

Labour Law in Namibia

Collins Parker



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*Labour Law in Namibia* is the first comprehensive and scholarly text to analyse labour law in the country, the Labour Act of 2007, and how it affects the common law principles of employment relations. Concise and extensively researched, it examines the Labour Act in detail in 16 chapters that include the employment relationship; duties of employers and employees; unfair dismissal and other disciplinary actions; the settlement of industrial disputes; and collective bargaining.

Over 500 relevant cases are cited, including court rulings in other countries, and comparative references to the labour laws of other Commonwealth countries, notably South Africa, Swaziland, Zambia and the United Kingdom, making it a reference and comparative source book for common law countries in the SADC region and beyond.

Written by an authority in the field of labour law, this is a unique reference guide for key players in labour relations, including teachers and students of law, legal researchers and practitioners, human resource and industrial relations practitioners, employers and employer's organisations, employees and trade unions, public servants and public policy advisors, and the academic community internationally.

In clear and uncomplicated English, the book is accessible to professional and lay people. A comprehensive list of contents, tables of cases and statutes, bibliography and index, assist the reader.

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# PREFACE AND ACKNOWLEDGEMENTS

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This book is a comprehensive work on labour (or employment) law in Namibia, where the common law of master and servant forms its fundamentality, as it does in other common law jurisdictions. However, today, labour law in Namibia (and in other common law countries) is dominated by statute. Thus, the Labour Act 2007 (Act No. 11 of 2007) represents the sum and substance of much of Namibia's labour law, which governs employment contracts.

The book deals with the common law principles of employment relations applicable to Namibia and statutory modifications and amplifications of those principles by the Labour Act. It also treats other employment issues that are not even contemplated in the common law. Thus, the book examines, for instance, certain elements of labour law in Namibia that epitomize the political, social and economic realities of present-day employment relations that are found in most modern democratic and free societies like Namibia. Examples of those elements are the right of employees to form or join trade unions as employees' interests-promotion organizations, the right of employees to strike, the concept of unfair dismissal, collective bargaining, collective agreements, paid maternity leave, alternative dispute resolution mechanisms (i.e. conciliation, mediation and arbitration) and the Labour Court. In this connection, comparative references are made to the labour laws of some other Commonwealth countries, notably, South Africa, Swaziland, Zambia and the United Kingdom. Like Namibia's legal system, the legal system of the first two of these countries is based on the Roman-Dutch common law. Moreover, the first three countries and Namibia are all members of the Southern African Development Community (SADC).

In a period of barely eighteen years, Namibia has endeavoured, and to a large part succeeded, to move away from the apartheid-infested system of employment relations to a system that is in tune with its democratic milieu and which conduces to the fulfilment of its international obligations under the relevant International Labour Organization (ILO) Conventions and Recommendations. The repealed Labour Act 1992 (Act No. 6 of 1992) did well to bring Namibia's labour law and practices to the level of international standards, particularly standards under ILO Conventions, to which Namibia is a State Party, and some ILO Recommendations.

On the whole, the Labour Act 2007 has maintained the standards attained by the repealed Labour Act 1992. In that sense, the Labour Act 2007 does not depart markedly from the general policies and principles that shaped the repealed Labour Act 1992. There are,

however, some remarkable features of the Labour Act 2007. It provides for comprehensive alternative dispute resolution mechanisms, namely conciliation, mediation and arbitration, and procedures for their implementation. It has done away with the power of magistrates' courts to sit as a labour court of first instance: the new Act has instead created a new Labour Court as a court of first instance in labour matters that fall under the Act. Another key feature of the Act is that it introduces fully paid maternity leave for employees who are subject to the Act. Lastly, for the first time in Namibia, the concept of unfair labour practice has found expression in Namibia's labour law.

My profound gratitude goes to my wife, who typed the entire manuscript of this book with exemplary diligence and a superb sense of forbearance, albeit the task is outside the bounds of her conjugal duty.

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# 1 INTRODUCTION

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## 1.1 WHAT IS LABOUR LAW?

Labour law or employment law – the two terms can be used interchangeably – may be described as that branch of law that is concerned with persons in the employment relationship. Tebutt, JA put it succinctly in this way: ‘Briefly speaking Labour Law is to be understood as the common law of master and servant as expanded and otherwise modified by Industrial Legislation.’<sup>1</sup> Put simply, labour law governs the contractual relationship between an employer and an employee.<sup>2</sup> Flowing from that relationship, employers and employees have certain rights, obligations and liabilities under the law.

Principles of other branches of law are deeply embedded in labour law. Chief among these are principles of the law of contract, law of delict, criminal law, statute law, administrative law, constitutional law and human rights law.

Central to labour law, as already mentioned, is the contractual relationship between an employer and an employee. Therefore, principles of the law of contract are applied to explain the nature and consequences of the employment relationship. The law of delict is also employed to determine the civil liability of employees, employers and third parties in employment situations. Many countries have eschewed penal sanctions in labour relations, although criminal law still plays an important role in labour relations, especially with regard to unlawful strike, lockout, or picket, and the employment of minors. For example, it is an offence under s. 3(6) of the Labour Act 2007<sup>3</sup> for a person to employ, or require or permit, a child who is under the age of fourteen years to work in any circumstances prohibited by the Act. An employer found guilty of this offence is liable to a fine not exceeding N\$20,000.00, or to imprisonment for a period not exceeding four years, or to both.

Labour law also cuts into the domain of administrative law since administrative law deals with the question of the exercise of governmental power by public authorities, and control of such power by the courts. Nowadays, the exercise of governmental power by

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<sup>1</sup> *Sibongile Nxumalo and others v Attorney-General and others* Swaziland CA 25/96, 28/96, 29/96, 30/96 (consolidated) at p.15 (unreported).

<sup>2</sup> ‘Labour law’ has been chosen as the title of this book because Namibia’s employment statute is called the Labour Act.

<sup>3</sup> Act No. 11 of 2007. This is how the new Labour Act will be referred to throughout the book without any footnoting.

public officials, e.g. labour commissioners, employees' compensation commissioners and registrars of trade unions in labour relations, is well known. The principles of administrative law are, therefore, called to assist in judicial review proceedings to determine the limits of the powers of such public bodies or public officials and the lawfulness and fairness of their actions under the Labour Act.

The right to join or form trade unions within the wider right to freedom of association is protected by constitutional bills of rights in many countries. For instance, Art. 21(1)(e) of the Namibian Constitution provides, 'All persons shall have the right to freedom of association, which shall include freedom to form and join...unions, including trade unions.'<sup>4</sup>

The intrinsic element of labour law is the employer-and-employee relationship and the various rights, duties and liabilities that arise from the relationship. For this reason, the meaning of 'employee' and of 'employer' is fundamental to the whole gamut of labour law.<sup>5</sup> Consequently, our discussion will continue with determining who an employee is, and who an employer is, both at common law and in statute law.

## 1.2 WHO IS AN EMPLOYEE?

### 1.2.1 At Common Law

The provenance of Namibia's common law contract of employment or contract of service is traceable to a genre of *locatio conductio* of Roman law.<sup>6</sup> Roman law recognized three species of *locatio conductio*, i.e. letting and hiring. The first was *locatio conductio rei*, i.e. the letting and hiring of a specified thing for a monetary reward. Thus, since Roman legal and political thought recognized the institution of slavery,<sup>7</sup> a slave could form the 'thing' in a *locatio conductio rei*. The master of a slave could, therefore, lend him to another person. The reason was that a slave was a thing (*res*), and so 'he himself was incapable of letting his labour or services but if his owner did so then such a contract was construed as a letting of the slave as a thing (*res*), i.e. *locatio conductio*.'<sup>8</sup> In this arrangement, the slave was neither a *locator operarum* (an employee) nor a *conductor operis* (an independent contractor).

<sup>4</sup> 1990. This is how the Namibian Constitution will be referred to throughout the book without any footnoting. See also, e.g., s. 88 of Swaziland's Industrial Relations Act 2000 (Act No. 1 of 2000).

<sup>5</sup> See E. Mureinik, 'The Contract of Service: An Easy Test for Hard Cases', *SALJ* 97, 246.

<sup>6</sup> The two terms bear the same meaning but it appears that the former is 'a better-sounding term to democratic ears': *De Beer v Thomson & Son* 1918 TDP 70 at 76.

<sup>7</sup> Collins Parker, 'Executive Discretion and Personal Freedom', LLM Thesis, Dalhousie University, 1979, 2.

<sup>8</sup> *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A), at 56D.

The second species of letting and hiring was *locatio conductio operas (faciendi)*, i.e. the present-day independent contractor. This was the letting and hiring of a particular piece of work or job to be done as a whole (*opus faciendum*). Joubert, JA explained it graphically in *Smit v Workmen's Compensation Commissioner* supra thus:

This was a consensual contract whereby the workman as employee or hirer (conductor or redemptor operas) undertook to perform or execute a particular piece of work or job as a whole (*opus faciendum*) for the employer as letter or lessor (locator operis) in consideration of a fixed money payment (*merces*). Here there was a switch of terminology. The workman who undertook to perform or execute the work was deemed to be the hirer of the work (conductor or redemptor operis) whereas the employer who undertook to pay the *merces* for the execution of the work was considered to be the letter or lessor of the work (locator operas). What the parties to the contract contemplated was not the supply of services or a certain amount of labour but the execution or performance of a certain specified work as a whole.<sup>9</sup>

The third species was *locatio conductio operarum*, i.e. the letting and hiring of personal service in return for a monetary return. As Joubert, JA explained:

This was consensual contract whereby a labourer, workman or servant as employee (*locatio operarum*) undertook to place his personal services (*operae suae*) for a certain period of time at the disposal of an employer (conductor operarum) who in turn undertook to pay him the wages or salary (*merces*) agreed upon in consideration of his services.<sup>10</sup>

The central difference between the second and third types of letting and hiring is this: the subject matter of the contract under the second type was not the supply of services or labour but the product or result of labour. Where a contract obliges one party to build for the other, providing at his own expense the necessary plant and materials, this is not a contract of service, although the builder may be obliged to use his own labour only and to accept a high degree of control. Such a contract is a building contract. MacKenna, J explained: 'It is not a contract to serve another for a wage, but a contract to produce a thing (a result) for a price.'<sup>11</sup>

<sup>9</sup> Ibid. at 57C-E.

<sup>10</sup> Ibid. at 56E.

<sup>11</sup> *Ready Mixed Concrete (South East) v Minister of Pensions* [1968] 2 QB 433 at 440.

This distinction is, therefore, fundamental: ‘The contract between master and servant is one of letting and hiring of service (*locatio conductio operarum*) whereas the contract between the principal and a contractor is the letting and hiring of some definite piece of work (*locatio conductio operis*).’<sup>12</sup> The latter is a contract for work or *locatio conductio operis*, which is in English law equivalent to a contract for services.

Seminal to this distinction is the point that if *X* is not bound to render his personal service to *Y*, then *X* cannot be said to be ‘working for’ *Y*, i.e. *X* is not *Y*’s employee.<sup>13</sup> This proposition can be couched in a positive statement in this way: ‘An employee agrees...he will provide his own work and skill in the performance of some service for his master.’<sup>14</sup> Consequently, at common law, the hallmark of the contract of service is the rendering of personal service by the *locator operarum* (servant) to the *conductor operarum* (master). In this way the service so rendered is the object of the contract.

The servant in a contract of service is under the orders of the master to render his personal service upon the master’s personal command. The service that is to be rendered is, therefore, subject to the orders and decisions of the master, and the servant is subordinate to the disposition of the master. He is, therefore, obliged to obey the lawful commands or instructions of the master who has the right of supervising and controlling him by prescribing to him what work he has to do, as well as the manner in which it has to be done.<sup>15</sup> There is also an important feature of a contract of service or contract of employment with regard to termination: a contract of employment is terminated by the death of the servant or upon expiration of the period of service.

In summary, at common law, the law governing the master-and-servant relationship is based on the Roman law contract of letting and hiring of service (*locatio conductio operarum*). It has been said of the South African law of employment that its basis lies in the harmonization of Roman–Dutch common law and the English common law.<sup>16</sup> Doubtless, it is submitted, the same is true of Namibian labour law.

<sup>12</sup> *Colonial Mutual Life Assurance Society Ltd v Workmen’s Compensation Commissioner* 1931 AD 412, per De Villiers, CJ at 433.

<sup>13</sup> See *The State v A.M.C.A. Services (Pty) Ltd* 1962 (4) SA 537 (A); *Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C); *Ongwevallekommisaris v Onderlinge Versekeringsgenootskap AVBOB* 1996 (4) SA 446 (A); *Smit v Workmen’s Compensation Commissioner* supra.

<sup>14</sup> *Ready Mixed Concrete v Minister of Pensions* supra at 440.

<sup>15</sup> *Smit v Workmen’s Compensation Commissioner* supra.

<sup>16</sup> J. Grogan, *Riekert’s Employment Law*, 2<sup>nd</sup> edn, Cape Town, Juta, 1993, p. 2.

## 1.2.2 Tests Applied in Identifying Employees

It need hardly be said that while the definition of the employee in labour law has been enigmatic at times, in most cases, it is not difficult to identify the employee. However, because employment practices have changed considerably over the years and because government, commerce and industry have become highly complex and technical, requiring specialist expertise, problems do at times arise in identifying the modern-day employee. Consequently, over the years the courts have developed and applied various tests or approaches in their effort to determine who is an employee. Those tests or approaches will now be examined.

### 1.2.2.1 The Supervision and Control Test

In simple terms, this approach states that the higher the degree of supervision and control that the alleged employer (or master) exercises or is allowed to exercise over the work of the alleged employee (or servant) and over the manner in which the latter performs his work, the stronger is the indication that such a person is an employee (or a servant).<sup>17</sup> Curlewis, J observed in *De Beer v Thomson & Son*,<sup>18</sup> that certain elements in the employer-and-employee relationship might raise the probability that a person is an employee, but certain circumstances may not raise such probability: today the most important element seems to be the question of control.

The provenance of the supervision and control test lies in English law. The much-cited test was formulated by Bramwell, LJ in *Yewens v Noakes* as far back as 1880, thus: ‘A servant is a person subject to the command of his master as to the manner in which he shall do his work.’<sup>19</sup> The Appellate Division of the Supreme Court (now the Supreme Court of Appeal) of South Africa adopted the supervision and control test under English law in *Colonial Mutual Life Assurance Ltd v MacDonald* supra, in deciding whether an insurance agent was an employee. De Villiers, CJ formulated the test as follows:

The tests to be applied in deciding whether a person is a servant or an independent contractor have been dealt with recently in an instructive manner by McCardic, J. in *Performing Right Society Ltd v Mitchell and Booker (Palais de Danse) Ltd* (1924, 1 K.B. at p. 766), where he shows the difficulty of putting one’s hand upon any one test which is conclusive. But while it may sometimes be a matter of extreme delicacy to decide whether the control

<sup>17</sup> *Smit v Workmen’s Compensation Commissioner* supra.

<sup>18</sup> *De Beer v Thomson* supra.

<sup>19</sup> *Yewens v Noakes* [1880] 6 QBD 530 at 532-533, per Bramwell, LJ.

reserved to the employer under the contract is of such a kind as to constitute the employer the master of the workman, one thing appears to me to be beyond dispute and that is that the relation of master and servant cannot exist where there is a total absence of the right of supervising and controlling the workman under the contract; in other words, unless the master not only has the right to prescribe to the workman what work has to be done, but also the manner in which that work has to be done. In *The Queen v Walker* (27 L.J.M.C. 207) Bramwell, B. (as he then was), put it in this way: 'A principal has the right to direct what the agent has to do; but a master has not only that right, but also the right to say how it is to be done.' In *Yewens v Noakes* (1880, 6 Q.B.D. 530) the same learned judge applied the same test. Pollock on Torts (12<sup>th</sup> ed., pp. 79, 80) draws the same distinction: 'A servant is a person subject to the command of his master as to the manner in which he shall do his work.' So also does Salmond, *Law of Torts* (6<sup>th</sup> ed., p. 96), in the following passage: 'A servant is an agent who works under the supervision and direction of his employer... A servant is a person engaged to obey his employer's orders from time to time.'<sup>20</sup>

The essence of the supervision and control test is the right of the employer to lay down rules regarding:

- 1 the object to be attained (the 'what');
- 2 the means of attaining the object (the 'how');
- 3 the time within which the object should be attained (the 'when'); and
- 4 the place where the object should be attained (the 'where').

Thus, in *Ready Mixed Concrete v Minister of Pensions* supra McKenna, J put it succinctly in the following passage:

Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when, and the place where it shall be done. All these aspects of control must be considered in

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<sup>20</sup> *Colonial Mutual Life Assurance v MacDonald* supra at 434-5.

deciding whether the right exists in a sufficient degree to make one party the master and the other the servant.<sup>21</sup>

In *Smit v Workmen's Compensation Commissioner* supra, Joubert, JA reminds us, '[I]t is indisputably clear...that the so-called test of supervision is firmly rooted in Roman–Dutch soil.'<sup>22</sup>

The supervision and control test ruled the legal waves in an age during which the owners of two of the three means of production, i.e. land and capital (the third is labour), usually had the expertise required to supervise and control the labour that they hired. In that age, the brewery manager or the coal mine manager, for instance, usually possessed managerial and technical skills, which his employees did not possess. Such a manager could, therefore, actually supervise and control his employees. But, today, many employees are not practically subject to the kind of supervision and control to which their counterparts in the period before or immediately after the Industrial Revolution were subjected. As a result, to insist today on the supervision and control test as the determining factor in the identification of the employee, will be artificial. To sum up, the control test may be difficult to apply where the so-called servant exercises professional skills or performs work of a highly technical nature.<sup>23</sup>

Indeed, the courts have recognized the danger of making the control and supervision test decisive. It has, therefore, been stated, '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.'<sup>24</sup> Thus, Lord Wright made the following terse observation in *Montreal Locomotive Works Ltd v Montreal and Attorney-General for Canada*: 'Control in itself is not always conclusive.'<sup>25</sup> MacKenna, J also noted in a similar vein that an 'obligation to do work subject to the other party's control is a necessary, though not always a sufficient, condition of a contract of service.'<sup>26</sup> Consequently, the courts have recognized that the requirements of supervision and control as an indication of the existence of the employer-and-employee relationship

<sup>21</sup> *Ready Mixed Concrete v Minister of Pensions* supra at 440.

<sup>22</sup> *Smit v Workmen's Compensation Commissioner* supra at 62C.

<sup>23</sup> T.E. Lewis, *Winfield on Tort*, 6<sup>th</sup> edn, London, Sweet & Maxwell, 1954, p. 139.

<sup>24</sup> *Smit v Workmen's Compensation Commissioner* supra at 62F.

<sup>25</sup> *Montreal Locomotive Works Ltd v Montreal and Attorney-General for Canada* [1947] 1 DLR 161 at 169.

<sup>26</sup> *Ready Mixed Concrete v Minister of Pensions* supra at 440.

need to be qualified.<sup>27</sup> The following observation of Roper, J in *R v Feun* is apposite in this regard:<sup>28</sup>

the question (often extremely difficult) whether the relationship of master and servant exists depends mainly if not entirely upon the degree of control exercised by the employer over the manner in which the work is to be performed. Complete control in every respect is in my view not essential to the master-and-servant relationship, and some degree of freedom from control is not incompatible with the relationship.<sup>29</sup>

The learned judge goes on to illustrate his point with great clarity, thus:

For example, a chef may be engaged on the understanding that his mistress is to have no say in the manner in which he prepares his dishes, but he may nevertheless be a servant. As it was put by Curlewis (Hon) J., in *De Beer v Thomson* 1918 T.P.D. 70 at p.76, a large amount of direct control exercised over the person engaged would tend to raise a presumption that he was a workman, whereas if he was entirely independent and free of the control of the person engaging him that would tend to show that he was not a workman. Whether the control exercised is such as to lead to the inference that the engaged person is a servant is therefore a question of degree.<sup>30</sup>

It may be distilled from the authorities that while supervision and control may no longer be decisive factors in determining who an employee is, the presence of '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'.<sup>31</sup> Frank, AJ put it concisely thus in *Engelbrecht and others v Hennes* : 'Whereas the question of the exercise of control is no longer the determining factor but one of the factors to be considered the total absence of control would in my view be fatal to any claim to being an employee.'<sup>32</sup> In *Hannah v Government of the Republic of Namibia*, Ngoepe, AJ observed, 'Although not in itself conclusive, the presence

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<sup>27</sup> *Smit v Workmen's Compensation Commissioner* supra.

<sup>28</sup> *R v Feun* 1954 (1) SA 486 (T).

<sup>29</sup> At 60H-61A.

<sup>30</sup> Ibid.

<sup>31</sup> *Smit v Workmen's Compensation Commissioner* supra at 62D.

<sup>32</sup> *Engelbrecht and others v Hennes* 2007 (1) NR 236 at 239B.

or absence of supervision and control will be a relevant factor: a considerable measure of supervision and control will tend to indicate a master-and-servant relationship... There are several authorities on this point'.<sup>33</sup>

In *Hannah v Government of Namibia* supra, the respondent raised a point *in limine* as follows: the applicant, being a Judge of the High Court, was not an employee of the State in terms of the repealed Labour Act 1992<sup>34</sup> because the definition of 'employee' in the Act did not include a Judge. That being the case, it was argued, the Labour Court had no jurisdiction. The Court observed that when deciding whether the applicant came within the definition of 'employee' under the repealed Labour Act 1992, one had to consider not only the question of the absence of supervision and control, but also the prohibition of any interference by the State and its agents with a Judge in the execution of his or her judicial functions in terms of the Namibian Constitution.

Upon the authority of the Indian case of *Union of India v Pratibha Bonnerjea*,<sup>35</sup> the Court found that it was difficult to reconcile an employer-and-employee relationship with judicial independence as guaranteed in the Namibian Constitution. The Court observed further that matters such as the control that the State had concerning times when Judges worked, the place where they worked, their vacations, their pension, medical contributions, deductions for the purpose of income tax on a pay-as-you-earn (PAYE) basis, etc. were peripheral to a Judge's judicial function. In the result, the Court held that the applicant had not proved on a balance of probabilities that he was an 'employee' as defined in the repealed Labour Act 1992.

### 1.2.2.2 The Organization or Integration Test

Denning, LJ (as he then was) enunciated the organization or integration test in *Cassidy v Ministry of Health*,<sup>36</sup> and applied it in *Stevenson, Jordan and Harrison Ltd v MacDonald and Evans*,<sup>37</sup> as a criterion for distinguishing a contract of employment from a 'contract for services' (i.e. independent contractor). He stated, 'One feature which seems to run through instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business, whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.'<sup>38</sup> He also referred to the organization test in *Bank voor Handel en Scheepvaart NV v*

<sup>33</sup> *Hannah v Government of the Republic of Namibia* 2000 NR 46 (LC) at 50C. See also *Engelbrecht v Hennes* supra.

<sup>34</sup> Act No. 6 of 1992. This is how Namibia's repealed Labour Act will be cited without footnoting.

<sup>35</sup> *Union of India v Pratibha Bonnerjea* (1976) AIR SC 690 at 695.

<sup>36</sup> *Cassidy v Ministry of Health* [1951] 2 KB 353.

<sup>37</sup> *Stevenson, Jordan and Harrison Ltd v MacDonald and Evans* [1952] 1 TLR 100.

<sup>38</sup> *Ibid.* at 111.

*Slatford and another*, where he observed that: ‘the test of being a servant does not rest nowadays on submission to orders. It depends on whether the person is part and parcel of the organization.’<sup>39</sup>

The approach underlying the organization or integration test is that a person is an employee if he is integrated into the enterprise or business. Those who are sufficiently integrated into the enterprise or business are employees; those who are not so integrated are not. While in some simple cases it may not be difficult to apply the organization or integration test, it may not be so easy to apply it to borderline cases. It is in respect of such cases that criticisms have been levelled against the organization test. In *Ready Mixed Concrete v Minister of Pensions*, MacKenna, J opined in this way about the organization test: ‘This [the organization test] raises more questions than I know how to answer. What is the meaning of being “part and parcel of an organization”? Is every person who answers this description a servant? If only some are servants, what distinguishes them from the others if it is not their submission to orders?’<sup>40</sup> Joubert, JA expressed his view tersely about the apparent vagueness of the organization test in *Smit v Workmen’s Compensation Commissioner* thus: ‘In my view the organization test is juristically speaking of such a vague and nebulous nature that more often than not no useful assistance can be derived from it in distinguishing between an employee (*locator operarum*) and an independent contractor (*conductor operis*) in our common law.’<sup>41</sup>

### 1.2.2.3 The Proprietary Test

It seems that the organization test offers useful assistance in deciding whether a person is an employee if it is applied in conjunction with the proprietary test to which it appears to be akin. The Court in *Ready Mixed Concrete v Minister of Pensions* supra approached the issue of whether a master-and-servant relationship existed by invoking what has been referred to as the ‘proprietary’ test, together with other tests.<sup>42</sup> In that case, MacKenna, J referred to the following opinion of Lord Wright in *Montreal Locomotive Works Ltd v Montreal and Attorney-General for Canada*:

In many cases the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties. In this way it is in some cases possible to decide the issue by raising as the crucial

<sup>39</sup> *Bank voor Handel en Scheepvaart NV v Slatford and another* [1953] 1 QB 248 at 295.

<sup>40</sup> *Ready Mixed Concrete v Minister of Pensions* supra at 445.

<sup>41</sup> *Smit v Workmen’s Compensation Commissioner* supra at 63F-G.

<sup>42</sup> *Ready Mixed Concrete v Minister of Pensions* supra at 443.

question whose business is it, or in other words by asking whether the party is carrying on the business in the sense of carrying it on for himself or on his own behalf and not merely for a supervisor.<sup>43</sup>

MacKenna, J went on to observe:

If a man's activities have the character of a business, and if the question is whether he is carrying on the business for himself or for another, it must be relevant to consider which of the two owns the assets ('the ownership of the tools') and which bears the financial risk ('the chance of profit', the 'risk of loss'). He who owns the assets and bears the risk is unlikely to be acting as an agent or servant. If the man performing the service must provide the means of performance at his own expense and accept payment by results he will own the assets, bear the risk and be to that extent unlike a servant.<sup>44</sup>

Thus, relying on *Queensland Stations Pty Ltd v Federal Commissioner of Taxation*,<sup>45</sup> and *Montreal Locomotive Works Ltd v Montreal and Attorney-General for Canada* supra, MacKenna, J held that the common law test should not be limited to the power of control over the manner of performing service, but the test is wide enough to take account of investment and risk.<sup>46</sup> The proprietary test was applied in the South African case of *Tshabalala v Moroka Swallows Football Club Ltd*.<sup>47</sup>

According to the proprietary test, it is more likely than not that the person who has ownership of the assets of the business and bears the financial risk of the business is not an employee of the enterprise: such a person is carrying on the business as his own account. It has, therefore, been held that a director of a company, who held all the shares in a company, except one, was not an employee unless he had a service contract with the company.<sup>48</sup> Accordingly, in *Boulting v Association of Cinematograph, Television and Allied Technicians*,<sup>49</sup> Lord Denning, MR refused to accept the claim that the joint managing directors of a company were employees.

<sup>43</sup> *Montreal Locomotives v Montreal and Attorney-General* supra at 169.

<sup>44</sup> *Ready Mixed Concrete v Minister of Pensions* supra at 443.

<sup>45</sup> *Queensland Stations (Pty) Ltd. v Federal Commissioner of Taxation* (1945) 70 CLR 539.

<sup>46</sup> *Ready Mixed Concrete v Minister of Pensions* supra at 444.

<sup>47</sup> *Tshabalala v Moroka Swallows Football Club Ltd* (1991) 12 ILJ 389.

<sup>48</sup> *Lee v Lee's Air Farming Ltd* [1961] AC 12; *Robinson v George Sorby Ltd* (1960) 2 ITR 148.

<sup>49</sup> *Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606 (CA).

#### 1.2.2.4 *The Dominant Impression Test*

In some cases, the question whether a person is an employee is a difficult one, because the applicable contract may have some of the features of an agency agreement and yet be a service contract or vice versa. It is to deal with such borderline cases that the courts have resorted to the dominant impression approach as a guide in determining whether a person is an employee. 'It is in the marginal cases where the so-called dominant impression test merits consideration,' Joubert, JA stated in *Smit v Workmen's Compensation Commissioner* supra.<sup>50</sup> Consequently, in that case, the Court did not apply either the supervision and control test or the organization test. It rather followed the judicial path it had trodden in *Ongwevallekommisaris v AVBOB* supra. The essence of the dominant impression test is this: Where the relationship has indications tending to show the existence of employer-and-employee relationship and some other relationship, one must, considering all the facts, endeavour to determine which sort of relationship comes off best, or what 'dominant impression' such a contract leaves on one's mind.

Although it has been argued that the formulations by the Court in *Smit* supra and *AVBOB* supra contain inadequacies so much so that they cannot be of assistance in determining the question whether a person is an employee at common law,<sup>51</sup> in *Stein v Rising Tide Productions CC*,<sup>52</sup> the court paid particular attention to the dominant impression test in determining whether the contract in question was one of employment. The case concerned an action instituted by the plaintiff, a photographic sports model stuntwoman and sports-therapy masseuse, against the defendant, a close corporation carrying on business as a film production service corporation. In the action, the plaintiff claimed damages for loss allegedly suffered by her as a result of injuries that she had sustained while engaged in a modelling photographic shoot in Cape Town in April 1999. While performing a kickboxing routine in the course of the photographic shoot, she had fallen and allegedly twisted her leg, resulting in a rupture of the anterior cruciate ligament in her knee. The plaintiff alleged that she fell and injured herself during the photographic shoot as a consequence of the negligence of the servants of the defendant, who, acting within the course and scope of their employment, were negligent when operating the camera for the photographic shoot. Applying the dominant impression test formulated by Joubert, JA in *Smit v Workmen's Compensation Commissioner* supra, as developed in South African case law, to the evidence before it, the Court found that the technicians hired by the defendant and to whom the plaintiff sought to attribute negligence were not the employees of the defendant. Thus, the South African Labour Appeal Court observed in *Dempsey v Home & Property*:

<sup>50</sup> *Smit v Workmen's Compensation Commissioner* at 62G.

<sup>51</sup> See Mureinik, 'The Contract of Service: An Easy Test for Hard Cases', pp. 258-60.

<sup>52</sup> *Stein v Rising Tide Productions cc* 2002 (5) SA 199 (C).

no single factor is considered determinative and the Court has to examine the relationship in its totality to identify those aspects of their relationship which tend to indicate the existence of an employment relationship, and those which indicate a relationship other than that of master and servant. The factors are then weighed against each other and where the dominant impression indicates the existence of a contract of service, the court has to rule accordingly.<sup>53</sup>

### 1.2.2.5 The Multiple Test

Faced with the difficulty of putting their fingers on any one assured and decisive test, the courts have also at times fallen on the multiple test in order to determine who is an employee.<sup>54</sup> Indeed, the multiple test is not so different from the dominant impression test. Under the multiple test, too, what are seen to be relevant *indicia* are considered in relation to the particular situation, and the court embarks upon the exercise of balancing the various *indicia* against one another to determine what weight ought to be attached to each one of them. For instance, in *Colonial Mutual Life Assurance Society Ltd v MacDonald* supra, the court referred to some criteria of the multiple test outlined in *Performing Rights Society v Mitchell and Booker*:<sup>55</sup> the nature of the job or task at hand; the freedom of action of the alleged employee; the magnitude of the contract amount; the manner of payment of remuneration; the locus of the power of dismissal; the circumstances under which payment of remuneration may be withheld; and the exercise of control and supervision.

The Court in *Ready Mixed Concrete v Minister of Pensions* supra set out three conditions necessary for the existence of a contract of employment:

- 1 agreement by a person *X* in consideration of a wage or other remuneration to provide his own work and skill in the performance of some service for another *Y*;
- 2 express or implied agreement by *X* that in the performance of that service he will be subject to *Y*'s control in a sufficient degree so as to make *Y* the master; and
- 3 the other provisions of the contract are such that they are not inconsistent with it being a contract of employment.

<sup>53</sup> *Dempsey v Home and Property* (1995) 16 ILJ 378 (LAC) at 381B-C.

<sup>54</sup> The court in *Morren v Swinton & Pendlebury Borough Council* [1965] 1 WLR 576 applied the multiple test in order to reach the conclusion that a resident engineer appointed by a local authority and who worked under the instructions of a firm of consulting engineers, was an employee of the local authority.

<sup>55</sup> *Performing Rights Society Ltd v Mitchell and Booker (Palais de Dance) Ltd* [1924] 1 KB 762 at 767.

In English law, there must be a wage or other remuneration, otherwise, there is no consideration, and without consideration there is no contract of any kind. *Conradie v Rossouw*<sup>56</sup> settled the law in South Africa that the English doctrine of consideration forms no part of the South African law of contract, which is based on Roman–Dutch common law. There is no reason why the principle in *Conradie v Rossouw* should not apply to Namibian law of contract, which is also based on the Roman–Dutch common law. Nevertheless, what Christie states with regard to South African law of contract must be borne in mind, namely that the English doctrine of consideration has not been forgotten entirely in South African law of contract.<sup>57</sup> Thus, while payment of wages or other remuneration (*merces*) formed an element of the Roman law of *locatio conductio operarum*, it is not an essential element of the contract of employment at common law.<sup>58</sup> However, as we shall see in chapter 2 (para. 2.2.5 below), this aspect of the common law has been changed by statute law as far as employment contracts are concerned, for in terms of s. 1 of the Labour Act 2007, the payment of remuneration is an essential element of a contract of employment.

However, the nature of the remuneration payable is not in itself an indication that an employer-and-employee relationship exists. For instance, the payment of a commission is not necessarily incompatible with the existence of the employer-and-employee relationship; nor does it necessarily follow that because a person is paid a share of the profits of an undertaking that he is not an employee.<sup>59</sup>

### 1.2.2.6 The Pragmatic Approach

Finally, in recent times the courts have found it fit to adopt a more pragmatic approach when determining who an employee is, instead of applying mechanically the tests and approaches discussed above. Indeed, in *Hall (HM Inspector of Taxes) v Lorimer*,<sup>60</sup> having warned against applying any of the above tests and approaches impulsively, the Court of Appeal held that each case should be determined on the particular facts available to the court. In *Lane v Shire Roofing Co (Oxford) Ltd*,<sup>61</sup> too, the Court of Appeal referred with approval to a number of authorities in which the various tests have been applied, and held that the facts of the particular case must be considered and the tests that are applied must have relevance to modern employment practices.

<sup>56</sup> *Conradie v Rossouw* 1919 AD 279.

<sup>57</sup> R.H. Christie, *The Law of Contract in South Africa*, 5<sup>th</sup> edn, Durban, Butterworths, 2006, p. 10 (fn53).

<sup>58</sup> Mureinik, 'The Contract of Service: An Easy Test for Hard Cases', p. 262.

<sup>59</sup> *De Beer v Thomson* supra. See also *Dempsey v Home & Property* supra.

<sup>60</sup> *Hall (HM Inspector of Taxes) v Lorimer* [1994] IRLR 171.

<sup>61</sup> *Lane v Shire Roofing Co (Oxford) Ltd* [1995] IRLR 493.

In closing, an important question that arises is this: is the issue whether a person is an employee a question of law or fact? In *O’Kelly v. Trusthouse Forte Plc*,<sup>62</sup> the Court of Appeal stated that for over seventy years in England the issue of whether a person is an employee is a question of fact. The Privy Council expressed a similar view in *Lee v. Chung and Shun Shing Construction & Engineering Co Ltd*.<sup>63</sup> It is therefore submitted that whether a person is an employee is a question to be resolved by the determiner of fact.<sup>64</sup> However, where the question whether a person is an employee turns solely on the interpretation and application of a written contract of employment, then the question is a question of law.<sup>65</sup>

### 1.2.3 Statutory Provisions

Many statutory definitions of ‘employee’ are not definitions in sensu stricto; they merely provide statutory descriptions, which are invariably synonyms and not definitions, or are in the form of circular reasoning.<sup>66</sup> For instance, s. 230(1) of the Employment Rights Act (United Kingdom) states: ‘In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.’<sup>67</sup> The Act goes on to provide in s. 230(2) that: ‘In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.’ In terms of s. 1 of Swaziland’s Employment Act,<sup>68</sup> a ‘contract of employment means a contract of service, apprenticeship or traineeship.’ Furthermore, s. 1 of Zambia’s Employment Act<sup>69</sup> defines ‘employee’ as ‘any person who has entered into or works under a contract of service, whether the contract is express or implied, is oral or in writing’. Those Acts do not define precisely ‘contract of service’ or ‘contract of employment’.

Unlike the formulations in the Swaziland, English and Zambian definitions, the South African formulation appears to be in the form of a definition. Section 213 of South Africa’s Labour Relations Act 1995<sup>70</sup> defines ‘employee’ as ‘(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to

<sup>62</sup> *O’Kelly v Trusthouse Forte plc* [1983] 2 All ER 456.

<sup>63</sup> *Lee v Chung and Shun Shing Construction & Engineering Co Ltd* [1990] IRLR 236.

<sup>64</sup> See *Edwards v Bairstow* [1956] AC 14; *Rumingo and others v Van Wyk* 1997 NR 102 (HC).

<sup>65</sup> *The President of the Methodist Conference v Parfitt* [1984] IRLR 141.

<sup>66</sup> C.D. Drake, *Labour Law*, 2<sup>nd</sup> edn, London, Sweet & Maxwell, 1973, para. 35.

<sup>67</sup> Employment Rights Act (UK) 1996 (c. 18).

<sup>68</sup> Act No. 5 of 1980.

<sup>69</sup> Cap. 512 of the Laws of Zambia.

<sup>70</sup> Act No. 66 of 1995.

receive, any remuneration; and (b) any other person who in any manner assists in carrying on or conducting the business of the employer.’

The South African formulation is substantially the same as the formulation in the Labour Act 2007, s.1 of which provides:

‘employee’ means an individual, other than an independent contractor, who –

- (a) works for another person and who receives, or is entitled to receive, remuneration for that work; or
- (b) in any manner assists in carrying on or conducting the business of an employer.

The words in the first part of the definition, paragraph (a), are primarily based on the common law contract of employment (*locatio conductio operarum*).<sup>71</sup> Consequently, one has to look to the common law for guidance in construing the provision by resorting to the tests and approaches explained and developed by the courts, and discussed previously (see para 1.2.2 above).

The second part of the definition, in paragraph (b), extends the common law definition of ‘employee’. In *Borcherds v C W Pearce & F. Sheward t/a Lubrite Distributors* (IC) supra, the applicant contended that the ordinary grammatical meaning of the words ‘assists in the carrying on or conducting the business of an employer’ in the repealed South Africa’s Labour Relations Act 1956<sup>72</sup> was so wide that they were capable of including independent agents who did assist in the carrying on or conducting the business of the respondent. In that case the respondent conducted business exclusively through independent agents, and would not conduct any business, if those agents did not assist in it. Thus, if the words were given their ordinary grammatical meaning, then the applicant would be an employee within the meaning of the statutory provision. This, the Industrial Court conceded. The Court, nonetheless, refused to construe these words in their ordinary grammatical sense. De Kock, SM argued: ‘Giving the words used their ordinary grammatical meaning would give the word “employee” a meaning which was so wide that it would lead to anomalous and absurd situations.’<sup>73</sup>

The Industrial Court then proceeded to give two incisive examples to illustrate the absurdity of accepting the ordinary grammatical meaning of the statutory definition of ‘employee’ in

<sup>71</sup> *Borcherds v. C W Pearce & F. Sheward t/a Lubrite Distributors* (1991) 12 ILJ 383 (IC). See also para. 1.2.1 above.

<sup>72</sup> Act No. 28 of 1956.

<sup>73</sup> *Borcherds v Pearce* 1991 (IC) supra at 387F.

that provision: the wife and children who assist the husband and father to run the local corner café would be ‘employees’, as they assist him in conducting his business, and the attorney who advises his client on how to structure his business or minimise tax obligations would be an employee, as he assists him in conducting his business. The Industrial Court then concluded that the Legislature could not have intended such anomalous and absurd consequences. For that reason, the Industrial Court was prepared to place some limitation on the very wide import of the words of the statute. In this connection, the Industrial Court stated that the definition of ‘employee’ ought to be limited by the following considerations:

- (a) There is a distinction between assisting an employer in carrying on his business and performing work which is of assistance to the employer in the carrying on or conducting of his business. Work of the later category is not assistance within the meaning of that word as used in the (1956) Act.
- (b) The assistance must be intended to be repeated with some form of regularity. Assistance on an ad hoc basis or on a single isolated occasion such as a friend helping out in the case of need, will not make the one who assists an employee.
- (c) Assistance rendered at the will of and in sole discretion of the one assisting will not make him an employee. Such a relationship creates only social and not legal obligations. Those who voluntarily and without any obligation, except perhaps social, assist at the school tuck-shop are not employees despite the fact that they may have to follow the instructions of the one in charge. Chaos would reign if no one had the authority to instruct and direct.
- (d) The obligation to assist must not arise from some other legal obligation to render that assistance. The obligation may arise *ex contractu* or *ex lege*. The agent assists *qua agent* and not *qua employee*. The wife assists in the café not as an employee but as part of her duty of mutual support.<sup>74</sup>

The Industrial Court, therefore, found that the applicant did assist in the carrying on of the respondent’s business but that assistance arose out of his obligation as agent in terms of an agency agreement. The Court applied the control test, and dismissed it as being inapplicable. It then applied the dominant test and held that ‘[t]he applicant was in my opinion not an employee in terms of a common-law contract of employment. The applicant

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<sup>74</sup> Ibid. 388D-H.

was an independent agent who was his own master. He was bound by his own contract but not by his employer's orders.'<sup>75</sup>

The Labour Appeal Court – albeit by a different route – also came to the conclusion that the appellant was an independent contractor and was not an employee, either at common law or for the purposes of the Labour Relations Act and, accordingly, there was no employer-and-employee relationship between the appellant and the respondent.<sup>76</sup>

From *Borcherds v Pearce* (IC) supra, the following useful principles emerge in respect of the interpretation and application of the second part of the definition of 'employee' in South Africa's repealed Labour Relations Act 1956, where the words used, as has been shown above, are substantially the same as those used in the second part of the definition of 'employee' in the Labour Act 2007. First, the nature of the legal agreement would determine whether a person assists in the carrying on or conducting the business of an employer and the nature of the assistance would determine the nature of the legal agreement between the parties. Second, the general words cast in very wide terms do not have the effect of extending the meaning of 'employee' to independent contractors because independent contractors are not bound to render personal service to the hirer of their service but are bound merely to produce a certain result by their own labour or the labour of others under their control and supervision. Third, some limitation must be read into the wide terms defining 'employee' because there is a distinction between assisting in the carrying on or conducting business and performing work or service, which is of assistance to another person. Work of the latter is not assistance within the meaning of 'assistance' as used in the definition of 'employee' in the Act. Fourth, the words in the second part of the definition of 'employee' do not have the effect of changing the common law: it is obvious that to alter any well-established principle of the common law, clear and positive legislation is necessary;<sup>77</sup> nor may legislation be presumed to make any alteration in the common law further otherwise than the Act does expressly declare.<sup>78</sup> Lastly, the question is always this: has the individual *X* who is assisting another person *Y* surrendered his or her productive capacity to *Y*. If *X* has not and *X* works for himself, he is outside the protective net of the Labour Act.

The interpretation and application of 'employee' in terms of s. 1 of the repealed Labour Act 1992 came up for determination in *Paxton v Namib Rand Desert Trails (Pty) Ltd*.<sup>79</sup> In that case, the applicant applied to the Labour Court for an order declaring that she was an

<sup>75</sup> *Borcherds v Pearce* 1991 (IC) supra at 387A. The control test is discussed in para. 1.2.2.1 and the dominant test in para. 1.2.2.4 above.

<sup>76</sup> *Borcherds v C W Pearce & F Sheward t/a Lubrite Distributors* (1993) 14 ILJ 1162 (LAC).

<sup>77</sup> See S.G.G. Edgar, *Craies on Statute Law*, 7<sup>th</sup> edn, London, Sweet & Maxwell, 1971, p. 121.

<sup>78</sup> *Du Toit v Office of the Prime Minister* 1996 NR 52; *Secretary of State for India v Bank of India* (1938) 159 LT 101 (Privy C.) at 104 per Lord Wright.

<sup>79</sup> *Paxton v Namib Rand Desert Trails (Pty) Ltd* 1996 NR 109 (LC).

employee of the respondent during the periods 1 June 1989 to 31 May 1992 and 1 June 1992 to 31 May 1993 in terms of the repealed Act. The facts of the case were briefly these: The applicant was the wife of *P* who was employed from June 1989 to 31 May 1993 by the respondent as game ranch manager of a farm which belonged to the respondent's company. The applicant did assist her husband and rendered certain services on an ad hoc basis and intermittently at Namib Rand Desert Trails from 1 June 1989 to 31 May 1993. The services included keeping the guestroom at Wolwedaans clean and habitable and stocked for use by tourists, assisting in game-culling in 1991 and 1992, and rendering support and assistance to her husband, *P*, in connection with his duties, particularly when he was absent from work. In a letter dated 17 August 1992, the applicant declined to negotiate any arrangement with the respondent. She confirmed that she wished to adhere to the arrangements then existing and that she was unsure at that stage whether she wanted to be employed.

Having reviewed South African authorities (textual and case-law), O'Linn, J enunciated the following principle:

Although the exercise of control has been watered down to 'being an important yardstick or testing' but not 'decisive', it seems to me that it remains a very important yardstick and perhaps even an indispensable one when deciding the issue of who is an 'employee' in the context of the provisions of the Namibian Labour Act. I say this inter alia because of Part V of the Labour Act which provides for basic conditions of employment, which must be complied with and where failure to comply even carries a criminal sanction. Compliance with these conditions or at least several of them necessitates a substantial degree of control by the employer over the employee. If the relationship between the parties does not have such control or provide for such control as an element, whether express or implied, then the fact must be a very important, if not decisive, pointer that the relationship is not that of employer-and-employee.<sup>80</sup>

After applying the law to the facts of the case, O'Linn, J held that in the period subsequent to the applicant's letter of 17 August 1992, it could not be controverted that the applicant was not an employee, 'notwithstanding the widest possible interpretation of the statutory definition of "employee", "employer", and "employment"' in the repealed Labour Act 1992. The court further held that the applicant was at best an independent contractor.

<sup>80</sup> *Paxton v Namib Rand* supra at 114E.

It is submitted that the conclusions and decisions in *Borcherds (IC)* supra and *Paxton* supra should apply with equal force to the application and interpretation of the second part, i.e. paragraph (b), of the definition of employee under the Labour Act 2007. The reason is that the words in the Labour Act 2007 are, as has been said above, substantially similar to the words used in both the repealed South African statute<sup>81</sup> and the repealed Labour Act 1992. The principles proposed in those two cases clearly show that if the words ‘assists in carrying on or conducting the business of an employer’ were interpreted literally, they would be too wide and also carry a restrictive interpretation.<sup>82</sup>

It deserves to be mentioned that there must be a contract of employment for the employer-and-employee relationship to exist. How else can the existence of an employment relationship and the terms governing such a relationship be established, if not by reference to a contract of employment? In this regard, O’Linn, J’s views in the following passage from *Paxton v Namib Rand* supra are instructive:

It seems to me that in order to establish there is in fact an employment relationship, an agreement of some sort, indicative of the alleged relationship, would be an almost indispensable feature of the relationship. Such agreement of course need not be a formal agreement, reduced to writing. The agreement can be in whole or in part in express terms or implied or tacit. Such implied or tacit terms can be inferred from conduct of the parties.<sup>83</sup>

At times a contract of employment may be subject to a suspensive condition; in that case, such a contract would only inure when the condition is fulfilled. Therefore, the party, who pleads that there is no enforceable contract because the other party has failed to fulfil any suspensive condition, bears the onus of proving the suspensive condition and its non-fulfilment.<sup>84</sup>

This brings us to a related, practical issue: suppose, for example, an employer *X* enters into a contract of employment with an individual *Y*. Before *Y* starts to work for *X*, *X* changes his mind and informs *Y* that he is no longer required to work for *X*. The question that arises is: did *Y* become an employee of *X* the moment he accepted an offer of employment under the Labour Act 2007? If according to the letter, or the oral intimation, of appointment of *Y*, *Y* was to assume duty at a later date, and before he assumed duty on that appointed date *X*

<sup>81</sup> Labour Relations Act No. 28 of 1956, s. 1.

<sup>82</sup> See *Ellis Park Stadium Ltd v Minister of Justice and another* 1989 (3) SA 898 (T).

<sup>83</sup> *Paxton v Namib Rand* supra at 115B.

<sup>84</sup> *Bucher v Kalahari Express Airlines* NLLP (2002) (2) 104 NLC.

set aside the appointment, then *Y* never became an employee of *X*. In that case *Y* cannot look to the Labour Act 2007 for assistance: *Y* was not an employee of *X* within the meaning of ‘employee’ in s. 1 of the Labour Act. The remedy of *Y* lies in contract – at common law.<sup>85</sup> The reason is that it cannot be said that *Y* is a person ‘*who works for*’ *X*, ‘and who receives, or is entitled to receive, remuneration *for that work*, or *in any manner assists*’ *X* ‘in carrying on or conducting the business of’ *X*, within the meaning of s. 1 of the Labour Act 2007.<sup>86</sup>

In order to ascertain the relationship between the parties it is always necessary to look at the terms of the contract. It is equally important to note that the name the parties may give to their agreement is not determinative either way. Thus, the title or designation by which a person is described or called is not conclusive that he is an employee: it is the duty of the court or arbitrator to determine the relationship between the parties. Thus, when required, the court or arbitrator is duty-bound to determine the true and real nature of the parties’ relationship; the court or arbitrator must not make a determination solely on the basis of how the parties have chosen to describe their relationship in their contract.<sup>87</sup> In *Dempsey v Home and Property* supra, the Labour Appeal Court accepted submission of the respondent’s counsel that little emphasis must be placed on the fact that the appellant was designated a sales manager and that the Court must make an attempt to determine the true relationship between the parties. In the words of Fannin, J in *Goldberg v Durban City Council*, ‘It is not enough for the parties to describe their contract as one whereby Dippenaar is appointed an independent contractor, for it is the duty of the court to have regard to the realities of their relationship, and not regard itself as bound by what they have chosen to call it.’<sup>88</sup>

<sup>85</sup> *Whitehead v Woolworths (Pty) Ltd* (1999) 20 ILJ 2133 (LC).

<sup>86</sup> However, see the South African case of *Wyeth SA (Pty) v Manqele and others* [2005] 6 BLLR 523 (LAC), where the South African Labour Appeal Court held that in terms of the South African Labour Relations Act 1995 (Act No. 66 of 1995) an ‘employee’ includes a person who has concluded an employment contract which will commence at a future date. It is submitted that the decision cannot apply in the Court in Namibia in the light of the correct interpretation of ‘employee’ under Namibia’s Labour Act 2007. Therefore, the principle laid down in *Whitehead v Woolworths (Pty) Ltd* supra is preferred because it is in line with the correct interpretation of ‘employee’ under the Labour Act 2007. But see s. 5(7)(a) of the Labour Act 2007, which provides that for the purposes of s. 5(8), (9) and (10) of the Act, ‘employee includes a prospective employee’. It is submitted that the special definition of ‘employee’ under s. 5(7)(a) is only applicable when dealing with sexual harassment under the Labour Act 2007. Sexual harassment is discussed in chapter 5, para. 5.5 below.

<sup>87</sup> *Denel (Pty) Ltd v Gerber* [2005] 9 BLLR 849 (LAC).

<sup>88</sup> *Goldberg v Durban City Council* 1970 (3) SA 325 (N) at 331B-C.

## 1.3 WHO IS AN EMPLOYER?

### 1.3.1 At Common Law

Who an employee (*locator operarum*) is at common law has been discussed above (see para. 1.2). By deduction, an employer (*conductor operarum*) at common law is any person – natural or legal – who has entered into a contract of employment with a natural person who has contracted to render his personal service to this other person.<sup>89</sup>

### 1.3.2 Statutory Definition

Here, too, it must be said that the two points made in respect of the statutory definition of employee (see para. 1.2 above) apply with necessary modifications to the statutory definition of ‘employer’. Section 1 of the Labour Act 2007 provides:

‘employer’ means any person, including the State who –

- (a) employs, or provides work for, an individual and who remunerates or expressly or tacitly undertakes to remunerate that individual;
- (b) permits an individual to assist that person in any manner in the carrying on or conducting that person’s business;

In terms of s. 1 of the Labour Act 2007, ‘employer’ includes a natural person, a legal person or the State. ‘State’ should be understood to mean any organ of State and agents of those organs, including parastatal organizations, regional councils,<sup>90</sup> and local authority councils and their representatives.<sup>91</sup>

The definition of ‘employer’ under English law is succinct. Section 230(4) of the Employment Rights Act, (United Kingdom) states: ‘In this Act “employer”, in relation to an employee or a worker, means the person by whom the employee or worker is (or where the employment has ceased, was) employed.’<sup>92</sup>

<sup>89</sup> See *Smit v Workmen’s Compensation Commissioner* supra.

<sup>90</sup> Councils established under the Regional Councils Act 1992 (Act No. 22 of 1992).

<sup>91</sup> Councils established under the Local Authorities Act 1992 (Act No. 23 of 1992).

<sup>92</sup> Employment Rights Act (UK) 1996 (c.18).

## 1.4 INTERPRETATION OF THE LABOUR ACT 2007

It is worth making the point that in interpreting and applying the statutory definitions under the Labour Act 2007, one must take into account the well-known canons of construction of statute, e.g. that one must have regard to the Act in question as a whole and not just to a particular section of it, and that it is also permissible to look at the object and purpose of the legislature in passing the Act. In *Nkumbula v Attorney-General of Zambia*, Baron, DCJ had this to say: ‘No provision can be read in isolation and construed in isolation: any word or phrase or provision in an enactment must be construed in its context.’<sup>93</sup> In the celebrated House of Lords case of *Attorney-General v HRH Prince Augustus of Hannover*, Viscount Simonds stated, ‘words, and particularly general words, cannot be read in isolation; their colour and content are derived from their context.’<sup>94</sup> In *Paxton v Namib Rand* supra,<sup>95</sup> O’Linn, J referred with approval to the judgement of Joubert, JA in *Adampol Pty Ltd v Administrator, Transvaal*, where it was said that:

The plain meaning of the language in a statute is the safest guide to follow in construing the statute. According to the golden or general rules of construction the words of a statute must be given their ordinary, literal and grammatical meaning and if by so doing it is ascertained that the words are clear and unambiguous, then effect should be given to their ordinary meaning unless it is apparent that such a literal construction falls within one of those exceptional cases in which it would be permissible for a court of law to depart from such a literal construction, e.g. where it leads to a manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent.<sup>96</sup>

## 1.5 APPLICATION OF THE LABOUR ACT 2007

The application section, i.e. s. 2 of the Labour Act 2007, prescribes the scope of application of the Act. The section is meant to remove uncertainties as to the scope of application of the Act, including subject matter, connected statutes, persons and bodies that are subject to the Act or any part of it.

<sup>93</sup> *Nkumbula v Attorney-General* (1972) ZR 202 (SC) at 211.

<sup>94</sup> *Attorney-General v HRH Prince Augustus of Hannover* [1957] 2All ER 45 at 53.

<sup>95</sup> *Paxton v Namib Rand* supra at 111A-D.

<sup>96</sup> *Adampol Pty Ltd v Administrator, Transvaal* (1989)(3) SA 733 (A) at 804A-G.

According to s. (2)(1) of the Act, s. 5 of the Act, which deals with prohibition of discrimination and sexual harassment in employment, applies to all employees and employers. Furthermore, according to s. 2(2) and subject to subsections (3), (4), and (5) of the Act, all other sections of the Act apply to all employers and employees, except members of the Namibian Defence Force, unless the Defence Act 2002 provides otherwise;<sup>97</sup> the Namibian Police Force and a municipal police service referred to in the Police Act 1990, unless the Police Act 1990 provides otherwise;<sup>98</sup> members of the Namibian Central Intelligence Service, unless the Namibia Central Intelligence Service Act 1997 provides otherwise;<sup>99</sup> and members of the Prison Service, unless the Prisons Service Act 1998, provides otherwise.<sup>100</sup>

In terms of s. 2(3) of the Labour Act 2007, the Minister responsible for Labour may, by notice in the *Gazette*, declare that (1) any of the laws listed in s. 2(5), namely, the Apprenticeship Ordinance 1938,<sup>101</sup> the Merchant Shipping Act 1951,<sup>102</sup> or any law on the employment of persons in the service of the State does not apply to an employee, in so far as any such statute relates to the employee's remuneration or other conditions of service and such statute is in conflict with any provision of the Labour Act 2007, or (2) that a provision of the Labour Act applies, with such modifications as the Minister may specify in the notice, to employees referred to in (1).

Lastly, according to s. 2(4) of the Labour Act 2007, where there is a conflict between a provision of the Labour Act and a provision of a law mentioned in s. 2(5) in respect of which the Minister has not made the declaration referred to in s. 2(3), the conflict must be resolved in favour of the latter provision, so long as that provision is more favourable to the employee; otherwise the conflict should be resolved in favour of the former provision in any other case.

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<sup>97</sup> Act No. 1 of 2002.

<sup>98</sup> Act No. 19 of 1990.

<sup>99</sup> Act No. 10 of 1997.

<sup>100</sup> Act No. 17 of 1998.

<sup>101</sup> Ordinance No. 12 of 1938.

<sup>102</sup> Act No. 57 of 1951.