The parties to the employment relationship: a comparative analysis

MARIUS VAN STADEN*
STEFAN VAN ECK**

1 *Introduction*

The International Labour Organisation notes that globally there is "a general increase in the precarious nature of employment and the reduction of workers' protection".[1] The issue of who is party to an employment relationship has become increasingly problematic as a result of major changes in the organisation of work and the growing inadequacy of labour law to adapt to those changes.[2] New forms of work have arisen which do not properly fit into traditional parameters and in which workers find themselves in a precarious situation where their employment status is unclear or outside the scope of protection that has been linked to an employment relationship.[3] As a consequence the topic of the employment relationship is increasingly on the agenda of the International Labour Organisation.[4]

Globalisation, driven by trade liberalisation and technological change, has resulted in rapid economic integration among countries.[5] The impact of globalisation has been uneven to the extent that it benefits (and disadvantages) countries, enterprises and workers.[6] As the problem of identifying the parties in the employment relationship is a concern shared among many other jurisdictions it is therefore appropriate to explore the experiences and lessons learnt at an international level and in other jurisdictions in order to inform our understanding of the situation. From a geopolitical perspective there is no longer such a thing as a closed world.

* Lecturer, Department of Public Law, University of Johannesburg. Orcid ID https://orcid.org/0000-0002-7515-1423. This article is an adapted version of Van Staden *Identification of the Employment Relationship: An Appraisal of the Teleological Interpretation of Statutes* (2018 thesis UP).

** Professor of Labour Law, Department of Mercantile Law, University of Pretoria. Orcid ID orcid.org/0000-0002-1563-6736.

1 International Labour Organisation *Meeting of Experts on Workers in Need of Protection: Basic Technical Document* (2000) 4-6.

2 Casale "The employment relationship: a general introduction" in Casale (ed) *The Employment Relationship: A Comparative Overview* (2011) 1. In 1944 the United States supreme court in *National Labor Relations Board v Hearst Publications* 1944 322 US 111 121 averred that few problems in law offer greater interpretive difficulty as that of identifying the parties to the employment relationship. This statement is equally apt today.

3 The European Foundation for the Improvement of Living and Working Conditions (Eurofound) has identified nine broad new forms of employment. They are: employee sharing; job sharing; interim management; casual work; ICT-based mobile work; voucher-based work; portfolio work, crowd employment; and collaborative employment. Not all these new form of employment are necessarily non-standard, as they represent new models of the employment between employers and employees (or clients and workers), and new work patterns. See also Mandl "Overview of new forms of employment" in Blanpain, Hendrickx and Waas (eds) *New Forms of Employment in Europe* (2016) 7 8.

4 Casale (n 2) 1.

5 International Labour Organisation *Non-standard Employment Around the World: Understanding Challenges, Shaping Prospects* (2016) 221.

6 Casale (n 2) 3.

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It is therefore exceedingly important that countries learn from each other and take account of European, North American, Asian, Australasian and African experiences. In the context of the drive towards the "decolonisation" of knowledge, the African experience also has become valuable.[7] Countries surveyed for the purpose of this research include Australia, Canada, India, the United Kingdom, Morocco, Namibia, Swaziland, Tanzania, Zimbabwe, Germany and the Netherlands.

This article explores the manner in which the standards of the International Labour Organisation shed light on the question of who are parties to the employment relationship. Section 233 of the Constitution of the Republic of South Africa, 1996 requires that legislation must be interpreted in compliance with international law. According to section 39(1)(*b*) of the constitution, "[w]hen interpreting the Bill of Rights, a court, tribunal or forum ... must consider international law". In addition, section 37(4)(*b*)(i) requires legislation that derogates from the bill of rights to be "consistent with the Republic's obligations under international law applicable to states of emergency". The constitutional court has stressed that these provisions mean that international law serves only as an interpretive aid and not that international law must apply.[8] Interpreting legislation in a way that does not violate international law ensures "the state's international obligations are honoured in the application of municipal law and that international standards for the protection of fundamental rights and freedoms are upheld by the state".[9] According to section 39(1)(*c*) of the constitution, "[w]hen interpreting the Bill of Rights, a court, tribunal or forum ... may consider foreign law".

Although national situations and circumstances are both diverse and dynamic, the employment relationship is a universal notion and a current issue in many countries. Everywhere there are workers who do not enjoy the same protection as other workers due to the fact that they find themselves in the precarious position between employment and self-employment. Also, it should be noted that all countries draw a distinction between employment and self-employment.[10] With regard to a selection of themes relevant to the identification of the parties to the employment relationship key insights need to be distinguished. These insights are definitions relevant to the binary divide between employees and independent contractors; the distinction between employees and independent contractors; the relevance, if any, of the contract of employment and factors relevant to identifying the employment relationship.[11]

[7] It is important to consider the experiences of other African countries as they provide an overview of legislative responses which function in much the same economic reality as that faced by South African workers. As the pressure mounts upon the South African judiciary to contribute to the "decolonisation" of knowledge it is foreseen that the judiciary increasingly will call upon the African experience. It should, however, be noted that other African countries are not without colonial influences (either directly or via South African inception). Although a matter beyond the scope of this study, the judiciary will have to consider the historic and contemporary contextual factors within which the legal provisions of African countries operate.

[8] *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) par 98.

[9] Du Plessis *Re-interpretation of Statutes* (2002) 173.

[10] Marín "The employment relationship: the issue at the international level" in Davidov and Langille (eds) *The Boundaries and Frontiers of Labour Law* (2006) 339 342 and Creighton and McCrystall "Who is a 'worker' in international law?" 2016 *Comparative Labor Law and Policy Journal* 691.

[11] Note that this exposition is not meant to be a complete account of employment regulation in these countries. Instead the exposition highlights significant legislative, judicial and critical academic responses to the regulation of the employment relationship in these countries that might be of value to the South African judiciary.

2 *International law*

With the exception of the Employment Relations Recommendation, 2006, there is little attempt in other conventions and recommendations of the International Labour Organisation (collectively referred to as international labour standards) to distinguish between independent contractors and employees.[12] The term "worker" is used in international labour standards as the preferred term of reference with very little guidance given as to whom the term is meant to apply. In some instances the term clearly encompasses employees and independent contractors, in other instances the term applies only to employees and in yet others there is uncertainty as to which category of workers it applies.[13]

In what follows the approach of the International Labour Organisation in relation to the categories of workers to which international labour standards apply will be analysed. To this end the study considers the approach of the International Labour Organisation regarding the organisation's four "core" rights and the eight conventions that give effect to them.[14] According to the Declaration on Fundamental Principles and Rights at Work, 1998, all members, even those who have not ratified any relevant conventions, and simply by virtue of membership of the International Labour Organisation, have a constitutional obligation to promote and to realise the principles concerning four fundamental rights. These are freedom of association and free collective bargaining, the elimination of forced labour, the abolition of child labour and the elimination of discrimination.[15] Additionally, it has been argued that these core rights should be recognised as part of customary international law and, as such, they form part of national law to the extent that they are consistent with the constitution.[16]

Thereafter, other international labour standards relevant to the employment relationship will be considered.[17] The purpose of this exposition is not to provide a summary of South Africa's public international law obligations,[18] but rather to show how the body of international labour standards that have developed within the International Labour Organisation may inform our understanding of who is to be regarded as a party to the employment relationship for purposes of interpreting

[12] Creighton and McCrystall (n 10) 692.

[13] above.

[14] They are: the Freedom of Association and Protection of the Right to Organise Convention, 1948; the Right to Organise and Collective Bargaining Convention, 1949; the Forced Labour Convention, 1930; the Abolition of Forced Labour Convention, 1957; the Minimum Age Convention, 1973; the Worst Forms of Child Labour Convention, 1999; the Equal Remuneration Convention, 1951; and the Discrimination (Employment and Occupation) Convention, 1958. South Africa has ratified all of these conventions. See International Labour Organisation "Ratifications for South Africa" http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102888 (11-04-2017).

[15] a 2 of the Declaration on Fundamental Principles and Rights at Work, 1998.

[16] Rubin "International labour law and the law of the new South Africa" 1998 *SALJ* 685 708-709.

[17] The Employment Relations Recommendation, 2006 will be considered followed by an exploration of other key international labour standards such as the Domestic Workers Convention, 2011; the Home Work Convention, 1996; the Maternity Protection Convention, 2000; the Part-Time Work Convention, 1994; the Protection of Wages Convention, 1949; the Rural Workers' Organisation Convention, 1975; the Termination of Employment Convention, 1982; the Work Health and Safety Convention, 1981; and the Workers with Family Responsibility Convention, 1981.

[18] In fact many of these standards have not been ratified by South Africa and therefore do not necessarily create any public international law obligations for the country, in so far as it is not possible to argue that a customary international law principle has been established. S 232 of the constitution provides that "[c]ustomary international law is law in the Republic unless it is inconsistent with the constitution or an act of parliament".

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the concept "employee" in South Africa. The goal of this exploration is to identify trends and norms in the jurisprudence of the International Labour Organisation, to see if there any which may assist the South African judiciary in determining the parties to the employment relationship.

2.1 Freedom of association and free collective bargaining

Article 2 of the Freedom of Association and Protection of the Right to Organise Convention, 1948 guarantees the right of "workers and employers *without distinction whatsoever*, to establish and join organisations of their own choosing, without prior state authorisation".[19] The International Labour Organisation Committee on Freedom of Association has held that the criteria for determining whether persons are covered by the convention are not limited to the existence of an employment relationship and self-employed workers in general should enjoy the right to organise.[20] The Committee of Experts on the Application of Conventions and Recommendations has held that the terminology "workers and employers without distinction whatsoever" applies to all workers, regardless of occupation, sex, colour, race, creed, nationality, or political opinion.[21] Additionally, it was held that the term applies to self-employed workers and workers without employment contracts.[22] South Africa has ratified the convention and compliance with its provisions is therefore obligatory.[23]

Article 4 of the Right to Organise and Collective Bargaining Convention, 1949 reads:

> "Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements."

Unlike the 1948 convention, the text of the 1949 convention uses the terms "employment" and "terms and conditions of employment". Therefore the effect of the convention is to protect workers only against acts of anti-union discrimination in respect of their employment. In addition, it requires state action "with a view to the regulation of terms and conditions of employment by means of collective agreements".[24] Therefore it is wrong to view the terminology employed in the convention as reducing the scope of protection it affords. Instead it may be averred that the use of the term "employment" was intended only to mean that the convention applies to the terms and conditions under which workers are engaged.[25] As such it can clearly be concluded that the 1948 convention and the 1949 convention apply to employees and independent contractors as well as to workers on the margin thereof or to those in non-standard forms of employment.

In South Africa, "[e]very employee has the right to participate in forming a trade union or federation of trade unions; and to join a trade union, subject to its

[19] emphasis added.

[20] International Labour Organisation *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the International Labour Organisation* (1996).

[21] ILC *Freedom of Association and Collective Bargaining, International Labour Organisation General Survey of the Reports on the Freedom of Association and Right to Organise Convention 1948 (No 87) and the Right to Organise and Collective Bargaining Convention 1949 (No 98)* (1994) par 45.

[22] Creighton and McCrystall (n 10) 701.

[23] Van Niekerk and Smit (eds) *Law@work* (2015) 59.

[24] Creighton and McCrystall (n 10) 700.

[25] Creighton and McCrystall (n 10) 701.

constitution".[26] In consequence it is clear that the application of the right to freedom of association is more limited than in the 1948 and 1949 conventions. However, it is one thing to argue that South Africa is in breach of its public international law obligations and something else to argue that the term "employee" should be interpreted to extend to independent contractors. However, it may be argued that the term "employee" as it relates to the freedom of association in particular and arguably also to the term in general, should be interpreted extensively and in a way that brings those at the margins of the employment relationship into the relationship.

2.2 The elimination of forced labour

Article 2(1) of the Forced Labour Convention, 1930 defines forced labour as "all work or service which is exacted from any person under the menace of penalty". The Abolition of Forced Labour Convention, 1957 contains no definition of forced labour. The Committee of Experts on the Application of Conventions and Recommendations however held that the term has the same meaning as in the 1930 convention and that both instruments are intended to encompass forms of work performed by all persons. These conventions do not use the term worker but it has been held by the Committee of Experts on the Application of Conventions and Recommendations that they refer to work in the broadest possible sense.[27]

These conventions therefore have the same field of operation as the Freedom of Association and Protection of the Right to Organise Convention, 1948 and the Right to Organise and Collective Bargaining Convention, 1949. Unlike the 1948 and 1949 conventions they contain no exclusionary or limiting provisions. It can be concluded that the 1957 convention and the 1930 convention apply to employees and independent contractors as well as to workers on the margin thereof or in non-standard forms of employment.

The South African constitution provides that "[n]o one may be subjected to slavery, servitude or forced labour" and it is clear that South Africa is in compliance with its public international law obligations.[28] It is clear from the nature of the right that it applies as extensively as possible. Again, it is not averred that employment related terms such as "employee" in all instances should be interpreted as broadly, however it may be argued that such terms should be interpreted as broadly as is appropriate for the policy context within which the term operates.

2.3 The abolition of child labour

The Minimum Age Convention, 1973 and the Worst Forms of Child Labour Convention, 1999 do not refer to child workers, rather they refer to child labour and to the admission to employment or work. The Committee of Experts on the Application of Conventions and Recommendations has observed that the 1973 convention is meant to be applicable to all economic sectors and to all forms of employment irrespective of whether there is a contractual employment relationship or if the work is remunerated.[29] *Inter alia*, the convention applies to work in the informal economy, in family enterprises, on domestic premises, in agriculture

[26] s 4 of the Labour Relations Act 66 of 1995.

[27] Creighton and McCrystall (n 10) 705.

[28] s 13.

[29] ILC *Giving Globalization a Human Face: General Survey on the Fundamental Conventions Concerning Rights at Work in Light of the International Labour Organisation Declaration on Social Justice for a Fair Globalization, 2008* (2012).

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and farming and to self-employment.[30] The 1973 convention allows for countries to exclude certain categories of workers from the scope of the convention, which permits a government to adapt the convention to a particular national context.[31] The convention does not list the categories of employment that may be covered by such exclusions, but states that limitations may not include types of employment likely to jeopardise the health, safety or morals of young persons.[32] The Committee of Experts on the Application of Conventions and Recommendations has held that the flexibility clause used to limit the scope of application can be implemented only at the time of ratification, and that it may not be invoked subsequently.[33]

The 1999 convention specifies that for the purpose of the convention "the term 'child' shall apply to all persons under the age of 18".[34] Because the 1999 convention focuses specifically on the most extreme forms of child labour, this narrow focus permits a wide scope of application to all children.[35] The 1999 convention applies equally to boys and girls, citizens and non-citizens, employed and self-employed children, as well as to legal and illegal work.[36] Unlike the 1973 convention, the 1999 convention permits no exceptions.[37] Determination of the types of hazardous work however is left to each state after consultation with the employers and workers concerned.[38] Although these conventions allow certain exceptions to their field of operation, these instruments are meant to apply in the broadest sense possible and to employees and independent contractors as well as to workers on the margin thereof or to non-standard forms of employment.

In South Africa child "work" is prohibited for all children below fifteen years of age or under the minimum school-leaving age.[39] A person must not require or permit on pain of prosecution[40] a child to perform any work or provide any services "that is inappropriate for a person of that age ... that places at risk the child's well-being, education, physical or mental health, or spiritual, moral or social development".[41] Again, the right highlights the principle that terms such as "employee" should be interpreted as broadly as is appropriate for the policy context within which the term operates.

2.4 The elimination of discrimination

Equality has a central role in the jurisprudence of the International Labour Organisation.[42] The International Labour Organisation constitution, 1919 (part XIII of the Treaty of Versailles) sets out nine principles "of special and urgent importance" which includes the principle that "men and women should receive equal remuneration for work of equal value".[43] The Declaration of Philadelphia,

[30] par 322 and 433.
[31] a 4(1) of the 1973 convention.
[32] a 3 and 4(3).
[33] ILC (n 29) par 366.
[34] a 2 of the 1999 convention.
[35] ILC (n 29) par 433.
[36] above.
[37] a 3(a)-(c) of the 1999 convention.
[38] a 4(1).
[39] s 43(1) of the Basic Conditions of Employment Act 75 of 1997.
[40] s 43(3).
[41] s 43(2).
[42] ILC (n 29) par 658.
[43] a 427 of the treaty.

1944[44] contains an extensive list of objectives "which should inspire the policy of its Members". The declaration *inter alia* provides that "all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity".[45] The reference in the principle of equality to the terms "men and woman" and "all human beings" highlights the universality of its application.

The Equal Remuneration Convention, 1951 applies to all workers and extends to all workers the principle of equal remuneration for men and women workers for work of equal value. Remuneration is defined as the "ordinary, basic or minimum wage or salary ... payable directly or indirectly ... by the employer to the worker and arising out of the worker's employment".[46] The Committee of Experts on the Application of Conventions and Recommendations[47] has stated that "the principle of equal remuneration for men and women shall apply everywhere".[48]

The Discrimination (Employment and Occupation) Convention, 1958, however, does not refer to workers but uses the term "persons".[49] The convention applies to "employment and occupation" which it defines as "access to vocational training, access to employment and to particular occupations, and terms and conditions of employment".[50] The Committee of Experts on the Application of Conventions and Recommendations has held that the use of the term employment in these conventions is not intended in any way to limit the scope of its application. The Committee of Experts on the Application of Conventions and Recommendations states that no exclusions are permitted under the convention and that it "applies to all workers, both nationals and non-nationals, in all sectors of activity, in the public and the private sectors, and in the formal and informal economy".[51] Again, it can be concluded that these conventions are meant to apply in the broadest sense possible and to employees and independent contractors as well as to workers on the margin thereof or in non-standard forms of employment.

It should not be inferred that the term "employee" should be interpreted to include independent contractors. In South Africa, the Employment Equity Act regulates discrimination protection within the employment context.[52] Although such protection extends only to "employees",[53] those who find themselves outside the scope of the employment relationship can always rely on the protection afforded by the Promotion of Equality and Prevention of Unfair Discrimination Act.[54] Nevertheless, the term "employee" should be interpreted as broadly as possible so as to allow litigants to make use of the specialised dispute resolution mechanisms provided for in the Employment Equity Act.

[44] The declaration was incorporated into the International Labour Organisation constitution in 1946 and is reproduced as an annex thereto.
[45] a 1 of the declaration.
[46] a 1(*a*) of the 1951 convention.
[47] ILC *Equal Remuneration: General Survey of the Reports on the Equal Remuneration Convention (No 100) and Recommendation (No 90), 1951* (1986).
[48] par 170.
[49] a 5(2) of the 1958 convention.
[50] a 1(3).
[51] ILC (n 29) par 658.
[52] 55 of 1998.
[53] s 1.
[54] 4 of 2000.

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2.5 The employment relationship

In 2000 the International Labour Organisation organised a tripartite meeting of experts to consider which workers were in need of protection, how they should be defined and the appropriate means of protection. The meeting of experts produced a report for the governing body which noted that the legal definition of employment in many countries does not "accord with the realities of working relationships" with the consequence that workers who should be protected are not.[55] The report identified a need

> "to provide clear guidance about employment relationships, particularly as to the difference between dependent workers and self-employed persons; to combat disguised employment, which has the effect of depriving workers of proper legal protection; and not to interfere with genuine commercial or independent contracting".[56]

In 2003 the International Labour Conference established a committee on the employment relationship. In its report to the conference the committee proposed a series of conclusions by which it attempted to clarify the meaning of the terms "employee," "employer," and "worker" and which were adopted by the conference.[57] They correctly concluded that:

> "[t]he term employee is a legal term which refers to a person who is a party to a certain kind of legal relationship which is normally called an employment relationship. The term worker is a broader term that can be applied to any worker, regardless of whether or not she or he is an employee. ... The employment relationship is a notion which creates a legal link between a person, called the 'employee' with another person, called the 'employer' to whom she or he provides labour or services under certain conditions in return for remuneration. Self-employment and independent work based on commercial and civil contractual arrangements are by definition beyond the scope of the employment relationship."[58]

Importantly, the International Labour Conference accepted that the term "worker" is broader than "employee" and acknowledged that between the extremes of employment and self-employment there are groups of "disguised" or "ambiguous" employees whose status is uncertain.[59] The committee proposed to the International Labour Conference it adopts a recommendation which focuses on the phenomenon of disguised employment, however, the International Labour Conference faced difficulties surrounding the "adoption" of a recommendation as opposed to a convention. Although a draft convention was prepared and submitted to the International Labour Conference, no consensus was reached. Instead the focus of the conference shifted to the adoption of a recommendation, as there was general awareness that a recommendation on this topic was more likely to secure the requisite assent of a majority of two thirds of delegates present than would a proposal for a convention.[60]

[55] International Labour Organisation "Report of the meeting of experts on workers in situations needing protection". Conclusions adopted by the 279th session Governing Body (2000) 38.

[56] Creighton and McCrystall (n 10) 711.

[57] International Labour Organisation "Report of the committee on the employment relationship". Provisional record no 21 91st session International Labour Conference (2003).

[58] (n 57) 52.

[59] above.

[60] See Freedland "Application of labour and employment law beyond the contract of employment" 2007 *International Labour Review* 3 18 and Servais *International Labour Law* (2014) 219.

The International Labour Organisation consequently adopted the Employment Relationship Recommendation, 2006.[61] The preamble to the recommendation clearly roots the instrument in the principles set out in the International Labour Organisation Declaration on Fundamental Principles and Rights at Work, 1998[62] and in the decent work agenda.[63] The preamble affirms that "the protection of workers is at the heart of the mandate of the International Labour Organisation". Additionally, the preamble acknowledges the difficulties in establishing whether an employment relationship exists where there has been an attempt to disguise the employment relationship or where inadequacies or limitations exist in the legal framework or in its interpretation or application. It further acknowledges that contractual arrangements can have the effect of depriving workers of due protection. Insightfully and correctly, the preamble recognises that difficulties in establishing the existence of an employment relationship create serious problems for workers, communities, and society at large.

The recommendation provides members with guidance on how to establish the existence of the employment relationship. It deals with the phenomenon of disguised employment, which is an agreement cast in terms that on the face of it establish a relationship other than employment but which is an employment relationship in practice.[64] It advises that a decision as to who is an employee should be directed by the facts relating to the performance of work rather than the character and content of a contract between the parties.[65]

The recommendation also suggests that member states should consider the following factors in relation to the existence of the employment relationship:[66] if the work is carried out under the instructions and control of another party; if the worker is integrated into the organisation of the enterprise; if the work is to be done mainly for the benefit of the other party; if the work is carried out personally by the worker; if the work is performed within specified working hours; or if the work requires the provision of materials, machinery and tools by the party and who requests the work to be done.[67] These indicators reflect the tests developed by courts in England and in South Africa.[68] These criteria were first set out in *Smit v Workmen's Compensation*

[61] The recommendation has been described as the result of "a long-lasting and difficult debate" which has resulted in an anodyne instrument that has attracted little interest within the International Labour Organisation or in the secondary literature.

[62] See n 15 above.

[63] The decent work agenda promotes four strategic objectives. They are promoting employment, developing and enhancing measures of social protection (that is, social security and labour protection), promoting social dialogue and tripartism, and respecting, promoting and realising the fundamental principles and rights at work. See a I of the Declaration on Social Justice for a Fair Globalisation, 2008. A II of the declaration states that members have a "key responsibility" to contribute to the decent work agenda through their social and economic policy, although member states are free to determine how to achieve the strategic objectives. According to Creighton and McCrystall (n 10) 716 "the issue of coverage of labor standards necessarily underlies attempts to provide decent work and achieve social justice".

[64] a 4(a) of the recommendation. A 4(b) of the recommendation states that a "disguised employment relationship occurs when the employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee".

[65] a 9.

[66] a 11(b).

[67] a 13.

[68] Fourie "Non-standard workers: the South African context, international law and regulation by the European Union" 2008 *PER* 110 135.

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Commissioner[69] and are now codified in South Africa's presumption in favour of employment[70] and the "Code of good practice: who is an employee?"[71]

Although the presumption will not be applicable if a person's income exceeds the amount determined by the minister of labour in terms of section 6(3) of the Basic Conditions of Employment Act,[72] the labour appeal court on occasion has applied the factors as a guide for purposes of identifying the employee even though the claimant exceeded the statutory threshold.[73] The code of good practice also specifically provides that even in cases where the presumption is not applicable the factors listed therein "may be used as a guide for the purpose of determining whether a person is in reality in an employment relationship or is self- employed".[74] However, from a procedural point of view this will not reverse the onus of proof. As there is nothing in the recommendation that supports the implementation of a statutory threshold requirement and as the court may consider the factors listed in the presumption in any event, it may be asked if the requirement relating to the threshold should not be scrapped.

The recommendation advocates that national policies should ensure protection to those affected by uncertainty, including the most vulnerable workers such as young people, workers in the informal economy and migrant workers.[75] Importantly, it accepts that certain categories of workers may justifiably be excluded from labour law protections, in particular it is justifiable to exclude workers who are genuinely self-employed from protection. The recommendation has been criticised for doing little more than codifying the traditional demarcation line between employees and independent contractors in the common-law and civil-law tradition and for not dealing with the grey area in-between these positions.[76] South Africa, at the time of the adoption of the recommendation, already had adopted the presumption in favour of employment and the code of good practice.

2.6 Other international labour standards

An exploration of the eight key International Labour Organisation conventions and the recommendation is important as they provide key insights into the approach of the International Labour Organisation in determining who should be protected by employment legislation. Several other international standards have also been adopted to deal with specific (vulnerable) groups of workers in an attempt to extend labour protection to them and to bring them into the ambit of employment. A selection of the most appropriate instruments will be analysed to further determine the approach of these instruments with regard to their scope of application.

The Protection of Wages Convention, 1949[77] applies to all persons to whom wages are paid or payable.[78] "Wages" are defined as "remuneration or earnings ... payable in virtue of a written or unwritten contract of employment by an employer

[69] 1979 1 SA 51 (A).
[70] s 200A of the Labour Relations Act and s 83A of the Basic Conditions of Employment Act.
[71] *GG* 29445 (01-12-2006). See r 32-43 of the code.
[72] The amount is currently set at R205 433.30.
[73] *Denel Pty Ltd v Gerber* 2005 ILJ 1256 (LAC) par 99.
[74] reg 20.
[75] a 5.
[76] Theron "The shift to services and triangular employment: implications for labour market reform" 2008 *ILJ* 1 18-19.
[77] This convention has not been ratified by South Africa.
[78] a 2(1) of the 1949 convention.

to an employed person for work done or to be done or for services rendered".[79] The convention confines its scope to persons engaged in an employer-employee relationship. The Committee of Experts on the Application of Conventions and Recommendations[80] however held that the term "wages" is not intended to be used in a technical sense, and instead applies "all the various forms and components of labour remuneration" and "clearly aims at the protection of all workers without exception".[81] The Committee of Experts on the Application of Conventions and Recommendations has warned that "the obligations deriving from the convention with respect to the protection of workers' wages cannot be bypassed by mere terminological subterfuges".[82]

The Part-Time Work Convention, 1994[83] not only recognises part-time work but also provides for the extension of protection to these workers. The convention recognises in its preamble

> "the importance of productive and freely chosen employment for all workers, the economic importance of part-time work, the need for employment policies to take into account the role of part-time work in facilitating additional employment opportunities, and the need to ensure protection for part-time workers in the areas of access to employment, working conditions and social security".

"Part-time worker" is defined as "an employed person whose normal hours of work are less than those of comparable full-time workers".[84] "Comparable full-time worker" is defined as

> "a full-time worker who has the same type of employment relationship; is engaged in the same or a similar type of work or occupation; and is employed in the same establishment or, when there is no comparable full-time worker in that establishment, in the same enterprise or, when there is no comparable full-time worker in that enterprise, in the same branch of activity, as the part-time worker concerned".[85]

The convention provides that measures must be taken to ensure that part-time workers receive the same protection as comparable full-time workers with regard to the right to organise, the right to bargain collectively and the right to act as workers' representatives, as well as to occupational safety and health and non discrimination in employment and occupation.[86] Additionally, measures must be taken to ensure that part-time workers receive conditions equivalent to those of comparable full-time workers in the fields of maternity protection, termination of employment, paid annual leave and paid public holidays and sick leave (although pecuniary entitlements may be determined in proportion to hours of work or earnings).[87] The conventions also necessitate measures to be taken to facilitate access to productive and freely chosen part-time work that meets the needs of both employers and workers, including the review of laws and regulations that may prevent or discourage recourse to acceptance of part-time work and to the use of employment services where they exist.[88]

[79] a 1.
[80] ILC *General Survey of the Reports Concerning the Protection of Wages Convention (No 95) and the Protection of Wages Recommendation (No 85), 1949* (1994).
[81] Creighton and McCrystall (n 10) 718 and ILC (n 80) par 64.
[82] above.
[83] This convention has not been ratified by South Africa.
[84] a 1(*a*) of the 1994 convention.
[85] a 1(*c*).
[86] a 4.
[87] a 7.
[88] a 9.

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The Home Work Convention, 1996[89] recognises that there are workers in need of protection who do not work at the place of the employer.[90] The preamble to the convention states that international labour standards of general application concerning working conditions are applicable to home-workers and that the conditions specific to home work make it desirable to improve the application of those standards to home-workers and to supplement them by standards which take into account the special characteristics of home work. The term "home work" is defined as

> "work carried out by a person ... in his or her home or in other premises of his or her choice, other than the workplace of the employer; for remuneration; which results in a product or service as specified by the employer, irrespective of who provides the equipment, materials or other inputs used, unless this person has the degree of autonomy and of economic independence necessary to be considered an independent worker under national laws, regulations or court decisions".[91]

The convention also offers a definition of "employer" as "a person, natural or legal, who, either directly or through an intermediary, whether or not intermediaries are provided for in national legislation, gives out home work in pursuance of his or her business activity".[92] Notably, the employer is identified and held accountable on the basis of the existence of an identifiable economic relationship and not a contract of employment. The convention provides that the national policy on home work of each member which has ratified the convention, as far as is possible, must promote equality of treatment between home-workers and other wage earners, taking into account the special characteristics of home work and, where appropriate, conditions applicable to the same or a similar type of work carried out in an enterprise.[93]

The Workers with Family Responsibility Convention, 1981[94] applies to all workers with responsibilities in relation to their dependent children, where such responsibilities restrict their possibility of preparing for, entering into, participating in or advancing in economic activity.[95] This convention applies to all branches of economic activity and all categories of workers.[96] According to Fourie the convention acknowledges that the problems faced by workers with family responsibilities are wider societal issues.[97] The convention requires that measures compatible with national conditions and possibilities must be adopted to take account of the needs of workers with family responsibilities in community planning and to develop and promote community services such as child-care and family services and facilities.[98]

The Rural Workers' Organisation Convention, 1975[99] defines the term "rural worker" as "any person engaged in agriculture, handicrafts or a related occupation

[89] This convention has not been ratified by South Africa.
[90] Fourie (n 68) 137.
[91] a 1(a) of the 1996 convention.
[92] a 1(c).
[93] a 4(1). A 4(2) provides that equality of treatment shall be promoted, in particular, in relation to the home-workers' right to establish or to join organisations of their own choosing and to participate in the activities of such organisations; to protection against discrimination in employment and occupation; to protection in the field of occupational safety and health; to remuneration; to statutory social security protection; to access to training; to a minimum age for admission to employment or work and to maternity protection.
[94] This convention has not been ratified by South Africa.
[95] a 1(1) of the 1981 convention.
[96] a 2.
[97] Fourie (n 68) 138.
[98] a 5 of the 1981 convention.
[99] This convention has not been ratified by South Africa.

in a rural area, whether as a wage earner or as a self-employed person such as a tenant, sharecropper or small owner-occupier".[100] The convention, however, applies only to those tenants, sharecroppers or small owner-occupiers who derive their main income from agriculture, who work the land themselves with the help only of their family or with the help of occasional outside labour and who do not permanently employ workers or employ a substantial number of seasonal workers or have any land that is cultivated by sharecroppers or tenants.[101] The convention *inter alia* provides that all categories of rural workers, whether they are wage earners or self-employed, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.[102] Interestingly, therefore, the convention extends protection to the traditional categories of workers of independent contractors as well as to employees.

The exposition traced thus far illustrates that with the exception of the Employment Relations Recommendation, 2006 that endorses the traditional binary divide between employees and independent contractors international labour standards generally are extended to workers in the broadest possible sense. The Termination of Employment Convention, 1982,[103] however, excludes workers who are not in an employee-employer relationship. Although the convention applies to "all branches of economic activity", its protection extends only to "employed persons".[104] The convention makes it clear that this means only persons who are engaged under a contract of employment.[105] The Committee of Experts on the Application of Conventions and Recommendations has observed that the application of the convention is expressly limited to persons in an employment relationship and not to self-employed persons.[106]

The Work Health and Safety Convention, 1981[107] states that it has application to "all branches of economic activity" and to "all workers in the branches of economic activity covered".[108] The term "worker" is defined as "all employed persons, including public employees".[109] As such the convention is silent with regards to self-employed persons. Also, the Domestic Workers Convention, 2011[110] applies to "any person engaged in domestic work within an employment relationship".[111] This convention seems to apply only to those workers who are engaged under a contract of employment, although the preparatory materials of the convention suggest it was intended to apply more broadly.[112] From the above it is clear that with some exceptions international labour standards generally are broad enough to encompass employees and independent contractors in addition to workers on the margin of these relationships.

[100] a 2(1) of the 1975 convention.
[101] a 2(2).
[102] a 3(1).
[103] This convention has not been ratified by South Africa.
[104] a 2(1) of the 1982 convention.
[105] a 2(2).
[106] Creighton and McCrystall (n 10) 719.
[107] This convention has not been ratified by South Africa.
[108] a 1(1) and a 2(1) of the 1981 convention.
[109] a 3(b).
[110] This convention has been ratified by South Africa.
[111] a (1) of the 2011 convention.
[112] Creighton and McCrystall (n 10) 722.

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3 *Foreign law*

There are three important and distinct reasons as to why an interpreter should consider the comparative experience of other countries in dealing with the interpretive problem of who should be regarded as a party to the employment relationship. First, it may be argued that the identification of the parties to the employment relationship is cut from a universal cloth and that all courts are engaged in the identification, interpretation and application of the same set of norms in establishing the parties.[113] Those norms are understood as universal legal principles.[114] Second, it is argued that legal systems are often bound by complicated historical relationships and that those relationships are sufficient justification to import and apply foreign law norms.[115] Courts favour comparisons with judicial systems which share our legal tradition, and which historically have had an impact on their understanding of the problem. Third, courts identify the normative and factual assumptions that underlie their understanding of the parties to the employment relationship by engaging with comparable jurisprudence in other jurisdictions.[116]

In *K v Minister of Safety and Security*[117] the constitutional court warned that it is important not "to equate legal institutions which are not, in truth, comparable". The court, however, went on to hold that "the approach of other legal systems remains of relevance to us"[118] and that "[i]t would seem unduly parochial to consider that no guidance, whether positive or negative, could be drawn from other legal systems' grappling with issues similar to those with which we are confronted". The court found that the responses of other legal systems might enlighten the understanding of our law and assist us in developing it further.[119] It is also trite that the problems associated with identification of the parties to the employment relationship are a shared concern among many legal jurisdictions.

3.1 Definitions

A definition, for purposes of a specific statute, requires a technical meaning to terms that may deviate from their ordinary meaning.[120] The definition of "employee" as used in employment legislation therefore obtains a technical meaning that may differ from the public's ordinary understanding of the term. As such it may be useful to contrast and compare the definition that has been given to concepts relevant to determining the parties of the employment relationship so as to elucidate the South African understanding of similar provisions in South African labour law.

It is significant to note that in many countries there is no statutory definition of the term "employee". Australian labour legislation does not provide any workable statutory definitions of the concept. The Australian Fair Work Act,[121] for example, merely defines the term as having its ordinary meaning.[122] So too, despite the

[113] Choudhry "Globalisation in search of justification: towards a theory of comparative constitutional interpretation" 1999 *Indiana Law Journal* 820 825.
[114] (n 113) 833 and 841.
[115] (n 113) 838 and 866.
[116] (n 113) 835 and 855.
[117] 2005 6 SA 419 (CC).
[118] par 34.
[119] par 35.
[120] Du Plessis "Interpretation of statutes and the constitution" in *LexisNexis Bill of Rights Compendium* (2012) 2C32.2C34.
[121] 28 of 2009.
[122] s 11 and 12.

importance of the concept of "employee" in extending (individual and collective) labour protection to workers in Canada and the acceptance of the binary divide between employees and independent contractors in the country, the concept is largely left undefined in Canadian labour legislation.[123]

This choice of the Australian and Canadian legislature should not be dismissed out of hand. The South African legislature in the past also legislated in a similar manner. When the concept "unfair labour practice" was first introduced in South Africa it was defined as "any labour practice that in the opinion of the Industrial Court is an unfair labour practice".[124] In effect the former industrial court was given extensive discretion to decide for itself what conduct amounted to unfair labour practices and according to some this leeway "amounted to a license to legislate".[125] The allocation of this power to the judiciary is justifiable because judges possess specialised expertise to develop legislation in light of norms. The doctrine of precedent allows the norm to develop incrementally and to revise general principles through the processes of appeal.[126] The processes of the courts mean that general rules develop only after taking cognisance of both employees and employers.

Although some countries choose to provide no statutory definition of "employee", they often utilise so-called deeming provisions to explicitly provide that certain categories of workers are employees. In Australia some cleaners, outworkers and drivers of public passenger vehicles who ordinarily may be considered independent contractors are deemed employees under the Fair Work Act.[127] In the United Kingdom the minister of labour may extend employment rights to certain individuals and may provide that such individuals are treated as parties to employment contracts.[128] In Morocco the labour code, 2004 specifically includes groups of workers that are often unprotected, such as salespersons and home workers.[129] In Tanzania the minister is given the express authority to deem any individual an employee.[130]

In South Africa section 83 of the Basic Conditions of Employment Act[131] provides that the minister of labour, on advice of the Employment Conditions Commission and by notice in the *Government Gazette*, may deem any category of persons specified in the notice to be employees for the purposes of the whole or any part of the Basic Conditions of Employment Act or any other employment law or sectoral determination. Fourie has asked "why the act does not regulate the position of non-standard workers directly, and whether or not it is wise to leave a matter of such importance up to the discretion of the minister to adopt measures when he/she deems it appropriate".[132] As it is questionable if section 23 of the Basic Conditions of Employment Act has had the profound effect for which it was created, it may be argued that the legislature should consider the approach of Moroeco where specific categories of workers are legislatively regarded as employees.

[123] Sack, Phillips and Leal-Neri "Protecting workers in a changing workworld: the growth of precarious employment in Canada, the United States and Mexico" in Casale (ed) (n 2) 233.

[124] s 1(f) of the Industrial Conciliation Amendment Act 94 of 1979.

[125] Vettori *Alternative Means to Regulate the Employment Relationship in the Changing World of Work* (2005 thesis University of Pretoria) 301 and Thompson and Benjamin *South African Labour Law* (1997) A-60.

[126] Endicott "The value of vagueness" in Marmor and Soames (eds) *Philosophical Foundations of Language in the Law* (2013) 14 26-28.

[127] s 4 and 5.

[128] s 23 of the Employment Relations Act, 1999.

[129] s 2 of the Moroccan Labour Code.

[130] s 4(c) of the Tanzanian Employment and Labour Relations Act 6 of 2004.

[131] 75 of 1997.

[132] (n 68) 125.

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Of the array of countries that were surveyed, many choose to provide a statutory definition of the term "employee"[133] or of similar terms.[134] The majority of African countries define the term "employee" in a manner practically identical to the definition of employee in South African labour legislation.[135] Although little can be discerned from the statutory definitions of the term utilised in these countries, guidance can be gained from the interpretation given to the term in these countries.

Many countries, such as Namibia,[136] Swaziland,[137] and Zimbabwe,[138] also choose to include a statutory definition of the term "employer". Davies and Freedland argue

[133] S 2(*e*) of the Indian Payment of Gratuity Act 39 of 1972 defines "employee" as "any person (other than an apprentice) who is employed for wages, whether the terms of such employment are express or implied, in any kind of work, manual or otherwise, in or in connection with the work of a factory, mine, oilfield, plantation, port, railway company, shop or other establishment to which this Act applies, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity". See also s 2 of the Swaziland Industrial Relations Act 1 of 2000 and s 2 of the Swaziland Employment Act 5 of 1980.

[134] S 2(*s*) of the Indian Industrial Disputes Act 14 of 1947, for example, defines "workmen" as "any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person (i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or (ii) who is employed in the police service or as an officer or other employee of a prison; or (iii) who is employed mainly in a managerial or administrative capacity; or (iv) who, being employed in a supervisory capacity, draws wages exceeding one thousand six hundred rupees *per mensem* or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature." S 6 of the Moroccan labour code provides that "[w]age earners/ salaried workers' include every person who is engaged to carry out a professional activity under the direction of one or more employers in return for remuneration, whatever the nature and method of payment".

[135] S 213 of the Labour Relations Act defines "employee" as "(*a*) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and (*b*) any other person who in any manner assists in carrying on or conducting the business of an employer". This definition is practically identical to those used in s 1 of the Basic Conditions of Employment Act, and s 1 of Skills Development Act 97 of 1998. S 1 of the Namibian Labour Act 11 of 2007 defines an employee as "an individual, other than an independent contractor, who (*a*) works for another person and who receives, or is entitled to receive, remuneration for that work; or (*b*) in any manner assists in carrying on or conducting the business of an employer".

[136] Employer is defined in s 1 of the Namibian Labour Act 11 of 2007 as "any person, including the State who (*a*) employs or provides work for, an individual and who remunerates or expressly or tacitly undertakes to remunerate that individual; or (*b*) permits an individual to assist that person in any manner in the carrying or, conducting that person's business".

[137] S 2 of the Swaziland Employment Act 5 of 1980 defines "employer" as "any person or undertaking, contractor, corporation, company, public authority or body of persons who or which has entered into a contract of employment with an employee and includes any agent, representative, foreman or manager of such person, undertaking, corporation, public authority or body of persons who is placed in authority over that employee; and in the case of any such person who has died, his executor; who has become of unsound mind, his *Curator Bonis*; who has become an insolvent, the trustee of his insolvent estate; which is a company in liquidation, the liquidator of the company".

[138] Employer is defined in s 2 of the Labour Act 17 of 2002 as "any person whatsoever who employs or provides work for another person and remunerates or expressly or tacitly undertakes to remunerate him, and includes (a) the manager, agent or representative of such person who is in charge or control of the work upon which such other person is employed; and (*b*) the judicial manager of such person appointed in terms of the Companies Act; (*c*) the liquidator or trustee of the insolvent estate of such person, if authorised to carry on the business of such person by (i) the creditors; or (ii) in the absence of any instructions given by the creditors, the Master of the High Court; (*d*) the executor of the

that many difficulties about the scope of labour law coverage can be resolved or at least be better understood by shifting the focus of the debate from the question who is an employee to the question who is an employer.[139] Alternatively, the problem of identifying the parties to the employment relationship is better understood by asking the question who is the employer and not who is the employee. As such, the inclusion of a definition of employer serves as an important potential instrument in determining the scope and application of labour legislation.[140] In South Africa recent amendments[141] to the Labour Relations Act[142] introduced a definition of "employer" into South African labour legislation. Section 200B(1) of the Labour Relations Act reads:

> "For the purposes of this act and any other employment law, 'employer' includes one or more persons who carry on associated or related activity or business by or through an employer if the intent or effect of their doing so is or has been to directly or indirectly defeat the purposes of this act or any other employment law."

Although the introduction of this definition has drawn little scholarly attention, it is foreseen that the inclusion of a definition of "employer" that is meant to apply to all employment law will provide significant fodder for interpreters. Although the definition of employer is somewhat limited as clearly it is intended only to deal with the phenomenon of disguised employment, the term is defined more comprehensively in other labour legislation. The South African judiciary would do well in approaching the question as to who is party to the employment relationship, firstly, by asking if an "employer" is present and, secondly, looking to the judicial experiences of Namibia, Swaziland, and Zimbabwe in interpreting the concept.

In Zimbabwe the term "contractor" is defined as "a person who renders to an employer services which are related to or connected with those of the employer's undertaking".[143] It may be argued, as in the case of the introduction of a definition of "employer", that, similarly, it is useful to determine who is a party to the employment relationship by asking who should not be party thereto, that is, an independent contractor. Although South African law recognises the key distinction between "employees" and "independent contractors",[144] there is no definition of the term in South African labour legislation.

The usefulness of such an approach may be demonstrated with reference to German labour law. Until recently, no statutory definition of the term *Arbeitnehmer* (employee) or *Arbeitsvertrag* (contract of employment) was present in German

deceased estate of such person, if authorised to carry on the business of such person by the Master of the High Court; (*e*) the curator of such person who is a patient as defined in the Mental Health Act), if authorised to carry on the business of such person in terms of section 88 of that act".

[139] Davies and Freedland "The complexities in the employment enterprise" in Davidov and Langille (eds) (n 10) 273.

[140] Benjamin "Subordination, parasubordination and self-employment: a comparative study of selected African countries" in Casale (ed) (n 2) 119.

[141] Labour Relations Amendment Act 6 of 2014.

[142] 66 of 1995.

[143] s 2 of the Labour Act 17 of 2002.

[144] S 213 of the Labour Relations Act defines "employee" as "excluding an independent contractor". See also *Colonial Mutual Life Assurance Society Limited v Macdonald* 1931 AD 413.

labour law.[145] There was only a definition of the term *Selbständiger* (self-employed). Section 84(1) of the *Handelsgesetzbuch* (commercial code) defines the term as follows: "Selbständig ist, wer im Wesentlichen frei seine Tätigkeit gestalten und seine Arbeitszeit bestimmen kann."[146] The German courts sought guidance from this definition to identify employees.[147] From the definition personal freedom is deduced to be the main characteristic of being self-employed. Conversely, *persönliche Abhängigkeit* (personal subordination) is taken to be the main characteristic of being employed. Personal subordination has been understood to mean something different from economic dependency.[148] The *Sozialgesetzbuch* (German social security code), however, contains a definition of *Beschäftigung* (employment): "Beschäftigung ist die nichtselbständige Arbeit, insbesondere in einem Arbeitsverhältnis. Anhaltspunkte für eine Beschäftigung sind eine Tätigkeit nach Weisungen und eine Eingliederung in die Arbeitsorganisation des Weisungsgebers."[149]

In the Netherlands the *Burgerlijk Wetboek* (Dutch civil code) establishes and defines two forms of contract relating to the performance of work: "de arbeidsovereenkomst" (the employment agreement) and "de opdracht" (the contract for services). The "arbeidsovereenkomst" is defined as follows:

> "(1) De arbeidsovereenkomst is de overeenkomst waarbij de ene partij, de werknemer, zich verbindt in dienst van de andere partij, de werkgever, tegen loon gedurende zekere tijd arbeid te verrichten. (2) Indien een overeenkomst zowel aan de omschrijving van lid 1 voldoet als aan die van een andere door de wet geregelde bijzondere soort van overeenkomst, zijn de bepalingen van deze titel en de

[145] S 611a(1) of the *Bürgerliches Gesetzbuch* (civil code) defined the *Arbeitsvertrag* (contract of employment) as follows: "Durch den Arbeitsvertrag wird der Arbeitnehmer im Dienste eines anderen zur Leistung weisungsgebundener, fremdbestimmter Arbeit in persönlicher Abhängigkeit verpflichtet. Das Weisungsrecht kann Inhalt, Durchführung, Zeit und Ort der Tätigkeit betreffen. Weisungsgebunden ist, wer nicht im Wesentlichen frei seine Tätigkeit gestalten und seine Arbeitszeit bestimmen kann. Der Grad der persönlichen Abhängigkeit hängt dabei auch von der Eigenart der jeweiligen Tätigkeit ab. Für die Feststellung, ob ein Arbeitsvertrag vorliegt, ist eine Gesamtbetrachtung aller Umstände vorzunehmen. Zeigt die tatsächliche Durchführung des Vertragsverhältnisses, dass es sich um ein Arbeitsverhältnis handelt, kommt es auf die Bezeichnung im Vertrag nicht an." Translated as: "An employee is any person who, pursuant to a civil law contract, is obligated to perform, subject to instructions, work determined by a third party in relation to whom the person is personally dependent. The right to give instructions can concern the content, performance, time, duration and place of the activity. An employee is any employed person who cannot essentially determine freely his/her activities and his/her working hours; the degree of personal dependency is also determined by the specific nature of the activity in each case. All of the related circumstances must be given consideration in determining whether a person is an employee within this sense. If the actual performance of the contractual relationships demonstrates that it is an employment relationship, the designation in the contract is irrelevant."

[146] Translated it means it is presumed that anybody who is essentially free to organise his work and to determine his working time is self-employed.

[147] Jünger *Arbeitrecht* (2017) 8.

[148] Weiss and Schmidt *Labour Law and Industrial Relations in Germany* (2008) 45.

[149] s 7.1 of Book IV. Employment is not self-employed work, especially when it is done within the confines of the employment relationship. Indicators of employment are that the work is done under the control of another person and that the worker is part of the employer's organisation.

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> voor de andere soort van overeenkomst gegeven bepalingen naast elkaar van toepassing. In geval van strijd zijn de bepalingen van deze titel van toepassing."[150]

"Opdracht", the contract under which independent contractors operate, is defined as follows:

> "De overeenkomst van opdracht is de overeenkomst waarbij de ene partij, de opdrachtnemer, zich jegens de andere partij, de opdrachtgever, verbindt anders dan op grond van een arbeidsovereenkomst werkzaamheden te verrichten die in iets anders bestaan dan het tot stand brengen van een werk van stoffelijke aard, het bewaren van zaken, het uitgeven van werken of het vervoeren of doen vervoeren van personen of zaken."[151]

Accordingly, three core elements must be present in order for an employment agreement to exist under Dutch civil law. First, the employer must be entitled to give orders as to how the work is to be carried out (relationship of authority). What is determinative is if the employer is entitled to give orders, not if he actually does. Second, the worker must carry out the work personally (exclusively). Third, the worker must receive remuneration (wages) for his work from the employer.[152] It may be argued that these three elements be considered by the South African judiciary in order to determine the existence of the employment relationship.

Although it is clear that there is no singular approach to the legislative definition of key concepts relevant to the identification of the employment relationship and although some countries choose to leave certain concepts undefined, nevertheless much can be discerned form the legislative approaches of various countries to elucidate the parties in the employment relationship. Much may be discerned from the respective approaches of the Australian and Canadian judiciary who, unbridled by a statutory definition, have to decide on a case-by-case basis when confronted by real-world factual circumstances. So too, the judiciary would do well by having regard to other concepts associated with the employment relationship, such as "employee" and "independent contractor", and to how these concepts are interpreted in other countries.

3.2 The binary divide between employees and independent contractors

In *ACE Insurance Ltd v Trifunovski*[153] the federal court of Australia dealt with the distinction between employees and independent contractors. The court found that "the distinction between an employee and an independent contractor is rooted

[150] a 7:610 CC: (1) An employment agreement is an agreement under which one of the parties ("the employee") engages himself towards the opposite party ("the employer") to perform work for a period of time in service of this opposite party in exchange for payment. (2) When an agreement has the characteristics of both, an agreement as meant in par 1 and of another statutory regulated particular agreement, then the statutory provisions of the present Title and the statutory provisions set by law for this other particular agreement shall apply simultaneously (side by side) to that agreement. In the event of a conflict between these statutory provisions, the statutory provisions of the present Title prevail.

[151] a 7:400 CC: A service provision agreement is the agreement under which one of the parties ("the service provider") has engaged himself towards the other party ("the client") to perform work on another basis than an employment agreement, which work consists of something else than the making of a tangible construction, the safekeeping of property, the publication of a work or the transportation of persons or goods.

[152] Oberman "The Netherlands" in L&E Global (eds) *Employees vs Independent Contractors: Understanding the Distinction between Contractors and Employees and the Re-characterization of a Contractor into an Employee* (2014) 131 134.

[153] 2011 FCA 1204.

fundamentally in the difference between a person who serves his employer in his, the employer's, business, and a person who carries on a trade or business of his own". The court stressed that the answer to the question as to who is an employee must be determined by reference to the totality of the relationship.[154]

Some countries have moved beyond a mere binary divide and towards recognising further categories of workers. Canada has taken significant steps towards recognising an intermediate category of worker between an employee and an independent contractor. A number of Canadian provinces, as well as the federal government, deem "dependent contractors" to be employees for purposes of labour relations legislation in order to extend collective bargaining rights to such workers. So, for example, the Ontario Labour Relations Act, 1995 defines a "dependent contractor" as

> "a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor".[155]

The Canadian labour board has considered the following factors as relevant in determining if a worker is a dependent contractor. These factors are if the worker exercises independent judgement when providing services; if he has control over scheduling; the method of payment; if the worker negotiates the rate of pay; how essential is the worker's service to the operations of the enterprise, providing an opportunity for profit and loss; compliance with employee manuals; and worker evaluation and discipline.[156]

The British Columbia court of appeal in *Old Dutch Foods Ltd v Teamsters Local Union No 213* considered the statutory definition of "dependent contractor" (identical to Ontario's definition) and established a two-part test for dependent contractor status.[157] The first part is whether a worker "performs work or services for compensation or reward" and whether the worker is economically dependent on the employer. The court further found, in determining dependent contractor status, that it is important to assess the "the substance of the relationship, not merely its form". Arthurs has suggested that the Canadian government for the purposes of individual labour standards protection should recognise a category of so-called "autonomous workers" who "inhabit some of the same workplaces and labour markets [as employees and who] must deal with many of the same practical and contractual issues".[158]

In Tanzania the legislature has adopted a definition of "employee" designed to broaden the scope of application of labour protection to the so-called "middle-category" between employee and self-employed.[159] The Tanzanian Employment and Labour Relations Act[160] includes within the definition of employee "an individual who has entered into a contract, other than a contract of employment" under which

[154] par 29.
[155] s 1(1).
[156] Sack, Phillips and Leal-Neri (n 123) 258.
[157] 2006 BCJ No 3127 (BCCA).
[158] Arthurs *Fairness at Work: Federal Labour Standards for the 21st Century* (2006) 61.
[159] Davies *Perspectives on Labour Law* (2004) 87.
[160] 6 of 2004.

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"the individual undertakes to work personally for the other party to the contract and the other party is not a client or customer of any profession, business, or undertaking carried on by the individual".[161] The definition is based on the definition of "worker" contained in section 230 of the United Kingdom Employment Rights Act, 1996. This definition of "worker" specifically acknowledges that the term is broad enough to allow for work under other arrangements than a contract of employment.[162] The United Kingdom employment appeals tribunal has used the economic dependence test to determine if a person falls within this definition.[163] In *Flynn v Torith Ltd*[164] it was found that the term is broad enough to include many casual, freelance and self-employed workers.

It is trite that the term "worker" is not unfamiliar to South African labour lawyers. Section 23 of the constitution extends the right to fair labour practices to "everyone",[165] the right to freedom of association to "workers" and "employers", the right to bargain collectively to trade unions and employers' organisations and the right to strike to "every worker".[166] The use of the term "worker" instead of "employee" is significant as the terms are not synonymous and "worker" has a meaning that is generally perceived as being broader than the term "employee".[167] The constitutional court has found that the term "worker" can encompass anyone who has not entered into a formal contract of employment but is in a work relationship "akin" to the employment relationship governed by a contract of employment, such as atypical work relationships.[168]

The constitutional court found that the section engages "broadly speaking, the relationship between the worker and employer".[169] Cooper therefore indicates that the term "worker" "could encompass persons on the margins of the employment relationship, including those in the employee-like relationships".[170] Cheadle has argued that the constitutional assembly used the term "worker" instead of "employee" because "worker" extends the application beyond those who enter into common-law contracts of employment.[171]

[161] s 4.

[162] The term "worker" has been defined in s 230(3) of the UK Employment Rights Act as "an individual who has entered into or works under (or, where the employment has ceased, worked under) (*a*) a contract of employment, or (*b*) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker's contract shall be construed accordingly."

[163] Davies (n 159) 88.

[164] case no 17/02 (EAT) (unreported).

[165] In *National Education Health and Allied Workers Union v University of Cape Town* 2003 3 SA 1 (CC) par 36 it was held that the term "everyone" applied to workers and employers.

[166] According to Cheadle "Constitutionalising the right to strike" in Hepple, Le Roux and Sciarra (eds) *Laws Against Strikes: The South African Experience in an International and Comparative Perspective* (2015) 71-72, the right to strike is a collective right that can be exercised collectively only with others in a collective action. As such, "the individual rights are dependent on the existence of the lawfulness of the collective action, which brings into play the collective facet of the right".

[167] Cooper "Labour relations" in Woolman, Roux and Bishop (eds) *Constitutional Law of South Africa* (2014) 3.

[168] *South African National Defence Union v Minister of Defence* 1999 4 SA 469 (CC) par 24.

[169] the *University of Cape Town* case (n 165) par 40.

[170] Cooper (n 167) 5.

[171] Cheadle "Labour relations" in Cheadle, Davis and Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2006) 18-4(1).

The proposed National Minimum Wage Bill[172] applies to all "workers" and their "employers". Therefore it may be argued that the use of the term "workers" is meant to apply to those who find themselves in employee-like relationships or at the margins of the employment relationship and that a valid contract of employment is not a requirement for admission to the category of "workers" (although of course it also is not a requirement for admission to the category of "employees" either).[173] South African courts would do well to consider the Tanzanian and United Kingdom experience in this regard. The South African judiciary and legislature also would do well to recognise other categories of workers, such as the "dependent contractors" in the Canadian example. This is not to say that all workers and true independent contractors should be brought under the ambit of labour protection through such devises, as there is general consensus of a "need to regulate access to the framework of the Labour Relations Act and its various rights, duties and procedures designed specifically to regulate relations between employers and employees".[174]

3.3 The contract of employment

Although a contract of employment is not *sine qua non* for two parties to be deemed to be employer and employee for the purposes of South African labour law[175] there are instances where the South African judiciary requires the existence of a personal contract between the parties,[176] where the judiciary has refused to look beyond the strict form of the contract[177] and where the contract of employment was regarded as relevant in determining the nature of the relationship.[178] Section 186(1)(*a*) of the Labour Relations Act acknowledges that the termination of employment is a dismissal, whether or not there is a formal or written contract of employment. Prior to the 2015 amendments a dismissal was defined, *inter alia,* to mean "an employer has terminated a contract of employment with or without notice". This paragraph now reads "'dismissal' means that an employer has terminated employment with or without notice".[179] As such the Labour Relations Act confirms the principle that the existence of a formal and legally valid contract of employment is not a prerequisite for legislative labour protection. So too the definition of "employee" in section 213 does not require the existence of a contract of employment.

[172] 31 of 2017.

[173] n 141 above.

[174] Du Toit, Potgieter and Fouché "Labour and the Bill of Rights" in *LexisNexis Bill of Rights Compendium* (2012) 4B16.

[175] *Buffalo Signs Co Ltd v De Castro* 1999 ILJ 1501 (LAC); *Denel Pty Ltd v Gerber* 2005 ILJ 1256 (LAC); *Discovery Health Limited v CCMA* 2008 ILJ 1480 (LC); *State Information Technology Agency v CCMA* 2008 7 BLLR 611 (LAC); *"Kylie" v CCMA* 2010 ILJ 1600 (LAC) and *National Education Health and Allied Workers Union v Ramodise* 2010 ILJ 695 (LC).

[176] *CMS Support Services v Briggs* 1998 ILJ 271 (LAC) 277H.

[177] *Vermooten v Department of Public Enterprises* 2017 ILJ 607 (LAC).

[178] *Phaka v Commissioner Ronnie Bracks* 2015 ILJ 1541 (LAC). In this case it found that the formulation of contract between the parties left no doubt that the intention of the parties was to establish a relationship between the company and the worker that was on a different footing to that of the employment relationship. In the *Ramodise* case (n 175) it was held that the courts must go beyond what parties regard as the nature of their relationship to uncover the true nature of the relationship. Nevertheless, the contractual expression by the parties as contained in the agreement should not be ignored. See also *Hydraulic Engineering Repair Services v Ntshona* 2008 ILJ 163 (LC); *Pretorius and Prime Product Manufacturing (Pty) Ltd* 2014 ILJ 305 (CCMA). It has been found that the exploration of extrinsic facts is mandatory to determine intended meaning. See *De Paauw and Living Gold (Pty) Ltd* 2006 ILJ 1077 (ARB).

[179] s 186(1)(*a*) of the Labour Relations Act.

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In several countries, however, the existence of a valid contract of employment is a *conditio sine qua non* for the establishment of an employment relationship. In Australia an employee is someone who performs work under a contract of employment. There can be no employment relationship without a valid contract of employment between a putative employer and a putative employee.[180] The Australian courts in certain cases have refused to classify workers as employees in the absence of any contract of employment even when the relationship had all the hallmarks of an employment relationship.[181] So too in the United Kingdom, according to section 230(1) of the United Kingdom Employment Rights Act,[182] an employee is someone who works under a contract of employment. In Zimbabwe legislative amendments in 2002 removed the existence of a valid contract of employment as a requirement for the establishment of an employment relationship.[183] Such legislative interventions however were short-lived as legislation was amended in 2005[184] so as to require the existence of at least some form of agreement between the parties.[185]

In Swaziland, a contract of employment is a requirement to establish the existence of the employment relationship for purposes of the Swaziland Employment Act,[186] but not for the Swaziland Industrial Relations Act.[187] The industrial court of Swaziland held in *Maphosa v Max Enterprises (Pty) Ltd*[188] that the act therefore applies only to persons who are employees under a common law contract of employment, the *locatio conductio operarum*.[189] As Benjamin notes the inconsistent usage in Swaziland's labour legislation creates a situation where certain "quasi-employees" may have collective labour rights under the Industrial Relations Act but no dismissal protection or minimum conditions of employment under the Employment Act.[190]

It is evident that the judiciaries of several countries have moved beyond the principle of *pacta sunt servanda*. The Australian courts uphold the true nature of a work relationship despite an attempt to label an employer-employee relationship as something else in certain cases.[191] The Canadian federal court of appeal in *Wiebe Door Services Ltd v Canada (Minister of National Revenue)*[192] looked to the factual situation of the various company workers in deciding the company's liability for their taxes, workers' compensation, unemployment insurance and pension contributions. While noting that the agreement was that the workers would be running their own businesses and therefore responsible for their own taxes and other contributions, the court stated that "[s]uch an agreement is not of itself determinative of the relationship between the parties, and a court must carefully examine the facts in order to come to its own conclusions".[193] In the United Kingdom judges similarly demonstrate a

[180] *R v Brown; ex parte Amalgamated Metal Workers and Shipwrights Union* (1980) 144 CLR 426 475. See also Floyd, Steenson, Coulthard, Williams and Pickering *Employment, Labour and Industrial Law in Australia* (2017) 4.

[181] *Advanced Workplace Solutions Pty Ltd v Fox and Kangan Batman TAFE* 1999 AIRC 731.

[182] 1996.

[183] s 2 of the Labour Act 17 of 2002.

[184] s 2 of the Labour Act 7 of 2005.

[185] See Gwisai *Labour and Employment Law in Zimbabwe: Relations of Work Under Neo-colonial Capitalism* (2006) 55 and Madhuku *Labour Law in Zimbabwe* (2015) 25.

[186] 5 of 1980.

[187] 1 of 2000.

[188] 1986 3 FC 531.

[189] par 11.

[190] Benjamin (n 140) 122.

[191] *Hollis v Vabu Pty Ltd (t/as Crisis Couriers)* (2001) 207 CLR 21.

[192] 1986 3 FC.

[193] (n 192) 553.

willingness to imply such a contract of employment, notwithstanding contractual evidence to the contrary.[194]

In the Netherlands, however, the Dutch courts classify the contract as a contract of employment if the three core criteria are met, notwithstanding any arrangement the parties may have to the contrary.[195] If a relationship is labelled as an employment contract, the employee is protected by Dutch employment laws, for example, regarding minimum wages, holidays, sickness, termination, pension rights, and collective bargaining agreements.[196] However, when dealing with the increase in workers who find themselves in non-standard forms of employment, a number of Dutch labour laws have been extended to include workers who work under the direction of others, even if the contract is not a contract of employment.[197]

The statutory definition of "employee" in Swaziland's Industrial Relations Act[198] extends the act's protection to two categories of workers who may not be able to establish the existence of a (legally valid) contract of employment. These are persons who work under an arrangement in terms of which they are under the control of another person or a person who works under an arrangement in terms of which there is a sustained dependence for the provision of work upon another person. The definition makes it clear that there are persons who may be covered by the definition who are not common-law employees.[199] The industrial court of Swaziland in *Lokotfwako v Swaziland Television Broadcasting Corporation t/a Swazi TV*[200] described the implication of this broader definition as possibly meaning that the Swazi industrial court may have jurisdiction over independent contractors and their principals "provided that the necessary degree of control or sustained dependence for work is shown to be present in the relationship".[201]

Some countries penalise the phenomenon of disguised employment. In Australia the Independent Contractors Act[202] and the Workplace Relations Amendment (Independent Contractors) Act[203] impose penalties on employers who use sham arrangements either to disguise the fact of employment as being independent contractors or to coerce employees into independent contracting arrangements. Under the Fair Work Act an employer may not misrepresent an employment relationship as an independent contractor relationship (sham contracting),[204] may not dismiss an employee to engage them as an independent contractor[205] and must not make a false statement to encourage someone to be engaged as an independent contractor.[206]

Although the penalisation of disguised employment emphasises the seriousness of this societal problem, nevertheless it is not advocated that the South African

[194] See *Dacas v Brook St Bureau* 2004 ICR 1437.
[195] Jacobs *Labour Law in the Netherlands* (2004) 47.
[196] Oberman (n 152) 140.
[197] Jacobs (n 195) 48.
[198] 1 of 2000. S 2 of the act defines employee as: "a person, whether or not the person is an employee in common law, who works for pay or other remuneration under a contract of service or under any other arrangement involving control by, or sustained dependence for the provision of work upon, another person".
[199] Benjamin (n 140) 121.
[200] case no 151/2007 (ICS) (unreported).
[201] par 9 and 18.
[202] 162 of 2006.
[203] 163 of 2006.
[204] s 357.
[205] s 358.
[206] s 359.

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legislature adopt a similar approach. General problems associated with the penalisation of labour law aside, this approach is to be avoided as there are cases where there should be no policy objection to "sham" contracting, such as in the case when parties in a relatively equal bargaining position choose to enter into an agreement that excludes the contract of employment and such an agreement is not for an illegal purpose.[207] However, from the countries surveyed it is concluded that there is an increased willingness on the part of the judiciaries to look beyond the label given to a particular contract of work and to uphold the true nature of a work relationship.

3.4 Factors relevant to identifying the employment relationship

The dominant impression test transplanted into South African law and which primarily remains the interpretive approach of the South African judiciary in this interpretive area does not represent the final doctrinal development on the matter in English law. English courts in the 1980s adopted the so-called "mutuality of obligations" test because of the influence of the work of Freedland.[208] This test operates in addition to the other tests developed by the English courts, such as the control test, the integration test, the mixed test and the economic reality test.[209]

In addition to these tests the English courts also require that beyond the exchange of work for remuneration there must be a promise to employ and be employed as such a mutuality of obligations is the essence of any contract of employment. The absence of mutuality of obligation therefore excludes a claim of employee status without in itself being a sufficient condition.[210] In all likelihood such a test either would be rejected in the South African context (due to its narrow contractual nature) or be regulated to the status of "just another factor" to be considered alongside all other factors relevant to the so-called dominant impression test.

In the *Trifunovski* case[211] the federal court of Australia highlighted a list of non-exhaustive *indicia* which the Australian courts to varying degrees have used to determine the parties to the employment relationship. They are the terms of the contract; the intention of the parties; whether tax is deducted and what is disclosed in the tax returns; whether sub-contracting is permitted; whether uniforms are worn and tools are supplied; whether holidays are permitted; the extent of control; whether wages or commissions are paid; whether one party represents the other; for whose benefit the goodwill in the business accrues; how business-like the business is and if there are systems, such as manuals and invoices.[212]

The Canadian judiciary similarly developed tests to identify the parties to an employment relationship. Although the Canadian courts rely heavily on the presence or absence of control, it was found in *Montreal v Montreal Locomotive Works Ltd*[213] that because of the complexity of modern industry a "fourfold test would in some cases be more appropriate, a complex involving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss". The court found that in itself control is not always conclusive and in many cases "the question can only be settled by examining

[207] *Vermooten v Department of Public Enterprises* (n 177) par 26
[208] Freedland *The Contract of Employment* (1976).
[209] Clarke "Mutuality of obligations and the contract of employment: *Carmichael and Another v National Power plc*" 2000 *Modern Law Review* 757.
[210] (n 209).
[211] (n 153).
[212] above.
[213] 1937 1 DLR 161 (PC).

the whole of the various elements which constitute the relationship between the parties".[214]

The supreme court of Canada has made it clear that notwithstanding and irrespective of these common-law tests courts and tribunals must take into account the particular policy objectives of the statute when deciding if a person has employee status.[215] Consequently, the court adopted a broad purposive approach to the interpretation of the concept of employee. The Canadian judiciary, accordingly, should advance the protective goals of Canadian labour legislation. The shortcoming of such an approach is that different definitions of employee may develop as the concept is interpreted to give effect to the varying policy objectives of different pieces of labour legislation.[216] A purposive approach to the identification of the parties in the employment relationship requires that the interpreter must distinguish between workers who need the protection of labour law and workers who do not.[217]

So too, the Indian judiciary has been unwilling to commit itself to any singular test to identify the employment relationship. In *Workmen of Nilgiri Coop Mkt Society Ltd v State of Tamil Nadu*[218] the court commented on the use of common-law tests to identify the existence of an employee relationship. It found that no single test is determinative for the relationship. The court advanced an integrated approach in which it is determined if a person is "fully integrated into the employer's concern". It was held that a court is required to consider several factors; they include who is the appointing authority; who is the pay master; who can dismiss; how long alternative service lasts; the extent of control and supervision; the nature of the job and the nature of the establishment.[219] Although acknowledging that the Indian judiciary's unwillingness to commit to any particular test is hardly a peculiarity of the Indian legal system, some authors contend that "it leads to a rather loose and unpredictable framework, further exacerbated by the extremely fragmented, informal, and deregulated realities of the [Indian] labour market".[220]

In Germany the *Bundesarbeitsgericht* prefers to decide on a case-by-case basis who is party to the employment relationship. The court has held that it is sufficient for any one or any number of the indicators enunciated in the case law to be present in order to establish the existence of an employee relationship. These factors include the sophistication of the working tasks given (that is how the tasks are performed); the ability to determine working time; the ability to determine work place; the extent that work depends on the principals' business organisation (*eg*, use of equipment and resources, team work with other employees) and which of the two parties gains more directly from the performed services.[221]

For purposes of German social security law it is presumed that an individual is an employee if at least three of the following factors are present: if the worker does not ordinarily employ anyone covered by compulsory social insurance or

[214] 169.

[215] *Pointe-Claire (City) v Quebec (Labour Court)* 1997 1 SCR 1015 (SC) and *67112 Ontario Ltd v Sagaz Industries Canada Inc* 2001 2 SCR 1983 (SC).

[216] Sack, Phillips and Leal-Neri (n 123) 255.

[217] Davidov *A Purposive Approach to Labour Law* (2016) 127.

[218] 2004 (101) FLR 137 par 32.

[219] par 37.

[220] Casale, Countouris, Fenwick, Lee and Mascarenhas "Legal regulation of the employment relationship in the Asia-Pacific region" in Casale (ed) (n 2) 196.

[221] Preedy "Germany" in *Employees vs Independent Contractors: Understanding the Distinction between Contractors and Employees and the Re-characterization of a Contractor into an Employee* (2014) 95 96.

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whose monthly payment exceeds €400; if the person has been working for only one principal for a long time; if the principal has similar activities carried out by other employees; if the activities of the person does not display the characteristics of entreprencurial activity and if the activities carried out by the person are the same as that carried out by a previous employee of the employer.[222] Consequently, the protection afforded to German workers is broader under social security laws (which admits economically dependent workers) than under labour laws (which are limited to instances of personal subordination).[223]

The Dutch courts have looked to the following elements to determine whether a contract was an *opdracht* or an *arbeidsovereenkomst*: the freedom of the worker regarding the organisation of his work; the nature of the remuneration; if payments are made directly by several clients; the extent to which the worker bears an entreprencurial risk; the extent to which the worker supplies raw materials and consumables and tools; if there is continued payment during vacation time, illness and leave; the extent to which, in addition to the agreed work, other work is performed; the occasional nature of the work; any deduction of social security contributions and payroll taxes by the (potential) employer and any payment of value added tax by the worker.[224]

In *State Information Technology Agency v CCMA*[225] the labour appeal court again endorsed the so-called "dominant-impression test" (which the court termed the "reality test") to determine the existence of the employment relationship.[226] Among the various indicators the court emphasised three as primary criteria for the establishment of an employment relationship, namely, an employer's right to supervision and control; whether the employee forms an integral part of the organisation of the employer and the extent to which the employee was economically dependent upon the employer.[227] However, it should be stressed that the court did not deny the existence of other indicia relevant to identifying the parties in the

[222] Perulli "Subordinate, autonomous and economically dependent work: a comparative analysis of selected European countries" in Casale (ed) (n 2) 155.

[223] above. A greater number of indicators therefore have been enunciated in case law dealing with social security law that are indicative of an employee relationship; these are if the worker has to provide services in person or may the worker engage an employee/subcontractor himself; which party carries the economic risk of no performance or poor performance; if the worker is integrated into the business organisation; if the worker is named in duty rosters; if the worker provides the equipment for the work performance; if the worker has a regular workplace at the principal's location; if the worker has an e-mail address or a telephone number; if the worker is registered in the principal's telephone book; if the worker has branded business cards of the principal; if the worker attends internal team-meetings; if the worker attends training sessions; if the worker attends internal events, such as Christmas parties; if the worker is obliged to notify about holidays or other leave; if the worker receives fixed monthly remuneration or if the worker is paid only for the services actually provided; if the worker has to write invoices; if the worker is covered for sick leave or for holidays; if the worker has a trade licence or registered business; if the worker advertises his services; if the worker works only for one principal; if the worker receives more than 5/6 of his overall income from the principal and the amount of time the worker works for the principal. See Preedy (n 221) 96.

[224] Oberman (n 152) 135.

[225] (n 175).

[226] par 10. The roots of this test are in the decision of the former appellate division of 1979 in the *Smit* case (n 69) 56D. The "Code of good practice: who is an employee?" explicitly endorses this test. Additionally, jurisprudence has emerged which displays a significant relationship between the dominant impression test and the factors listed in s 200A of the Labour Relations Act, as the courts have used these factors to determine the existence of an employment relationship. See *Beya v General Public Service Sectoral Bargaining Council* 2015 ILJ 1553 (LC) and *Universal Church of the Kingdom of God v Myeni* 2015 ILJ 2832 (LAC).

[227] par 14.

employment relationship. The court similarly did not exclude the possibility that other *indicia* may be relevant to prove the three primary criteria identified in the case. In addition, the code of good practice acknowledges that the factors listed therein do not represent a closed list and that the courts may consider other factors.[228] It may be argued that the South African judiciary should consider the factors regularly relied on in foreign courts to identify the employment relationship or the parties thereto.

4 *Conclusion*

To a varying degree the International Labour Organisation and all the countries surveyed increasingly deal with the proliferation of non-standard forms of employment and the ever-increasing number of workers who find themselves in a precarious position as a result thereof. The jurisprudence of the International Labour Organisation is insightful in our understanding of who should be the beneficiaries of international labour standards. The eight conventions that constitute the basis of the decent work agenda are clear that they are intended to apply to all workers,[229] irrespective of the kind of contractual arrangement (if any) under which individuals are engaged.[230] They are meant to apply to all workers without distinction or discrimination of any kind. In addition to applying to workers of all races, genders, religions, political affiliations and so on, they apply to all kinds of work relationships in which a worker happens to be engaged.[231]

South Africa has ratified all of these instruments and consequently it may be argued that the South African judiciary has a public international law obligation to extend the protection of these standards to as many workers as is possible, especially within the context of the four core rights. It needs reminding that admission to the concept of "employee" is a prerequisite for the extension of many of these rights. The judiciary can satisfy this demand by interpreting the concept of "employee" broadly. The same is true of many of the other international labour standards that were surveyed[232] although some instruments clearly apply only to workers who may be said to be employees.[233]

The Employment Relationship Recommendation, 2006 recognises that some workers justifiably may be denied labour protection both in international and municipal law, according to the category of worker to which they belong. In particular, it is seen to be justifiable to exclude workers who genuinely are independent contractors (self-employed). The purpose of the recommendation is to ensure that workers are not excluded from protections to which they ought to have access through the use of disguised employment or other avoidance strategies. Beyond this fact, however, the recommendation offers little guidance as to who should be regarded as an employee for the purposes of international law (other than the factors which are deemed indicative of the employment relationship).[234]

[228] reg 43.
[229] Creighton and McCrystall (n 10) 692.
[230] Creighton and McCrystall (n 10) 706.
[231] Creighton and McCrystall (n 10) 723.
[232] The Home Work Convention, 1996; the Maternity Protection Convention, 2000; the Part-Time Work Convention, 1994; the Protection of Wages Convention, 1949; the Rural Workers' Organisation Convention, 1975; and the Workers with Family Responsibility Convention, 1981.
[233] The Domestic Workers Convention, 2011; the Termination of Employment Convention, 1982; and the Work Health and Safety Convention, 1981.
[234] Creighton and McCrystall (n 10) 716.

Although all the countries surveyed have seen an increase in the amount of workers who find themselves in the precarious position between employment and self-employment, legislative and judicial responses vary. The existence of the employment relationship in some cases is dependent upon the conclusion of a (valid) contract of employment (such as in Australia, Zimbabwe and the Netherlands), but there are examples where the employment relationship extends beyond the contract of employment (such as in Swaziland for purposes of collective labour law). Whereas no legislative definition of the concept "employee" exists in several countries (such as Australia and Canada), other countries have often extensive legislative definitions thereof or of the contract of employment (such as India, Namibia and the Netherlands). Some countries (such as Namibia) also define concepts such as "employer" (Namibia, Swaziland and Zimbabwe) and "contractor" (Zimbabwe and Germany) legislatively.

Some countries deem certain categories of workers to be employees so as to remove any uncertainty about their status (such as Australia and Morocco). The judiciary in some countries uphold the true nature of a work relationship despite attempts to label an employer/employee relationship as something else (such as in Australia and Canada). Australia imposes penalties on employers who use sham arrangements to disguise employees as independent contractors.

In many countries no single factor is determinative of the employment relationship (such as in Australia, Canada, India and Germany). Factors that the judiciary consider in Germany and the Netherlands might be significant for South African courts in determining who is regarded as part of the employment relationship and who is not. The strikingly purposive approach of the Canadian judiciary is of substantial importance to the South African approach to the interpretation of the concept of "employee" as our courts have adopted a similar approach in the interpretation of statutes.[235] In Canada courts and tribunals must take into account the particular policy objectives of the statute when deciding if a person has employee status. The extension of labour protection to intermediate categories of workers in Canada ("dependent contractors"), United Kingdom ("workers") and Tanzania (an extensive definition of "employees" other than to those who operate under a contract of employment) ostensibly will have an impact upon the South African understanding of the employment relationship.

SAMEVATTING

DIE PARTYE TOT DIE INDIENSNEMINGSVERHOUDING: 'N VERGELYKENDE ONTLEDING

Die identifisering van die partye tot die indiensnemingsverhouding is 'n universele vraagstuk. Dit is dus gepas om die internasionale ervaring sowel as die ervarings van ander jurisdiksies te verken ten einde die Suid-Afrikaanse begrip daarvan te verhelder. Die bydrae verken hoe die standaarde van die Internasionale Arbeidsorganisasie lig kan werp op die vraag oor wie 'n party tot 'n indiensnemingsverhouding is. Die artikel verken relevante kwessies wat in ander regstelsels na vore gekom het. Die aspekte sluit onder

[235] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: in re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 1 SA 545 (CC); the *University of Cape Town* case (n 165); *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC); *African Christian Democratic Party v Electoral Commission* 2006 3 SA 305 (CC); *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 6 SA 199 (CC); *Aviation Union of South Africa v South African Airways (Pty) Ltd* 2012 1 SA 321 (CC); *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Co Ltd* 2014 5 SA 138 (CC) and *Cool Ideas 1186 CC v Hubbard* 2014 4 SA 474 (CC).

andere in: definisies toepaslik tot die binêre skeiding tussen werknemers en onafhanklike kontrakteurs; die verskil tussen werknemers en onafhanklike kontrakteurs; die toepaslikheid van die dienskontrak en faktore wat tersaaklik is vir die identifisering van 'n indiensnemingsverhouding. Die bogenoemde vraagstukke word aan die hand van die regsposisies in Duitsland, Indië, Kanada, Marokko, Namibië, Nederland, Swaziland, Tanzanië, die Verenigde Koninkryk en Zimbabwe toegelig.

Die agt sleutelkonvensies wat die grondslag van die Internasionale Arbeidsorganisasie se "decent work agenda" vorm, is op alle werkers van toepassing. Insgelyks geld verskeie ander internasionale arbeidstandaarde wat ondersoek is ten opsigte van alle werkers, hoewel sommige instrumente slegs op werkers wat as werknemers beskou kan word van toepassing is. Die *Employment Relationship Recommendation*, 2006 erken egter dat sommige werkers arbeidsbeskerming geweier kan word omdat hulle aan 'n sekere werkskategorie behoort. In die besonder is dit geregverdig om onafhanklike kontrakteurs uit te sluit.

Die ondersoek na die posisie in ander lande het getoon dat daar ander regs- en wetgewende reaksies tot die vraagstuk is. Terwyl die bestaan van die dienskontrak 'n voorvereiste vir die bestaan van 'n indiensnemingsverhouding in verskeie lande is, is daar voorbeelde waar die indiensnemingsverhouding sonder die sluiting van 'n dienskontrak kan bestaan. In sommige lande bestaan daar geen wetgewende definisie van 'n "werknemer" nie, terwyl ander lande uitgebreide definisies daarvan voorskryf. Verskeie lande ag sekere kategorieë van werkers as werknemers om sodoende enige onsekerheid oor hul status uit te klaar. Die regbank in verskeie lande sal die ware aard van 'n werksverhouding handhaaf ten spyte van pogings om 'n werkgewer, of werksverhouding, as iets anders uit te beeld. Die outeurs het ook die faktore ondersoek wat in ander lande aangewend word om die partye tot die indiensnemingsverhouding te bepaal.

IN 'N REGSTAAT KAN GEEN INMENGING DEUR 'N MINISTER MET DIE ONAFHANKLIKE VERVOLGINGSGESAG GEDULD WORD NIE

"Auf Ermittlungen Einfluss zu nehmen, weil deren mögliches Ergebnis nicht politisch opportun erscheint, ist ein unerträglicher Eingriff in die Unabhängigkeit der Justiz" – Range (voormalige *Generalbundesanwalt* – hoof van die vervolgingsgesag) met sy voortydige pensioenering deur die minister van justisie, Maas (die huidige minister van buitelandse sake van Duitsland), toe die uitreiking van 'n dagvaarding aan joernaliste om hul bron onder eed te openbaar in verband met 'n terreurnetwerk waarteen opgetree moes word, as polities té sensitief aangemerk is en Range, weens sy weiering om die minister se aanwysing te volg en die dagvaarding terug te trek, gevolglik vroeg gepensioeneer is (4-08-2015).

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