

# IS THERE AN EMPLOYMENT RELATIONSHIP BETWEEN ESTATE AGENT AND PRINCIPLE?

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- “Labour laws changed the definition of "employee" in a way which made many estate agents employees rather than "independent contractors” - The Institute of Estate Agents of South Africa – An Overview December 2005
- **EMPLOYEE:** The object of the contract of service is the rendering of personal services by the employee to the employer. The services are the object of the contract.
- **INDEPENDENT CONTRACTOR:** The object of the contract of work is the performance of a certain specified work or the production of a certain specified result.
- **A true independent contractor:**
  - will be a registered provisional taxpayer
  - will work his own hours
  - runs his own business
  - will be free to carry out work for more than one employer at the same time
  - will invoice the employer each month for his/her services and be paid accordingly

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- will not be subject to usual “employment” matters such as the deduction of PAYE or UIF from his invoice
- Will not receive a car allowance, annual leave, sick leave, 13th Cheque and so on.
- IC is not obliged to perform the work himself or to produce the result himself, unless otherwise agreed upon
- The IC is bound to perform a certain specified work or produce a certain specified result within a time fixed by the contract of work or within a reasonable time.
- The IC is hypothetically on a footing of equality with the employer.
- The IC is bound to produce in terms of his contract of work, not by the orders of the employer.

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- Usually, an independent contractor will have an established business, such as a close corporation. He will have one or more clients on his books, and the IC takes the risk of profit and loss in his / her business.
- A person who is an **employee** will not normally, or is unlikely to, invest money into the business of his employer, and be liable if the business crashes.
- Generally, an independent contractor does not have to carry out the delivery of the agreed end result himself - he can use his employees to do that.
- The independent contractor is responsible for his own tax liability. Thus, deduction of PAYE or SITE tax is a strong indicator of an employee/employer relationship.

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- The IC is not under the supervision or control of the employer. Nor is he under any obligation to obey any orders of the employer in regard to the manner in which the work is to be performed.
- Generally, an independent contractor would not have fixed working hours, and paid annual leave would not apply to him. He regulates his own usage of annual leave.
- The independent contractor is his own master.
- A contract of service is terminated by the death of the employee whereas the death of the parties to a contract of work (i.e. and IC) does not necessarily terminate it.
- A contract of service terminates on expiration of the period of service entered into while a contract of work terminates on completion of the specified work or on production of the specified result.

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- The written agreement on the other hand, does contain provisions which make it clear that the contract was intended to be a contract of work and not a contract of service i.e. that the **result** of the appellant's labour and not his labour as such was intended to be the object of the contract. " – Pam Golding v Erasmus
- Davis JA held in *State Information Technology Agency (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others (2008) 29 ILJ 2234 (LAC)*. that when a court determines the question of an employment relationship, based on the legislative presumption of employment in s 200A and the judgment in *Denel*, three primary criteria apply. These are:
  - an employers right to supervision and control;
  - whether the employee forms an integral part of the organisation with the employer;
  - the extent to which the employee was economically dependent upon the employer (at paragraph [12] of the judgment).
- The fact that a person is required by contract to only provide services for a single "client" is a very strong indication of economic dependence. Likewise, depending upon an employer for the supply of work is a significant indicator of economic dependence. - *"An Accident of History: Who is (and Who Should Be) an Employee under South African Law"* (2004) 25 ILJ 787

## 200A. Presumption as to who is employee

- (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 or she works or renders services;
  - (f) the person is provided with tools of trade or work equipment by the other person; or
  - (g) the person only works for or renders services to one person.
- (2) Subsection (1) does not apply to any person who earns in excess of the amount determined by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act. CURRENTLY IS R205 433.30

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**THERE IS INDEED AN EMPLOYMENT  
RELATIONSHIP BETWEEN THE  
MAJORITY OF TRADITIONAL ESTATE  
AGENTS AND THEIR PRINCIPALS**



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THANK YOU

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