

**APPLICATION OF THE NATIONAL MINIMUM WAGE ACT 9 OF 2018 TO COMMISSION
BASED ESTATE AGENT**

***This summary must be read together with the attached legal opinion prepared for and on
behalf of REBOSA***

The National Minimum Wage Act 9 of 2018 ("**NMWA**") applies to employees, and not to independent contractors. The focus of this advisory relates to where there is either an established or presumed employment relationship.

Unfortunately, the question of "*Whether Estate Agents are employees or independent contractors?*" is not a simple one, and in many cases, the answer to this question can differ dramatically, depending on the circumstances surrounding the facts in question.

The first issue to be determined, is the type of relationship that exists. This is an important consideration for both Estate Agencies and Estate Agents alike, as certain legal consequences flow from the type of relationship which exists between the parties.

Section 200A of the Labour Relations Act ("**LRA**") further provides for the presumption that a person is an employee, regardless of the form of the contract. However, section 200A does not apply to a person who earns in excess of the statutory earnings threshold as determined by the Minister in terms of section 6(3) of the BCEA. This amount is currently R205 433. 30 per annum.

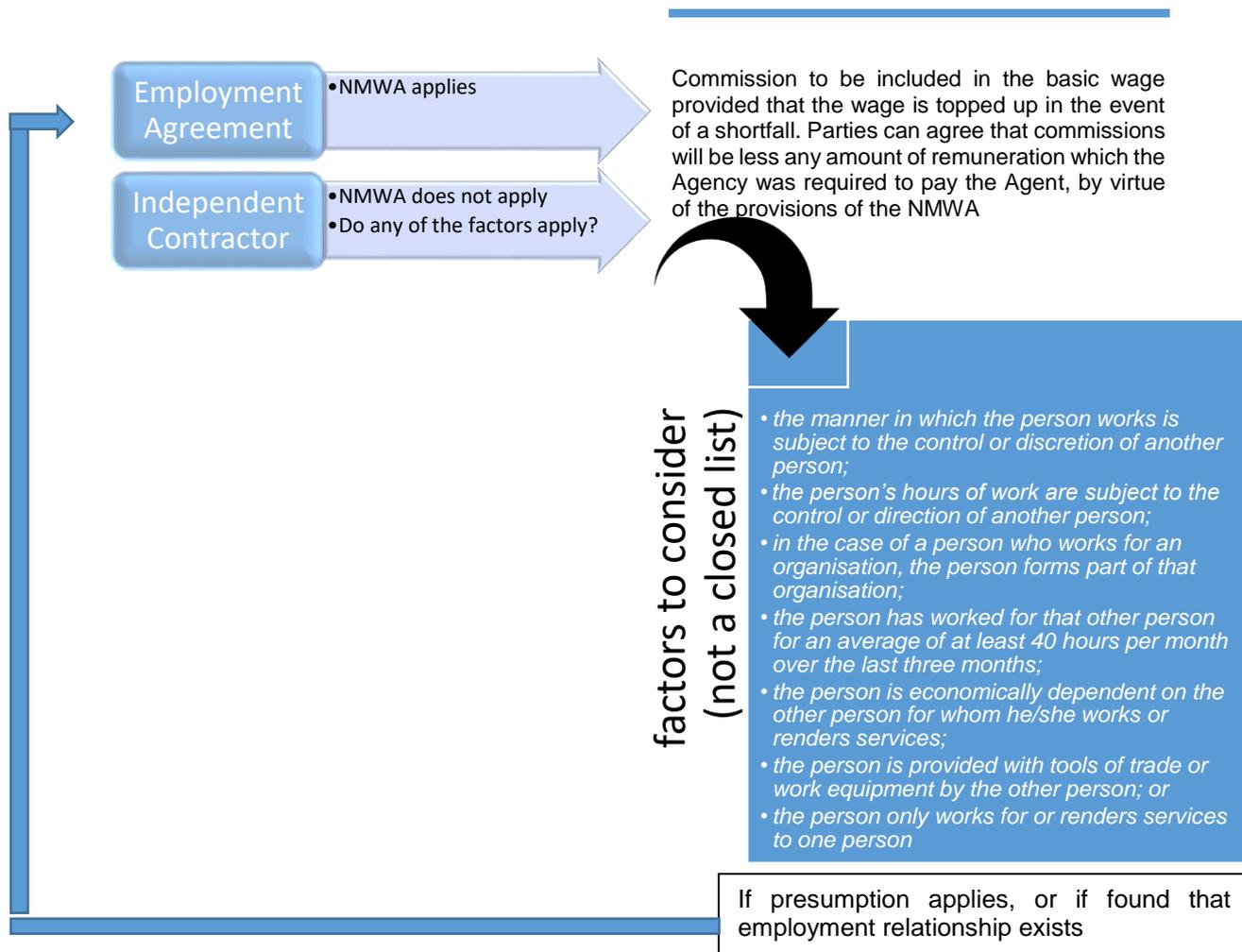
The provisions of Section 200A creates a presumption that a person who meets any the requirements stated in Section 200A of the LRA is an employee if that person earns less than or equal to the annual statutory threshold amount. In these circumstances, an Estate Agency would have to prove that despite this presumption, the independent contractor is not an employee, should it wish to escape the consequences of the LRA.

Generally, there are six factors the Labour Court will take into consideration when determining the true nature of the relationship (reality or dominant impression test). The difference between an employee and an independent contractor can be summarized as follows:

Employee	Independent Contractor
The object of the contract is to render personal services.	Object of contract is to perform a specified work or produce a specified result.
Employee must perform services personally.	Independent contractor may usually perform work through others.

Employer may choose when to make use of services of employee.	Independent contractor is subservient to the contract, not under supervision or control of employer.
Employee obliged to perform lawful commands and instructions of employer.	Independent contractor is subservient to contract, not under supervision or control of employer.
Contract terminates on death of employee.	Contract does not necessarily terminate on death of employee.
Contract also terminates on expiry of period of service in contract.	Contract terminates on completion of work or production of specified result.

The legal provisions as explained above are best applied in the following diagram:



Only where it is determined that an employment relationship exists between an Estate Agency and an Estate Agent, the provisions of the NMWA applies, although the Estate Agent earns exclusively on a commission-based structure.

Commission is not excluded in terms of the NMWA and there are no prescribed categories of payment which have been prescribed yet. Commission therefore forms part of the wage/ remuneration calculation, excluding certain exceptions, provided that the wage/ remuneration is topped up in the event of a shortfall.

If an Estate Agent (who is an employee) does not make any sales in a month or does not earn commission to the value of R 3 500. 00, must the Estate Agency pay the Agent a minimum wage?

This is complex question, but on our reading of the NMWA, the answer is yes.

If an Estate Agent (who is an employee) has not made any sales within the relevant period of assessment (within 12 months from the anniversary date of employment), it is likely that the provisions of the NMWA will compel the employer (Estate Agency) to pay, or at least 'top up', the Estate Agent's wage/ remuneration to R 3 500. 00 for the month, and any subsequent months in which the Estate Agent does not affect any commission earning sales.

The Estate Agency (employer) will be entitled to embark on a poor performance management process in respect of poorly performing Estate Agents (who are employees), who consistently fail to achieve their sales targets, and ultimately terminate the relationship based on incapacity – poor performance.

Estate Agencies (employers) are however cautioned that all the substantive and procedural aspects prescribed in the LRA must be followed in order to lawfully terminate the relationship.

What happens if an Estate Agent (who is an employee), earns a good commission in one month, but in subsequent months fails to make any sales and earn commission in excess of R 3 500. 00?

The provisions of the NMWA are untested by our Courts in this respect.

We are of the opinion that, given the purpose of the NMWA¹, there is scope for legal argument that commissions earned in excess of the national minimum wage in a month, may be averaged over a 12-month period.

In other words, if Estate Agent A, does not earn any sales commissions in excess of R 3 500. 00 for example 3 months in the relevant period of assessment, the Estate Agency will be required to pay, alternatively top up Estate Agent A's remuneration up to R 3 500. 00 per month. However, if Estate

¹ The purpose of the NMWA is to advance economic development and social justice by— (a) improving the wages of lowest paid workers; (b) protecting workers from unreasonably low wages; (c) preserving the value of the national minimum wage; (d) promoting collective bargaining; and (e) supporting economic policy.

Agent A earns R 60 000. 00 (sixty thousand rand) commission on a sale in month 4, then the R 60 000. 00 is averaged out over 12 months being R 5 000. 00 per month, and no further payments or top ups will be required from the Estate Agency (employer) for the remainder of the relevant assessment period.

May an Estate Agency (employer), who has paid, or who has topped up an Estate Agent in the absence of any commissions earned in a period of assessment, claim back any remuneration paid to the Estate Agent (who is an employee), once commission in excess of the national minimum wage is earned within the period of assessment?

Once again, the provisions of the NMWA are untested by our Courts in this respect.

However, in short, we are of the opinion that the Agency (employer) will not be able to claim back any remuneration already paid but will be able to contractually agree that any commissions payable, will be less any amount of remuneration which the Agency was required to pay the Estate Agent, by virtue of the provisions of the NMWA, as long such deductions do not result in the Estate Agent earning under the national minimum wage over the relevant assessment period.

By using the same example referred to above, if Estate Agent A does not earn any sales commissions in excess of R 3 500. 00 for example 3 months in the relevant period of assessment, the Estate Agency will be required to pay, alternatively top up Estate Agent A's remuneration up to R 3 500. 00 per month, amounting to R 10 500. 00. However, if Estate Agent A earns R 60 000. 00 (sixty thousand rand) commission on a sale in month 4, then the R 10 500. 00 becomes deductible from the R 60 000. 00 commission. This calculation still leaves the Estate Agent (who is considered an employee) with a balance of R 49 500. 00, which equates to R 4 125.00 averaged over 12 months. No further payments or top ups will be required in respect of the respective Estate Agent for the remainder of the relevant assessment period.

CONCLUSION

The provisions of the NMWA allows scope for commission to be included in the basic wage provided that the wage is topped up in the event of a shortfall.

Once an Estate Agent (who is an employee) earns enough commission which would satisfy the national minimum wage requirement over the relevant assessment period, the Estate Agency is neither required to pay, nor top up the Estate Agent's remuneration.

Payments made to an Estate Agent (who is an employee) during the relevant assessment period may be deducted from subsequent commission earned as long such deductions do not result in the Estate Agent earning under the national minimum wage over the relevant assessment period. This arrangement may however require certain changes or amendments to existing contracts in order to avoid unlawful deduction disputes.

