

# A Critical Analysis of the Concept of an Independent Contractor in South Africa

## 1 Introduction

Outsourcing has become an integral part of the strategy in many firms in South Africa, as they take a closer look at what business is core and what is non-core in their operations (Van der Walt “Economic slowdown giving renewed impetus to outsourcing” 2002 *InTouch* 4).

A worldwide, “big four” accounting firm, Ernst and Young (as cited by Van der Walt 2002 *InTouch* 4) says the following about the outsourcing/independent contracting industry:

“The economic slow-down is giving renewed impetus to the trend towards outsourcing, so that organisations focus their efforts to cut costs and focus on their core competencies. This conclusion stems from an analysis of responses from participants in an outsourcing survey conducted by Ernst and Young in the UK. Of the respondents, 68% indicated that they thought that outsourcing is set to expand.”

It can, therefore, be safely assumed that the independent contracting industry is not only here to stay, but it will expand in the near future.

The concept of an independent contractor remains one of the most contentious elements of the fourth schedule to the Income Tax Act (Act 58 of 1962). In determining the status of a person who is rendering a service, it is very important to understand that the common law principles in South Africa do not allow for a simple approach. There are consequently no set rules to follow in determining whether or not a person is an independent contractor. An overall or dominant impression of the employment relationship must be formed (Symington “Employee’s Tax: Independent Contractors” 1999 *Circular Minute 22: South African Revenue Service (SARS)* 7).

One of the main sources of revenue for the SARS is employment taxes, more specifically, employees’ tax. Paragraph 2(1) of the fourth schedule to the Income Tax Act stipulates that employees’ tax is payable in respect of remuneration paid or payable by an employer to an employee. Income

received by an independent contractor is specifically excluded from the definition of remuneration (paragraph 1 of the fourth schedule to the Income Tax Act), and consequently an independent contractor's income is not subject to the deduction of employees' tax.

Recent amendments to the Labour Relations Act (Act 66 of 1995) include a reworking of the definition of an employee. This means that a contractor of any type – a freelancer or an independent service provider – may, under the new legislation be “presumed to be an employee, depending on the service relationship” (Singh “Now independent contractors are employees too” *Business Day* (2002-11-5) 11).

However, the drafters of the legislation have tried not to make business impossible for genuine independent contracting relationships, by stipulating that the changes should apply only to contractors earning less than R115 572 per annum (Government Gazette 356 of 2003-03-14). Should a contractor earn more than that amount, the “dominant impression test” (refer to s 4 1), still applies where a dispute arises (Singh *Business Day* (2002-11-5) 11).

These changes were largely motivated by employee abuse and, therefore, mainly attempt to protect lower income earners from a situation where companies label workers “independent contractors” to sidestep legislation like the Income Tax Act and the Labour Relations Act. The changes do not attempt to simplify the process of determining the employment status of an individual.

The situation discussed above is not unique to South Africa. The United Kingdom (UK) struggles with precisely the same matters, where the relevant issues are contained in the IR35 legislation. It may, therefore, be appropriate to analyse this legislation and to compare the relevant issues with those that arise in South Africa today. The reasons for choosing legislation in the United Kingdom for comparison are the following:

- (a) A system of universal taxation began in the UK in the tenth century during the reign of King Edgar (Strong *The Story of Britain* (1998) 36). Lord Addington reintroduced income tax in the UK in 1801 (Foreman *The Allied Dunbar 2001/2002 Tax Handbook* (2001) 1), and in 1803 during the Napoleonic Wars it rose steeply to finance the army and navy (Strong 372).
- (b) Furthermore, the UK has had to contend with the same issues regarding employment status. A leading UK tax specialist, (Newth “Guide to Dealing with Status Disputes” 2002 *AccountingWeb* ([www.accountingweb.co.uk](http://www.accountingweb.co.uk))) reported:
 

“Successive Governments have been at pains to stress the merits of the small business, but the attitude of the Inland Revenue has always been somewhat hostile to the small independent trader. Currently, one suspects that there are several main reasons for this. The first reason is that the independent contractor is able to claim expenses ‘wholly and exclusively incurred’, without the intrusion of that word ‘necessarily’. This has always provoked a Revenue attitude that the sole trader or independent partnership is somehow ‘getting away with something’. Secondly, many employed workers do not have to complete a self-assessment tax return, and the Revenue saves much time, effort and cost if the worker is taxed under PAYE. Tax is collected quickly and efficiently at source under PAYE.”

## 2 Problem Statement

Determining the employment status of an individual is crucial for the survival of any organisation that uses the services of contractors, as well as for the survival of legitimate independent contractors. The employment status issue is thus one of the key issues to be addressed in this contribution.

In South Africa all the risks and obligations pertaining to the relevant employment taxes are squarely being placed on the shoulders of the employer, or if the contractor is truly independent, on the shoulders of the contractor. A failure to comply with all the complex legislation could result in dire consequences for the persons concerned. Therefore, it is necessary to perform a detailed analysis of all the relevant legislation in order to determine the obligations and potential risks for the employers and or contractors.

## 3 South African Legislation: Income Tax Versus Labour law

Employees, employers and independent contractors are caught in a complex maze between the Income Tax Act and the Labour Relations Act.

Currently the Income Tax Act tries to oversimplify the issue in terms of the definition of remuneration as it reads today. As stated in the Income Tax Reporter:

“The present provisions in the definition of ‘remuneration’ in paragraph one of the Fourth Schedule that deems a person to be carrying on a trade independently are less than adequate and are too simplistic” (Mitchell, Stein, Silke and Jooste “Taxation Laws Amendment Act” 2000 Apr *Income Tax Reporter* 274).

On the other hand, to determine whether a person is an employee (as opposed to an independent contractor) based on the common law and the Labour Relations Act, a far more involved process is applied which takes various factors into account, none of which can alone be indicative of the true nature of the person. The most relevant aspects of the Income Tax Act and the Labour Relations Act will now be discussed.

## 4 The Income Tax Act or Statutory Test

The definition of “remuneration” in paragraph 1 of the fourth schedule to the Income Tax Act specifically excludes any amount that is paid or payable for services rendered or to be rendered by a person who is independent of the person who pays the amount and who is independent of the person to whom the services are rendered. The basic principle, therefore, is that amounts paid to persons conducting an independent trade are not “remuneration”.

The problem is, that attached to this statutory rule, is a deeming provision, which provides that a person shall not carry on a trade independently if:

- (a) That person is subject to the control of any other person as to the manner in which that persons duties are or will be performed, or as to the hours of work; or

- (b) that person is subject to the supervision of any other person as to the manner in which that person's duties are or will be performed, or as to the hours of work; or
- (c) the amounts paid or payable for that person's services consist of or include earnings of any description, which are payable at regular daily, weekly, monthly or other intervals (paragraph 1 of the fourth schedule to the Income Tax Act).

Only one of the three deeming provisions needs to apply positively. The result of a positive application is that the recipient of remuneration is deemed not to be an independent contractor and the remuneration received is subject to employees' tax. Where none of these deeming provisions apply positively (as per the contract between the relevant parties), it is necessary to consult the common law dominant impression test.

#### **4 1 The Common Law Dominant Impression Test**

The dominant impression test is currently the common law criterion that must be applied to determine whether a worker is an independent contractor or an employee. The courts developed this test over time and is currently the test preferred by SARS as well as the Supreme Court of Appeal. From the different court cases several indicators, all of which differ in significance or weight, were developed (*Withers v Flackwell Heath Football Supporters Club* 1981 IRLR 307, *Smit v Compensation Commissioner* 1979 1 SA 51 (A), *Liberty Life Association of SA v Niselow* 1996 17 ILJ 673 (LAC), *Niselow v Liberty Life Association of SA* 1998 4 SA 163 (SCA)), *ITC 1718* 2000 64 SATC 43 and *SABC v Mckenzie* 1999 1 BLLR 1 (LAC)).

No single indicator is conclusive or a determinant of a person's status (SARS "Interpretation Note 17" 2003 6). Only on the balance of all the indicators may a conclusion be formed as to the existing relationship. The indicators are classified into three categories. The near conclusive indicators are those relating most directly to the acquisition of productive capacity. The persuasive indicators are those that establish the degree of control of the work environment and the resonant indicators of either an employee/employer relationship or an independent contractor/client relationship, whichever is relevant (SARS 2003 7).

#### **4 2 Near Conclusive Indicators of the Acquisition of Productive Capacity**

The indicators in this category indicate the quality/nature of control, the nature/extent of financial relations, and the degree of exclusivity of the relationship. These indicators are nearly conclusive, because they are considered to be the deciding factors in distinguishing between the acquisition of the worker's productive capacity (employee) as opposed to the result (independent contractor) (SARS 2003 8). The indicators include:

##### **4 2 1 Control of Manner**

This indicator examines the quality rather than the degree or extent of control. The principal may exercise direct or indirect control over the

manner in which work is done. This may be done by detailed instructions, by training or by ensuring that the services were performed satisfactorily (Van Jaarsveld and Van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* (2003) 39). A right to control “manner” will indicate that the employer intended to acquire productive capacity.

#### 4 2 2 Payment Regime

A worker/service provider can be paid for his time/effort or for the result from his time/effort. When a person is remunerated for his time/effort no matter what the result, it usually indicates employee status (SARS 2003 9).

#### 4 2 3 Person Who must Render the Service

If a principal has the right to select who will perform the work it usually indicates a relationship of employment. The absence of this right usually indicates that no master/servant relationship exists and points towards an independent contractor relationship (*Van Wyk v Lewis* 1924 AD 438 450 458–460). An independent contractor does not necessarily need to perform the work him/herself or produce the result him/herself. He/she may acquire the services of others to perform the work or to assist him/her in the performance of the work (*SABC v McKenzie* 6A–B 6G).

#### 4 2 4 Nature of Obligation to Work

The productive capacity of the employee is placed at the disposal of the employer. This is the case whether there is work to be done or not. The independent contractor only commits himself/herself to deliver the product or end result of the productive capacity (*Liberty Life Association of SA Ltd v Niselow*).

#### 4 2 5 Employer (Client) Base

An independent contractor usually has more than one client and thus more than one source of income. An independent contractor would do a job, get paid and possibly never deal with the client again (*ITC 1718* 481–49A). A person/worker who works exclusively for one principal is usually in an employer/employee relationship with the principal (*S v Lyons Brooke Bond* 1981 4 SA 445 (A) 450C–G). If a person is prohibited from rendering similar services to other clients/competitors it is usually indicative that the person is part and parcel of the organisation and that an employer/employee relationship is present (*FPS Ltd v Trident Construction* 1989 3 SA 537 (A) 542F–543C).

#### 4 2 6 Risk, Profit and Loss

The employee is concerned with the business of the employer whereas the independent contractor is more concerned with his own business rather than that of the employer (*Liberty Life Association of SA Ltd v Niselow*). The independent contractor is fully exposed to the risks and obligations pertaining to a bona-fide business (full benefit of profit and complete exposure to loss), whereas the employee is usually shielded from these risks (SARS 2003 12).

### **4 3 Persuasive Indications of the Acquisition of Productive Capacity**

The indicators in this category indicate the degree or extent of control. It also indicates what the purpose was for acquiring control. These indicators tend to indicate the existence of an employee, depending on the circumstances. Control enables management to convert productive capacity into productive activity (SARS 2003 12). Some examples include:

#### **4 3 1 Instructions/Supervision**

The employee is obliged to obey the lawful commands, orders or instructions of the employer who has the right to supervise and control the employee by prescribing to him/her what work he/she has to do as well as the manner in which it has to be done (*SABC v McKenzie* 6C–D 6F).

#### **4 3 2 Reports**

The employee is usually subordinate to the employer and is, therefore, usually bound by a very comprehensive and detailed reporting liability. The independent contractor, however, is on equal footing with the principal and thus regards the principal as a third party/client. The independent contractor thus has a very limited reporting liability towards the principal (*Smit v Compensation Commissioner* 60H–61A 61E–F 67B–D). A reporting structure indicates that a measure of supervision exists. The existence of a comprehensive and detailed reporting structure is usually persuasive in favour of an employer/employee relationship (SARS 2003 14).

#### **4 3 3 Training**

The employer usually provides a training programme to develop the employees and to ensure that the employees perform their work in accordance with the employer's work processes (*R v AMCA Services* 1959 4 SA 207 (A) 212H). This training may involve technical or professional competency, general training regarding the business operations and its clients or any other form of training deemed necessary by the employer (Van Jaarsveld and Van Eck 39). An independent contractor usually invests in his/her own training, and is free to choose his/her own production techniques (SARS 2003 14).

#### **4 3 4 Productive Time (Control of Working Hours)**

The permanent nature of fixed hours of work usually indicates an employment relationship (*Padayachee v Ideal Motor Transport* 1974 2 SA 565 (N) 567F–568E). The opposite is also true that if a person may choose his own working hours, when to work and when not to, this usually indicates an independent contractor relationship (*S v AMCA Services* 1962 4 SA 537 (A) 542D–543C). The independent contractor has no contractual right to take leave. Working for his/her own account he/she needs to deliver the specified result at the agreed date. If the independent contractor needs to take leave, this leave period must be planned for in advance so as to ensure that the specified result is still delivered on time.

#### **4 4 Indicators Resonant of (Creating an Immediate or Superficial Impression of) an Employee Relationship or an Independent Contractor Relationship**

The indicators in this category may shed some light on how the parties view their relationship. These indicators may provide insight into the true nature of the relationship (SARS 2003 15). Some examples include:

##### **4 4 1 Tools, Materials, Stationery, etc**

If tools, capital equipment, office material or an office is supplied by the principal, and the service provider's investment in tools and equipment is relatively small or unsubstantial, it usually indicates an employer/employee relationship (*R v Feun* 1954 1 SA 58 (T) 62D-F; (*ITC 1718* 481-49A)). An independent contractor characteristically invests in his/her own tools or equipment, production or office materials, business stationery, and so on (*Ongevallekommissaris v Onderlinge-versekeringsgenootskap Avbob* 1976 4 SA 446 (A) 458-459).

##### **4 4 2 Office or Workshop**

An independent contractor usually conducts his business operations from his/her own business premises and is only temporarily and sporadically present at the client's premises (*Ongevallekommissaris v Onderlinge-versekeringsgenootskap AVBOB* 458-459). When an office or workshop is provided by the principal and the work is continually or permanently performed at the principal's premises it is an indication of dependence and indicative of an employer/employee relationship (SARS 2003 16).

##### **4 4 3 Integration/Usual Business Operations**

When a person's daily activities form an integral part of the organisation it may indicate that the person is part and parcel of the business organisation and that an employer/employee relationship is present (*R v AMCA Services Ltd* 213H; *Van Jaarsveld and Van Eck* 43). An independent contractor is in essence another employer running a separate business (SARS 2003 16).

##### **4 4 4 Duration of Relationship**

A contract of service (employment contract) will be terminated at the end of the period for which service was entered into (*SABC v McKenzie* 61). A contract of work (independent contractor) terminates on completion of the specified task or on production of the specified result (*SABC v McKenzie* 61). An employment contract is in general an open-ended contract with no fixed term; the employee renders his services on a permanent basis to the employer (*De Beer v Thomson and Son* 1918 TPD 70 76).

##### **4 4 5 Termination and Breach of Contract**

If the principal has the power to dismiss the worker/service provider it may indicate an employee/employer relationship (*De Beer v Thomson and Son* 73). The threat of termination is a form of control normally associated

with an employee relationship. Where the employer has the right to dismiss and/or the worker has the right to resign prior to completion of any task or before any result is achieved, without being in breach of contract, this may be an indication of an employer/employee relationship (SARS 2003 17).

#### 4 4 6 Bona Fide Business Expenses, Bona Fide Statutory Compliance

An independent contractor incurs his own business expenses like advertising, wages, travelling, medical cover, pension or provident fund contributions. The principal will not reimburse the service provider for any of these expenses and the independent contractor will build these expenses into his fee or contract price (Brassey *The Nature of Employment* (1990) 928).

#### 4 4 7 Viability on Termination

If a worker or “business” is not economically viable after completion of the contract with the principal it indicates an employee/employer relationship (SARS 2003 19).

### 4 5 *The Labour Relations Act*

This section regarding the Labour Relations Act is not exhaustive nor is it a detailed exposition of the issues. It is only meant to further highlight the complicated nature of employment versus independent trade.

Section 213(f) of the Labour Relations Act defines an employee as:

- “(a) Any person, excluding an independent contractor, who works for another person or for the State and who receives or is entitled to receive any remuneration; and
- (b) any other person who in any manner assists in carrying on or conducting the business of an employer.”

Section 200A of the Labour Relations Act goes as far as to presume certain workers to be employees and reads as follows:

- “(1) Until the contrary is proved, a person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present:
- (a) the manner in which the person works is subject to the control or direction of another person;
  - (b) the person’s hours of work are subject to the control or direction of another person;
  - (c) in the case of a person who works for an organisation, the person forms part of that organisation;
  - (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;
  - (e) the person is economically dependent on the other person for whom he/she works or renders services;

- (f) the person is provided with tools of trade or work equipment by the other person; or
- (g) the person only works for or renders services to one person.”

Subsection (1) does not apply to any person who earns in excess of the amount determined by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act (Act 75 of 1997). This amount is currently fixed at R115 572 per annum (s 200A of the Labour Relations Act). With regard to temporary employment services, section 198 of the Labour Relations Act states the following:

- “(1) In this section, ‘temporary employment service’ means any person who, for reward, procures for or provides to a client other persons; who render services to, or perform work for, the client; and who are remunerated by the temporary employment service.
- (2) For the purposes of this Act, a person whose services have been procured for or provided to a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person's employer.
- (3) Despite subsections (1) and (2) above, a person who is an independent contractor is not an employee of a temporary employment service, nor is the temporary employment service the employer of that person.”

There have been CCMA cases where one of the parties to a dispute is defined as an employee and the other as an employer by the fourth schedule to the Income Tax Act, but the relationship has been ruled by the CCMA to be an independent contracting.

In the matter between A (the applicant) and ABC Ltd (the first respondent) and XYZ (Pty) Ltd (the second respondent), CCMA case number KN 9530-01 (2001), the applicant alleged that both the respondents were his employers and that whilst the second respondent was in law his employer, the second respondent was in fact his employer. The first respondent argued that they were not the employer of the applicant and that they had contracted with the second respondent for the services of the applicant as an industrial relations officer.

On examination of the contract, which existed between the first and second respondent, it was clear that the second respondent supplied the services of the applicant to the first respondent for a fixed term of 18 months. The second respondent paid the applicant's salary, together with, all other benefits.

The contractual relationship, which existed between the applicant and the second respondent, was also examined in detail. The second respondent alleged that they did not employ the applicant and that the applicant had only approached them to handle the paying of his salary. The applicant stated in this respect that he did approach the second respondent, as he had been requested to do so by the first respondent.

It was held that for purposes of the Labour Relations Act the applicant was, for all intents and purposes, not an employee of the second respondent. The second respondent merely performed the function of a payroll administrator. It was further held that the applicant was not an employee

of the first respondent as stipulated in the Labour Relations Act. The commissioner for the CCMA (Oakes) stated:

“It would seem from the evidence that the applicant was not bound to either the 1st or the 2nd respondent and was free to contract his services to whoever he wanted” (CCMA KN9530-01 2001).

#### **4 6 Summary of the South African Legislation Concerning Independent Contractors**

The question of employment status remains unresolved. There are no clear and easy answers. In practice, it regularly happens that the fourth schedule to the Income Tax Act defines the parties to a transaction as an employer and an employee respectively, but when the facts are tested against the Labour Relations Act, the contrary is found. It, therefore, seems that the definitions contained in the Income Tax Act pertaining to the concept of employee, employer and independent contractor are not sufficient. The Income Tax Act tries to oversimplify a very complex reality. This is because the situation exists where a person is “caught” by the Income Tax Act but excluded by the Labour Relations Act from being defined as an employee.

#### **5 IR35: United Kingdom Legislation Regarding an Independent Contractor**

The United Kingdom also struggles with the issue of employment status. The new UK IR35 regulations became effective from 6 April 2000, and will affect anyone who offers his/her personal services from that date (the “worker”) to a client who is then invoiced through the worker's own limited company, or small partnership (the “intermediary”). The nature of the engagement is typically similar to a situation in which the worker behaves as an “employee” of the client (King “Client’s Guide to IR35 – IR35 explained” 2000 ([www.accountingweb.co.uk](http://www.accountingweb.co.uk))).

As in South Africa, many UK businesses need to take on specialist consultants for relatively short contracts. In order to avoid incurring potential employee’s tax problems over the engagement, they understandably insist that these people should be an employee of an intermediary company. The client then contracts directly with the intermediary (King 2000 ([www.accountingweb.co.uk](http://www.accountingweb.co.uk))).

The arrangement seemed to suit everyone, until the UK Inland Revenue became aware that many of these consultants with intermediary companies were enjoying a significant tax advantage. They were taking most of their earnings out of their companies by way of dividends, which helped them to avoid paying National Insurance tax. IR35 was introduced by the Inland Revenue to stop this practice (King 2000 ([www.accountingweb.co.uk](http://www.accountingweb.co.uk))).

The new legislation was designed to increase the tax and National Insurance collected from the services industry and to counter a perceived avoidance of National Insurance Contributions (NIC) (McMahon “How will I know if I am caught by IR35? Contractor UK” 2003 ([www.contractoruk.com](http://www.contractoruk.com))).

com)). The fear was that those who set up personal service companies were opting to take out income in the form of dividends rather than salary, thus avoiding NIC (King 2000 ([www.accountingweb.co.uk](http://www.accountingweb.co.uk))).

One of the central questions in deciding whether the new rules apply to an engagement is to establish whether the worker would have been an employee of the client if engaged directly. This issue is addressed in detail below.

The term “employment” is not defined in law. The question of whether a person is employed or self-employed is determined by the relevant case law. The approach taken by the courts has been to identify factors, which help to determine if a particular contract is a “contract of service” (employment) or a “contract for service” (self-employment). However, the final decision is not reached by adding up the number of factors pointing towards employment and those pointing towards self-employment and comparing the two. The Courts have specifically rejected that approach (Morliss “Notes on IR35” 2002 ([www.accountingweb.co.uk](http://www.accountingweb.co.uk))). In *Hall v Lorimer* (1994 66 TC 349 366F–H), Mummery J made the following comment, which was quoted with approval by Nolan J in the Court of Appeal:

“In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person’s work activity. This is not a mechanical exercise of running through a checklist to see whether they are present in, or absent from, a given situation. It is a matter of evaluation of the overall effect, which is not necessarily the same as the sum total of all the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another.”

The approach to be adopted is that all the facts must first be established. Then, one needs to stand back in order to evaluate the overall effect of all the facts. This will help to determine whether the person is in business for his own account, or a person working as an employee in somebody else’s business. The reality of the relationship is what matters. If all the factors are neutral, the intention of the parties may then decide the issue (*Massey v Crown Life Insurance Co* 1978 2 All ER 576 579J–580F).

## **5 1 Terms and Conditions of the Contract**

The terms of the engagement must first be established in order to determine whether the worker would have been an employee if he/she were engaged directly by the client. The contract is considered to be very important as it sets out the rights and obligations agreed between the parties (McMahon 2003 ([www.contractoruk.com](http://www.contractoruk.com))). Sometimes it is obvious whether a particular contract is a contract of service (employment) or a contract for service (self-employed). A simple example is the contrast between the jobs of chauffeur and taxi-driver (*Stephenson Jordan and Harrison Ltd v Macdonald and Evans* 1952 1 TLR 101; see the judgment of Denning LJ).

After the terms and conditions of the contract are established, it is then necessary to consider any surrounding facts that may be relevant, for

example, whether the worker has other clients and a business organisation (Morliss 2002 ([www.accountingweb.co.uk](http://www.accountingweb.co.uk))).

## 5 2 Deciding Employment Status

The relevant factors that need to be taken into account when determining the employment status of a person are discussed in detail below.

### 5 2 1 Control

A worker is not an employee unless there is a right to exercise control over the worker. This may be a right to control what work is done, where or when it is done, or how it is done. Actual control of this sort is not necessary; it is the right of control that is important (Morliss 2002 ([www.accountingweb.co.uk](http://www.accountingweb.co.uk))).

Although not essential, the acceptance by the worker of control by the master is a strong pointer towards employment. A working relationship, which involves no control at all is unlikely to be an employment relationship (*Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* 1968 1 433 QB 440C–E 440I–441A).

### 5 2 2 The Right to Get a Substitute or Helper to do the Job

One of the essential elements of a contract of service (employment) is personal service. The freedom to do a job either by one's own hands or by another person's hands is inconsistent with a contract of service. If a person may hire someone else to provide substantial help, he/she is probably self-employed (*Australian Mutual Provident Society v Chaplin* 1978 18 ALR 385; *Express and Echo Publications Ltd v Tanton* 1999 ICR 693 700).

### 5 2 3 Provision of Equipment

The provision of significant equipment (and/or materials), by the client, which is fundamental to the engagement, is of particular importance as this points towards employment. A self-employed contractor generally provides whatever equipment is needed to do the job (*Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* 442A–G; Morliss 2002 ([www.accountingweb.co.uk](http://www.accountingweb.co.uk))).

### 5 2 4 Financial Risk

Financial risk and payment are one of the main differences between employment and self-employment. A self-employed contractor will typically risk his/her own money to buy the necessary assets to perform the service and pay for his/her own training. He/she will accept the risk of bearing additional costs if the job overruns (*Market Investigations Ltd v The Minister of Social Security* 1968 3 All ER 732 737G–738C).

### 5 2 5 Basis of Payment

A self-employed contractor's income is typically based on results and not on a fixed rate or salary. Additional payments such as overtime, a long

service bonus or profit share is typically reserved for employees. However, payment “by the piece” where the worker is paid according to the amount of work actually done, or by commission, can be a feature of both employment and self-employment (Morliss 2002 ([www.accountingweb.co.uk](http://www.accountingweb.co.uk))).

#### 5 2 6 Opportunity to Profit from Sound Management

A self-employed contractor accepts all the risks and profits of being in business for his/her own account, his/her profit or loss depends on his/her capacity to reduce overheads and organise his/her work effectively (*Market Investigations Ltd v The Minister of Social Security* 737G–738C).

#### 5 2 7 Part and Parcel of the Organisation

Part and parcel of the organisation considers whether the self-employed contractor has now become integrated into the client’s organisation. An important factor is whether the contractor works infrequently and only works for the client when work is available. An employee of a company will expect to receive payment/employment and other benefits regardless of the financial affairs of the company. As a self-employed contractor, there is no obligation on the client to provide additional work and payment after completion of the contract (*Carmichael v National Power Plc* 1999 ICR 1226 1230). Someone taken on to manage a client’s staff is normally seen as part and parcel of the client’s organisation and is likely to be an employee (Morliss 2002 ([www.accountingweb.co.uk](http://www.accountingweb.co.uk))).

#### 5 2 8 Right of Dismissal

A common feature of employment is that both parties may under certain circumstances terminate the relationship, either through notice given by the employee of his intention to resign, or by dismissal of the employee by the employer due to misconduct or any other righteous reason. A contract for service usually only terminates on completion of the task/service or if the terms of the contract are breached (Morliss 2002 ([www.accountingweb.co.uk](http://www.accountingweb.co.uk))).

#### 5 2 9 Employee Benefits

A typical feature of employment (in addition to payment) is the existence of other employee benefits such as sick leave, annual leave, pensions, expenses, and so on. The absence of these features does not, however, necessarily mean that the worker is self-employed (Morliss 2002 ([www.accountingweb.co.uk](http://www.accountingweb.co.uk))).

#### 5 2 10 Length of Engagement

A self-employed contractor typically only works for short or limited periods for a single client. As soon as the product is delivered or the service is rendered, the contract ends and the contractor moves on to other clients. Long periods working for one client may be typical of employment but are not conclusive. It is still necessary to consider all the terms

and conditions of each engagement. Regular working for the same client may indicate that there is a single and continuing contract of employment (*Nethermere (St Neots) Ltd v Gardiner* 1984 ICR 612).

#### 5 2 11 Personal Factors

Factors that are personal to the worker but have no direct relevance to the particular engagement may sometimes need to be considered when determining a person's employment status. An example is where a person performs work for various clients throughout the year or where he/she demonstrates a business-like approach in obtaining contracts and servicing clients (*Hall v Lorimer*).

#### 5 2 12 Intention

The reality of the relationship is what matters. If all the factors are neutral, the intention of the parties may then decide the issue (*Massey v Crown Life Insurance Co* 579J–580F).

### 5 3 *Summary of the United Kingdom Legislation Concerning Independent Contractors*

It is evident from the above that one of the most important elements pertaining to the entire issue of IR35 is, without a doubt, the accurate determination of a service provider's employment status, the decision between employment and self-employment.

Unfortunately no fixed rules exist, nor can a checklist approach be used. A decision can only be based on the balance of all the facts, which makes this kind of ruling extremely complicated.

The approach adopted by the UK courts has been to identify factors, which help to determine if a particular contract is a contract of service (employment) or a contract for services (self-employment). This approach is very similar to the dominant impression test and the dominant impression indicators currently in use in South Africa. It seems that the UK struggles with the same issues as we do here in South Africa. A comparison of the regulations in place in both South Africa and the United Kingdom is, therefore, required.

## 6 Conclusion

There is no doubt that the contracting industry all over the world is flourishing and will continue to do so in the foreseeable future. It forms an integral part of the modern economy and many businesses depend on the contracting industry for their survival.

In South Africa employers, employees and independent contractors are caught in a complex maze between the Income Tax Act and the Labour Relations Act. Situations exist where a person is regarded as an employee by the Income Tax Act but excluded by the Labour Relations Act from being an employee.

In an attempt to clarify some of the contradictions, the South African and United Kingdom tax legislation pertaining to independent contractors were compared. The basic approach followed by both South Africa and the United Kingdom to determine the employment status of an individual is substantially the same. Both countries follow a holistic or dominant impression approach. After analysing all the factors and taking a look at the complete picture it can be determined that only minor differences of no real consequence exist. It is, however, apparent that the South African rules are more structured and thus appear to be more refined than those used in the United Kingdom.

From this contribution it is concluded that it will be beneficial for the contracting industry if all the role players (labour brokers, independent contractors, companies utilising independent contractors, SARS and the Department of Labour) commit themselves to resolving the contradictions as highlighted. It might also be helpful if a relationship between SARS and the United Kingdom Revenue Service can be established in order to share their respective knowledge and experience with regard to the intriguing "independent contractor".

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