EMPLOYEES, WHO ARE THEY

The status of employee versus independent contract is a complex subject with many pit falls. There have been decisions and judgements from both the CCMA and the Labour Courts on the matter.

The Basic Conditions of Employment Act (75/1997) defines employee as:-

" employee" means –

(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and

(b) any other person who in any manner assists in carrying on or conducting the business of an employer;

The Labour Relations Act in s 213 defines an employee in exactly the same wording.

The definition does not refer directly nor make reference to a contract of employment.

However, in 2002 the Basic Conditions of Employment Act was amended by the insertion of section 83A, which introduced a presumption as to who is an employee.

"83A Presumption as to who is an employee.- (1) A person who works for, or renders service to, any other person is presumed, until the contrary is proved, to be an employee, regardless of the form of the contract, if any one or more of the following factors is present:

(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 is a 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 that person 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.

(2) Subsection (1) does not apply to any person who earns in excess of the amount determined by the Minister in terms of section 6 (3).

(3) If a proposed or existing work arrangement involves persons who earn amounts equal to or below the amounts determined by the Minister in terms of section 6 (3), any of the contracting parties may approach the CCMA for an advisory award about whether the persons involved in the arrangement are employees.

The Labour Relations Act in s 200A contains the exact same presumption.

In terms of the stated presumptions, a person earning below the amounts determined by the Minister[1] (R149736.00 per annum) is automatically presumed to be an employee. The onus then rests upon the employer to prove the contrary, regardless of what the content of the contract may be.

This, however, does not imply that a person earning above the amount determined by the Minister is not an employee. In such a case, the factors out lined in the presumption may be used as guidelines to determine the status of the person.

The National Economic Development and Labour Council, has in terms of section 200A (4) of the Labour Relations Act issued a lengthy Code of Good Practice on the determination of who is an employee. [2] The following extracts are from the code:-

The contractual relationship may not always reflect the true relationship between the parties. In these cases, the court must have regard to the realities of that relationship, irrespective of how the parties have chosen to describe their relationship in the contract [3] Adjudicators should look beyond the form of the contract to ascertain whether there is an attempt to disguise the true nature of the true nature of employment relationship or whether there is an attempt by the parties to avoid regulatory obligations, such as those under labour law or the payment of tax.

Disguised employment is a significant reality in the South African labour market and has been dealt with in a number of reported decisions.

Courts, tribunals and officials must determine whether a person is an employee or independent contractor based on the dominant impression gained from considering all relevant factors that emerge from an examination of the realities of the parties' relationship.

[1] GNR 100 of 1 February 2008
[2] GenN 1774 in GG 29445 of 1 December 2006
[3] SA Broadcasting Corporation v McKenzie (1999) 20 ILJ 585 (LAC); [1999] 1 BLLR 1

It is consistent with the purpose of the LRA and other labour legislation to classify as employees, workers who have agreed to contracts purporting to classify them as independent contractors. The fact that a person provides services through the vehicle of a legal entity such as a company or a closed corporation does not prevent the relationship being an employment relationship covered by labour legislation. It is necessary to look beyond the legal structuring to ascertain the reality of the employment relationship and determine whether the purpose of the relationship was to avoid labour legislation or other *regulatory obligations* [4] *However, where a person has made representations to an agency such as the SA Revenue Services that they are not employees in order to gain tax benefits, it may be appropriate for a court or arbitrator to refuse to grant them relief on the basis that they have not instituted the proceedings with "clean hands".* [5]

The code further lists certain factors which are frequently cited in judgements listing the differences between the two types of contracts.

Employee	**Independent Contractor**
1. Object of the contract is to render Personal services	Object of contract is to perform a specified work or produce a specified result
2. Employees must perform services personally	Independent contractor may usually perform through others
3. Employer may choose when to make use of services of employee	Independent contractor must perform work (or produce result) within period fixed by contract
4. Employee obliged to perform lawful commands and instructions of employer	Independent contractor is subservient to the contract, not under supervision or control of employer
5 Contract terminates on death of employee	Contract does not necessarily terminate on death of contractor
6 Contract also terminates on expiry of period of service	Contract terminates on completion of work or in contract

These six factors are not a definitive listing of all the differences between the two types of contracts.

What is the situation with casuals, applicants and foreign workers?

In ***NUCCAWU v Transnet LTD t/a Portnet*** [6] the Court held the definition of 'employee' was wide enough to include persons who were retained on the books of an employer to render services, albeit on an ad hoc basis. Moreover, the label 'casual' did not detract from the facts that such persons remained employees.

[4] Denel (Pty) Ltd v Gerber (2005) 26 ILJ 1256 (LAC); [2005] 9 BLLR 849 (LAC)
[5] Denel (Pty) Ltd v Gerber.
[6] (2000) 21 ILJ 2288 (LC)

In ***Wyeth SA (Pty) LTD v Mangqele & others***[7] the Court held the termination of a contract of employment before the employee commences service constitutes a dismissal for the purposes of the Labour Relations Act. The applicant took the matter on appeal, and the Labour Appeal Court [8] held that a person who has concluded a contract of employment but has not yet commenced working for an employer is an employee for purposes of the Labour Relations Act and the withdrawal or termination of the contract by the employer constitutes a dismissal.

Section 38(1) of the Immigration Act reads:

"Employment – (1) No person shall employ –

(a) an illegal foreigner;

(b) a foreigner whose status does not authorise him or her to be employed by such person: or

(c) a foreigner on terms, conditions or in a capacity different from those contemplated in such foreigner's status"

Section 43(3) of the Act reads:

"(3) Anyone who knowingly employs an illegal foreigner or a foreigner in violation of this Act shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding one year, provided that such person's second conviction of such an offence shall be punishable by imprisonment not exceeding two years or a fine, and the third or subsequent convictions of such offences by imprisonment not exceeding three years without the option of a fine."

A contract in violation of these sections of the Immigration Act would be void *ab initio,* and accordingly the 'employee' can not rely on the protection of the Labour Relations Act or the Basic Conditions of Employment Act.

Not so says the Labour Court in its recent judgement in the matter of **DISCOVERY *HEALTH LIMITED v COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION, COMMISSIONER ELE MYHILL, GERMAN LANZETTA*** [9]. The back ground to the matter is as follows:

Lanzetta an Argentinean national, entered South Africa on 21 January 2001, on a study visa, issued by the Department of Home Affairs. The permit was valid until 15 January 2002, but the Department later extended the visa until 31 December 2002. On 1 January 2003, Lanzetta obtained a temporary residence permit, valid for a period of three months. He also applied for a work permit, which he obtained on 8 May 2003, permitting him to work until 31 March 2004. The work permit was later extended, to permit Lanzetta to work for Multi-Path Customer Solutions (Pty) Ltd only until 31 December 2005. On 1 May 2005 Lanzetta commenced work for Discovery Health, who contends that when it

[7] [2003] 7 BLLR 734 (LC)
[8] [2005] 6 BLLR 523 (LAC).
[9] [2008] 7 BLLR 633 (LC)

came to their notice that Lanzetta did not have a valid work permit, his employment was terminated on 4 January 2006. by letter.

Lanzetta referred an unfair dismissal to the CCMA, who ruled that it had the necessary jurisdiction to determine the matter. It is this decision that Discovery took on review.

Discovery argued that since the contract was void *ab initio* because it was in conflict with the Immigration Act, it could not be said that Lanzetta was an employee.

Lanzetta's argument was that the definition of 'employee' in the LRA contemplates an 'employment relationship' that transcends contract, and while a contract of employment entered into with a foreign national who does not possess a valid work permit is invalid, the employment relationship is not.

The Court found that although Lanzetta's employment status may have been illegal, he was resident in South Africa legally. It had been the employer and not Lanzetta who had contravened the Immigration Act, because the wording of that Act prohibited employers from employing certain foreigners rather than prohibiting the foreigners from accepting employment. Section 23 of the Constitution provides "that everyone" has the right to fair labour practices. There is no indication in the Constitution or in the Immigration Act that illegally-employed foreigners are excluded from this constitutional right. The Immigration Act's prohibition against the employment of so-called "illegal" foreigners does not void the employment contract of such a foreigner. The definition of an employee as per the Labour Relations Act does not require there to be an employment contract in order for a person to be an employee, neither does section 23 of the Constitution require the existence of an employment contract. International Law and the ILO Convention 87 supports this principle. The definition of employee does also extend to persons who work without the existence of a contract.

The Court concluded as follows:-

"(a)
The contract of employment concluded by Discovery Health and Lanzetta was not invalid, despite the fact that Lanzetta did not have a valid work permit to work for Discovery Health. For this reason, Lanzetta was an 'employee' as defined in s 213 of the LRA and entitled to refer the dispute concerning his unfair dismissal to the CCMA.

(b)
Even if the contract concluded between Discovery Health and Lanzetta was invalid only because Discovery Health was not permitted to employ him under s 38(1) of the Immigration Act, Lanzetta was nonetheless an 'employee' as defined by s 213 of the LRA because that definition is not dependent on a valid and enforceable contract of employment."

To confuse matters even further the Labour Appeal Court in ***"Kylie" v CCMA & OTHERS***[10] held sex workers fall within the statutory definition of "employee" and accordingly, under the jurisdiction of the forums established by the LRA. Further it was held employees who have concluded contracts for the performance of illegal work are not entitled to reinstatement, but entitled to compensation only as *solatium* to be determined after the application of the *par delictum* rule.

The Labour Relations Act recognises misconduct, incapacity and operational reasons only as reasons for dismissal.

Thus it appears that the termination of an employee's services based upon the expiry of his work permit and in turn the validity of the contract *perse,* is not a valid reason. However, retaining the employee's services under these conditions leaves the employer open to prosecution under the Immigration Act.

The recent judgement makes it clear, foreigners who are employed irrespective of the fact that such foreigners are not in possession of a valid work permit are employees, and entitled to be treated fairly, i.e. the requirements of substantive and procedural fairness apply.

It will be noted that in the matter involving Discovery no hearing was held. A meeting was held and the employee presented with a letter terminating his employment.

What are the employer's options then?

Employers who have such foreigners that are subject to work permits in their employ, must keep accurate records of the expiry dates of work permits, make available the required documentation, and instruct the employee to have the work permit renewed prior to the permit expiring. Should the employee fail to do so, the employee would have failed to carry out a lawful instruction, and could therefore be disciplined for misconduct after having followed a fair procedure.

[10] [2010] 7 BLLR 705 (LAC)