Real Estate Business Owners of South Africa

Attention: Mr J le Roux

Dear Mr Le Roux

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

1 INTRODUCTION

1.1 We have been instructed to provide Real Estate Business Owners of South Africa ("**REBOSA**") with legal opinion on whether the provisions of the National Minimum Wage Act 9 of 2018 ("**NMWA**") apply between Estate Agents and Estate Agencies.

1.2 We have also been requested to answer some additional questions which arose from our previous legal opinion dated 19 August 2019. We include herein the supplemented legal opinion which incorporates our answers to the additional questions raised.

1.3 Firstly, it is important to mentioned that the NMWA applies to employees, and not to independent contractors.

1.4 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.

1.5 It is however a vital question to answer, as it is fundamental to the question whether the provisions of the NMWA should be applied. This question is particularly tricky, as many Estate Agents earn their income exclusively in terms of a commission-based structure, and the form of contract which the Estate Agent Holders, is merely one of the factors that are considered in determining the existence of an employment relationship.

2 FIRST ISSUE TO BE DETERMINED

2.1 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.

2.2 If the parties have arranged their relationship according to the principles of an independent contractor arrangement, then the provisions of the applicable labour legislation do not apply.

2.3 If however an employment relationship does exist, all duties and responsibilities which is ordinarily applicable between an employer and its employees, apply. This may mean that the provisions of the Occupational Health and Safety Act ("**OHSA**"), Basic Conditions of Employment Act ("**BCEA**"), Labour Relations Act ("**LRA**"), Employment Equity Act ("**EEA**"), Immigration Act ("**IA**"), National Minimum Wage Act ("**NMWA**") and Unemployment Insurance Fund Act ("**UIFA**"), to name but a few, become applicable in the relationship between the parties.

2.4 In the ordinary course, an independent contractor relationship may be terminated in accordance with the provisions in the applicable agreement. However, this presents a pecuniary risk for Estate Agencies if it terminates what it believes to be an independent contractor agreement, albeit in accordance with its terms, but the Estate Agent alleges the existence of an employment relationship.

2.5 Should an independent contractor agreement be terminated, the independent contractor may lodge a claim to the Commissioner for Conciliation, Mediation and Arbitration ("**CCMA**") and argue that the true nature of the relationship between the parties constituted an employment relationship.

2.6 The CCMA will determine whether the "independent contractor" is an employee. If the CCMA determines that the independent contractor is an employee, it will adjudicate the dispute. It will therefore determine whether the termination of the "independent contractor" was procedurally and substantively fair. This would be unlikely as the termination would have occurred pursuant to the agreement. Accordingly, the CCMA may award compensation of up to a maximum of 12 months' remuneration, alternatively reinstate the independent contractor. The situation may even be worse if the agent alleges an automatically unfair dismissal, where the Labour Court may award up to 24 months compensation and reinstatement.

3 PURPOSE OF THIS ADVISORY

3.1 This advisory aims to firstly, elaborate on the legal principles which may apply to the determination of the relationship between Estate Agencies and its Estate Agents, and to equip the reader with the necessary basic knowledge in order to self-determine the nature of the relationship he/ she may have with an Estate Agency or Estate Agent, and secondly the legal consequences thereof, insofar as the NMWA is concerned.

3.2 The focus of this advisory relates to where there is either an established or presumed employment relationship. If it is determined that there exists an employment relationship, then the provisions of the NMWA is applicable.

3.3 If there is any doubt whether there exists an employment relationship or not, it is recommended that the reader obtains a legal opinion based on the merits of its particular circumstances.

4 SUMMARY OF ADVICE

4.1 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.

4.2 The provisions of the NMWA allows enough scope for commission to be included in the basic

wage provided that the wage is topped up in the event of a shortfall.

4.3 The NMWA came into operation in January 2019 and the interpretation and application of the NMWA to, inter alia, Estate Agents is largely untested by our courts. 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.

5 PROBLEM STATEMENT

5.1 An employee is a person working for another person or business for pay. An independent contractor is a person who provides services to a company but is not an employee of that company. These are two categories someone could fall into when they start working. In real estate, agents are often considered independent contractors working under the owner of the agency they are affiliated with.

5.2 The distinction between an independent contractor and an employee is crucial because of it impacts substantially on the rights of the person who provides the work as well as the obligations of the person on whose behalf the work is provided.

5.3 Section 213 of the LRA 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, a remuneration; and*
>
> *(b) any other person who in any manner assists in carrying on or conducting the business of an employer, an employee and employment have meanings corresponding to that of employee"* (own emphasis)

5.4 The provisions of the LRA expressly exclude independent contractors. Independent contractors are not considered employees and therefore most likely not subject to the provisions of the NMWA.

5.5 Section 200A of the LRA further provides for the presumption that a person is an employee, regardless of the form of the contract as long as the following factors are satisfied –

> *"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 –*
>
> *the manner in which the person works is subject to the control or discretion of another person;*
>
> *the person's hours of work are subject to the control or direction of another person;*
>
> *in the case of a person who works for an organisation, the person forms part of that organisation;*
>
> *the person has worked for that other person for an average of at least 40 hours per month*

over the last three months;

the person is economically dependent on the other person for whom he/she works or renders services;

the person is provided with tools of trade or work equipment by the other person; or

the person only works for or renders services to one person."

5.6 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.

5.7 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.

5.8 However, where the independent contractor earns in excess of the annual statutory earnings threshold, there is no such presumption, but this does not mean that a tribunal with competent authority could find that an employment relationship exists. Consequently, the provisions of Section 200A will simply be a guideline to determine whether the person is an employee.

5.9 Whether an employee meets the threshold is determined annually. Therefore, if the independent contractor's services are terminated on 1 January, the payment he received for the previous 12 months will be considered in determining whether he/ she meets the threshold.

5.10 The Courts have taken the factors listed in section 200A into account where the independent contractor in question earns in access of the determined amount in determining whether the independent contractor should be regarded as an employee.

5.11 The Courts have also found that there is no single test to determine whether a person is an independent contractor or an employee. The surrounding circumstances and all the relevant facts should be considered.

5.12 In terms of the **Code of Good Practice: Who is an Employee**, it provides as follows –

"(27) When deciding whether a person is an employee rather than an independent contractor, the courts follow an approach usually referred to as the 'dominant impression' test. In terms of this approach, it is necessary to evaluate all aspects of the contract and the relationship and then make a classification based on the 'dominant impression' formed in that evaluation…

(28) To determine whether a person is an employee, our courts seek to discover the true relationship between the parties. In certain cases, the legal relationship between the parties may be gathered from a construction of the contract that the parties have concluded."

5.13 In **Smit v Workmen's Compensation Commissioner**, the Court found the following –

> *"The presence of such a right of supervision and control is indeed one of the most important indicia that a particular contract is in all probability a contract of service. The greater the degree of supervision and control to be exercised by the employer over the employee the stronger the probability will be that it is a contract of service. On the other hand, the greater the degree of independence from such supervision and control the stronger the probability will be that it is a contract of work. Notwithstanding its importance the fact remains that the presence of such a right of supervision and control is not the sole indicium but merely one of the indicia, albeit an important one, and there may also be other important indicia to be considered depending upon the provisions of the contract in question as a whole*."

5.14 In **Dempsey v Home & Property**, the Labour Appeal Court found that the LRA did not apply to the relationship between a principal and an independent contractor as the latter did not fall within the definition of 'employee', which definition was to be interpreted according to its ordinary literal meaning and having regard to the intention of the legislature. In determining whether a person was an employee, the dominant impression test was to be applied and the Court was required to look at the relationship in its totality and identify those aspects indicating an employment relationship and those indicating some other form of association. Those factors were then to be weighed and the dominant impression would prevail. The right of supervision and control remained, however, an important indicator of an employment relationship.

5.15 The Labour Appeal Court referred to Brassey, in the article 'The Nature of Employment' -

> *"If the worker is paid by time this would be some indication that he or she is an employee for then it is easy to infer that it is the worker's time that the employer has contracted for, ie productive capacity. If on the other hand, the worker is paid by results, this will tend to suggest that he or she is an independent contractor… The question to be decided was what the remuneration was for. Was it for effort or was it for results? That it was paid by results obviously suggests the former; but effort is required to produce results, and the parties may have regarded payment on commission as the appropriate measure of that effort, rough and ready, perhaps, but at least having the virtue of certainty. Employees paid by results are common, and so are contractors paid by time. It would be wrong to see the mode of payment as conclusive of the status of either… the independent contractor 'sells the job' whereas the employee 'sells his hands', ... [e]mployment is a relationship in which one person is obliged, by contract or otherwise, to place his or her capacity to work at the disposal of another ... an employee is to be distinguished from an independent contractor, who undertakes to deliver, not his or her capacity to produce, but the product of that capacity, the completed work."*

5.16 This was referred to with approval by the Labour Appeal Court in **Liberty Life Association of Africa Ltd v Niselow** .

5.17 In **State Information Technology Agency (SITA) (Pty) Ltd v CCMA and others** the Court held that when the question of an employment relationship is determined, it must consider the following criteria –

5.17.1 an employer's right to supervision and control;

5.17.2 whether the employee forms an integral part of the organisation with the employer; and

5.17.3 the extent to which the employee was economically dependent upon the employer.

5.18 In the case of **Taljaard and Basil Real Estate** it was decided that –

> *"The power to control has traditionally been regarded as the hallmark of the employment contract. The employee is subject to the control of the employer in the sense that the latter has the right to prescribe not only what work has to be done, but also the manner in which that work has to be done"*

5.19 In **Denel (Pty) Ltd v Gerber** the court adopted the "reality test". The Court approached the question of the employment relationship based on the substance of the arrangement between the parties as opposed to the legal form so adopted.

5.20 The reality test was endorsed in **NEHAWU v Ramodise and others**. The Court held that when determining the issue of an employment relationship, the Court must work with three primary criteria. These were an employer's right to supervision and control; whether the employee formed an integral part of the organization with the employer; and the extent to which the employee was economically dependent on the employer.

5.21 The reality test considers the instance where the other party to the independent contractor agreement exercises control over the independent contractor, which means that this person is an employee.

5.22 There are six factors as set out in the decision of **Denel (Pty) Ltd v Gerber** such can be summarised in table form 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.

5.23 It is therefore vital to determine the true nature of the relationship between the Estate Agency and its Estate Agents, regardless of the form of contracts it has in place.

5.24 Where it is determined that an employment relationship exists between an Estate Agency and an Estate Agent, the provisions of the National Minimum Wage Act applies, although the Estate Agent earns exclusively on a commission-based structure

6 IS THE NMWA APPLICABLE TO ESTATE AGENTS EARNING COMMISSION

6.1 The NMWA applies to all workers and their employers except members of the South African National Defence Force, the National Intelligence Agency and the South African Secret Service. However, it does not apply to a volunteer, who is a person who performs work for another person and who does not receive or is not entitled to receive, any remuneration for his or her services.

6.1 There is a distinction between "wage" and "remuneration". In order to answer the question, we need to determine whether commission forms part of "wage" or "remuneration".

6.2 The definitions of wage in the BCEA and the NMWA are identical, save for the reference to "worker". In terms of the BCEA, a wage means the amount of money paid or payable to an employee in respect of ordinary hours of work or, if they are shorter, the hours an employee ordinarily works in a day or a week. The NMWA defines "wage" as the amount of money paid or payable to a worker in respect of ordinary hours of work or, if they are shorter, the hours a worker ordinarily works in a day or a week.

6.3 In terms of section 35(4) of the BCEA, if an employee's remuneration or wage is calculated, either wholly or in part, on a basis other than time or if an employee's remuneration or wage fluctuates significantly from period to period, any payment to that employee in terms of the BCEA must be calculated by reference to the employee's remuneration or wage during the preceding 13 weeks or if the employee has been in employment for a shorter period, that period. The BCEA therefore also provides for a wage to be calculated with reference to something other than merely hours worked. This provides scope, albeit in terms of the BCEA, for wage to be calculated with reference to performance/outcome (i.e. commission) as well.

6.4 The BCEA also defines remuneration. It is defined as any payment in money or in kind, or both in money and in kind, made or owing to any person in return for that person working for any other person. Remuneration is wider than merely a wage. Wage is focused on the payment made for hours worked whereas remuneration refers to any payment made in return for work being performed. In our view, commission is part of remuneration.

6.5 This provision may create confusion, particularly in relation to the provisions of the NMWA which

provides that the national minimum wage must constitute a term of the worker's contract except to the extent that the contract, collective agreement or law provides a wage that is more favourable to the worker.

7 INCLUSION OF COMMISSION IN THE CALCULATION OF WAGE

7.1 In our view, commission and / or variable pay is included in the calculation of the minimum wage for the purposes of the NMWA.

7.2 This view is based on:

7.2.1 Our evaluation of the academic articles below;

7.2.2 The fact that the NMWA did not specifically exclude commission in terms of section 5.

7.3 However, should Estate Agencies opt for a conservative approach, it may consider increasing the basic wage to the national minimum wage whilst also increasing the threshold for earning commission.

7.4 Please note that this note constitutes a guideline and what is to be included or excluded may change, depending on the interpretation of the NMWA by our courts.

8 CALCULATION OF MINIMUM WAGE

8.1 Section 5(1) of the NMWA provides that:

> "5*. Calculation of wage*
>
> *(1) Despite any contract or law to the contrary, the calculation of a wage for the purposes of this Act is the amount payable in money for ordinary hours of work excluding-*
>
> *(a) any payment made to enable a worker to work including any transport, equipment, tool, food or accommodation allowance, unless specified otherwise in a sectorial determination;*
>
> *(b) any payment in kind including board or accommodation, unless specified otherwise in a sectoral determination;*
>
> *(c) gratuities including bonuses, tips or gifts; and*
>
> *(d) any other prescribed category of payment*."

8.2 Commission is not excluded in terms of section 5(a) or (b) and there are no prescribed categories of payment in terms of 5(d) yet.

8.3 Accordingly, it must be determined whether commission may constitute a gratuity, including bonuses, tips or gifts in terms of section 5(c). If it does not, it must be established whether the intention was to also exclude items which are not specifically listed in section 5.

8.4 Importantly, the NMWA specifically includes the application of sections 32, 33[1] and 34 of the Basic Conditions of Employment Act, 1997 ("**BCEA**").

8.5 Section 33 of the BCEA provides that an employer must pay to an employee any remuneration that is paid in money daily, weekly, fortnightly or monthly.

8.6 For the purposes of this opinion, and for the sake of convenience, we shall assume that Estate Agents are generally paid based on a monthly sales calculation. Therefore, the relevant period on which we shall assume the calculation of the national minimum wages for the purposes hereof is monthly i.e. wage/ remuneration earned over 12 months ("**relevant assessment period**"), amounting to R 3 500. 00 (three thousand five hundred) rand per month, which, calculated over a 12-month period totalling R 42 000. 00 p/a, excluding those considerations set out above in section 5(1)(a)-(d) of the NMWA.

9 DOES COMMISSION CONSTITUTE A GRATUITY, TIP OR GIFT IN TERMS OF SECTION 5(C)?

9.1 In our view, commission does not constitute a gratuity, tip or gift.

9.1.1 We base this view on the schedule issued in Government Notice 691, Government Gazette 24889 of 23 May 2003. This schedule stipulates what is included and excluded from "remuneration".

9.1.2 In terms of item 1(c) any cash payments made to an employee, except those listed as exclusions, are included as remuneration. In terms of item 2 the following items do not form part of remuneration: gratuities (for example, tips received from customers) and gifts from the employer and discretionary payments not related to an employee's hours of work or performance (for example, a discretionary profit-sharing scheme).

9.1.3 The fact that payments relates to hours of work or performance are listed separately to gratuities, tips and gift, indicates to us that payments related to performance are not considered gratuities, tips or gifts.

9.2 For this reason, section 5 of the NMWA can also not be interpreted to specifically exclude commission.

9.3 The International Labour Organisation recommended that the minimum wage be clear, transparent, easy to comply with and straightforward to enforce. In accordance with this guideline, our view is that unless an item has specifically been excluded from the calculation of wage in terms of the NMWA, there is scope to argue that it must be included. "*Expressio unius est exclusio*

[1] 32 Payment of remuneration

(1) An employer must pay to an employee any remuneration that is paid in money-
(a) in South African currency;
(b) daily, weekly, fortnightly or monthly; and
(c) in cash, by cheque or by direct deposit into an account designated by the employee.

alterius" is a principle in our law which states that if a document contains a special reference to a particular thing or matter, it is prima facie assumed that the parties intended to exclude everything else, even that which would have been implied in the circumstances had it not been for the special reference. Accordingly, that which has not been specifically been excluded may be included. Although this principle must be applied with caution in the interpretation of statutes, it supports the International Labour Organisation's requirement as well – an easy and straightforward interpretation must be adopted.

10 WHAT IS INCLUDED AND EXCLUDED FROM THE MINIMUM WAGE CALCULATION: VARYING VIEWS

10.1 It is worthwhile considering the varying views expressed in academic articles.

10.2 "*A National Minimum Wage for South Africa – Recommendation on Policy & Implementation*" a report issued by the National Minimum Wage Panel to the Deputy President, 2016 ("**Wage Panel Report**").

10.3 The Wage Panel Report states that the reference to "wage" is a reference to payment in money.[2] The Wage Panel Report considers "commission" to be incentive payments related to the value or volume of sales, profit margin or the number of orders submitted and accepted by an employer.[3]

10.4 There is consensus in the Wage Inequality Technical Task Team that the following should *not form* part of the "wage":

10.4.1 Gratuities;

10.4.2 Discretionary payments not related to an employee's hours of work or performance.[4]

10.5 The labour constituency at Nedlac proposed that the basic minimum wage should exclude productivity and performance bonuses, annual bonuses, overtime payments, shift or nightwork allowances, an employer's contributions towards medical aid and pension funds.[5] Most of these requests appear to have been accommodated in that section 5 of the NMWA excludes bonuses, overtime payments and allowances.

10.6 Regarding commission, the Wage Panel Report, with reference to other sources, records that:

> *"'[i]n most countries, including Germany, Malaysia, Portugal and the United Kingdom commissions are included in the calculations towards the NMW, but if at the end of the reference period the total value of commissions falls below the NMW level, the employer must top these up in order to meet the NMW' (NMW RI, 2015:8) Likewise, in South Africa, the Sectoral Determination 14: Hospitality Sector provides that '… irrespective of the commissioned earned; the employer shall pay such employee not less than the prescribed minimum wage for the period worked'.*

[2] Wage Panel Report, page 115.
[3] Wage Panel Report, page 117.
[4] Wage Panel Report, page 116.
[5] Wage Panel Report, page 116 -117.

10.7 CDH View: The Wage Panel Report

10.7.1 The Wage Panel Report leaves room for commission to be included in the basic wage, for the following reasons:

10.7.1.1 It is not a discretionary payment not related to an employee's hours of work or performance;

10.7.1.2 The labour constituency only advocated for the exclusion of productivity and performance bonuses, not commission.

10.7.1.3 In other jurisdictions and in some sectors (prior to the NMWA), it was permitted provided that the employer provides a top up to comply with the NMWA.

10.8 University of the Witwatersrand, Johannesburg: *Policy Considerations for the Design and Implementation of a National Minimum Wage for South Africa* ("**Policy Considerations**").[6]

10.8.1 In terms of the Policy Considerations, the components of the wage which count towards compliance are determined by sectoral determinations and collective bargaining agreements.[7]

10.8.2 When a comparison was done on components of the wage in collective agreements and sectoral determinations in 2015, performance and productivity pay which includes commissions and piecework, but importantly excludes tips and gratuities, were included in the minimum wage. In some instances, productivity pay is regulated to ensure that employees nevertheless receive no less than the minimum wage.[8]

10.8.3 According to the Policy Considerations:

> "*Productivity and performance pay are supplemental forms of remuneration. They include commission work, piecework, and tipped work. Commissions are based on the value or volume of sales. Many countries exclude commissions from the calculation of the national minimum wage in order to minimise abuse and confusion (ILO 2014b). However, in certain sectors, such as the hospitality and retail sector, commissions are an important component of the pay structure. Therefore, some countries allow for commissions but under strict terms. For instance, in the UK, if at the end of the reference period the total wage falls below the national minimum wage level the employer must top these up (Low Pay Commission 1998). This is also the case in South Africa. The advantage of such an approach is that it allows workers to receive earnings above the national minimum wage due to positive performance but provides safeguards to ensure that all workers receive at least the national minimum wage and are, therefore, able to meet their basic needs (Castel-Branco 2015)*."[9]

10.8.4 In recommending policy considerations to take note of in defining the components of a national minimum wage, the Policy Considerations stated that in some instances, performance pay with top-ups by employers could also be considered.[10]

[6] Ruth Castel-Branco, July 2016.
[7] Policy Considerations, page 18.
[8] Policy Considerations, page 18.
[9] Policy Considerations, page 20.
[10] Policy Considerations, page 21.

10.9 CDH View: Policy Considerations

10.9.1 The Policy Considerations leave room for commission to be included in the basic wage, provided that the wage is topped up in the event of a shortfall.

10.10 Report submitted to the Friedrich Ebert Stiftung by the University of Cape Town's Labour & Enterprise Policy Research Group entitled "*An examination of how the National Minimum Wage can be optimally accommodated by the existing labour legislative framework*" dated 16 August 2017 ("**UCT Report**").[11]

10.10.1 In terms of the UCT Report, performance bonuses are often included in the basic wage but this is contradictory as productivity pay or a performance bonus or commission is by definition something that is earned over and above the time-based wage. The UCT Report therefore argues that such payments should be excluded from the minimum wage. According to the UCT Report, this is supported by the approach adopted with regard to piecework in a number of bargaining council agreements:

> "*The principle is that if a piecework arrangement is in place a worker cannot receive less than the minimum time-based wage rate. So, a worker who does not produce sufficient pieces must still get the minimum wage. Only when the piecework goes beyond what is necessary to cover the minimum wage is it added to the wage. This is the approach the NMW should adopt with regard to such arrangements, i.e. a worker being paid at the NMW rate must get R20 per hour and any productivity or piecework payments are factored in only when they are over and above the R20 per hour.*" ***12***

10.10.2 The UCT Report also considered the approach to the minimum wage in terms of sectoral determinations and collective agreements:

10.10.2.1 *Sectoral Determination for Wholesale and Retail (No. 9)* provides for "Commission Work" for sales staff. The base wage rate for employees earning commission in terms of this clause is two-thirds of the applicable minimum wage. So, payment for commission work is over and above two-thirds of the *applicable* minimum wage. The NMWA will raise the base wage rate, which might require adjustment to commission arrangements or could eliminate them altogether.[13]

10.10.2.2 *Bargaining Council Main Agreement for the Motor Industry (National)* regulates piecework and commission work but in both cases the bottom line is compliance with the relevant minimum wage rates.

10.10.2.3 *Bargaining Council Main Agreement for the Clothing Industry (Non-Metro Areas)* makes provision for piecework and commission work. However, in both cases an employee is guaranteed the minimum time-based wage for their category of work.

10.11 CDH View: UCT Report

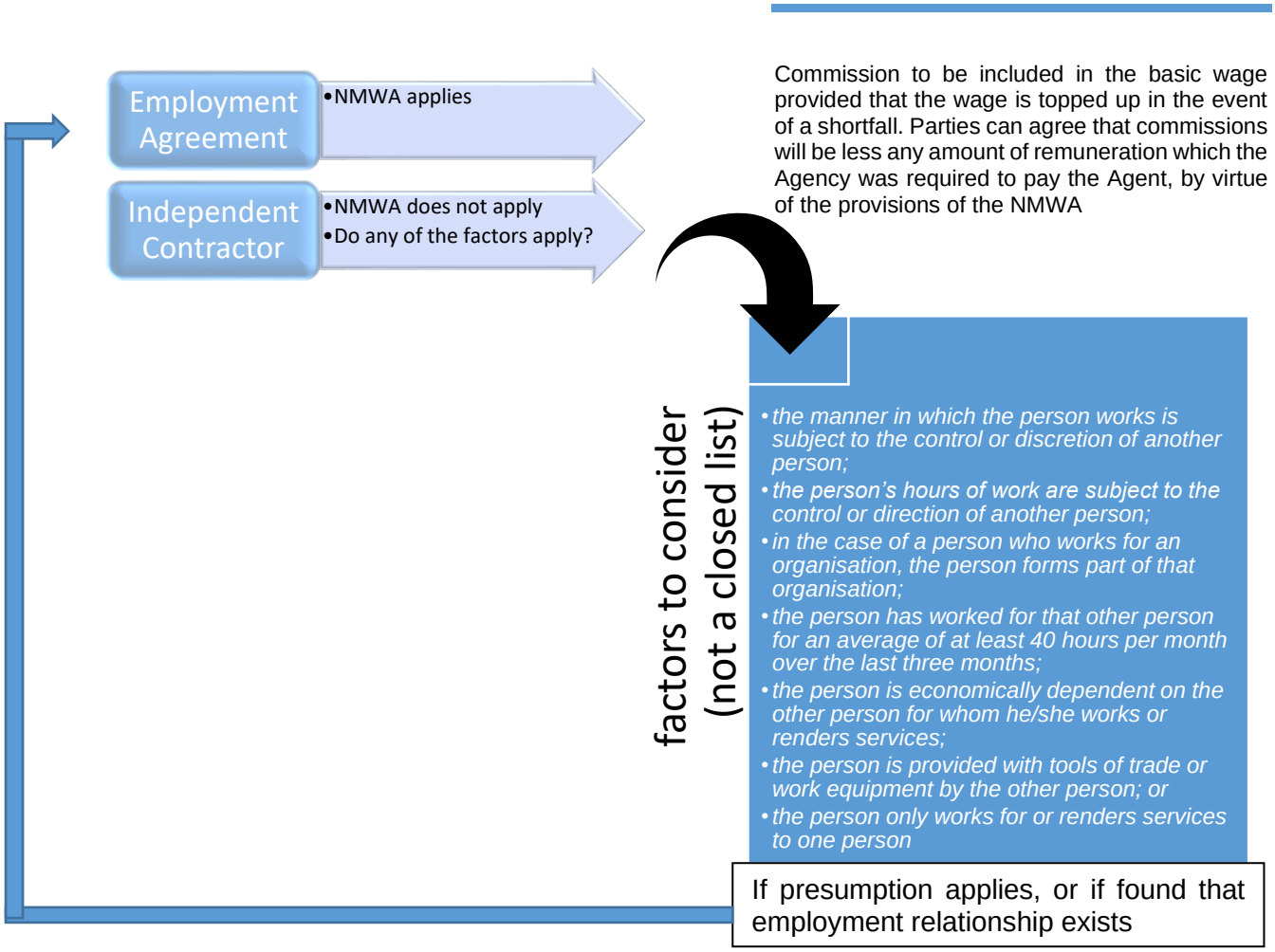
10.11.1 In terms of the UCT Report, The Policy Considerations leave room for commission to be

[11] Shane Godfrey and Mario Jacobs.
[12] UCT Report, page 29.
[13] UCT Report, 49 – 50.

included in the basic wage, provided that the wage is topped up in the event of a shortfall.

11 PRACTICAL APPLICATION

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



12 FREQUENTLY ASKED QUESTIONS

12.1 **<u>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?</u>**

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

12.1.2 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.

12.1.3 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.

12.1.4 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.

12.2 **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?**

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

12.2.1.1 We are of the opinion that, given the purpose of the NMWA[14], 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.

12.2.1.2 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 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.

12.3 **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?**

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

12.3.2 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.

12.3.3 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

[14] 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.

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.

12.3.4 This arrangement is however, best regulated in terms of contract and thus may require an amendment to existing independent contractor and employment agreements in order to avoid unlawful deduction disputes.

12.4 **Do Estate Agencies as "employers" now have to deduct and pay over UIF for our agents?**

12.4.1 As mentioned above, the first issue to be determined, is the type of relationship that exists.

12.4.2 If the parties have arranged their relationship according to the principles of an independent contractor arrangement, then the provisions of the applicable labour legislation, including the UIF Act, do not apply.

12.4.3 However, all employees, as well as their employers, are responsible for contributions to the UIF. However, there are some exclusions. Employees are excluded from contributing to the UIF if the employee –

12.4.3.1 Is employed by the employer for less than 24 hours a month;

12.4.3.2 Receives remuneration under a contract of employment as contemplated in section 18(2) of the SDL Act[15];

12.4.4 For the purposes of this answer, we have not included employees in the government sector.

12.5 **Do Estate Agencies as "employers" now have to pay SDL on the earnings of agents?**

12.5.1 As mentioned above, the first issue to be determined, is the type of relationship that exists.

12.5.2 If the parties have arranged their relationship according to the principles of an independent contractor arrangement, then the provisions of the applicable labour legislation, including the SDL Act, do not apply

12.5.3 SDL is due by registered employers and is a levy imposed to encourage learning and development in South Africa and is determined by an employer's salary bill.

12.5.4 Where an employer expects that the total salaries will be more than R500 000 over the next

[15] Contract of employment with learner for a learnership [see chapter 4 of the SDL]. "learner" includes an apprentice.

12 months, that employer becomes liable to pay SDL. Any employer whose total remuneration subject to SDL (leviable amount) paid/due to all its employees over the next 12-month period won't exceed R500 000 is exempted from paying SDL. If this is the reason for exemption, these types of employers are not required to register to pay SDL.

12.5.5 For the purposes of this answer, we have not included employees in the government sector.

12.6 **Will the requirement for supervision and control of intern agents automatically make them employees?**

12.6.1 For the purposes of this answer, we shall assume that intern agents constitute "learners" and fall under the ambit of the SDL Act.

12.6.2 Per section 18(1) of the SDL Act, where the intern agent [or learner] already has an employment contract with the Estate Agency, then the intern agent is an employee and all the natural consequences of an employment relationship flows therefrom.

12.6.3 However, section 18(2)[16] of the SDL Act requires that all learners, who are party to a learnership agreement, must conclude an employment agreement.

12.6.4 By virtue of section 18(2) of the SDL, it appears as if intern agents on a learnership must have employment contracts, and thereby the relationship will constitute an employment relationship.

12.6.5 We are however aware of certain Estate Agencies who have referred disputes to the Tax Ombudsman in this respect. Regrettably, SARS have withdrawn their claim that estate agents constitute employees and therefore SDL levies must be paid and there is no finality to this question yet. We are however of the opinion that this question is not simply a "yes" or "No" question, as the circumstances in each case may differ, yielding a different result.

12.7 **Employees are not only entitled to a minimum hourly wage under the Basic Conditions of**

[16] 18 (2) If the learner was not in the employment of the employer party to the learnership agreement concerned when the agreement was concluded, the employer and learner must enter into a contract of employment.

(3) The contract of employment with a learner contemplated in subsection (2) is subject to any terms and conditions that may be determined by the Minister on the recommendation of the Employment Conditions Commission established by section 59(1) of the Basic Conditions of Employment Act.

(5) The contract of employment of a learner may not be terminated before the expiry of the period of duration specified in the learnership agreement unless the learnership agreement is terminated in terms of section 17(4).

(6) The contract of employment of a learner terminates at the expiry of the period of duration specified in the learnership agreement unless the agreement was concluded with a person who was already in the employment of the employer party to the agreement when the agreement was concluded.

Employment Act, but they are also entitled to other conditions of employment prescribed in terms of the BCEA, such as leave entitlement, overtime and mandatory rest periods etc.

12.7.1 In the absence of a sectoral determination or an exemption under the BCEA, it is correct to say that employers are bound by the provisions of the BCEA.

12.7.2 This means that its employees, are entitled to the minimum prescribed conditions of employment as prescribed in the BCEA, which includes the right to leave entitlement, as well as prescribed rest periods etc.

12.7.3 Generally, if the estate agent earns in excess of R 205 433.30 per annum, or is a senior managerial employee or the estate agent is an employee engaged as sales staff who travel to the premises of customers (we are, however, of the opinion that an estate agent cannot be considered sales staff) and who regulate their own hours of work or the estate agent is an employee who works less than 24 hours a month for an employer, Chapter 2, save for section 7 dealing with the regulation of working time of the BCEA, does not apply. In other words, the following provisions of the BCEA generally will not apply -

12.7.4 Section 9. Ordinary hours of work

12.7.5 Section 9A. Daily wage payment

12.7.6 Section 10. Overtime

12.7.7 Section 11. Compressed working week

12.7.8 Section 12. Averaging of hours of work

12.7.9 Section 13. Determination of hours of work by Minister

12.7.10 Section 14. Meal intervals

12.7.11 Section 15. Daily and weekly rest period

12.7.12 Section 16. Pay for work on Sundays

12.7.13 Section 17. Night work

12.7.14 Section 18. Public holidays[17]

[17] In terms of section 2(2) of the Public Holidays Act, 1994 (Act No. 36 of 1994), a public holiday is exchangeable for any other day which is fixed by agreement or agreed to between the employer and the employee.

12.8 **Sectorial Determination for Estate Agents.**

12.8.1 It is possible for industries to request the Minister of Labour to investigate a sector or industry and to decide of the conditions of employment in that particular sector or industry.

12.8.2 The purpose of the BCEA is to “To give effect to the right to fair labour practices referred to in section 23(1) of the Constitution by establishing and making provision for the regulation of basic conditions of employment; and thereby to comply with the obligations of the Republic as a member state of the International Labour Organisation; and to provide for matters connected therewith.”

12.8.3 In terms of Section 3 of the BCEA the provisions of the Act apply to all employees and employers, save for certain exceptions.

12.8.4 Section 4(6) of the National Minimum Wage Act (NMWA), provides that the payment of a national minimum wage cannot be waived, and the national minimum wage takes precedence over a sectoral determination. This means that if a sectoral determination does not prescribe a wage or prescribes a lower wage than the National Minimum Wage, the National Minimum Wage must be paid.

12.8.5 In terms of Section 51(1) of the BCEA the Minister of Labour may make a sectoral determination ("**SD**") establishing basic conditions of employment for employees in a sector and area.

12.8.6 Provided that the procedure set out in Chapter 8 of the BCEA is followed the Minister may in terms of Section 55 of the BCEA make a SD. Section 55(4) provides that a Sectoral determination may in respect to the sector and area concerned:

12.8.6.1 set minimum terms and conditions of employment, including minimum rates of remuneration;

12.8.6.2 provide for the adjustment of minimum rates of remuneration;

12.8.6.3 regulate the manner, timing and other conditions of payment of remuneration;

12.8.6.4 prohibit or regulate payment of remuneration in kind;

12.8.6.5 require employers to keep employment records;

12.8.6.6 require employers to provide records to their employees;

12.8.6.7 prohibit or regulate task-based work, piecework, homework and contract work;

12.8.6.8 set minimum standards for housing and sanitation for employees who reside on their employers' premises;

12.8.6.9 regulate payment of traveling and other work-related allowances;

12.8.6.10 specify minimum conditions of employment for trainees;

12.8.6.11 specify minimum conditions of employment for persons other than employees;

12.8.6.12 regulate training and education schemes;

12.8.6.13 regulate pension, provident, medical aid, sick pay, holiday and unemployment schemes or funds; and

12.8.6.14 regulate any other matter concerning remuneration or other terms or conditions of employment.

12.8.7 Section 55(6) prohibits a SD relating to the regulation of working time (which is already covered by a substantial code of good practice), child labour, or employment of children over the age of 15, and forced labour.

12.8.8 The Minister may not, in terms of Section 55(7) make a SD covering employees and employers who are bound by a collective agreement concluded at a bargaining counsel; regulating any matter in a sector and area in which a statutory council is established and in respect of which that statutory council has concluded a collective agreement; regulating any matter regulated by a SD for a sector and area which has been in effect for less than 12 months.

12.8.9 Section 18(4) of the SDL Act excludes 55(7) of the BCEA which provides that the Minister may not publish a sectoral determination -

(a) covering employees and employers who are bound by a collective agreement concluded at a bargaining council;

(b) covering employees covered by a collective agreement concluded in a statutory council regulating any matter in respect of which that statutory council has concluded a collective agreement;

(c) regulating any matter regulated by a sectoral determination for a sector and area which has been in effect for less than 12 months.

13 **CONCLUSION**

13.1 Considering the above, once it has been determined that an Estate Agent is an employee, 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.

13.2 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.

13.3 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.