THE DISTINCTION BETWEEN A CONTRACT OF EMPLOYMENT AND A CONTRACT WITH AN INDEPENDENT CONTRACTOR

by

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SUMMARY

The purpose of this treatise was to determine the distinction between the contract of service (employment) and the contract of work (independent contractor). A comprehensive literary survey was undertaken so as to establish if such a distinction does indeed exist. A logical point of departure was to study the contract of service and determine how the employment relationship is established by it. It is also necessary to establish under what circumstances a contract may be terminated and what the rights and obligations of the parties to the contract were. The contract between the parties will determine remedies to the breach of contract or applicability of labour legislation.

It is also necessary to establish the definition of an employee under various statutes so as to understand what remedies exist should rights be infringed upon. Statutes considered include the Constitution of the Republic of South Africa, Labour Relations Act, Basic Conditions of Employment Act, Employment Equity Act, Unemployment Insurance Act, Compensation for Occupational Injuries and Diseases Act, Skills Development Act and the Income Tax Act. The effect of insolvency of the employer on the employee is also discussed.

Outsourcing has played a major role in the emergence of the independent contractor. This phenomenon is considered from the point of the employer in terms of the reasons for choosing the option of outsourcing and the associated risks. The employee perspective is also dealt with in terms of why an employee would change his/her employment status.

The various tests historically applied to determine the status of a worker is also discussed. These include the control, organisation, dominant impression and economic tests. Currently the dominant impression test is the one that is being applied to determine the employment relationship.

Extensive reference was made to case law. United States of America cases are referred to with specific reference to the 20 Factor Test applied by the Internal
Revenue Service. South African case law is dealt with in terms of enforcement of Bargaining Council agreements, commission-earning persons, payment for services rendered, the intention of the parties and the identity of the true employer.

The emergence of the dependent contractor is also addressed. This form of worker normally falls outside of the protection of labour legislation and social security. Amendments have been proposed to various statutes to remedy the situation in South Africa.

A final aspect that is dealt with is that of vicarious liability. The applicability of this aspect lies in the liability of the employer for damages inflicted by the employee.
The employment relationship has always been a source of controversy. This has especially been so once it is necessary to establish whether the relationship is one of service (employee) or work (independent contractor). The relationship is founded in the contract that is established between the parties, whether written or verbal. In this treatise it has been attempted to take a broad view of the employment relationship and the implications for the parties involved, with reference to local and foreign case law.

The contract of service is dealt with in some detail. A definition of the contract of service is determined and then the different elements of the contract are discussed. Included in the discussion are the requirements for a valid contract, conditions under which it can be terminated, rights and obligations of the parties under various statutes and remedies for breach of contract.

It is necessary to determine who is defined as an employee. This necessity arises from the fact that various statutes attach differing meanings to the term and different rights are conferred or denied according to the definition.

Outsourcing plays a vital role in the emergence of independent contractors. The entire aspect of outsourcing is dealt with from the perspective of both the employer and the employee (contractor). From the point of the employer reasons for outsourcing are dealt with together with risks associated with such a decision. Reasons as to why an employee may wish to make the status change from employee to that of independent contractor are briefly discussed.

The tests applied to determine the employment relationship have undergone various changes over time. Tests were initially fairly rigid, concentrating on elements of control and integration into the organisation. More recently the focus has changed to one of determining an overall impression of the relationship, taking all relevant facts into account. Certain authors suggest that a fourth test may exist, namely the economic test. Case law (United States of America and South Africa) indicates the factors which the courts and arbitrators consider when determining the employment relationship. South African case law deals with the enforcement of bargaining council agreements,
commission-earning persons, payment for services rendered, the intention of the parties at the time of concluding the contract and finally, determining the true employer.

It is necessary to look at a new species of relationship that is emerging world wide and how legislation is dealing with it. This concerns the so-called dependent contractor. A final aspect dealt with is the issue of vicarious liability and the importance of determining the employment relationship to establish liability.

2. ESTABLISHING THE EMPLOYMENT RELATIONSHIP

Although seeming to be a relatively simple question, distinguishing between an employee and other persons performing work has resulted in a surprising amount of difficulty. Zondo J sums up this difficulty in *Medical Association of SA and Other v Minister of Health and Another*¹ when he stated:

“To define the word ‘employee’ in such a way that it is easy to make the distinction between an employee and a independent contractor or to put it differently to make a distinction between a contract of service and a contract of work is one of the most difficult questions which the courts have grappled with in decades.”

Under South Africa common law, the terms have their origin in Roman Law. Three species of *locatio conductio* (letting and hiring) exist:²

- *Locatio conducio rei* - letting and hiring of specific thing against monetary payment
  (the hiring of a sanding machine for the week-end for example);

- *Locatio conducio operis* - forerunner of the independent contractor;

- *Locatio conductio operarum* - letting and hiring of personal services against payment.

The realities of modern employment practices make it increasingly important that a distinction be made between the contract of employment and that of a contract of work. Specific types of employment contracts are being concluded to meet various demands.

¹ [1997] 18 ILJ 528 (LC) 533.
Drawing a distinction between the two types of contract is of fundamental importance for the following reasons:

- Protection against unfair dismissal.
- Entitlement to redundancy payment.
- Income tax matters.
- Entitlement to social security benefits.
- Matters of vicarious liability.

3. THE CONTRACT OF SERVICE

*Locatio conductio operarum* (contract of service) therefore has to do with the personal hiring of services and is governed by a contract of employment. This contract does not have to be in writing, however for the sake of removing confusion and in the event of a dispute, this should preferably be the case. Basson et al define the contract of employment as follows:

“… an agreement between two parties in terms of which one party (the employee) places labour potential at the disposal and under the control of the other party (the employer) in exchange for some form of remuneration.”

In his definition of the contract of employment, Grogan adds the factors of a potential time frame and the employer’s entitlement to determine the duties of the employee. This definition contains the following elements:

- **Voluntarism.** For the agreement to be valid there can be no compulsion to enter into or be taken into employment. In *Whitehead v Woolworths* it was determined that
a person who has been offered employment, but has not yet tendered their services, cannot be dismissed. Jordaan cautions against a blind acceptance of voluntarism and freedom of contract “… particularly today when so much of the content of that relationship is governed by statute. Whatever voluntarism may formally exist at the inception of the relationship, the employee has little, if any, control over the substance of the relationship with the employer”.9

- **Legal personae.** Two parties must enter into the agreement, one being the employee and the other the employer.

- **Time frame.** The agreement can either be for an indefinite or fixed period.

- **Subjugation.** The labour potential of the employee is placed at the disposal of and under the control of the employer. This implies that the employee must perform the services personally. The employer obtains the right to determine the manner in which the employee will do his/her work.

- **Remuneration.** The employer pays a determinable amount in exchange for the labour potential. This amount can be in the form of cash or a combination of cash and kind.

3.1 **Requirements for a valid employment contract**

If parties conclude a contract that does not meet the legal requirements, it will not be recognised in law. The employment contract needs to fulfil the following requirements to be valid:11

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6 26.
7 Basic Conditions of Employment Act, s 48.
8 [1999] 8 BLLR 862 (LC) - this case also dealt with an alleged unfair labour practice relating to discrimination on the grounds of pregnancy.
10 “To bring under the yoke; to force to submit” - Collins English Dictionary. Although this term appears to be harsh, it is used as a result of the so-called imbalance in bargaining power between the parties. The assumption is made that the employer enjoys a power advantage.
11 Basson et al 31-32.
Agreement. **Parties must agree on the nature as well as the content of the contract.** This means that there needs to be agreement on the type of contract (for example employment versus agency) as well as terms of engagement.\(^{12}\)

Legality. **The terms of the contract cannot be contra bones mores (contrary to the law).** Parties may not for example agree to terms that are less favourable than those contained in any relevant legislation or is illegal in terms of the law of the country. In *MacKenzie v Paparazzi Pizzeria Restaurant*\(^ {13} \) the arbitrator held that despite the fact that the contract was illegal due to the provisions of the Liquor Act\(^ {14} \) (person under the age of eighteen cannot be employed where liquor is served), this did not deprive the applicant of access to the mechanisms of the Labour Relations Act. This decision is contrary to an earlier decision of the Industrial Court that determined that due to the illegality of the contract it lacked jurisdiction to entertain the dispute.\(^ {15} \)

Capacity. **This usually refers to the age of the person.** In terms of the Basic Conditions of Employment Act, the employment of a person under the age of 15 is prohibited.\(^ {16} \) It can also refer to the person’s ability to understand the contract. The fact that a contract has not been understood can lead to it not being considered binding.\(^ {17} \) A further meaning of capacity is the legal ability of a person to enter into a contract.

Possibility. **That which is agreed to must be able to be done.**

Formalities. **Any formalities need to be complied with.** This applies for example with apprenticeship and candidate attorney agreements.

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\(^{12}\) Absence of true agreement means that no contract is formed - *MacKay and another v Comtec Holdings (Pty) Ltd* [1996] 7 BLLR 863 (IC). See also *Smith v Apollo Batteries SA (Pty) Ltd* Labour Law Digest Vol 4 (1999) 598.

\(^{13}\) [1998] 9 BALR 1165 (CCMA).

\(^{14}\) Act 27 of 1989.

\(^{15}\) *Norval v Vision Centre Optometrists* [1996] 2 BLLR 135 (IC).

\(^{16}\) s 43.

\(^{17}\) *Mqwebe v Goldstar Security; Matabane v Goldstar Security* [2000] 7 BALR 769 (CCMA) - applicants had not understood contract deeming them to be independent contractors and that the contracts were entered into with a labour broker. The arbitrator determined that the applicants were in fact employees of the respondent and not of the labour broker. See also
3.2 Termination of employment relationship

Both the contract of service and the contract of work can be terminated for various reasons and include the following:\textsuperscript{18}

- Expiry of agreed period (fixed-term contract): The contract terminates once the agreed to period comes to an end. Parties contract to a specific beginning and ending dates. Non-renewal of a fixed term contract may be deemed as a dismissal. The test in determining if non-renewal qualifies as a dismissal revolves around if an expectation of renewal was created.\textsuperscript{19}

- Completion of specific task: Parties contract to the performance of a specific task. When this is completed, the relationship terminates.

- Notice: Parties are entitled to terminate the contract on giving notice in compliance with the Basic Conditions of Employment Act.\textsuperscript{20}

- Summary termination: The contract may be terminated summarily without complying with the required notice periods when there has been a material breach of the contract.\textsuperscript{21} Such termination is still subject to fair procedure however.

- Repudiation: Where a party repudiated terms of a contract the relationship may be terminated. Specific damages or performance may be claimed by the party terminating the contract.

- Mutual agreement: Despite contractual conditions to the contrary, parties may terminate the agreement by mutual consent.

\textsuperscript{18} Grogan 71-81.
\textsuperscript{19} s 186(b) Labour Relations Act.
\textsuperscript{20} s 37.
\textsuperscript{21} s 37(6)(b) Basic Conditions of Employment Act.
- Death of either party: The death of the employee will automatically terminate the employment relationship. This is not necessarily the case on the death of the employer or independent contractor. The executors of a deceased estate may however still claim any outstanding remuneration.22

- Insolvency: The employment relationship automatically ceases with the insolvency of the employer.23 Collective agreements are however not automatically terminated with the employer's insolvency.24

- Supervening impossibility of performance: If any party to the employment relationship is unable to perform contracted obligations on a permanent or unreasonably extended period, the other party may terminate the contract.

- State action: Where official State action renders performance impossible, the other party may terminate the contract of employment.

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22 Estate late Mavuna and another v National Sorghum Breweries Ltd [1996] 5 BLLR 599 (IC) and Estate late WG Jansen van Rensburg v Pedrino (Pty) Ltd [2000] 21 ILJ 494 (LAC).

23 SAAPAWU v HL Hall and Sons (Group Services) Ltd and others [1999] 2 BLLR 164 (LC); Ndima and others v Waverly Blankets Ltd [1999] 6 BLLR 577 (LC).

24 SACTWU obo Zondi & others v Waverly Blankets Ltd [1999] 7 BALR 841 (CCMA).
3.3 Rights and obligations of employees and employers

Within the employment relationship both the employee and employer have certain rights and obligations.

3.3.1 Duties of the employee

An employee has a duty to enter and remain in service, to maintain reasonable efficiency, to further the employer’s business interests, to be respectful and obedient; and to refrain from misconduct. Any transgression of these duties may lead to the employee being disciplined, including dismissal under an applicable disciplinary code and/or criminal and civil litigation.

3.3.2 Statutory rights of the employee

The employee enjoys the following statutory rights:

- Remuneration
- Safe working conditions
- Prescribed working hours
- Annual leave
- Sick leave
- Maternity leave

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25 Grogan 43-52.
26 Employee’s duty to refrain from disclosing confidential information even after leaving the employer - Penta Publication (Pty) Ltd v Schoombie and others [2000] 2 BLLR 199 (LC).
27 Grogan 57-70.
28 ss 16, 17, 18 & 32 Basic Conditions of Employment Act.
29 ss 7, 8, 9, 10, 11, 12, 14 & 15 Basic Conditions of Employment Act.
30 ss 20 & 21 Basic Conditions of Employment Act.
31 s 22 Basic Conditions of Employment Act.
Family responsibility leave

Prescribed days off

Notice on termination of employment

Payments on termination

Freedom of association. An employee has the right to participate in the formation of a trade union and to be a member of a trade union (subject to its constitution). Once a member, that person can participate in the election of office-bearers or stand for election.

Enforcement of statutory rights

Fair labour practices

Not to be unfairly dismissed

Certificate of service

Strike, subject to limitations and other protest action. The Labour Appeal Court determined that courts should not restrict protest action rights as conferred by the Constitution.

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33 s 27 Basic Conditions of Employment Act.
34 s 18 Basic Conditions of Employment Act.
35 s 37 Basic Conditions of Employment Act.
36 ss 38 & 40 Basic Conditions of Employment Act.
37 s 4 Labour Relations Act.
38 Applicant deemed not to be employee able to join union in terms of its constitution - Nomabunga v Daily Dispatch [1997] 11 BLLR 1519 (CCMA).
39 ss 9, 22 & 191 Labour Relations Act.
40 s 23(1) Constitution of the Republic of South Africa.
41 s 185 Labour Relations Act.
42 s 42 Basic Conditions of Employment Act.
43 s 23(2)(c) Constitution of the Republic of South Africa; s 64 Labour Relations Act.
44 ss 65, 67 & 68 of Labour Relations Act.
3.3.3 Employer duties

An employer has a duty to receive the employee into service, to remunerate the employee, ensure safe working conditions, general contractual duties and specific statutory duties.

4. REMEDIES FOR BREACH OF CONTRACT

4.1 Employee

- Resignation: The employee can sue for outstanding contractual obligations under common law. Further a claim of unfair dismissal can be instituted if the reason for the resignation was that the employment relationship had become intolerable (constructive dismissal). Although resignation is not strictly a contractual remedy, it nevertheless remains a course of action that may be followed in the event of a contractual breach.

- Interdicts: The Labour Court has exclusive jurisdiction to grant interdicts against employers from performing illegal actions against employees.

- Claim outstanding wages due.

- Sue for damages: Recovery of patrimonial loss limited under Labour Relations Act.

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47 Grogan 52-56.
49 Grogan 52-56.
50 Generally there is no legal obligation to provide work once the employee has been accepted into service. This is however subject to the employee receiving the agreed to remuneration and benefits. It would however not make economic sense to employ someone and let him or her remain idle while receiving a salary. A noticeable exception to this is where the employee relies on commission as remuneration. In this case the failure to provide work can be seen to be a breach of contract (Faberlan v McKay and Fraser 1920 WLD 24).
51 s 186(e) Labour Relations Act.
52 Employment contract not automatically terminated unless employee resigns - Coetzee and another v Pitani (Pty) Ltd t/a Pitani Electrification Projects and others [2000] 8 BLLR 907 (LC).
53 s 186(e) Labour Relations Act.
54 NUM v Elandsfontein Colliery (Pty) Ltd [1999] 12 BLLR 1330 (LC).
☐ Application for reinstatement in terms of Labour Relations Act.

☐ Application in terms of internal grievance procedure.

☐ Use of private dispute resolution: Where a dispute resolution mechanism is governed by a collective agreement, this mechanism must be utilised.

☐ Withdrawal of labour (strike).\(^{55}\)

4.2 Employer

☐ Disciplinary action: This may take the form of warnings, suspension or dismissal.

☐ Interdicts: In this case the employer may apply for an interdict requiring compliance by the employee.\(^{56}\)

☐ Damages: The recovery of damages is regulated by the Basic Conditions of Employment Act.\(^ {57}\)

☐ Criminal prosecution.

☐ Lockouts: This is a "weapon" of the employer to agree to a demand or to retaliate against employees who are in breach of their contracts. It is usually used in the context of collective bargaining.

☐ Statutory and private dispute resolution: In terms of legislation or collective agreement.

4.3 Independent contractor

The independent contractor does not have access to the mechanisms of labour legislation in his/her contractual relationship with the person for whom he is

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\(^{55}\) Strike action is covered in ss 64-68 of the LRA.


\(^{57}\) s 34(1)-(2).
performing work. Obviously if the contractor employs other persons, then that relationship is subject to labour legislation.

The independent contractor needs to resort to common and commercial law. Remedies include:\n
- **Specific performance:** This is an order for the defaulter to do what is required of him/her. Where compliance is not ordered, damages may be awarded.

- **Damages:** The intention of an award for damages is to place the injured party in the economic position he/she would have occupied had the contract been properly performed.

- **Cancellation.**

5. **DEFINITIONS OF EMPLOYEE UNDER VARIOUS STATUTES**

The obvious need to distinguish between an employee and the independent contractor lies in the protection and benefits that the employee enjoys under the various statutes and the recourse the respective parties have in the event of breach of contract. In addition, the distinction is of importance in the Law of Delict in determining vicarious liability of an employer.

5.1 **Constitution of the Republic of South Africa (the Constitution)\textsuperscript{59}**

The Constitution\textsuperscript{60} confers certain labour rights and these then need to be and are embodied in subservient legislation. These rights are contained in section 23 and

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\textsuperscript{58} Sharrock *Business Transactions Law* 339-346 and Hutchinson (Ed) Wille’s *Principles of South African Law* 515-527.

\textsuperscript{59} Act 106 of 1996.

\textsuperscript{60} For example the Labour Relations Act, Basic Conditions of Employment Act, Employment Equity Act, Skills Development Act, Unemployment Insurance Act, Compensation for Occupational Injuries and Diseases Act.
include fair labour practices, freedom of association, collective bargaining and the right to strike.\footnote{Labour Court lacks jurisdiction to enforce constitutional rights other than those contained in labour legislation - \textit{FGWU \& others v The Minister of Safety and Security \& others} [1999] 4 BLLR 332 (LC).}

5.2 Labour Relations Act (the LRA)\footnote{Act 66 of 1995 as amended.}

The LRA defines an employee as follows:

\begin{quote}
\text{(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}\n\end{quote}

\begin{quote}
\text{(b) any other person who in any manner assists in carrying on or conducting the business of an employer,}”\end{quote}

It has been proposed that section 200 be amended by the insertion of the following:\footnote{Labour Relations Amendment Bill, 2000 Government Gazette 21407 27 July 2000.}

\begin{quote}
”200A
\end{quote}

\begin{quote}
(1) Until the contrary is proved, a person who works for, or provides services to, any other person is presumed to be an employee, if any one of the following factors are present –
\end{quote}

\begin{quote}
(a) the manner in which the person works is subject to the control or direction of the other person;
\end{quote}

\begin{quote}
(b) the person’s hours of work are subject to the control or direction of another person;
\end{quote}

\begin{quote}
(c) in the case of a person who works for an organisation, the person forms part of that organisation;
\end{quote}

\begin{quote}
(d) the person has worked for that person for an average of at least 40 hours per month over the last three months;
\end{quote}

\begin{quote}
(e) that person is economically dependent on the person for whom he or she works or provides services;
\end{quote}

\begin{quote}
(f) the person is provided with his or her tools of trade or work equipment by another person;
\end{quote}

\begin{quote}
(g) the person only works or supplies services to one person.”
\end{quote}

5.3 Basic Conditions of Employment Act\footnote{Act 75 of 1997 as amended.} and the Employment Equity Act\footnote{Act 55 of 1998.}
These Acts apply the same definitions as that used in the Labour Relations Act, except that the Employment Equity Act uses the phrase “other than an independent contractor”. The Minister of Labour is able to classify any group of persons, not covered by the definition, as an employee.\textsuperscript{66}

It is proposed to amend the definition of an "employee" (section 83) and use the exact wording as applied in the proposed amendment in the Labour Relations Act.\textsuperscript{67}

5.4 Unemployment Insurance Act\textsuperscript{68}

This Act uses the word “contributor” rather than employee. A contributor is defined as “any person who has entered into or works under a contract of service or a contract of apprenticeship or a contract of learnership”. The Act only allows for contributors to claim from the fund. Despite the fact that the definition of a contributor appears to match that of an employee in a broad sense, the act allows for certain categories of persons to be excluded. The following categories are listed:\textsuperscript{69}

- Independent contractors.
- Persons who have never been in formal employment, for example school leavers or those completing tertiary or further training.
- Non-citizens of South Africa entering the country to perform work or undergo training and where a legal obligation exists for them to leave on completion of the contract of work or training.
- Persons earning above the ceiling imposed by section 50 of the Unemployment Insurance Act.\textsuperscript{70}
- Casual employee’s not for the purposes of the employers business.

\textsuperscript{66} s 83(1) Basic Conditions of Employment Act.
\textsuperscript{67} See 5.2 supra for the proposed amendment.
\textsuperscript{68} Act 30 of 1996.
\textsuperscript{70} The limit as from 1 November 1999 is R93 288 per year/R7 774 per month.
☐ A person employed for less than one full working day or for less than eight hours per calendar week.

☐ Domestic workers.

☐ The husband or wife of an employer who works for that employer.

☐ Officers in terms of the Public Service Act of 1994. Employees in terms of the act are not excluded as long as they comply in terms of the imposed ceiling.

☐ Persons contributing to the Government Employees Pension Fund.

☐ Certain educators.

☐ Officers on the fixed establishment of Parliament.

Although a detailed discussion of the merits of the above exclusions falls outside the scope of this treatise, it is apparent that these exclusions are applicable to persons who in fact need the unemployment benefits. These include domestic workers, seasonal and casual employees. They are often the poorest paid and most vulnerable to dismissal.

5.5 Compensation for Occupational Injuries and Diseases Act (COIDA)

This Act defines an employee as follows:

“A person who has entered into or works under a contract of service or apprenticeship or learnership, with an employer, whether the contract is express or implied, oral or in writing, and whether the remuneration is calculated by time or by work done, or is in cash or kind, and includes –

(a) a casual employee employed for the purpose of the employer’s business;

(b) a director or member of a body corporate who has entered into a contract of service or, in so far as he acts within the scope of his employment in terms of such contract;

71 Proclamation 103 of 1994.
(c) a person provided by a labour broker against payment to a client for the rendering of a service or the performance of work, and for which service or work such person is paid by the labour broker;

(d) in the case of a deceased employee, his dependants, and in the case of an employee who is a person under disability, a curator acting on behalf of that employee;

but does not include –

(i) a person performing military service … who is not a member of the Permanent Force …;

(ii) a member of the Permanent Force …;

(iii) a member of the South African Police Service …;

(iv) a person who contracts for the carrying out of work and himself engages other persons to perform such work;

(v) a domestic employee employed as such in a private household.”

While a person is employed outside of the Republic, they are excluded from the ambit of the Act. Foreigners employed within the Republic for longer than 12 months enjoy protection under the Act. Casual employee’s, outworkers and those earning above a certain threshold have also been brought into the ambit of the Act.

Noticeable exclusions are independent contractors and domestic workers. The author contends that no logical explanation exists for the exclusion of domestic workers. Where they were previously excluded from the protection of labour legislation, they are now covered by the Labour Relations Act, the Basic Conditions of Employment Act and the Occupational Health and Safety Act. One reason for exclusion is that the administrative burden of compliance on the employer and monitoring of compliance by the Department of Labour will be too onerous.

It is submitted that this argument has little substance. Domestic workers constitute a grouping in excess of one million persons, yet they together with other categories enjoy no or limited protection under the various labour statutes. It seems absurd to extend limited protection to a person. The domestic worker is for example not excluded from the ambit of the Occupational Health and Safety Act, yet does not qualify for compensation in terms of Compensation for Occupational Injuries and Diseases Act.

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73 Persons given material to work on at a place other than premises under the control of the employer (normally work from home). ILO Convention 177 extends all basic rights to those performing homework.

74 Huber and Sack Employing a Domestic Worker (November 1997).
then appears that if a domestic worker is injured during the course of employment, he/she needs to resort to civil action.

5.6 Skills Development Act\textsuperscript{76}

The definition used in the Skills Development Act corresponds with that of the Labour Relations Act. Amongst the objectives of the Act are the improvement of skills and the subsequent improved prospects of future employment.\textsuperscript{77} A further objective is the encouragement of self-employment.\textsuperscript{78} The overall objective of the Act is encouraging the acquisition of skills, and it is apparent that the main beneficiaries will be employees or potential employees.

5.7 Income Tax Act\textsuperscript{79}

The Fourth Schedule of the Income Tax Act defines an employee as follows:

- \textit{(a)} any person (other than a company) who receives any remuneration or to whom any remuneration accrues;
- \textit{(b)} any person who receives remuneration or to whom any remuneration accrues by reason of any services rendered by such person to or on behalf of the labour broker;
- \textit{(c)} any labour broker;
- \textit{(d)} any person or class or category of person whom the Minister of Finance by notice in the \textit{Gazette} declares to be an employee for the purposes of this definition.”

Landman\textsuperscript{80} explains the reasons for labour brokers being included in the definition after an amendment in 1990. The intention was to bring former employees, who had escaped the Pay As You Earn (PAYE)\textsuperscript{81} net by disqualifying themselves as employees as per the conventional definitions, back into the ambit of PAYE provisions.

These definitions leave no doubt as to the exclusion of the independent contractor from all the mechanisms, privileges and rights afforded by the various labour legislation

\textsuperscript{75} Olivier 286.
\textsuperscript{76} Act 97 of 1998.
\textsuperscript{77} s 2(1)(a)(i).
\textsuperscript{78} s 2 (1)(a)(ii).
\textsuperscript{79} Act 58 of 1962.
\textsuperscript{80} \textit{Labouring under a misapprehension} (1996) \textit{SALJ} 220-221.
statutes. Because of this exclusion, the independent contractor, and all others excluded, need to make their own provision for contingencies like medical aid funds, retirement benefits and other savings for lean times. In the event of contractual disputes, the independent contractor has to resort to the mechanisms afforded by common-law.

6. THE EFFECT OF THE INSOLVENCY ACT ON THE EMPLOYEE

The Insolvency Act\textsuperscript{82} stipulates that the contract of employment is terminated when the employer’s estate is sequestrated.\textsuperscript{83} Under such circumstances the employee may “claim compensation from the insolvent estate of his former employer for any loss which he may have suffered by reason of the termination of his contract of service prior to its expiration”.\textsuperscript{84} The Insolvency Act gives preferential claim status to claims against the insolvent estate in terms of claims under the Compensation for Occupational Injuries and Diseases Act, The Unemployment Fund or statutory wage determinations providing for employee benefits.\textsuperscript{85} Outstanding wages and salaries, leave entitlement and outstanding bonuses rank lower in precedence. The quantum of these claims is however capped. By contrast, the independent contractor does not enjoy preferential claim status and is treated like any other creditor.

Important amendments have been proposed to the Insolvency Act.\textsuperscript{86} The proposed amendment to section 38 stipulates that the contract of employment is suspended from the date of the granting of the sequestration order. This is in contrast to the current position where insolvency of the employer automatically terminated the employment relationship.\textsuperscript{87} Further the employee need not tender his/her services, but at the same time no remuneration will be paid. The employee will also qualify for benefits under the Unemployment Insurance Act.

A trustee appointed in terms of the Insolvency Act may terminate the contracts of employment. It is however necessary that the requirements in terms of termination for

\textsuperscript{81} A withholding tax deducted at source by the employer.
\textsuperscript{82} Act 24 of 1936.
\textsuperscript{83} s 38.
\textsuperscript{84} Brassey E1:32.
\textsuperscript{85} Brassey E1:33.
\textsuperscript{86} Insolvency Amendment Bill, 2000.
\textsuperscript{87} See note 20 for relevant case law.
operational requirements be followed. The employees will then also qualify for severance benefits that will be recoverable from the insolvent estate of the employer.

7. OUTSOURCING AS A FACTOR IN THE EMERGENCE OF INDEPENDENT CONTRACTORS

7.1 Employer perspective

The independent contractor has been around for many years and is not a new phenomenon. During the era of slavery, slaves did menial tasks, while craftsmen let out their specialised skills. With the advent of the Industrial Revolution and later technological developments, work was broken down into parts, with each worker being responsible for a specific function. Thus with the introduction of the assembly line, the craftsman “lost” his specialised skills. The point has been made that the “trend towards contingent and independent contractor employment may simply represent a return to contractual conditions which were common before and during the early stages of industrialisation”.

Globalisation has had a profound impact on how business is conducted and how companies are structured. It is not the intention of the author to canvass the entire globalisation debate, however certain features are mentioned in so far as it is relevant to the reasons for making use of the independent contractor. It is however an indisputable fact that companies are faced with intense competition and need to develop strategies to remain competitive and relevant.

Competitive advantage is achieved through efficiency, quality, innovation and customer responsiveness. Competitive advantage also has to do with identifying the core business of an enterprise and outsourcing that which falls outside the core business. Outsourcing has been defined as “the act of transferring some of a company’s recurring internal activities and decision rights to external suppliers, as set out in a contract”. The meaning of outsourcing originally was understood to revolve around downsizing and reengineering, while it is now seen in terms of strategic options. A firm needs to

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decide what it is able to/should do itself and what can be obtained from other providers. Prior to outsourcing, an enterprise needs to consider the following factors:91

- What is it that is being outsourced? “Never outsource that which you do not understand. The goal is to outsource the things you can do, but rather would not.”92

- Managing the outsourced function does not cease once you are not doing it yourself anymore.

- Problems must never be outsourced.93

Bragg94 identified the typical outsourcing path in terms of strategic importance and the time it took to decide to implement. Those of least perceived strategic importance were outsourced first and included maintenance, administration and janitorial functions. Those of relative strategic importance were accounting, human resources, sales and marketing, materials management and customer service functions. The functions that were the most strategically important and took the longest to outsource included manufacturing, computer services and engineering.

7.2 Tactical and strategic reasons for outsourcing

Coleman95 describes a number of tactical and strategic reasons for outsourcing as identified by Johnson. **Tactical reasons** include:

- Reduction or control of operating costs;

- Making capital funds available;

- Creating of cash infusion;

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91 Coleman 25.
- Gaining access to resources not available within the company; and
- To manage a difficult function or one that is out of control.

**Strategic reasons** included:

- Improving business focus;
- Gaining access to world-class capabilities;
- Accelerating benefits of reengineering;
- Sharing of risks; and
- To free up resources for other purposes.

### 7.3 Other reasons for outsourcing

Houseman\(^{96}\) identifies further reasons for the use of flexible staffing arrangements. These were gleaned from survey's in the United States of 550 employers by the Upjohn Institute for Employment Research in 1996 and a survey of 1000 employers sponsored by the National Science Foundation in 1998. Some of the identified factors included fluctuating staffing needs, saving on personnel costs, screening workers for permanent posts and accessing special skills. Employers are of the opinion that if they outsource the recruitment and selection function, they are able to avoid the legal commitments emanating from the typical employment relationship in terms of individual and collective labour law.\(^{97}\)

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\(^{95}\) Coleman 28-29.


\(^{97}\) Lansbury 5. See also Commons "Dependent Contractors: In From the Cold" *Auckland University Law Review* Vol 8 (1996) 107.
It is submitted that this latter point may give employers a false sense of security. Governments are also able to introduce legislation if they so wish to counteract the perceived negative impact of such moves. In South Africa for instance, provision is made for a temporary employment service and the client thereof to be jointly and severally responsible for any non-compliance on the part of the temporary employment service.\footnote{\textsuperscript{98} s 82(3) of Basic Conditions of Employment Act and s 57(2) of the Employment Equity Act.}

Supiot\footnote{\textsuperscript{99} The Supiot Inquiry into the Reform of European Employment Law (1999) – appointed by the European Commission.} identified two major concerns with the open-ended employment contract. \textbf{Firstly}, they lacked flexibility to respond swiftly to changes in the market and technology. \textbf{Secondly}, the introduction of special employment contracts to accommodate new work arrangements, have made labour laws exceedingly complex.

\section*{7.4 Risks associated with outsourcing}

Outsourcing is not a risk-free exercise and there are a number of factors to consider.\footnote{\textsuperscript{100} Bragg 7.} \textbf{Firstly}, the possibility exists that the contractor’s ability to provide the service will change. A number of reasons exist for this possible change, however the important issue is to have an adequate termination clause in the event of the provider not being able to fulfil the service as required. \textbf{Secondly}, the incorrect function may be outsourced. This can be prevented by initially correctly identifying core competencies. \textbf{Thirdly}, it is almost inevitable that certain positions will become redundant when certain functions are outsourced. This can result in skills being lost to the firm unless the employee can be deployed elsewhere internally.

\section*{7.5 The service agreement}

It is necessary for the service agreement to be properly drawn up and the following factors will contribute to a successful relationship.\footnote{\textsuperscript{101} Coleman 30-31.}
Activities are properly identified;

Roles and responsibilities are clearly defined;

A good relationship exists between the company and the service provider;

The service provider delivers a superior service; and

The contract and relationship between the parties is effectively managed.

The duration of the contract depends on a number of factors. These include the amount of uncertainty in the proposed relationship; which activities are to be outsourced; the significance of the assets to be transferred (if any), and the investment required from the service provider.

Usually the contract will be of shorter duration when significant uncertainties exist in the proposed relationship; non-core activities are to be outsourced; the asset value being transferred is insignificant, and the service provider is not required to make any significant investment. Logically the opposite is applicable if the contract period is to be longer.

Outsourcing agreements normally have four broad divisions. They are the scope of services to be provided, performance areas, pricing, and terms and conditions which would include dispute resolution and termination provisions. A successful agreement would make provision for the changing business conditions. Reasons for terminating the agreement include effluxtion of time, breach of contract, convenience (which may incur penalties), and change of control.102

7.6 Employee perspective

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102 Greaves 245.
One needs to ask why would a person voluntarily choose to change their status from one of employee to that of contingent worker. This change is accompanied by loss. The first loss is of benefits normally associated with a “regular” employee, for example medical aid and pension benefits (negotiated benefits). The second area of loss is in the arena of statutory protection afforded those classified as employee’s. A third area of loss is that the employee forgoes the opportunity of internal promotion and training.

Suggested reasons include a preference for more leisure time, different/varied work experiences, or flexible work schedules. Added to this can be the wish to establish ones own enterprise, the quest for independence (whether it is economic or otherwise) or the identification of a niche market/product.

Figures recently released by Statistics SA reveal that approximately 23 000 people lost their jobs in the period June-September 2000. These figures include the formal business sector, but exclude agriculture, the self-employed and domestic workers. Jackie Kelly of Andrew Levy and Associates contends that the major reason for these job losses is the increased rate of outsourcing in line with international trends. She further contends that outsourcing is accompanied by retrenchment.

Trade union reaction to these figures was that they were “disastrous” and that greater inequalities in income distribution were caused by job losses in the formal sector. A call was made on the government for “… a new development strategy … that will encourage job creation rather than losses in the formal sector”.

7.7 International trends in contingent employment

103 Include “true” temporary workers (on short-term assignments), “true” leased employee’s (those instructed how and what to perform) and contract employee’s (contractors taking over a specific function and controlling all work within that function – independent contractor). Other commentators refer to such persons as typical workers.

104 In Britain it is a basic prerequisite under the Employment Rights Act, 1996, that an employee must first have two years continuous service before he/she can qualify for employment protection.

105 Kellog 1777.


107 Neva Makgetla – COSATU co-ordinator for fiscal and monetary policy.

108 Lansbury 4.
The following figures do not distinguish between the various types of atypical workers, however the trends that they represent are significant. Japan has seen a decline of regular employee’s from 84% in 1987 to 79% in 1994. Apparent gender bias however exists in that 88% of males are regular employees compared to 69% females. South Korea saw an increase in atypical workers from 19% in 1997 to 42% in 1998. This dramatic increase was precipitated by the Asian economic crisis. France has seen an increase from 1.6% in 1987 to 17.4% in 1997.

Government policies on labour have a profound effect on employment trends. Any policies that have the effect of increasing the cost of hiring employees on a long-term basis increase the difficulty for employers to downsize or terminate the services of employees. In South Africa the business sector claims that government policy is restricting job creation, while the trade union movement contends that workers rights are being undermined. One contentious issue currently under review in South Africa is the need for employers to negotiate retrenchment as opposed to consulting on it.

8. A LEGAL PERSPECTIVE OF THE INDEPENDENT CONTRACTOR

All the definitions supra exclude the independent contractor from the definition of employee. Du Toit et al109 distinguish between an employee and an independent contractor in the following way:

An employee is someone who “works for a single employer in a permanent, full-time capacity, is subject to the supervision of the employer, receives regular monthly or weekly remuneration, and is obliged to place his/her full productive capacity at the disposal of the employer”. By contrast the independent contractor “usually performs a discrete service for a fee, does not work for a single ‘employer’, and is not expected to be at the employer’s beck and call”.

Several tests have been developed over the years to distinguish between an employee and the independent contractor. These tests have also changed over the

years as economic realities have changed. The identified tests are the **CONTROL TEST**, the **ORGANISATION TEST**, the **DOMINANT IMPRESSION TEST**, and the **ECONOMIC TEST**.

### 8.1 Control test

In applying this test one tries to establish whether the employer controls the activities of the person doing the work. The assumption is made that the worker is subject to the “command and control of the employer as to the manner in which the work is done”\(^{110}\) and harks back to the “master and servant” concept. This makes the further assumption that the employer can determine what, how, where and when the work is to be performed. Brassey refers to this as “management prerogative, which is the “very heart of the employment relationship”.\(^{111}\) In the case of the independent contractor, the employer can only direct what work is to be done.

This test has become problematical in terms of modern work practices in that the employer cannot exercise this control over highly specialised tasks. The courts have shifted in their stance from requiring direct control\(^{112}\) to merely requiring a right to control.\(^{113}\) The fact that an employer may choose not to exercise his right to control does not change the intention of the contract of employment.\(^{114}\) Kahn-Freund attacked the control test,\(^{115}\) which led to the control element becoming one of the factors to be considered in the dominant impression test.

The American Internal Revenue Service (IRS) uses a 20 Factor Control Test\(^{116}\) to determine if a worker is an employee for federal tax purposes. This test relies strongly on the control of the employee’s job performance by the employer. The 20 factors are:

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110 Basson *et al* 27.
111 B1:23.
113 *Braamfontein Food Centre v Blake* 1982 (3) SA 248 (T) – see Brassey B1:22 note 4.
114 Grogan 17.
115 “Servants and Independent Contractors” (1951) 14 *Modern LR* 504.
- Instructions on when, where and how to work emanate from the employer;
- Training is on-the-job by other employee’s;
- Services performed are an integral part of the business and are vital for continued success;
- Services personally rendered;
- The employer hires, supervises and remunerates assistants;
- A recurring relationship exists between the employer and the worker;
- The employer determines the work hours;
- Time is fully devoted to one employer;
- Work is done on the employers premises;
- Routines, work schedules and task lists are set by the employer;
- Report-back on work in progress is routine;
- Payment is according to pay periods and not a single payment;
- Work-related expenses are paid by the employer;
- The employer provides all necessary materials and equipment;
- Minimal investment is required from the worker;
- The worker does not directly bear the profit or loss of the enterprise;
- Work is done only for one employer;
The work of the worker is generally not available or advertised to the public;

Employer can discharge the worker without contractual liability; and

Employee can quit without liability.

8.2 Organisation test

This test “measures” the degree to which the worker is integrated into the organisation of the other person (employer). It is therefore possible that the worker forms an integral part of the firm with little or no control over the performance of the work. Because of the difficulty in determining/measuring the degree of integration required to determine that the person is an employee or not, this test has been rejected.\(^{117}\) Within the South African context the organisation test seems to have met its final demise in *Smit v Workmen’s Compensation Commissioner* 1979 (1) SA 51 (A) when Joubert JA stated that the test was “juristically speaking of such a vague and nebulous nature that, more often than not, no useful assistance could be derived from it”.\(^ {118}\)

8.3 Dominant impression test

This test does not use any single indicator, but looks at all indicators to gain an overall impression of the working relationship. The following factors are considered:\(^ {119}\)

- Right to supervision.

- Degree of dependence of worker on employer in performing the work.

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\(^ {117}\) *R v AMCA Services and Another* 1959 (4) SA 207 (A). Before the decision was overturned on appeal, the lower Court had determined that premium collectors appeared to be part of the organisation (integrated into it) and were therefore employees.

\(^ {118}\) Brassey B1:32.

\(^ {119}\) Basson *et al* 28.
Is the worker allowed to work for someone else?

The specific time the worker is required to devote to his duties.

Is personal service required?

The manner in which the person is remunerated.

Who provides the tools and equipment?

Right to discipline.120

Two further interesting factors considered in the United States are length of employment121 and industry custom.122 Kellog argues for instance that the computer software industry is “… not a field in which work is continuous and likely to last in the same form for many years”.123

Courts around the world have now accepted the dominant impression created by the above factors as the applicable test to determine the status of a worker. Brassey argues however that this is in reality not a test, “… but merely a shorthand way of saying that the decision must not be taken without considering all the relevant factors”.124

Observers should guard against comparing two cases that on the face of it appearing identical. “No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question [ie whether a person works for himself or another], nor can strict rules be laid down as to the relative weight which the various considerations

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120 Employer lacks power of discipline concerning acts committed while employee independent contractor - Transnet Ltd v Haanyama [2000] 10 BALR 1222 (IMSSA).
121 This was but one of the factors considered in National Mutual Insurance Company v Darden 503 U.S 318, 323 (1992). In the United States statutes define the temporary employee in terms of length of service.
122 Kellog 1802-1803.
123 1802. See context of comment in light of Vizcaino infra.
124 Brassey B1:35 – see note 2.
should carry in particular cases."\textsuperscript{125} The same applies to identical contracts and
each contract needs to depend on its own construction.\textsuperscript{126}

\textsuperscript{125} CookeJ \textit{Market Investigations v Minister of Social Security} [1969] 2 QB 173 as quoted in

\textsuperscript{126} Ramsbottom in \textit{Venter v Livni} 1950 (1) SA 524 (T); Joubert JA in \textit{Colonial Mutual Life
Assurance Society v MacDonald} 1931 AD 412.
8.4 Economic test

Grogan\textsuperscript{127} proposes the existence of a fourth test, namely the economic test. Here it needs to be established who profits from the work done – who is the owner of the business?\textsuperscript{128} Du Toit \textit{et al} refers to the Economic Realities Test, which attempts to establish the underlying economic realities of the relationship and the degree of economic dependence/independence of the one party on the other.\textsuperscript{129}

Du Toit \textit{et al} further suggests that the answering of the following questions may assist in determining the economic independence of the independent contractor from the employer:\textsuperscript{130}

- Is the person performing the work truly an independent entrepreneur?
- Does the general public perceive the person as a business entity?
- How many clients does the person have?
- Who bears the economic risk of the work?

Little\textsuperscript{131} argues that people need to understand the situation before jumping at the opportunity of becoming independent contractors. Individuals are converting employment contracts into service contracts with the same employer. “Inevitably what is happening is that permanent staff are reviewing the shift to contracting more and more, because the money seems more attractive. The problem arises when they neglect to drop those benefits that they received…” By not dropping these benefits, the contractor appears still to be an employee and will inevitably attract the attention of the Revenue Services.\textsuperscript{132}

\begin{thebibliography}{132}
\item Grogan\textsuperscript{127} 20.
\item Du Toit \textit{et al} \textit{Montreal v Montreal Locomotive Works} [1947] 1 DLR 161.
\item Little\textsuperscript{131} Computing SA (12 October 1998) 41.
\item In \textit{Hunt v ICC Car Importers Services Co (Pty) Ltd} [1999] 20 ILJ 364 (LC) it was found that the intention of the parties of changing the employment relationship into one of independent contractor was to avoid tax obligations. Landman J felt so strongly about this intention of tax evasion that he ordered the Receiver of Revenue to be informed of the judgement.
\end{thebibliography}
9. CASE LAW

9.1 United States of America (America)

America, as all countries, grapples with the question of distinguishing between employee’s and contingent workers, and the subsequent legal and social issues. In *Nationwide Mutual Insurance Company v Darden*¹³³ the United States Supreme Court, while acknowledging the usefulness of the 20 Factor Control Test supra in the context of tax law, indicated that “all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.”¹³⁴ The Court devised its own checklist, which considered the following factors:¹³⁵

- Skills required;
- Source of tools and other instruments;
- Location of work;
- Duration of the working relationship;
- Possibility of assigning additional tasks to the worker;
- Worker’s discretion in determining hours of work;
- Method of payment;
- Are assistants hired and who pays them;
- Is the work part of the employer’s regular business?
- Is the employer registered as a business?

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¹³⁴ Kellog 1798.
¹³⁵ Kellog 1798 note170.
Provision of benefits and employee benefits, and

How the worker is treated in terms of tax matters.

*Vizcaino v Microsoft Corporation*137 illustrated how a company that apparently only had good intentions, found itself tangled in the employee-independent contractor web. During 1989 and 1990 Microsoft was subjected to an audit by the Internal Revenue Service, which applied the 20 Factor Test *supra*. It was found that the freelance workers were employees. Microsoft then paid all overdue taxes and issued the necessary documents in terms of the workers' new status.

Some employees were subsequently offered permanent positions (on the supposition of a long-term relationship). The balance of the group were offered the choice of termination of services or being employed by a newly created temporary employment agency (continued employment relied on other factors and was not envisaged to be long-term).

Eight plaintiffs in the new group of permanent employees sued Microsoft for retrospective entitlement to employee benefits because their status as independent contractors excluded them from such benefits. This is despite the fact that the plaintiffs had signed the Microsoft Corporation Independent Contractor Copyright Assignment and Non-Disclosure Agreement. Included in this agreement was a clause wherein the worker agreed to be responsible for all taxes, insurance, social security and other benefits.

It is not intended to discuss the details of the case.138 After various processes the case was referred to the 9th Circuit of the United Stated Supreme Court. The majority opinion139 held that the plaintiffs were entitled to retrospective benefits. The dissenting opinion of Trott J140 indicated in no uncertain terms that at the time of

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136 The author assumes that a distinction is being made between statutory and negotiable benefits.
137 97 F.3d 1187 (9th Circuit 1996), 120 F.3d (9th Circuit 1997) and 118 Supreme Court 899 (1998).
138 See detailed discussion in Kellog *Independent Contractor or Employee:Vizcaino v Microsoft* 1784-1786.
139 Kellog 1786-1789.
them entering into the Independent Contractor Agreement, the plaintiffs knew that they were not eligible for benefits.

Trott further criticised the reliance of the majority on the Internal Revenue Service 20 Factor Control Test – “What the IRS does for the purpose of collecting its due … need not cast a dark light on a relationship with which both Microsoft and these employees were comfortable.”

He went on to add “it is not for the courts under these circumstances to add clauses to agreements that the parties never contemplated, … not to give them benefits for which they did not contract”. In his analysis of the case, Kellog states that “… the objective intent of the parties themselves should be first and foremost amongst the ‘extrinsic’ evidence that is considered”.

A second case illustrating the minefield wherein employers find themselves is that of Roadway Package System Incorporated (RPS) v International Brotherhood of Teamsters, Local 63. The Internal Revenue Service had issued guidelines that would evaluate the employment status of owner-operators within the carrier industry. The National Labour Relations Board (NLRB) however determined that these owner-drivers were employees based on the following factors:

- The employer exercised a large degree of control over the operators in that:
  - Operators had to wear designated uniforms;
  - A specialised vehicle had to be acquired which had to bear the employers prescribed markings;
  - Operators had to attend RPS training courses; and

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141 Kellog 1787.
142 Kellog 1787-1788.
143 1805.
144 326 NLRB No.72 (Aug. 27, 1998).
146 Wimbish et al Independent Contractor or Employee? The Owner-Operator Saga Continues Direction (June 1999) 9.
- Each operator was designated a specific area within which to make deliveries and do pick-ups.

- The operators were not separate business entities and therefore not independent. The NLRB was of the opinion that due to the amount of support provided to the operators, they “... bore minimal business risk”.

- Other factors that were considered were that the operators seldom established independent entities, they seldom owned more than one vehicle, assistants were not hired, and services were rarely provided to anyone other than RPS.

What is interesting is that on the day that the RPS decision was handed down, the NLRB handed down another decision (Dial-a Mattress) that was apposite.147 Besides the fact that the two enterprises operated different types of business, the NLRB considered the following Dial-a-Mattress factors as distinguishing features:148

- Operators did business under a separate name;

- Many operators owned more than one vehicle to do deliveries;

- Operators kept separate business addresses and bank accounts and submitted corporate tax returns;

- Assistants were hired and dismissed by the operator, who also registered these workers;

- Operators and their staff did not have to wear Dial-a-Mattress uniforms, nor were operators restricted to any particular area; and

- Some operators negotiated better terms than others did.

The IRS and NLRB purport to apply the same tests in determining worker status. The NLRB applies the following factors in their test:  

- Extent of control by employer over worker;
- Degree to which worker is engaged in a distinct occupation or business;
- Is that work normally performed under the supervision of the employer?;
- Skill required;
- Who supplies the requisites of the job and the place of work?
- Length of employment;
- Method of remuneration – according to time or job;
- Is the work performed part of employer’s normal business?
- Are the parties under the impression that they are creating an employee-employer relationship?; and
- Does the principal (employee) form part of the enterprise?

Both agencies rely on two critical factors in determining the status of a worker. Firstly, the greater the CONTROL, the greater the likelihood of finding that the worker is an employee. Secondly, the greater the RISK the owner-operator bears, the more likely he is to be classified as an independent contractor.

9.2 South Africa

- Enforcement of Bargaining Council agreements

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148 Wimbish 11.
149 Wimbish 5-6.
Bargaining councils are entitled to extend collective agreements to parties and non-parties.\textsuperscript{150} In \textit{Motor Industry Bargaining Council v Wolseley Panel Beaters and Another}\textsuperscript{151} the applicant bargaining council applied for the extension of a collective agreement to an employer on the basis that the employer fell within the registered scope of the agreement as provided for in the Labour Relations Act. The respondent countered that the workers were not employee’s, but independent contractors. The collective agreement was therefore not applicable to the respondent. It was agreed that should the arbitrator find the workers to be employee’s then the agreement would be extended to the employer.

The arbitrator used the contractual relationship between the parties as the point of departure in determining the employment relationship. The terms of the relationship were contained in an agreement entitled “Code of Conduct of Contractors”. This agreement showed a lack of independence firstly in that the workers did not own the means of producing the work or when it was to be produced. Secondly, Company discretion rendered forms of independence in the agreement as notional. The arbitrator considered the workers to be employees and the employer was ordered to comply with all the attendant obligations of the collective agreement within fourteen days.

\textsuperscript{150} s 28(1) and 32(1) Labour Relations Act.  
\textsuperscript{151} (2000) 21 \textit{ILJ} 2132 (BCA).
**Commission-earning persons**

- **Niselow v Liberty Life Association of Africa Ltd**

The case came before the Supreme Court of Appeal after the Labour Appeal Court ruled against the applicant. The applicant was appointed as an agent of the respondent on a full-time basis and had to work exclusively for the respondent. Reward would be in the form of commission. The applicant was required to become a member of the respondent's death or retirement funds, and he could terminate the contract on fifteen days written notice.

The Supreme Court of Appeal held that "[t]he undertaking by appellant, ... may be more common in a contract of service than in a contract appointing an independent contractor but is not inconsistent with the concept of an independent contractor". The Court held that the "... the result of the appellant's labour and not his labour as such was intended to be the object of the contract".

This judgement of the Court reinforces the concept that the intention of the contract needs to be determined and not necessarily what the contract is labelled as.

- **SATDU v Ebrahim's Taxis**

The union brought an application for organisational rights after being refused such rights. The employer did not attend and the union ventured that the non-attendance was due to the employer's contention that the employee's were in fact independent contractors. It was the contention of the union that the drivers were in fact employee's and relied on the following factors:

- drivers received 30% of the daily takings;
- the vehicle belonged to the employer;

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153 1996 (17) ILJ 673.
- management controlled the drivers;

- when drivers missed a day they were disciplined in the form of not being provided with a vehicle the next time they reported;

- drivers were not permitted to work for anyone else.

The arbitrator found that the drivers were in fact employee's due to the degree of supervision and control exercised by the employer. The arbitrator concurred with the decision made in *SATDU v Marine Taxis CC*. \(^{155}\)

- **Payment for services rendered**

  - *Caetano v Carousel Dance and Dine* \(^{156}\)

  The applicant worked as a disc jockey at the premises of the respondent and provided his own equipment. He received payment for actual time worked (as determined by the respondent) and was free to work for other establishments. No statutory deductions were made and the applicant was not entitled to any leave benefits.

  The arbitrator determined that although some factors may point to an employment relationship, the overall impression was one of an independent contractor.

  - *SABC v McKenzie* \(^{157}\)

  The respondent was a freelance presenter at the SABC for approximately six and a half years and was paid per programme presented. At some stage the appellant advised McKenzie that his programmes would be discontinued. When this came about the respondent claimed that he was an employee and that his services had been unfairly terminated.

\(^{155}\) [1997] 6 BLLR 823 (CCMA).

\(^{156}\) [1999] 4 BALR 397 (CCMA).

McKenzie referred the dispute in terms of the 1956 Labour Relations Act and the Industrial Court found in his favour. The SABC appealed the Industrial Court decision, which was overturned. Key indicators that McKenzie was indeed an independent contractor included the following:

- McKenzie made an informed decision to work as a freelance presenter.

- The parties were bound by the provisions of the freelance contract, which determined the respondent's status as an independent contractor.

- The object of the contract was the production and presenting of radio programmes by McKenzie.

- A fee per programme was paid on a monthly basis.

- He was not under the control of the SABC.

- He received no benefits and was not entitled to any leave provisions.

- He was able to perform other work without obtaining permission from the SABC.

- Office space and access to a telephone and fax was a matter of convenience.

- McKenzie was registered as an independent businessman with the Receiver of Revenue.

- No attempt was made by McKenzie to alter the contractual relationship in the entire time of its existence.

- The fact that editorial control was exercised by the SABC did not equate to control akin to that in an employment relationship.

**What was the intention of the party's at the time of concluding the contract?**
• **Cheater v Kowie Advertiser**¹⁵⁸

The applicant was originally appointed as an independent agent to gather advertising revenue for the respondent's publications. At some stage the applicant was requested to assist with journalistic duties while the owner was away on leave. The remuneration package was altered and this led the applicant to believe that he was now an employee. When the working relationship ended, the applicant claimed that he was unfairly dismissed.

The arbitrator found on a balance of probabilities that the fact that the remuneration package had changed did not necessarily imply that the intention of the parties was to change the employment relationship from one of independent contractor to employee.

• **Jordison v Primedia Broadcasting (Pty) Ltd**¹⁵⁹

The applicant provided his services as a radio announcer to the respondent through a closed corporation. An attempt was made to change the relationship into one of employment. This did not happen, therefore the status quo remained.

• **CWIU obo Ngxokela v Engen Petroleum**¹⁶⁰

At the commencement of a dismissal arbitration the union objected to the employer representative and requested that the contract of employment between the representative and the respondent be declared in fraudem legis. The arbitrator determined that the CCMA lacked jurisdiction to make such an order concerning a contract that appeared to be lawful. The employee was entitled to represent the respondent even if he was retained solely for that purpose.

• **Gordon v St John's Ambulance**¹⁶¹

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¹⁵⁹ [2000] 2 BALR 140 (CCMA).
¹⁶⁰ [2000] 6 BALR 641 (CCMA) See also Mafuyeke v CCMA and others [1999] 9 BLLR 953 (LC) and Makhafola v Sunpac (Pty) Ltd [2000] 8 BLLR 940 (LC).
The applicant was employed as a fundraiser. Although the respondent claimed that the applicant was not an employee, the arbitrator determined that the intention of the parties was that of an employer/employee relationship.

- **CMS Support Services (Pty) Ltd v Briggs**<sup>162</sup>

The respondent was previously an employee of the applicant. It was then decided that the applicant would provide an accounting service to the applicant on a consultancy basis through a closed corporation. The respondent was the sole member of the closed corporation. The Court determined that the intention of the parties was to evade tax.

- **Determining the true employer**

Although the employer is not under discussion in this treatise, determining who the true employer is remains extremely relevant in the employment relationship. The importance of this lies in who is to be held responsible for any breach of contract.

- **Hugo v Shandelier Hotel Group CC (in liquidation) and others**<sup>163</sup>

The applicant was employed to work in a hotel that was under liquidation. During arbitration proceedings the liquidators were joined as respondents as they could also be seen as the employers of the applicant. The arbitrator found that the true employer was indeed still the entity under liquidation and not the liquidators.

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<sup>162</sup> [1997] 5 BLLR 533 (LAC).
<sup>163</sup> [2000] 9 BALR 1004 (CCMA).
• **Pearson v Sheerbonnet South Africa (Pty) Ltd**\(^{164}\)

The applicant was employed by a British-based firm and posted to its South African subsidiary. At some stage the employment relationship was terminated and the applicant sought relief under the Labour Relations Act. The arbitrator found that the respondent was not the true employer of the applicant.

• **Labuschagne v WP Construction**\(^{165}\)

The applicant was employed by the respondent and his services were let to third parties. While working for a third party the applicant was discharged by the third party for allegedly sleeping on duty. It was the contention of the respondent that the applicant was an independent contractor.

The arbitrator determined firstly that the applicant was an employee of the respondent. Secondly, it was determined that because the applicant was an employee of the respondent, the applicant could not be dismissed by the third party.

10. **THE DEPENDENT CONTRACTOR**

The dependent contractor can be described as someone who, although nominally independent, relies on his/her livelihood from a single source. Du Toit *et al* argues that should a worker be economically dependent on a single entity, they should generally be considered as employees\(^{166}\). The dependent contractor differs from an employee on the basis that he/she contributes both personal labour and capital to the employment relationship\(^{167}\). In contrast the employee only contributes a labour component.

It is becoming evident that the dependent contractor is in need of some form of protection that would not normally accrue to the independent contractor. It may be

\(^{164}\) [1999] 7 BLLR 703 (LC).

\(^{165}\) [1997] 9 BLLR 1251 (CCMA). See also *Mandla v LAD Brokers (Pty) Ltd* [2000] 9 BLLR 1047 (LC) and *Mhlongo and others v Industrial Trade Resources* [1999] 20 ILJ 453 (CCMA).

\(^{166}\) 56.

\(^{167}\) Commons 103.
useful to consider the position in Germany dealing with workers. German labour legislation makes provision for three categories of worker. These three categories are employee, employee-like and other self-employed persons.

The employee-like person is someone “who is self-employed, but whose economic situation nevertheless more closely resembles that of an employee than an autonomous self-employed person”. It is acknowledged that this category is economically dependent and in need of some form of social protection providing that the following conditions are met:

- Personal performance of contractual duties with essentially no assistance from employees; and
- The major part of the work needs to be performed for one entity, or more than half of income generated must derive from one source.

These persons enjoy the statutory privileges of disputes being settled in the Labour Courts as opposed to civil courts, and minimum standards concerning annual leave and holidays.

Within the context of the employee-like person, two categories exist (commercial agent and homeworker) and are treated differently by law. Commercial agents are subject to the following conditions:

- The agent should be contractually prohibited from working for other organisations, or the volume of work prohibits working for more than one organisation.
- Income from the work is not allowed to exceed a stipulated amount in any six-month period.

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168 Weiss Employment versus self-employment: The Search for a Demarcation Line in Germany 744.

169 Weiss 745.
Agents are excluded from collective agreement coverage.

A *homeworker* is anyone “who works, be it alone or with the help of family members, for another person or institution at a place of his own choosing whether it is an apartment, a house, or some other place, and who leaves the utilisation of the result of his or her work to the person or institution he or she is working for”. Coverage is also extended to the homeworker who utilises the assistance of not more than two persons (who are not family members). No preconditions exist concerning the provision of the raw materials required (compare this to one of the elements considered by the American IRS and NLRB). From the discussion above it can be seen that the German employee-like person can be compared to the dependent contractor.

It is submitted that the protection afforded employee-like persons in Germany can be applied to the South African situation, because here too the future of employment relationships is being debated. On the one hand there are proponents of bringing the self-employed back into the ambit of labour and social legislation. At the other end of the spectrum, there is a drive to restrict the concept of “employee” and further expand the status of self-employed.

Weiss suggests that rules and standards can then be developed according to the economic and social needs of specific groups. It is submitted that such a determination may be possible in a developed economy, however it is not applicable to the South African context where parties to the employment relationship are still coming to grips with the realities and implications of a global economy. It may lead to further confusion and possible exploitation in an already complex situation.

Moves are currently afoot in South Africa to bring certain categories of self-employed into the ambit of labour legislation. One of the proposed amendments will grant employee status to someone whom "... only works or supplies services to one person". These persons would therefore enjoy access to protection of labour

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170 Weiss 745.
171 See proposed amendments to the Labour Relations Act and Basic Conditions of Employment Act 5.2 *supra*. 
legislation mechanisms. It is not clear at this stage whether the extension of the definition will be applicable to social security laws.

11. VICARIOUS LIABILITY

An employer can be held responsible for the actions of an employee in the event of the employee being responsible for damages. Before vicarious liability is incurred however, certain prerequisites need to be complied with.\(^{172}\)

- A contract of service must exist between the employer and employee.\(^{173}\)

- The act/conduct of the employee must comply with all the elements of delict:
  
  - An act or omission on the part of the employee
  - This act or omission must have been unlawful
  - The act or omission needs to have been wilful or negligent
  - A third party must have suffered loss
  - The act or omission must have led to patrimonial loss by the third party

- The incident needs to have occurred in the course of the employee’s duties or service.

The element of control thus plays a crucial determining factor in apportioning vicarious liability. Wicke\(^{174}\) agrees with the notion that control is the only determining factor. He however contends that this test has the effect that persons, who would not ordinarily be treated as employees, are now accorded this status.

\(^{172}\) Basson \textit{et al} 50-51.

\(^{173}\) See Brassy B1:11. An insurance agent is not an employee of the company - the purpose was to allocate blame to the company for the negligent driving of the agent - \textit{Colonial Mutual Life Assurance Society Ltd v MacDonald} 1931 AD 412.

Any amount that has been paid to a third party as a result of an action or omission of an employee may be recovered from the employee after due process and in compliance with any applicable statute.\textsuperscript{175}

In \textit{Hartl v Pretoria Hospital Committee},\textsuperscript{176} the Court held that a doctor giving his services at no reward could not be regarded as an employee.\textsuperscript{177} Following this line of thought that (a) a contract of service is an \textit{essentiale} and (b) some form of remuneration is therefore required, the South African courts have made what would appear to be strange decisions regarding vicarious liability. In \textit{Mkize v Martens}\textsuperscript{178} the son and nephew of a transport rider who were accompanying him against no payment, were held to be employees, so as to impute vicarious liability against him for damage caused by the youngsters. Similar arguments were used to affix blame to the son of a shopkeeper who was assisting his father against no payment.\textsuperscript{179}

In the cases \textit{supra} great reliance was placed on the element of control. Although these cases need to be seen in the context of vicarious liability, it does make a mockery of some of the requirements of the definition of an “employee”.

A different approach was followed in \textit{Midway Two Engineering and Construction Services v Transnet Bpk.}\textsuperscript{180} The facts of the case were as follows: Midway operate as a temporary labour broker. At some stage Midway provided drivers to Transnet and one of these drivers caused damage to the property of a third party. Transnet paid the damages, obtained cession of the claim and then instituted action against Midway, based on the negligent conduct of the driver provided by Midway.

The question before the Court was whether the driver was acting in the course of his employment with Midway when the damage was inflicted. The Court concluded that the control test was obsolete and too simplistic.\textsuperscript{181} Nienaber JA adopted a multifaceted test to determine who, as a matter of policy and fairness was most

\textsuperscript{175} s 34(1) and (2) of the BCEA for instance.
\textsuperscript{176} 1915 TPD 336.
\textsuperscript{177} Brassey B1:21.
\textsuperscript{178} 1914 AD 382.
\textsuperscript{179} R v Gregoratos 1919 TPD 13.
\textsuperscript{180} (1998) 19 ILJ 738 (SCA).
\textsuperscript{181} At 740I.
closely associated with the risk-creating act. In a unanimous decision, the Court found that although the driver was employed by Midway and seconded to Transnet, the latter was the closest related to the driver’s negligence.

The implication of the Midway decision is that clients of labour brokers may be held vicariously liable for damages caused by employees provided by such a broker. The Court is likely to apply a wider test than what the contract between the party’s states and instead determine who is more closely linked to the damage-causing incident.

What is the liability of the employer of an independent contractor for the negligent acts of the contractor? In *D & F Estates Ltd and others v Church Commissioners for England and others* [1989] AC 177 Lord Bridge stated “[i]t is trite law that the employer of an independent contractor is, in general, not liable for the negligence or other torts committed by the contractor in the course of the execution of the work”.

In *Langley Fox Building Partnership (Pty) Ltd v De Valance* 1991 (1) SA 1 (A) the respondent sued the main contractor instead of the subcontractor whose negligent act caused injury to herself. The Court did not try to establish vicarious liability on the part of the main contractor, but found that liability existed in that the main contractor had a personal duty to the public ensuring that no harm was caused to them. The respondent was thus able to recover damages from the main contractor and not the subcontractor.

12. CONCLUSION

All the literature consulted indicates the importance of distinguishing between the parties to the employment relationship. This distinction has specific relevance to the rights and obligations of each party. It is apparent that employers use the guise of the independent contractor to escape from the obligations imposed on them by the various labour-related statutes. The courts have however been willing to pierce the "corporate veil" so as to determine the true relationship between the parties.

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182 At 742C.
Outsourcing of business has also had a major influence in changing the relationship from employee to contractor.

It is not only employer's who are responsible for the change of status from employee to independent contractor. Employees also sometimes initiate the change so as to utilise the more advantageous tax benefits afforded the person not classified as an employee. It is evident that adjudicators of disputes look beyond what the parties call the relationship. A school of thought exists which reasons that the courts should not interfere with the contract drawn up between parties if they have voluntarily chosen to attach a particular label to it.

Literature and case law indicates that a third species of worker exists. This is the so-called dependent contractor. The dependence lies in the fact that although the person is not considered an employee, he/she essentially relies on their livelihood from one source of work. The potential for abuse in this category has been recognised internationally and various countries have introduced legislation to prevent such abuse and to bring more persons into the protective net of social security. This situation has also been recognised in South Africa and proposals are currently being considered to amend the Labour Relations Act, the Basic Conditions of Employment Act and the Unemployment Insurance Act. If adopted, South African legislation will be in line with current thinking more akin to that of Europe concerning a typical worker.

Various tests have developed over the years to determine the true status of a worker. In the past a particular factor (control and integration) was the determining factor in establishing the relationship. The more modern thinking however is to consider all factors involved and then to make a determination, the so-called dominant impression test. Certain academics are also supporting the economic test which investigates the degree of economic dependence on the work provider.

This treatise has a number of limitations which include the following: The scope of this treatise did not allow for comprehensive comparison between the South African
situation and that existing in major trading blocs. It was further not the intention or purpose of this study to investigate all forms of atypical employment as it exists today and the implications thereof on the parties to the employment relationship. Trade unions also have a view on the changing status of employee's which was not dealt with. These and other areas would be able to form the basis of a further study.
EXAMPLES OF INDEPENDENT CONTRACTOR CONTRACTS

Various examples of contracts with independent contractors follow. It is not the intention of the author to furnish the entire contents of each contract. Only those provisions relating to the status of the worker are given so as to illustrate the material aspects of the contract.

Transport Workers’ Union of Australia and Burnetts Transport (Pty) Ltd (C37873 of 1997)\(^\text{185}\)

“14. OWNER DRIVERS

(a) All owner drivers shall receive payment comprising:

(i) labour component;
(ii) fixed cost component; and
(iii) variable cost component.

…

(d) This clause is made for the following purposes:

(i) regulating rates payable to employees who are required pursuant to the terms of employment to provide a vehicle for the use of the employer;
(ii) maintaining the job security and existing job conditions for the employees of the employer by ensuring that such job security and existing job conditions are not undermined by the terms and conditions upon which the employer engages independent contractors.

…

(e) Owner driver means

(i) an employee who is required pursuant to the terms and conditions of his or her employment to provide a vehicle for the use of the employer in the performance of his or her work; or
(ii) a dependent contractor who is engaged by the employer to perform work and is required pursuant to the terms of such engagement to provide a vehicle to assist in the performance of his or her work for the employer.”

\(^{185}\) Certification agreement in terms of Workplace Relations Act 1996.
2. MANDATE

2.1 The independent contractor will promote the company using company promotional material, which will be supplied by the Company and will canvass potential customers for the Company.

2.2 The independent contractor will ensure that a minimum of R15,000 sales per month are generated subject to the normal credit granting criteria.

2.3 The Company shall have a complete discretion as to whether to approve the sale or not.

3. MISCELLANEOUS

3.1 The independent contractor has a complete discretion as to his/her working hours and method to be adopted to obtain sales.

3.2 The independent contractor is obliged to make his/her own arrangements for transport in the execution of his/her mandate.

3.3 The independent contractor will perform his/her mandate in any geographical area he/she chooses.

3.5 The independent contractor may canvass other products for other companies provided that these products do not compete with those of....

4.1 The independent contractor shall receive commission in the amount of 12.5% of the gross profit of all approved sales.

5.1 This contract may be terminated by the furnishing of written notice by either party. Such notice shall not be less than one (1) working day.”

The X Group Limited

“Records that WHEREAS the Company, while wishing to provide a courteous, efficient and professional furniture removal service to its customers, it is desirous of granting the Contractor an opportunity to develop and profit from their entrepreneurial skills and expertise and

WHEREAS the Contractor wants to accept and exploit this opportunity to the mutual benefit of both parties,

1. PHILOSOPHY

This agreement with ... is the lifeline of your business and has been structured in such a way that:

- You are perceived by all parties, including yourself, to be an independent businessperson. You will need to think as a businessperson, and not as an employee.

186 Retail furnishers group not wishing to be identified.

187 A leading South African furniture removal company not wishing to be identified.
You are bound by the contract to provide the best possible professional service to ... but you are no longer under the orders of the Company. You are accountable for your own control and that of your employees.

You will be paid a fee for your contractual services. The fee is according to the standards laid down by the Company. You are responsible to invoice the Company correctly on completion of each job.

2. APPOINTMENT AS CONTRACTOR
The Company authorises the Contractor on behalf of the Company, to meet the following obligations:

• To act in a manner that upholds the professional image of... and your own sole trader business entity.

• To be at all times available and reliable to offer your services and to report in sound and sober senses during all times whilst performing to this contract.

These conditions are deemed to be of a material nature and therefore any breach in these clauses will be deemed to be a material breach which may result in the termination of the contract between yourself and ....

3. CONTRACTUAL DETAILS

3.1.2 The Company may terminate this Agreement immediately by giving written notice to the Contractor, if the Contractor should:

• Pledge, cede or assign, or attempt to pledge, cede or assign the rights granted by the Company to him in this Agreement;

Be in any breach of conduct as laid out in the Company disciplinary code and procedure or commits a material breach as laid out in this Agreement.

3.5 Trademarks

Although the Contractor is independent, he and his staff shall wear the official ... protective clothing whilst performing any contract.”
Table 1: A comparison of old and new outsourcing relationships between organisations and providers

<table>
<thead>
<tr>
<th>OLD PROVIDER RELATIONSHIPS</th>
<th>NEW PROVIDER RELATIONSHIPS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Old provider viewed with little trust and as a necessary evil.</td>
<td>Emphasis on building a sound trust relationship that can become strategic.</td>
</tr>
<tr>
<td>Provider controlled economically by spreading small orders among many suppliers.</td>
<td>Organisation increases the volume of business to fewer providers, when they perform well.</td>
</tr>
<tr>
<td>Little communication, and when it occurred, it was often confrontational.</td>
<td>Frequent communication meetings to solve problems and design better ways of operating.</td>
</tr>
<tr>
<td>Providers continually pressured to lower prices.</td>
<td>Organisation recognises that low price is generally not the best determinant for provider selection.</td>
</tr>
<tr>
<td>Low loyalty to providers resulted in moves for lower prices.</td>
<td>Increasing reliance on the providers, tying the two businesses and their future success together.</td>
</tr>
<tr>
<td>Saw little importance in sharing important information with providers.</td>
<td>Encourages the sharing of information and systems wherever possible.</td>
</tr>
<tr>
<td>Saw no value in tapping into providers’ creativity or core competencies for product service design or total cost reduction.</td>
<td>Rewards the provider for all kinds of input, not just related to their services.</td>
</tr>
</tbody>
</table>

188 Coleman 40.
<table>
<thead>
<tr>
<th><strong>CONTRACT OF EMPLOYMENT</strong></th>
<th><strong>CONTRACT OF WORK</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Services are rendered personally by the employee to the employer.</td>
<td>Specified work, a specific end result is the object. Unless otherwise agreed, the contractor is not required to perform the work personally.</td>
</tr>
<tr>
<td>Once in employ, the employer may decide whether to use the services of the employee or not.</td>
<td>The independent contractor is bound to produce a specific result in terms of the agreement between the parties.</td>
</tr>
<tr>
<td>The employer has the right to control the work done by the employee, including how, where and when.</td>
<td>The employer has no control over the manner in which the work is to be done. The employer merely states the required end result.</td>
</tr>
<tr>
<td>Terminates on the death of the employee.</td>
<td>The death of either of the parties does not necessarily result in the termination of the contract entered into.</td>
</tr>
<tr>
<td>The contract terminates on expiry of the period of service entered into.</td>
<td>The contract terminates on completion of the task contracted for.</td>
</tr>
<tr>
<td>The employee is paid a salary/wage for a period worked.</td>
<td>The independent contractor is paid a fee for the production of a specific result.</td>
</tr>
<tr>
<td>The employee is entitled to benefits such as medical aid, pension and statutory leave benefits.</td>
<td>No entitlement to benefits.</td>
</tr>
<tr>
<td>Tools and equipment to perform work provided by employer.</td>
<td>The independent contractor generally provides his/her own tools and equipment.</td>
</tr>
<tr>
<td>The employee is required to</td>
<td>No requirement of fixed working</td>
</tr>
<tr>
<td>CONTRACT OF EMPLOYMENT</td>
<td>CONTRACT OF WORK</td>
</tr>
<tr>
<td>------------------------</td>
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</tr>
<tr>
<td>maintain fixed working hours.</td>
<td>hours.</td>
</tr>
<tr>
<td>The employee needs the permission of the employer to perform paid work for another organisation.</td>
<td>The independent contractor may perform work for any number of organisations, without needing permission from anyone.</td>
</tr>
</tbody>
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