsection (1) to “*labour practices*.” The focus of enquiry into ambit should not be on the use of “*everyone*” but on the reference to “*labour practices*.” Labour practices are the practices that arise from the relationship between workers, employers and their respective organisations. Accordingly, the right to fair labour practices ought not to be read as extending the class of persons beyond those classes envisaged by the section as a whole.”¹¹⁴

Thus, reference to everyone under section 23 (1) does not extend to cover parties outside the employment relationship but is restricted to the beneficiaries of the right under section 23.¹¹⁵ Who then are “*workers*”?

¹¹¹ Section 23 (1) of the Constitution states as follows, “Everyone has the right to fair labour practices”.

¹¹² Section 1 of the LRA, 1995.

¹¹³ Cheadle H “Labour Relations,” in Cheadle *et al*, *South African Constitutional Law: The Bill of Rights* (2006).

¹¹⁴ Authorities are in agreement that this is the correct definition of everyone. See Chaskalson M *et al* *Constitutional Law of South Africa* (1996); Currie I and De Waal J *The Bill of Rights Handbook* (2005) at 490 – 520; Du Toit and Potgieter M *Labour Relations in the Bill of Rights in Bill of Rights Compendium* (Service Issue 21 Oct 2002).

¹¹⁵ *NEHAWU v University of Cape Town* (2003) 24 ILJ 95 (CC).

Happily the superior courts have already dealt with the question in more ways than one. The discussion begins with the decision in *SANDU*.¹¹⁶ This case dealt with the right of members of the South African defence force to join trade unions. Though Section 2 (a) of the LRA excludes members of the National Defence Force from application of the Act, section 23 (2) (a) of the Constitution guarantees every worker the right to form and join a trade union. The question for determination was whether soldiers were workers for purposes of section 23 (2) (a) of the Constitution despite the statutory exclusion in the LRA? In holding that soldiers were workers for purposes of Section 23(2), “O” Regan J stated that;

“Clearly, members of armed forces render service for which they receive a range of benefits. On the other hand, their enrolment in the permanent force imposes upon them an obligation to comply with the rules of the Military Disciplinary Code. A breach of that obligation of compliance constitutes a criminal offence. In many respects, therefore, the relationship between members of the permanent force and the defence force is akin to an employment relationship.”

The court concluded that, though the relationship between soldiers and the National Defence Force was *sui generis*, it was “*akin to an employment relationship*”. On this basis soldiers were held to be workers for purposes of Section 23 (2). But when is a relationship “*akin to an employment relationship*”? Whilst the authority set out above is helpful in identifying who is a worker it does not define when a relationship is akin to an employment relationship. Therefore there is need to make reference to a further authority which is the judgment of *SITA v CCMA*.¹¹⁷ In identifying the employer Davis JA reasoned that emphasis was not on the existence of a contract of employment but an employment relationship. Though the term employment relationship was not defined it was held that it must be established by reference to three primary criteria namely; the employer’s right to supervision and control, whether the employee is integrated into the organisation and economic dependence of employee on employer.¹¹⁸

In principle courts have gone back to the common law criteria under the DIT so as to identify an employment relationship. It is accepted that labour law presents itself in new and diverse forms such that reliance on the traditional contract of employment will render labour law less relevant.¹¹⁹ Thus, given that the employment relationship is a relationship of inequality there is need to

¹¹⁶ (1999) 20 *ILJ* 2265 (CC).

¹¹⁷ (2008) 7 *BLLR* 611 (LAC).

¹¹⁸ See also *Denel (Pty) Ltd v Gerber* (2005) 26 *ILJ* 1256 (LAC); *NEHAWU v Ramodise* (2010) 31 *ILJ* 695 (LC); *J and J N Freeze Trust v The Statutory Council for the Squid and Related Fisheries of SA* (2011) 32 *ILJ* 2966 (LC).

¹¹⁹ Le Roux R, The Meaning of “Workers” and the Road towards Diversification, Reflecting on *Discovery*, *SITA* and *Kylie* (2009) 30 *ILJ* 49.

countervail the exercise of employer power and promotion of labour market activities. This can only be achieved by protecting vulnerable and marginalised workers who participate in diverse and unpredictable forms of employment. The Constitution does this by using the term “*worker*” and not the narrow term “*employee*.” This demands a generous and purposive interpretation of the definition of employee capable of accommodating various forms of employment and is not circumscribed by the common law contract of employment.¹²⁰ Emphasis should be on the existence of an employment relationship as opposed to the existence of a valid contract of employment. The impact of the Constitution can be illustrated in cases of employees’ *in utero* and illegal employees discussed herein below.

3.3.3.1 Employees *in utero*

Labour legislation is silent on when one becomes an employee for purposes of statutory protections. Once upon a time authorities were in agreement that a person would only become an employee if that person rendered services for which he was entitled to remuneration.¹²¹ This position was reversed in the case of *Wyeth SA (Pty) Ltd v Mangele*.¹²² The question for determination was whether protections of the LRA were available to a person whose contract of employment is terminated prior to the commencement of employment. The court held that since section 23(1) of the Constitution guarantees everyone the right to fair labour practices, there was need to interpret the definition of employee purposively. The court concluded that,

“The definition of employee in S213 of the LRA can be read to include a person or persons who have or have concluded a contract or contracts of employment the commencement of which is or one deferred to a future date or dates.”¹²³

In any event, under the common law a contract of employment comes into existence where there is acceptance of an offer of employment.¹²⁴ It is only when the offer of is conditional that an employment relationship comes into existence on fulfilment of such condition. In light of the foregoing it can be concluded that, an employment relationship comes into existence on acceptance of an offer of employment unless the offer is conditional.

¹²⁰ Le Roux R, “The Worker: Towards Labour Laws New Vocabulary” (2007) 124 *SALJ* 469 at 472-3.

¹²¹ See *Whitehead v Woolworths (Pty) Ltd* [1999] 8 BLLR 862 (LC); *Jack v Director General Department of Environmental Affairs* (2003) BLLR 28 (LC).

¹²² [2005] 6 BLLR 523 (LAC).

¹²³ *Bayat v Durban Institute of Technology* (2006) 27 *ILJ* 188 (CCMA).

¹²⁴ See *Jafta v Ezemvelo KZN Wildlife* (2009) 30 *ILJ* 131 (LC).

3.3.3.2 Illegal Employees

Illegality of a contract of employment can arise from two scenarios. Firstly it can arise from the status of the parties to the employment contract, for instance, a foreigner performing work without the relevant work permit. Secondly, it can arise from the performance of prohibited work or conduct which would attract criminal sanctions such as prostitution. Traditionally, in the absence of valid contract of employment one is not entitled to protections given by labour legislation.¹²⁵ Inspired by international labour standards, the constitutional right to fair labour practices and the vulnerability of illegal workers, courts in 2008 accepted illegal workers as employees.¹²⁶ Significant changes to the law started in the case of *Discovery Health v CCMA*¹²⁷ followed by *Kylie v CCMA*.¹²⁸ The *Discovery* case involved a foreigner, who was employed without a work permit in contravention of the Immigration Act 2 of 2002. Having realised that Lanzetta had no work permit the employer dismissed him. Aggrieved by the decision Lanzetta approached the CCMA which declined jurisdiction and then the LC on review. The LC held that the contract of employment was not invalid. It was not the intention of the Immigration Act to render the employee's contract null and void but to penalise the employer who employed a foreigner without a work permit. Otherwise rendering such contracts void would encourage exploitation of illegal migrants by unscrupulous employers in contravention of international labour standards on migrant workers. Secondly, the court motivated by section 23 of the Constitution held that even if the contract was invalid the statutory definition of employee does not necessarily presuppose a valid contract of employment. It is wide enough to cover illegal migrant workers. Without having to establish the existence of an employment relationship the court concluded that any person who renders his services for remuneration on a basis other than that recognised as employment by the common law may be an employee for purposes of the statutory definition. The same reasoning was followed in *Kylie* case in which a sex worker claimed unfair dismissal. Despite the prohibition of prostitution under the Sexual Offences Act 23 of 1957 the court concluded that on the basis of the constitutional guarantee of labour rights, Kylie was in an employment relationship

¹²⁵ See *Dube v Classique Panel Beaters* [1997] 7 BLLR 868 (IC); *Vudhla v Millies Fashions* (2003) 24 ILJ 142 (CCMA); *Georgiva- Degonova v Graighall Spar* (2004) 4 BALR 1143 (CCMA).

¹²⁶ This acceptance was initially advocated by Bosch C in "Can unauthorized workers be regarded as employees for purposes of the LRA?" (2006) 27 ILJ 1342.

¹²⁷ [2008] 7 BLLR 633 (LC). See also *Ndikumdavyi v Vlakenberg Hospital* (2012) 33 ILJ 2648 (LC).

¹²⁸ [2010] 7 BLLR 705 (LAC).

notwithstanding the non-existence of a valid contract of employment.¹²⁹ These two cases clearly illustrate that labour legislation must be interpreted purposively with the aim being that of applying the interpretation that best gives effect to the Constitution.¹³⁰ While the employment contract signifies the birth of an employment relationship, its existence is no longer *sine qua non* of protection afforded by labour legislation.

Against this background the LRAA 6 of 2014 removed the words “*contract of employment*” from the definition of “*Dismissal*” in Section 186 of the LRA. Van Niekerk¹³¹ submits that the amendment sought to clarify that termination of employment is dismissal, whether or not there is a formal or written contract of employment. It removed the doubt raised by the old section 186 which defined dismissal on the basis of a contract of employment. The amendment is also a clear indication that emphasis is now on the existence of an employment relationship rather than a valid contract of employment. Instead of relying on the constitutional right to fair labour practices illegal employees can now base their *causa* on section 186 (1) of the LRA.

3.4 DISTINGUISHING AN EMPLOYEE FROM AN INDEPENDENT CONTRACTOR UNDER THE LRA

In Chapter 2 it was noted that courts developed a number of tests and during the 1970’s they settled for the DIT. In the early 2000’s this test was modified as focus shifted to the existence of an employment relationship rather than the contract of employment and three primary criteria indicative of an employment relationship were identified. Unfortunately the tests struggled to adequately capture the diversity of the labour market and the rise in atypical and disguised forms of employment. In response to these challenges the legislature enacted sections 200A of the LRA and 83A of the BCEA. In addition, NEDLAC also issued the Code. These policy measures were aimed at complementing DIT and assisting the courts in identifying the elusive employee. These measures are discussed in detail herein below.

¹²⁹ See generally Vettori S “The Extension of Labour Legislation Protection to Illegal Immigrants” (2009) 21 *SA Merc LJ* at 818-830; Grogan J “The wages of sin: Labour law in the sex industry” (2010) 26 (4) *Employment law* 1; Muswaka L “Sex Workers and the Right to Fair Labour Practices: *Kylie v CCMA*” (2011) 23 (3) *SA Merc LJ* 533.

¹³⁰ *NUMSA v Bader Bop (Pty) Ltd* (2003) 24 *ILJ* 305 (CC); *NEHAWU v University of Cape Town* (2003) 24 *ILJ* 95 (CC).

¹³¹ Van Niekerk A *et al* *Law @ work* (2015) at 61.

3.4.1 The presumption of employment

Section 200A (1) of the LRA introduced a rebuttable presumption as to who is an employee and provides as follows¹³²;

“(1) Until the contrary is proved, for the purposes of this Act, any employment law and section 98A of the Insolvency Act, 1936 (Act No. 24 of 1936) 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 one or more of the following factors are present:¹³³

- (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 or direction of another person
- (c) in the case of a person who works for an organisation, the person forms part of that organisation,
- (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 works for or renders services to one person.

The presumption builds on existing jurisprudence developed by the courts and does not amend or widen the scope of the definition of employee. As submitted by A van Niekerk *et al*¹³⁴ it is an “*evidentiary device calculated to switch the onus of proof of employment*” in circumstances where any one of the seven factors listed is established. If a person alleging to be an employee proves the existence of any one of the factors the presumption is triggered. That person is presumed an employee and the onus shifts to the alleged employer who must now rebut the presumption on a balance of probabilities. The criteria under section 200A (1) (a) – (g) is a codification of the common law indicators under the DIT. Thus, in applying the presumption, the nature of the relationship must be considered in its entirety so as to assess whether parties in fact entered into an employment relationship.¹³⁵

The main purpose of the presumption is to assist vulnerable workers who were either unable to assert their rights as employees or were classified as independent contractors despite their dependence on persons to whom they provided their services. It is aimed at combating disguised employment by demanding a purposive interpretation of the definition of employee.¹³⁶ In

¹³² See section 83A of the BCEA.

¹³³ Though the presumption is not found in other labour legislation and social security legislation it is submitted that by the use of the words “*any employment law*” it can still be invoked in identifying who is an employee under such legislation.

¹³⁴ Van Niekerk A *et al Law @ Work* (2015) at 64.

¹³⁵ *Van Zyl v WCPA Department of Transport* (2004) 25 *ILJ* 2060.

¹³⁶ See Explanatory Memorandum to Draft Bill 2000 published in (2000) 21 *ILJ* 2195.

recognition of this objective, the presumption does not apply to persons earning more than R205 433, 30 per annum¹³⁷ but to low income workers who are economically vulnerable.¹³⁸ Despite this assertion, it is submitted that there is no basis for distinguishing the nature of the relationship between the parties exclusively on the basis of income. The mere fact that a worker earns in excess of the threshold should not act as a bar for the applicability of the presumption.

In terms of section 200A (1) of the LRA the presumption applies “*regardless of the form of contract.*” By use of these words, the legislature confirmed that the statutory definition of employee extends beyond the common law contract of employment.¹³⁹ However this interpretation came under scrutiny in *Universal Church of the Kingdom of God v Myeni Mxolisi Justice*¹⁴⁰ which involved a pastor who alleged unfair dismissal. The LAC was called to interpret the meaning of the words “*regardless of the form of the contract*” and determine whether section 200A is applicable only where there is a contract or contractual arrangement between parties. The court concluded that section 200A required that there must be a legally enforceable agreement or some contractual working arrangement in place between the parties, for it to apply. By the use of the words “*regardless of the form of contract*”, it simply means that a contract does not have to be formal or in writing. The court then went on to rule that since on the facts the parties never intended to engage in any form of a legally binding agreement, including an employment contract, section 200A was not applicable to Myeni and for that reason, no employer - employee relationship existed. Thus, the appeal was upheld and the award of the CCMA set aside on the basis that it did not have the requisite jurisdiction.

It is submitted that the LAC adopted a restricted interpretation of section 200A. Emphasis on the term “*contract*” in section 200A negates earlier assertions that the statutory definition of an employee in labour legislation does not presuppose the existence of a valid and binding contract. Use of the word “*contract*” does not refer to a common law contract but a “*work arrangement*” as envisaged in sections 200A (3) of the LRA and 83A (3) of the BCEA. Applicability of section

¹³⁷ See section 200A (2) of the LRA.

¹³⁸ Du Toit D *et al Labour Relations Law: A Comprehensive Guide* (2006) at 80.

¹³⁹ Theron J, *The Shift to Services and Triangular Employment: Implications for Labour Market Reform 2008 ILJ* 1-21; Van Niekerk A *et al Law @ Work* (2015) at 64.

¹⁴⁰ Unreported LAC Durban, DA 3/14 delivered on 28th July 2015.

200A must be dependent on the existence of an employment relationship or a work arrangement and not existence of a valid and enforceable contract. To hold otherwise would clearly limit the scope of application of the presumption thereby defeating its purpose.

3.4.2 Code of Good Practice: Who Is an Employee?

The interpretive framework of the statutory definition of an employee is incomplete without reference to the Code issued by NEDLAC in terms of section 200A (4) read with section 203 of the LRA.¹⁴¹ In terms of these provisions any person interpreting or applying labour legislation must take into account the Code in determining whether one is an employee or not. The Code is aimed at providing certainty and clarity as to who is an employee. Furthermore, it assists persons applying and interpreting labour law to understand and interpret the various forms of employment in the labour market including disguised employment, ambiguous employment relationships, atypical employment and triangular employment relationships. In doing so, it ensures that a proper distinction is maintained between employment and independent contracting. It seeks to give effect to South Africa's obligations under ILO Employment Relationship Recommendation 198 of 2006 as well as setting out the interpretive principles contained in the Constitution.

As for the substantive contents of the Code, part 2 explains in detail the operation of the rebuttable presumption of employment and the seven indicators of employment are explained. Part 3 of the Code deals with guidelines on interpretation of the definition of employee in principal labour legislation whilst social security legislation is covered in Part 10. The other provisions relate to disguised and atypical employment relationships and principles of interpretation applicable to section 200A of the LRA and the definition of an employee. The Code does not amend the definition but is a guideline on interpreting it and section 200A of the LRA. As noted by Cheadle AJ¹⁴² the Code cements the modern trend that focus is now on the nature of the employment relationship rather than its contractual form. The language of the Code implores on courts to look at the realities of the relationship between the parties since the contractual relationship may not always reflect the true relationship.

¹⁴¹ The Code is published at (2007) 28 *ILJ* 96.

¹⁴² *Kylie v CCMA* (2008) 29 *ILJ* 198 (LC).

3.5 INTERNATIONAL LABOUR STANDARDS

International law is the yardstick for evaluating domestic legislation.¹⁴³ The South African Constitution recognises the relevance of customary international law as a source of law in sections 232, 233 and 39 (1) (b).¹⁴⁴ Relevant to labour law are international labour standards made under the auspices of ILO. Principal labour legislation recognises the supremacy of ILO standards. Sections 1 and 3 of the LRA clearly state that the purpose of the Act is to give effect to obligations incurred by South Africa as a member state of ILO and that the Act must be interpreted in compliance with the public international law obligations of the Republic.¹⁴⁵ The Code in Part 3 also demands that in interpreting the presumption of employment or definition of an employee such provisions must be interpreted in compliance with international labour standards. Therefore, ILO standards are important points of reference and it's necessary that those which have influenced the identification of the elusive employee be hashed out.

3.5.1 ILO Employment Relations Recommendation 198 of 2006 (ERR)

This recommendation was adopted on the 15th of June 2006 and its purpose is to combat disguised employment relationships which tend to deprive workers' protections afforded by labour legislation. Article 1 of the recommendation imposes an obligation on member states to define in domestic law workers protected by labour legislation. In an attempt to combat disguised employment Article 9 provides that in determining the existence of an employment relationship emphasis should be on the facts relating to performance of work and remuneration of the worker and not the character or contractual arrangement between the parties. For the purpose of facilitating the determination of the existence of an employment relationship Article 11 demands that member states should prescribe specific indicators or a legal presumption that an employment relationship exists, where one or more relevant indicators are present.¹⁴⁶ Some of the factors which must be taken into account include, supervision and control, integration of the worker, economic dependence of the worker, provision of tools and equipment and rendering of services personally

¹⁴³ See ILO; International Trading Centre, Use of International Law by Domestic Courts, Compendium of Court Decisions; 2011 at 3.

¹⁴⁴ The relevance of international law was also recognized in the following cases, *S v Makwenyane* 1995 (3) SA 391 (CC); *NUMSA v Bader Bop (Pty) Ltd* [2003] 2 BLLR 103 (CC); *Minister of Defence v SANDU* (2006) 22 ILJ 2276 (SCA).

¹⁴⁵ Similar statutory provisions are also found in the EEA, BCEA and SDA.

¹⁴⁶ See Articles 11-13 of the ERR.

by the worker. The recommendation acknowledges that the world of work is dynamic and encourages member states to establish appropriate mechanisms or make use of existing ones in monitoring developments in the labour market and organisation of work and to formulate, apply and review relevant laws. Despite regulating disguised employment, the ERR does not address triangular employment relationships. These are regulated by the Homework Convention 177 of 1996 and the Private Employment Agencies Convention 181 of 1997.¹⁴⁷

Apart from defining the term employee, South Africa has adopted several innovative measures to address the problem of identifying the elusive employee in line with the ERR. Firstly, South African courts focus on existence of an employment relationship and not a contract of employment. Secondly, some of the provisions of the ERR are incorporated into national law. The ERR requires that member states should provide for a legal presumption that an employment relationship exists where one or more indicators are present. This presumption exists in sections 200A of the LRA and 83A of the BCEA and is a codification of the dominant impression test. In delineating the boundary between employment and independent contracting, NEDLAC also issued the Code, which assists parties in determining the existence of an employment relationship. It can therefore be concluded that the statutory definition of employee is apposite and consistent with international labour standards.

3.6 CONCLUSION

Though the first part of the statutory definition of employee is premised on the traditional common law contract, the second part broadens the definition to cover workers who are in *de facto* employment relationships despite the absence of the traditional contract. It can be concluded that in identifying the elusive employee courts are guided by the principle of primacy of facts in that emphasis is on the existence of an employment relationship and not the existence of a valid contract of employment. On the basis of section 23 of the Constitution, the purpose of the LRA, section 200A of the LRA, the Code and international labour standards, there is a sound jurisprudential

¹⁴⁷ These conventions are beyond the scope of this discussion but are relevant in identifying the employee and employer in triangular employment relationships and home work. Other relevant ILO standards which deal with the employment relationship include Part-Time Work Convention 175 of 1994, Maternity Protection Convention 183 of 2000, Freedom of Association and the Right to Organise Convention 87 of 1948 and Termination of Employment Convention 158 of 1982.

foundation for a broad interpretation of the definition of employee. The main aim being to cast the net of protection wider and cover vulnerable employees. However, the definition is never immune from critical reflection, and when necessary revision.

CHAPTER FOUR

RECOMMENDATIONS AND CONCLUSIONS

4.1 RECOMMENDATIONS

Given the need for labour and social protection of workers in non-standard employment, the starting point to any meaningful reform in labour law is the ratification of all international labour standards adopted by ILO dealing with the employment relationship. Otherwise the effectiveness of the conventions in protecting vulnerable workers will be limited. As noted by Fourie¹⁴⁸ international labour standards that have been ratified can be effective only if the provisions are reflected in national legislation and policies. Though the definition of employee is broad enough to cover various forms of employment, there is need to revisit the definition and complement it with a statutory definition of the contract of employment and employment relationship. The LRA only defines the term employee. It does not deal with regulation of the employment contract as a specific contract or the concept of work. This is despite the fact that the employment contract is the basis of an employment relationship. The Labour Relations Amendment Bill, 2010 (LRAB) had proposed inserting the following definition of a contract of employment in the LRA,

“it is a common law contract of employment or any other agreement or arrangement under which a person agrees to work for an employer but excludes a contract for work as an independent contractor.”

The need for including this definition has been identified by the South Africa Law Commission and in decisions by the Labour Court. The main purpose of inserting it is to clarify the uncertainty that arises from the fact that the statutory definition of an employee is broader than the equivalent common law concept.¹⁴⁹ Regrettably, this proposal was removed from the final LRAA, 2014.

Apart from defining the term contract of employment, there is need for labour legislation to define the term employment relationship. The courts have only identified criteria for identifying an employment relationship in case law without defining the term. International labour standards demand that the term be defined or alternatively the employment contract be placed in the broader context of the employment relationship. This would necessarily demand that the term worker be

¹⁴⁸ Fourie ES “Non-Standard Workers: The South African Context, International Law and Regulation by the European Union” (2008) 4 *PER/PELJ* 23.

¹⁴⁹ Summary of Draft Labour Bills, *ILJ* 2011 at 57.

defined in labour legislation and the criteria for identifying one be codified. This provides clarity as to who is an employee. This would also entail the inclusion of a deeming provision in the LRA in terms of which one is deemed to be under a contract of employment if the criteria for the existence of an employment relationship is satisfied.

Another disquieting aspect about the current LRA is that it does not define the term independent contractor or self-employed. The definition of employee in section 213 excludes independent contractors from its ambit. The concept of an employee must be seen in contrast to that of an independent contractor. Independent contracting was defined in the LRAB as a,

“person who works for or supplies services to a client or customer as part of the person’s business, undertaking or professional practice.”

Inserting such a definition in the LRA will go a long way in ensuring that fraudulent “*independent contracting*” is not used to disguise employment.¹⁵⁰ The absence of a definition of employer in the LRA has also posed serious threats to the efficacy of labour legislation. The employment relationship is a relationship of reciprocity involving the employer and employee. Labour legislation identifies the employee but does not define the other party. The LRAB, 2010 once proposed the following definition of employer,

“any person, institution, organisation, or organ of state who employs or provides work to an employee or any other person and directly supervises or tacitly or expressly undertakes to remunerate or reward such employee for services rendered.”

Unfortunately, this definition was left out in the LRAA, 2014. Though the identification of an employer might appear simple, the rise in externalisation of work arrangements and conducting of business through holding companies has resulted in the true identity of the employer being masked. It is therefore necessary that the identity of the employer be defined by labour legislation.

One area which also needs revisiting is the presumption of employment in section 200A of the LRA and section 83A of the BCEA. This presumption only applies to the LRA and the BCEA. There is need for statute to expressly extend its application to other labour legislation and social security legislation. Secondly, the presumption does not apply to persons earning more than R205 433, 30 per annum. With due respect, there is no basis for distinguishing the nature of the relationship between the parties exclusively on the basis of income. The presumption must be invoked regardless of the income earned by the employee. In addition, section 200A (1) of the

¹⁵⁰ Summary of Draft Labour Bills, *ILJ*, 2011 at 57.

LRA states that the presumption applies “*regardless of the form of contract*”. As discussed in Chapter 3 courts have since held that for the presumption to apply there must be a legally enforceable or some contractual arrangement in place between the parties. Such a restrictive interpretation defeats the purpose the presumption. Section 200A (3) talks of a “*work arrangement*” whilst section 200A (1) refers to a “*contract*”. Since emphasis in identifying an employee is on the existence of an employment relationship, it is submitted that the words “*form of contract*” in section 200A (1) must be removed and substituted with, “*form of work arrangement.*” This will broaden the application of the presumption and ultimately the definition of employee without doing any violence to it.

4.2 CONCLUSION

It is generally accepted that the employment relationship is the best vehicle through which workers have access to rights guaranteed by labour legislation. In South Africa it is the predominant framework that underpins the operation of the labour market. Unfortunately, the world of work is changing resulting in the erosion of standard employment leaving many workers outside the scope of protection associated with employment. This has led to the misplaced conclusion that the definition of employee is no longer germane with modern work arrangements, the Constitution and international labour standards. In other words, it has been argued that the current statutory definition of employee is subtle. Despite this assumption there is no need to amend the definition. On a positive note, while the definition is still rooted in the common law contract, it is capable of an expansive interpretation. The jurisprudential basis for such a purposive interpretation lies in international labour standards adopted by ILO, the Constitution and the primary objects of labour legislation. On the basis of this broad interpretation it can be concluded that the definition of employee does not presuppose the existence of a valid contract. Emphasis is on the existence of an employment relationship rather than a contract of employment.

Though interpreted widely, there is potential for the definition failing to adequately cover workers in atypical and non-standard employment. It is acknowledged that this problem is attributable to the failure by labour legislature to provide statutory definitions for key terms such as contract of employment, independent contracting, worker, employment relationship and employer. These proposed definitions will not only complement the definition of employee but will also eliminate

problems arising from identifying the elusive employee and employer in indecipherable circumstances. This would mean that the development of a coherent labour jurisprudence capable of standing the test of time can be achieved.

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LIST OF ABBREVIATIONS

BCEA	Basic Conditions of Employment Act
CC	Constitutional Court
CCMA	Commission for Conciliation Mediation and Arbitration
COIDA	Compensation for Occupational Injuries and Diseases Act
DIT	Dominant Impression Test
EEA	Employment Equity Act
EER	Employment Relations Recommendation
IC	Industrial Court
ICA	Industrial Conciliation Act
ICAA	Industrial Conciliation Amendment Act

ILO	International Labour Organisation
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act
LRAA	Labour Relations Amendment Act
LRAB	Labour Relations Amendment Bill
NEDLAC	National Economic Development and Labour Council
OHSA	Occupational Health and Safety Act
SCA	Supreme Court of Appeal
SDA	Skills Development Act
UIA	Unemployment Insurance Act