

INDEPENDENT CONTRACTORS” POSSIBLY NO LONGER AS INDEPENDENT

An important amendment to the Basic Conditions of Employment Act, as well as the Labour Relations Act pointed out earlier in this series of articles, is the attempt to address the practice of changing the status of employees overnight to that of so-called independent contractors (i.e. non-employees) without changing the essence of the employment relationship.

A pertinent question that arises is whether a person who renders services to another, is in fact an employee or an independent contractor. There is a trend among employers, particularly in smaller businesses, to make use of contracts that strive to structure the working relationship as a relationship between a client and an independent contractor rather than between an employer and employee. In most cases, the employer’s underlying reason is the evasion of the provisions of our labour legislation, among which the right of employees to belong to trade unions and not to be unfairly dismissed, in an effort to create a simple labour dispensation. This would, so they argue, make it easier for the “employer” to terminate his relationship with the service provider.

For some service providers, it is also beneficial to structure their relationship with the institution to which they deliver services as an independent contractor’s relationship for income tax purposes and also as a way of avoiding restricting contract stipulations, such as compulsory membership of retirement/pension and medical funds.

In case law, it is evident that the six critical differences between an employment contract and a work contract (independent contractor) are the following:

1. The purpose of an employment contract is the delivery of personal services by the employee to the employer. The purpose of the work contract is the delivery of a specified end result or performance of a specified piece of work.
2. The employee must render his/her services personally to the employer according to the employer’s wishes and instructions. The independent contractor on the other hand, is not obliged to do the work him/herself, or to manufacture the end result him/herself, unless it is specifically so agreed.
3. As long as the employee is being paid when he/she tenders their services, the employer need not make use of the employee’s services. The independent contractor on the other hand normally only qualifies for payment when and if the end result/product had been delivered according to the requirements of the contract.

4. The employee must obey the lawful instructions of the employer. The latter may determine which work should be done and in which manner. The independent contractor, however, is obliged to deliver performance strictly according to the stipulations of the contract. He/she determines the manner in which work is done and is not obliged to obey any orders from the client in this regard, as long as the end result meets the contract's specifications.
5. An employment contract comes to an end upon the death of the employee. The death of the independent contractor does not necessarily terminate the work contract.
6. The employment contract is terminated upon the expiry of the term of service, while the work contract is terminated upon completion of the specified job that had to be performed, or achievement of the specified end result, as the case may be.

It is sometimes difficult to distinguish between an employment contract and a work contract, even when based on the abovementioned and it is therefore impossible to identify a single aspect as the distinguishing factor that would identify the contract as being an employment contract in each and every case. Consequently, our courts use the so-called "dominant impression" test to determine which type of contract is involved in case of a dispute in that regard. According to this test, all relevant factors are taken into consideration to determine the nature of the contract, including those mentioned above. It is then determined whether the prevailing impression is that the contract is an employment contract or a work contract. If the former, the relationship entails many very specific labour law and tax implications.

What is crucial, is that the way the contracting parties describe the contract is not the overriding consideration. Employers are consequently cautioned to be extremely careful when trying to convert employment relationships into independent contracting relationships, particularly when the persons involved are illiterate or otherwise vulnerable. Unless employers are properly advised in this regard, they may expose themselves to large tax and labour law risks.

On the other hand, persons who hold senior positions or who themselves arrange that their employment contracts are structured in order to obtain tax or other benefits are also cautioned that they will not be able to invoke the protection measures of our labour legislation if the relationship with the "employer" is terminated, as it may be regarded that they were aware of the fact that they have forfeited that protection contractually all along.

In the next article, the relevant amendments to labour legislation, the possible implications for employers and service providers of the new definition of "employee" and the practical application of the abovementioned six tests are discussed.