

Monday Contemplation No 42

Is a property practitioner an employee? Part 1

In my last few posts, we discussed some of the important nuances between the common law of agency and the law relating to real estate agency. In particular, the fact that the mandate is given by the client to the agency and not the agent. We also discussed the basic contents of the letter of employment (LOE) that is signed between the property practitioner (PP) and the agency. Please refer back to these posts.

An extremely interesting and important question that arises from the LOE, is whether or not a property practitioner is an employee? If a PP is an employee and an employment relationship exists between the employer and the employee, then there are significant duties and responsibilities that need to be complied with by both parties and there is a whole host of legislation that would be applicable, for example, the Basic Conditions of Employment Act, the Labour Relations Act, the Employment Equity Act, the Unemployment Insurance Fund Act and the list goes on.

An independent contractor is someone who provides services to someone, but they are not employed by that person or entity. An employee is someone who is employed by that person or entity.

In terms of Section 213 of the Labour Relations Act, an employee is defined as:

"employee" means-

- a. any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
- b. any other person who in any manner assists in carrying on or conducting the business of an employer,

Hence, if you are independent contractor, you are not an employee, as defined in the Labour Relations Act.

Section 200A of the Labour Relations Act creates a presumption as to who is an employee. Section 200A says:

(1) Until the contrary is proved, for the purpose of this Act, any employment law and section 98A of the Insolvency Act, 1936 (Act 24 of 1936), a person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present—

- (a) the manner in which the person works is subject to the control or direction of another person;
- (b) the person's hours of work are subject to the control or direction of another person;
- (c) in the case of a person who works for an organisation, the person forms part of that organisation;
- (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;
- (e) the person is economically dependent on the other person for whom he or she works or renders services;

- (f) the person is provided with tools of trade or work equipment by the other person;
or
- (g) the person only works for or renders services to one person.

If any of the factors mentioned above are present, then that person is presumed to be an employee. This presumption is rebuttable if the contrary is proved, for example, that the person is an independent contractor.

Section 200A does not apply where a person earns above an earnings threshold determined by the relevant Minister, in terms of the Basic Conditions of Employment Act. That threshold is currently R254 371.67.

In other words, if a person complies with any of the factors (a) to (g) above and earns under the statutory threshold (R254 371.67 at the moment), then they are presumed to be an employee and an employment relationship will then exist between the employer (**estate agency**) and the employee (**property practitioner**). As indicated, this presumption is rebuttable, which means that if it is demonstrated that the person is an independent contractor, then the labour legislation will in general, not apply. Hence, from the agency's perspective, your letter of employment (LOE) is extremely important.

Likewise, a person earning above the statutory threshold, could also be an employee or independent contractor.

Next week I will discuss some of the tests applied by the Courts when determining if someone is an employee or independent contractor.