

**SOUTH AFRICAN TOURIST GUIDES: AN ENQUIRY INTO
THEIR STATUS IN EMPLOYMENT**

By

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DECLARATION:

I hereby declare that I have read and understood the regulations governing the submission of **Masters of Philosophy (Commercial Law) by Coursework** dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Signed by candidate

P McIntyre

Dedication

To my entire family; without whose love, understanding and support, I would never have reached this milestone. May my life honour you all!

Abstract

The profession of tour guiding has always been considered a *freelance* occupation in South Africa. Due to tourism numbers having increased dramatically in the past decade; the South African Revenue Services have determined that tourist guides are employees of the tour operators they work for, for tax purposes. The Constitution entrenched the right to fair labour practices for all employees. It seems peculiar that tour guides are employees for the purposes of taxation; but not for the purposes of the Labour Relations and Basic Conditions of Employment Act's¹ respectively.

This paper examines in detail, the possibility of showing that most tourist guides are the employees of the tour operators for whom they work. A research survey covering approximately ten percent of the registered tour guides in the Western Cape region determined the extent to which an employment relationship can be said to exist. The common law concepts of control, integration and dominant impression were used to achieve an understanding of how tour guides and tour operators interact on a daily basis.

¹ Act 66 of 1995 & Act 55 of 1997 respectively.

The survey showed that a large percentage of guides are involved in relationships - with tour operators - that approximate those of common law employees. The survey identified a large degree of economic dependence; as well as problem areas with respect to the treatment received by tour guides *vis-à-vis* their working relationship with tour operators. The possible existence of temporary employment services within the sector was also uncovered.

The conclusion is that substantial parts of the tourist guide community could possibly be classified as employees of the tour operators for whom they work. It is not however a foregone conclusion. It seems that the tour guiding sector is extremely diverse, and many differing sorts of relationship and arrangements are present.

Using the common law control, integration and dominant impressions tests'; as well as S200A of the Labour Relations Act² or S83A of the Basic Conditions of Employment Act;³ it is possible for tour guides to seek redress against unfair treatment at the Commission for Conciliation, Mediation and Arbitration (CCMA); something which was previously not possible due to the '*independent contractor*' label given to the profession.

² Act 66 of 1995.

³ Act 55 of 1997.

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CHAPTER ONE: INTRODUCTION

1.1 Introduction

One of the most controversial debates within contemporary South African labour law is how to define an employee. For the past 25 years the courts have aimed to distinguish between individuals that enter into a contract *for service*, from those that enter into contracts *for work*. The central focus of this body of work involves an examination of employment status, within the context of the tour guiding industry.

The global tourism industry has grown steadily since the 1950's. It has become one of the world's largest industries; accounting for one in nine jobs worldwide⁴ with its effects having been felt in Africa, which in 1993 accounted for almost five percent of international tourist arrivals.⁵ Because of the growth in South African tourism, and the subsequent proliferation of tour operator businesses since 1994, the South African Revenue Services (SARS) looked to the tourism sector with a view to expanding fiscal coffers. It is this fact, amongst others, that has provided the impetus for this research.

⁴ Burns, P & Holden, A, (1995) *Tourism, a new perspective*. Page 3

⁵ Burns, P & Holden, A (1995) *Tourism, a new perspective*. Page 4

The South African tourism industry is made up of a multiplicity of buyers and sellers of good and services, some of which are hotels, guest-houses, restaurants and tour operating companies. Each of these suppliers relies on local providers to satisfy the needs of their foreign or domestic clients. The tour guide is one of these providers. This work concentrates solely on the tourist guide; a profession which has traditionally been considered a *freelance* occupation.

The history of *freelance* tour guiding in South Africa has given rise to various statutes⁶ which have formalised the manner in which guides are trained, registered and conduct themselves in their day to day business. The legislation has however fallen short of defining the manner in which the relationship between the tour guide, and tour operator should be structured within the employment context. This is the obvious reason for the persistence of the *freelance* label mentioned above.

The introduction of a new Labour Relations Act (LRA)⁷ in 1995, assisted workers on the fringes of the employment spectrum to gain recognition as employees and to seek redress for unfair treatment at

⁶ The Tour Guides Act 29 of 1978 (now repealed) and the Tourism Act 72 of 1993 (as amended).

⁷ Act 66 of 1995

appropriate dispute resolution bodies constituted in terms of the Act. It is with the new labour legislation in mind that this thesis asks to what extent tourist guides could be brought within the ambit of the definition of employee and also enjoy the protections afforded by that definition.

1.2 The Reality of South African Tourist Guiding

The profession of tourist guiding is seldom understood by many people. The common misconception is that tour guides merely drive foreigners to different tourist spots within South Africa and offer them small tidbits of information whilst doing so. This understanding is, in a very limited sense, only a minor part of the reality of the job of a tour guide. Being a tour guide involves far more than this. Tour guiding is an extremely specific type of work which involves a great deal of self-study about sites, regions and South Africa as a whole. A tour guide must be well-versed in a variety of discussion topics, across different interest types, and also ensure that their clients remain happy.

Along with the necessary knowledge; the tour guiding profession involves interaction on a commercial level. The tour guide sources his or her work from various providers of travel services, namely tour

operators, destination management companies, transport operators, hotel concierge companies and a host of others. It is therefore necessary to understand how the tour guide interacts with these organisations, what types of work they will do for them, and what each type of services involves. An in-depth discussion will help the reader to understand the basics of the tour guiding profession.

1.3 The law and employment status

Through the enactment of the new Constitution,⁸ the South African saw the introduction of legislation aimed specifically at the labour relations environment. The new Labour Relations Act⁹ sought not only to regulate the collective relationship between trade unions and employers, but also included important provisions aimed at job security. The Act included sections prohibiting unfair dismissals and unfair labour practices which further sought to redress the inequalities experienced in the past. The Basic Conditions of Employment Act (BCEA)¹⁰ which was introduced one year later set minimum standards of employment, and included provisions regulating issues such as

⁸ Act 108 of 1996

⁹ Act 66 of 1995

¹⁰ Act 55 of 1997

working hours, overtime, sick, annual and maternity leave, amongst others.

To benefit from the protections afforded by the new labour statutes; both Acts¹¹ required that a person fall within the definition of an '*employee*'. Both the LRA and the BCEA define the term '*employee*', however the modern economy has made the immediate application of the term rather problematic. The courts have therefore resorted to a variety of tests which assist in determining the existence of an employment relationship. The discussion which ensues in chapter 3 thus discusses the tests of control, integration and dominant impression to show the manner in which the courts have arrived at determining employment status. The dominant or overall impression of the relationship between two parties is the central theme of the chapter.

1.4 The research survey

In order to determine whether tourist guides could be considered the employees of the organisations for whom they work; it was necessary to conduct a research survey to identify whether control, integration,

¹¹ Act 66 of 1995 and Act 55 of 1997

or an overall impression of employment existed between the tour guide and tour operator. The survey asked a sample of registered tour guides about the manner in which they conducted their relationship with the tour operators, in general.

The sample of respondents were chosen at random and asked various questions in order to achieve these outcomes. The survey started by gathering general information about the respondents, so as to understand the demographic of the sample population. The survey then proceeded to ask how much the guide had worked on their last tour completed, what they had been paid for that work, how they had been booked for the tour, what (if any) tools the operator had provided them to do the work, how the operator had controlled and supervised them while on tour, and other questions aimed at establishing the nature of their relationship.

The results were organised into distinct groupings, which related to the objective of establishing whether control and supervision were present within the relationship; and whether it could be said that as an overall impression, that the relationship could be viewed as one of employment.

1.5 Application of the research survey findings

From the information gathered from the survey, indicators which demonstrated the existence of control, and supervision are discussed. By looking at the information provided by the respondents and attempting to relate it to the requirements of the dominant impressions test (DIT) as set out in the Interpretation Note to the Income Tax Act,¹² a parallel is drawn which relates the similarity between the requirements of that test, and the DIT as has been outlined in various cases heard before the Labour Court, and other forum.

The survey findings relate to whether a tour guide, using the aggregated information gathered, would be capable of triggering one of the rebuttable presumptions included in S200A of the LRA, in order to at least have an opportunity of having his or her case heard at the CCMA. The question of whether tourist guides, in general, prefer to be classified as independent contractors, or rather employees, still remains an unanswered question.

¹² Interpretation Note No 17 to the Fourth Schedule to the Income Tax Act 58 of 1962; released on 28 March 2003.

CHAPTER TWO: Tourist Guides: The South African Reality

2.1 Introduction

Tourist guides come in many classes and with differing levels of competence. They are generally known in South Africa as driver-guides, and are registered to guide in multiple regions, areas, cities or sites. A guide offers important knowledge to the tourist of the history, politics and economic circumstance of the places they visit. Without a guide, the foreign visitor is forced to read through volumes of historical and cultural recounts of the areas they wish visit.

The tourist guides' work is - for the most part - sourced from tour operators that sell packaged tours to clients abroad. It is however sometimes the case, that their work self-generated. The tour operator's principal business is to arrange accommodation; meals, sightseeing and related services for foreign and domestic tourists. Guiding services form a vital component of the services they offer to their clients. It is thus necessary to explain the interaction that takes place between the tour operator and tour guide.

This chapter will outline the various types of guides that exist, the respective services they perform. To assist in better understanding the type or work performed by tourist guide's, an explanation of each type of services is given including the fees associated with those services, the tools issued to the guide by the operator, the procedure followed when guiding services are cancelled, and the reports that guides must supply to the operator after the tour. This explanation aims to assist the reader to better understand the topics covered in the research survey discussion covered in chapter 4.

2.2 Types of tour guides

Today's tourist guides can be differentiated into those of a defined site, area or discipline, or those who are more flexible and diverse in their competencies. Today's guides act in this capacity with respect to a multiplicity of subjects and interests, and are able to traverse vast geographical regions. A tour guide is defined as one *"who conducts a tour... [with] a broad based knowledge of a particular area... [and] whose primary duty it is, to inform."*¹³

¹³ Pond, K (1983); *The Professional Guide: Dynamics of Tour Guiding*. Page 17

The worldwide tourism industry uses various names to describe tourist guides, namely *tour, local and city guides*. Each of these guides has a predefined role according to their respective areas of registration. Most nations define tourist guides according to their tourism sector needs,¹⁴ and within the parameters of the applicable legislation. In South Africa the recently amended tourism legislation¹⁵ has given rise to the development of three principal types of tourist guides, namely site guides, driver guides, and special interest guides.

Site guides are individuals who accompany groups around a specific site or area. The type of site may differ between countries. In South Africa examples of site guides are those you might find at an ostrich farm, the Cango Caves or Robben Island. Their level of knowledge is confined to the specific site and information relating to it. These guides will often undergo training at the site (normally involving guide shadowing¹⁶ and informal testing), and thereafter apply to the local tourism authority for accreditation in their field of competence.

¹⁴ For example, a country such as Luxembourg only has one class of guide; namely a city guide. These guides are trained to conduct tours within the framework of their local tourism industry; and have a possibility of ten tour types in and around the city of Luxembourg.

¹⁵ The Tour Guides Act 29 of 1978 (now repealed) and the Tourism Act 72 of 1993 (as amended).

¹⁶ Guide shadowing involves trainee guides accompanying, and learning from registered guides while they undertake tour services. It is essentially a '*learning by observation*' process.

South Africa also has local, regional, and national guides¹⁷ (often referred to as driver-guides) who drive the vehicle that is being used to transport travelers,¹⁸ and guide the group throughout its journey.¹⁹ Driver-guides need to be in possession of a valid driver's licence, and register themselves with the relevant traffic authority in order to be issued with a professional drivers permit (PrDP).²⁰ A PrDP ensures the tour operator that the guide has not previously been convicted of a vehicular related offence, and which legally permits the guide to transport passengers for financial reward.

Local guides²¹ are registered to accompany travelers in a pre-defined geographical area. The area could be as big as a city or metropolitan area; however they are not permitted to overnight

¹⁷ This obviously precludes 'Site Guides' as they are not qualified to guide outside of their particular area of registration.

¹⁸ A restriction applies according to S21H, Paragraph 4 of the Tourism Second Amendment Act of 2000, namely that a guide may not guide and drive simultaneously when using a vehicle with a carrying capacity in excess of 10 passengers.

¹⁹ This practice is however outlawed in countries such as Austria, Cyprus and Italy. The practice is however allowed in South Africa (subject to S21H, Para 4 of the Tourism Second Amendment Act of 2000) the SADC countries and the United States of America.

²⁰ In order to drive passengers for financial gain using South African public roads, driver-guides are required by law to have a public driving permit. Application for the permit is subject to a medical examination, and verification of any vehicular convictions through the South African Police Services criminal records system. The permit is generally issued at a cost of around R160.00, but may differ from province to province, and can be obtained from the Road Traffic Inspectorate applicable to the respective province.

²¹ Pond, K (1983); *The Professional Guide: Dynamics of Tour Guiding*. Page 18.

outside of this area of registration.²² An example of this type of guide would be one who is registered to guide in the greater Johannesburg, Cape Town or Durban city areas. In Cape Town, a guide registered locally (Cape Town) would be qualified to guide tours covering the Cape Peninsula, the City Centre, the West Coast as far as Citrusdal or Springbok, and the Winelands or wine producing regions. The knowledge of this guide is generally wide, and encompasses historical, political, sociological and other information relating to the respective city or region.

Regional guides are those who have a broader knowledge of more than one defined geographical area.²³ An example of this type of guide would be one who is registered to accompany groups in one or more regions, and generally remains with the clients for a number of days outside of the guide's city of residence. Tours generally depart from the so-called *corridor cities* such as Cape Town, Port Elizabeth, Johannesburg and Durban and travel into areas such as the Garden Route, Mpumalanga and the Kruger National Park. These cities are referred to as *corridor cities* because they function as starting (or termination) points for travel into outlying areas. The guide

²² Jordaan; M (2000) *Career Guide: Tourism in South Africa in the new millennium*. Page 250.

²³ Jordaan; M (2000) *Career Guide: Tourism in South Africa in the new millennium*. Page 250.

accompanying clients through these regions would need to be registered in all the areas to be visited.

National guides are registered to guide in all of South Africa's nine provinces.²⁴ This type of guide will be competent, and possess a high level of knowledge of all of South Africa's provinces. They are often also competent to guide through neighboring countries such as Lesotho, Swaziland, Botswana, Zimbabwe and Namibia. National guides usually undertake tours of long duration and are remunerated at a higher rate compared to regional guides.

Lastly, specialist guides are those who possess competencies in a specific discipline. Examples of this type of guide are industry, archeology or marine biology guides, and they are permitted to guide in all areas where their academic competence allows. Special interest guides are highly regarded in countries such as Egypt.²⁵ In the USA, this class of guide is often referred to as a *business* or *industry* guide.²⁶ In South Africa, less use is made of specialist guides; however with the growing influx of business tourism, this trend is changing.

²⁴ Jordaan; M (2000) *Career Guide: Tourism in South Africa in the new millennium*. Page 251.

²⁵ All guides in Egypt must possess degrees in Egyptology.

²⁶ Pond, K (1983); *The Professional Guide: Dynamics of Tour Guiding*. Page 25.

2.3 The basics of Tourist Guiding

As indicated in the introduction to this paper, its object is to determine the employment status of tourist guides in South Africa. In order to determine this it is necessary to establish some common features of the profession of tourist guiding. Small variations may occur based on geographical location and individual circumstance, but the description that follows will be helpful in understanding the realities of their working circumstance, and assist in understanding the basis for the research survey that follows in chapter 4.

In the following sections a discussion on how, and from whom the guides receive their bookings; and the types of services a guide can expect to provide, is illustrated. Each service entails an average number of hours; thus this is also discussed. In order to provide tour services to smaller groups, many guides have to drive vehicles which are outsourced from third party providers. In discussing this, cancellation fees, and the manner in which the guide is remunerated through this provider are important for the objective of this paper. The issue of remuneration and the resultant deductions from the guide's invoice are discussed, and the chapter concludes with a brief discussion describing tour expense reconciliation, and guide reports.

2.4 Booking & Confirmation

Tourist guides rely on tour operators²⁷ to book their services to generate their income. In order for an operator to be familiar with the experience and abilities of any individual guide, the guides must avail themselves to tour operators in their general vicinity (and often in cities further away). Tour operators act as a conduit between the needs of foreign (and sometimes domestic) clients for travel arrangements, a component of which in many instances are tour guiding services.

Once a tour operator receives a request from a client,²⁸ the operator approaches a guide, and requests them to reserve their services for the dates that the tour group will be traveling. Tour operators use various ways to book the services of a guide. They will communicate telephonically, by email, fax or by requesting the guide's services when they happen to be in the offices of the tour operator.

²⁷ Wikipedia defines the term 'tour operator' to mean: "A [company or individual] that combines component services to create a holiday for a client. The most common example of a tour operator's services would be a flight on an airline, combined with a transfer from the arrival airport to a hotel, with the services of a local representative, for an all-inclusive price. Niche tour operators may specialize in destinations e.g. South Africa and offer activities like safaris or a combination of safaris and cultural visits. The original reason for the development of the tour operating sector was the difficulty of making arrangements in foreign destinations, and to mitigate the problems of language, currency and communication that was needed in order to book services." Sourced from: http://en.wikipedia.org/wiki/Tour_operator. Last accessed on 19 November 2006.

²⁸ The term 'client' is generic, and refers to either an individual or foreign agent.

The guides are generally asked whether they have availability over the dates in question and, if the answer is in the affirmative, the operator will ask the guide to book their services for the specific dates of travel, in the area where the guide will need to fulfill the services.

Once the guide has confirmed his or her availability the operator will give the guide an indication of the services that they will be needed for. This information can come in one of three forms, namely the operator issues the guide with a finalised itinerary for the group in which it will be stipulated exactly what services the guide is to fulfill on the dates of the booking; the operator will issue the guide with an outline of the itinerary stipulating merely what is most likely to happen on the various dates of the group's travel; or the operator issues the guide only with the dates of the group's travel, and then proceeds to build the itinerary around those dates.

If the guide is only given the dates of the group's travel, and not an itinerary which includes details like times of arrival and services booked, the guide is unable to accept work from any other operator for those days due to lack of information. The reason is that the guide would not want to double book themselves and thus risk having to cancel one or both tours due to their being contracted to provide other

services on those days. This situation is problematic within the tourist guiding community, and will be discussed in greater depth later in the paper.

Another source of work for guides comes from third-party service providers within the tourism industry. Examples of these are transport operators²⁹ that contract the guide's services on behalf of a tour operator in order to fulfill a client itinerary. The evolution of this arrangement has come about because tour operators want to concentrate on their core business (i.e. selling tour packages and related services), and prefer to outsource their vehicle, and guide requirements to third parties. The effect on the tour operator's business is to negate the need for excessive capital outlay,³⁰ and the simultaneous need to provide for passenger transport insurance and related vehicle permits.³¹

²⁹ Transport operators are companies that deal with the transport aspect of the tourism industry. The transport operator, in its collaboration with the tour operator, offers the service of managing and remunerating tourist guides for the tour operator.

³⁰ The operator gets an all inclusive cost for a vehicle, the components of which are maintenance or repairs that need to be costed into the price.

³¹ The National Road Transportation Act 93 1996 requires that all transport-for-gain companies apply to their local transportation board for transport permits. The board must be satisfied that the vehicle to be used is suited to the required purpose; and is in possession of all the necessary roadworthy certificates and passenger liability insurances.

Other sources of work for guides come from a variety of organisations and can include guide broking services,³² guide associations,³³ foreign agencies,³⁴ and hotel concierge companies.³⁵ All these organisations provide their services either directly to the traveler when they are in South Africa, or through maintaining relationships with tour operators that make use of their services. In the case of foreign agencies, the tour guide is contacted by an agent, and is briefed as to the services the client may require.

2.5 Types of Services

There are various types of services that a guide can be contracted to perform. In South Africa, tourist guides are usually tasked with the fulfillment of six different types of services, namely transfers, half-day

³² Gold Reef Guides (based in Johannesburg, Gauteng) is essentially a guide broking service which assists operators in finding guides with the necessary competencies and registrations to fulfill client requirements. The company contracts the services of tourist guides, and sells such services to tour operators for a profit.

³³ Guide associations assist tourist guides by acting as facilitators or mediators between their members and tour operators. Guiding associations have been established in most of South Africa's nine provinces. The most well known guide association is the Gauteng Tour Guide Association. This Association is tasked with promoting the interests of its member guides, and has been instrumental in the formation of the National Tourist Guides Association of South Africa.

³⁴ This is a less likely source of work for guides as agencies abroad tend to prefer dealing with a tour operator. This is due to the fact that domestic tour operators are able to offer all the services that the agent may need.

³⁵ Hotel concierge companies offer tourism related services to clients of the respective hotel, where they have a presence. Hotel concierge companies outsource their guiding and vehicle services to operators in their general vicinity, for a profit.

tours, full day tours, overland tours, dinner transfers, and meet-and-greet services. These are discussed below.

A *transfer* is a service where a guide collects clients from either the airport, station or harbour port. In order to identify the clients, the operator will furnish the guide with a signboard³⁶ with the clients' names. After greeting the clients and introducing themselves, the guide will transfer the clients either by car or coach to the client's hotel or guest house. The guide will give basic information regarding the city of arrival en-route to the clients' place of accommodation. A service of this nature usually takes approximately two hours from the time of dispatch to the time of return to the offices of the operator.

A *half-day tour* is a service which lasts between four and five hours. The clients are generally fetched from their hotel or guest-house, and taken to visit sites of interest in the near vicinity. In Cape Town, a half-day tour might entail a visit to the city centre³⁷ and other sites such as Table Mountain. The guide gives the clients a detailed explanation of the sites being visited and an overview of how the sites

³⁶ Sometimes referred to as a silly-board.

³⁷ A half day Cape Town city tour can include visits to the South African Natural History Museum, the District Six Museum, the South African National Art Gallery, Koopmans De Wet House, the Town House on Greenmarket Square, Greenmarket Square, The Holocaust Museum, The Castle of Good Hope, Robben Island (time permitting) and other places of interest in and around the city's centre.

fit into to the history of the city or South Africa in general. If the clients have arrived in Johannesburg or Durban, on the other hand, a half-day tour might entail visits to places such as Soweto,³⁸ Pretoria³⁹ or the city district of Durban.⁴⁰

A full-day tour is a service that generally takes between eight and ten hours. The clients are fetched from their hotel or guest-house at around 08h30 in the morning, and remain with the guide for the entire day, returning between 17h30 and 18h30 the same evening. The guide will normally stop for lunch at a pre-booked restaurant facility sometime during the course of the day. Examples of full-day tours in Cape Town could include the Cape Peninsula Tour,⁴¹ a Cape Winelands Tour,⁴² or a visit to Hermanus⁴³ to see the whales (when in

³⁸ A half day Soweto tour can include visits to a traditional Sangoma, the Hector Peterson Memorial, the house of Nelson Mandela and a visit to a traditional shebeen (an African tavern). Lunch may or may not be included on this tour.

³⁹ A half day Pretoria city tour can include a visit to the Union Buildings, the Voortrekker Monument and the Paul Kruger House

⁴⁰ A half day Durban city tour can include visits to UShaka Marine World, the Indian Market, the old Municipal Building and other sites of historical interest in and around the city centre.

⁴¹ Includes visits to Hout Bay's Seal Island Colony, the Cape Point Nature Reserve including the Cape of Good Hope, the African Penguin colony at Boulder's Beach and Kirstenbosch National Botanical Gardens in Bishopscourt.

⁴² Includes visits to at least two wine producing farms with at least one cellar tour at one of the farms. This tour generally covers the areas of Paarl, Franschoek and Stellenbosch; however tour operators often require the guide to adhere to a specific routing.

⁴³ Includes a drive to Hermanus to view the whales when in season. This tour could include visits to the Harold Porter Botanical Gardens in Betty's Bay or the Grootbos Nature Reserve outside Hermanus. On occasions, the operator may include a visit to a wine farm en route.

season). Cities such as Johannesburg, Port Elizabeth and Durban all have various full-day tour options.

An *overland tour* is one which travels outside the town or city where the clients have arrived. When guides fulfill this sort of service, they are generally on-call twenty-four hours a day, although in reality the clients would not need the services of the guide during the night. It is however expected that the guide be constantly available to the clients, should an emergency arise. Examples of an overland service would be a Garden Route Tour,⁴⁴ a Panorama Tour⁴⁵ including the Kruger National Park or other tours which necessitate the guide sleeping outside their city of residence.

A *dinner transfer* is a service which generally takes place when a group is large (and where dining at the clients' hotel is not feasible) or where the restaurant is a fair distance from the hotel. The guide fetches the clients from their hotel at a stipulated time, and

⁴⁴ Includes departure from either Cape Town or Port Elizabeth and visits to the Tzizikamma area, Plettenberg Bay, Knysna, Oudshoorn, George and Swellendam. This tour can terminate in any city with an airport where the clients can depart for their next destination (e.g. George).

⁴⁵ This tour departs from Johannesburg and visits sites such as Bourke's Luck Pot Holes, God's Window, Pilgrim's Rest and then areas such as Nelspruit and White River. This tour is generally bought by clients wanting to visit the Kruger National Park. The guide would accompany the clients on game drives and give supplementary information concerning the various animal sightings.

accompanies them to a restaurant for dinner or lunch.⁴⁶ This service generally lasts between three and four hours, and will terminate at a place⁴⁷ where the clients no longer require the guide's assistance. The necessity of the guide's presence is to ensure quality of service and product⁴⁸, and in the case of foreign language groups, to assist in explaining the menu to the clients in their own language.

A *meet-and-greet* service⁴⁹ entails the guide meeting the clients at their port of entry (airport, station or harbour port) and assisting them with car hire arrangements, hotel location and directions, and basic information regarding places of interest in the city of arrival. The guide acts as a facilitator between domestic service suppliers (car hire companies etc.) and the operator that originated the tour package. The guide ensures that the clients are briefed with respect to the do's-and-don'ts of the area they are visiting. This service is similar in duration to that of a transfer and generally lasts approximately two hours from the time of dispatch to the time of return.

⁴⁶ Recently many popular eating establishments have been opened in various urban-informal settlements (townships) throughout the country.

⁴⁷ Clients could require the guide to drop them off at a night club or bar. The guide is not then required to remain with the clients and the clients make their own way back to the hotel or guest house.

⁴⁸ The guide acts as a liaison officer or facilitator between the needs of the group and the ability of the establishment to deliver what the clients have requested.

⁴⁹ Sometimes referred to as a meet and assist service.

2.6 Fees for Guiding Services

The services which guides provide are remunerated at varying rates. Dependant on the cost of the package sold to the clients and the budget of the clients, the guide is paid according to the services rendered and the operator's budget.⁵⁰ Guides can be booked for any service that falls within their areas of registration and competency. The services comprising the itinerary will dictate the duration and nature of the services that the guide will fulfill. In many instances a guide will be requested to start and end a tour with the clients. This would generally entail them remaining with the clients from their date of arrival until the day of their departure from South Africa.

It should be noted that due to the nature⁵¹ of tourism in South Africa, a guide cannot expect supplementary fees for work on Sundays or public holidays. This has been confirmed in a Department of Labour

⁵⁰ The operator's budget is a function of a generally acceptable fee structure for guiding services. Although generic in most cases, the market that the operator competes in is a major factor in determining how much an operator is able to pay a guide. Groups from South America, for instance, tend to be more budget constrained as opposed to groups from Euro-zone countries. The operator would therefore sell guiding services at a rate that would allow them to price-compete in the said market, and attract sufficiently experienced guides to fulfill their need for services.

⁵¹ The tourism industry operates 365 days a year. The concept of a public holiday or Sunday is not in any way observed within the sector.

research report⁵² relating to the hospitality industry and remains a controversial issue across all sub-sectors within the tourism service industry. The data collected regarding this question has been included in Appendix 3.

2.7 Vehicles and other equipment

A vital cost component of any client itinerary is the means of transport used. To make touring services cost effective the client must decide whether they are willing to travel in a small group or as part of a larger coach tour.⁵³ In the case of smaller groups⁵⁴ a driver-guide would be necessary and a vehicle would need to be provided from some source. The guide acts as both a driver and a guide,⁵⁵ whereas in the case of larger groups⁵⁶ the guide will only fulfill the role of guide as a driver will be assigned to drive the coach. In the South African tourism industry few tour operators own their own vehicles. Those who

⁵² Department of Labour (2006) Research Report: *Investigation into wages and conditions of employment in the hospitality sector*. Government Gazette No 28526 dated 24 February 2006 at page 37.

⁵³ Traveling with a number of other clients has the benefit of reaping cost economies. Therefore a large group tour would cost less than the same tour with only two or three passengers.

⁵⁴ Up to seven clients.

⁵⁵ This applies to groups of between one and seven passengers. The Tourism Second Amendment Act 70 of 2000 imposes a prohibition in Section 21H (4) whereby no tourist guide may act as both driver and guide in a vehicle with a carrying capacity in excess of 10 persons.

⁵⁶ Groups in excess of eight passengers could necessitate larger vehicles such as 15 or 22-Seater Coaches, and other larger vehicles.

do not have their own fleet tend to outsource their transport requirements to transport operators which are generally based in the corridor cities throughout South Africa.

Before the commencement of a tour, the guide would go to the offices of the operator (or transport operator) and collect the vehicle which will be used for the tour. On receipt of the vehicle the guide is required to complete a vehicle inspection form to ensure that the vehicle is handed over without any defects or damages⁵⁷ and then returned in the same manner. This is to ensure that any damage sustained to the vehicle while in the care of the guide can be identified easily and the necessary steps to recover the costs from the guide can be levied against their fees.

Should the guide damage the vehicle during the course of the services they would need to report the damage to the operator and the respective traffic authority.⁵⁸ Dependant upon the operator's conditions of rental or use (or the operators own policy regarding the use of its vehicles) the guide would be liable to pay for the costs of

⁵⁷ Should any defects be present, the guide would note them on the inspection form. This also serves as a warning mechanism for the operator that the vehicle requires attention in specified areas.

⁵⁸ In the case of an accident, a report needs to be made at the nearest local offices of the South African Police Services.

repairs to the vehicle. Guides can take out personal liability insurance to cover themselves against the risks of driving vehicles that belong to third party vehicle operators. The associated costs are always for the guide's own account.

In the case of a large group⁵⁹ the tour operator contracts the services of a company that specialises in coach services. The coach operator would provide the services of a driver in addition to the coach. In the event of damage being sustained to the coach the guide would not be responsible for any of these costs unless it could be proven that the guide was directly responsible for the damage.⁶⁰

2.8 Tour Expenses

One of the cost factors associated with travel to foreign destinations is the costs for visits to sites of interest. South Africa has a multitude of sites that could be of interest to a traveler, all of which have varying rates applicable to their entry. A client (foreign or domestic) would select which sites they would want to visit with the help of their travel agent and have these costs built into the total cost of the tour package

⁵⁹ Large group's can be between eight and 70 passengers.

⁶⁰ There have been cases where through the negligence of the guide, the coach sustained damage due to incorrect use of its accessories (i.e. microphone; seats; refrigerator facilities).

they select. This ensures that clients need not concern themselves with fluctuating exchange rates while abroad or with continuously having to have the correct foreign currency at hand when visiting sites of interest. The inclusion of entrance fees is also where tour operators increase profit margins in order to sustain their businesses.

From a guide's perspective, the costs for entry into the various sites can amount to as little as a few hundred Rands (in the case of a small tour group) or as much as R10,000 – R20,000 in the case of larger groups. In order for the guide to pay over the respective entrance fees the operator must pay these amounts over to the guide before the tour commences. Some operators deposit these funds into the guide's banking account or pay the guide in cash before the commencement of the tour. It is also common, however, to find that some operators expect the guide to advance these funds from their personal funds and, on completion of services, to claim these amounts from the operator.

The payment of tour funds to a guide presents a problem. In the case of the operator depositing these funds into the guide's banking account the guides incurs costs each time they withdraw these funds.

The bank fees incurred can be substantial⁶¹ and operators often refuse to refund these charges. In the case of guides being handed cash before the start of a tour the risk of personal attack and theft as a consequence of the often large quantities of cash kept on hand is pertinent. The issue of who bears responsibility for the cost of recovering these lost funds is uncertain. In the case of an operator that only refunds tour expenses to the guide after the completion of the tour the guide effectively becomes the financier of the business of the operator and can incur substantial costs⁶² and losses should there exist discrepancies in what should or should not have been paid over.

2.9 Cancellations (and the fees applicable)

A continuing issue in the South African tourism industry is the cancellation of client services even when they have already been booked and confirmed. This can happen for a variety of reasons and can include unaffordable pricing, perceived danger due to media-publicised events of a criminal nature, non-availability of accommodation or flights to the destination. To protect themselves against the losses associated with cancellations many tour operators

⁶¹ The average service fee for a withdrawal from a savings account can be as high as 1.5% of the funds withdrawn. On a withdrawal of R1,000; the guide incurs a cost of R15.00. This may happen many times throughout the duration of a tour.

⁶² Due to interest and service fees payments on their personal bank accounts.

require deposits before the formulation of itineraries and have a cancellation policy as a part of the standard terms and conditions of their service provision. If the client wishes to cancel their travel arrangements during the course of its organisation the client becomes subject to the standard cancellation fee structure⁶³ of the operator.

From the tourist guide's perspective a similar structure *theoretically* applies. This is however the most contentious issue in the tourist guiding sector and guides are forced to protect themselves from loss of income should booked services not be required, for whatever reason. The rationale for the incremental nature of a cancellation fee structure is that the closer the date of cancellation is to the actual date of travel, the more difficult it becomes for a guide to replace those lost days with alternative work of the same monetary value.

More often than not tour operators refuse to pay cancellation fees to guides. In many circumstances the operator will attempt to

⁶³ Cancellation policy for Taga Safaris. Found at <http://www.tagasafaris.co.za/cancellations.htm>. Last Accessed on 04/09/2006.

1. If a cancellation is made more than 8 weeks before departure then the guest loses the 20% (non-refundable) deposit; or
2. If a cancellation is made between four weeks and eight weeks, the guest loses their deposit plus 30% of the total price.
3. If a guest cancels less than four weeks prior to departure, the guest loses 100% of the amount paid.

replace the guides' lost days with work for another group. This solution is, however, rarely achieved due to differing language requirements of groups, the small work volumes that are often seen in low-season periods or because the operator had already allocated the proposed work to another guide. Should the operator cancel another already booked guide it would then become liable to similar cancellation charges in respect of the second guide. The fact is that it is virtually impossible to compensate a cancelled guide completely due to the nature of the industry.⁶⁴

2.10 Remuneration

On completion of services a guide must provide the operator with an invoice in order to be paid. The guide would give a breakdown of the services provided, the client or group name, and the dates of travel. On the invoice the guide would stipulate their daily or per-service fees and their terms of payment. Although terms of payment are generally included on the invoice the common understanding is that a guide must fit into the payment regime of the specific operator.

⁶⁴ See Appendix 1 for a diagrammatical discussion of this topic.

Generally operators pay their guides within a mutually acceptable time frame. The time frame can vary between operators, but is generally a function of when the operator is paid by their (foreign)⁶⁵ agent or individual (direct)⁶⁶ client. Once the guide invoice has been checked for accuracy⁶⁷ the operator will make arrangements to effect payment. This can happen once or twice a month or at such time as the operator deems it economical to do so.

The operator deducts amounts from the guide invoice in respect of 'Pay as You Earn' (PAYE) taxation and 'Unemployment Insurance'⁶⁸ (UIF) payments. These amounts are paid over to the relevant authorities within the legally required time frames and the guide is issued with an IRP5 at the fiscal year end to substantiate the off-setting of PAYE deductions against taxation on income owing.

⁶⁵ Tour operators cultivate relationships with foreign (outbound) agents to generate client bookings for their businesses. It is often the case that these relationships endure for substantial periods of time, as the benefits of consistency and quality of product are accrued. Accompanying this arrangement are compromises with respect to payment of accounts. Often; a domestic operator will receive payment for services rendered up to 30, or 60, day post-travel of clients.

⁶⁶ It is sometimes the case that an individual client (domestic or foreign) books directly with an operator. In this case; the client would need to pay a deposit on acceptance of their preferred itinerary; so as to mitigate losses on the part of the operator should cancellations occur, and then make final payment at an agreed date before the travel is set to commence.

⁶⁷ A guide may have a different way of calculating a set of services. If the guide does a transfer from the local airport in the early hours of the morning; and then continues later with the same clients, on a half day tour of the surrounding area, the guide may invoice for two distinct services, as opposed to only one, that being a full day service. There can be a significant price difference between the two.

⁶⁸ This is not always the case. There exist wide disparities regarding the deductions operators make from guide invoices.

2.11 Subsistence and associated allowances

Subsistence allowances are payments made to a guide in respect of fulfilling touring services for an operator. In the case of the guide having to eat out with his or her clients the operator pays the guide set allowances per meal.⁶⁹ These allowances are often viewed as a form of additional income due to the fact that guides often manage to negotiate free meals for themselves at many establishments. The allowance is most often paid to the guide along with the entrance fees, however it is not uncommon to find the guide invoicing the operator for these allowances after the completion of the tour. In general, an operator would regard this non-receiptable allowance, as non-taxable.

Other allowances such as cell-phone, laundry, and traveling allowances are sometimes paid to the guide by the operator.⁷⁰ In the case of cell-phone allowance, it is often the case that the guide must use his or her private cell-phone in order to make or confirm bookings at restaurants or warn hotels of their expected arrival times in cases where the tour has run late. The costs of these calls are then

⁶⁹ In most circumstances the guide would take the clients to a restaurant where it is known that guides eat for free. The restaurant, in order to attract this lucrative market, lures the guide by the promise that if they bring their clients to a particular establishment, the guide can have their meal for free.

⁷⁰ This could differ depending on the specific policy of the operator. Many operators give the guide a set allowance per day (i.e. R10.00 per day)

theoretically billed to the operator according to a breakdown of calls made and the justification for them. The payment of laundry allowances is not very common in the tourism industry. However, in cases where a guide is fulfilling services of a long duration,⁷¹ an allowance is due to the guide for these expenses. The payments of traveling allowances are similarly uncommon. Only in the event that guides must make their way to a tour starting point, without the benefit of use of the operator's vehicle, would they be able to claim this allowance.

2.12 Tour expense reconciliation

On completion of the services the guide must reconcile any outstanding petty cash monies – forwarded by the operator for client entrance and expense fees – with the operator.⁷² Any monies outstanding, or missing receipts are, generally claimed from the guide,

⁷¹ In some cases, the guide starts the tour in Cape Town, and will remain with the passengers until they depart from Johannesburg. Tours of this sort can be as long as 15 or 20 days, and due to space restrictions, the guide is often not able to take along sufficient clothes to not have to have laundry done during the duration of the tour.

⁷² In the instance where the guide has forwarded expense fees on behalf of the operator out of their own personal funds; the guide should be refunded these monies of the respective invoices. It does however happen that the guide will present the said receipts after the completion of the tour; and be forced to wait till their invoice is paid, in order to recover these monies from the operator. There is an obvious cost implication for the guide when this arrangement is the case.

unless some form of proof is available that demonstrates that the transaction took place.

Should the guide have lost any monies that were advanced by the operator, or been a victim of crime during the course of the tour, it is then the responsibility of the guide to fund all fees from their personal funds. It has become more common for tourist guides pay into personal insurance schemes that cover them from liability in these instances. The costs associated with these protection policies are however for the account of the individual guide.

2.13 Guide Reports

At the end of a tour guides are sometimes required to submit a detailed report of all happenings that transpired whilst on tour. This reporting mechanism ensures that the operator has documented proof of any problems that may have transpired in advance, and can give facilitate quicker resolution times for the clients. In essence, the reports act as form of pre-insurance policy for the operator, in that they are forewarned of any potential complaints that may arise after the return of the clients to their country of residence.

The report is given to the guide in a predefined format and forms part of the guide's duties for the tour. The report covers issues such as the client's satisfaction relating to hotel accommodation used during the tour, comments about restaurant service and food quality, vehicle cleanliness, and the guide's knowledge and driving habits. The guide is asked to give any additional feedback with respect to any problems that may have been encountered during the services. It is common for tour operators to compel guides to complete these reports by refusing to effect payment of their invoices until such time as one is handed in.

2.14 Conclusion

This chapter summarised the working environment of a South African tourist guide, based on the authors' own experience. In having understood the fundamentals of the industry; the reader is better equipped to understand the legal argument that follows in chapter 3, as it relates to how tourist guides could potentially be classed as employees of the tour operators or third-party providers, for whom they provide guiding services.

CHAPTER THREE: The law and employment status

3.1 The new Constitution⁷³ and labour justice

The enactment of the new Constitution ushered a move toward social justice in South Africa. The inalienable rights enshrined in the Bill of Rights⁷⁴ had a direct impact on every citizen's rights to have their life, dignity and freedom respected; and also addressed the need for labour justice. The Bill of Rights enshrined, amongst other things that:

"Everyone has the right to fair labour practices"⁷⁵ and;

"Every worker has the right to form a trade union⁷⁶; to participate in the activities and programmes of a trade union⁷⁷; and to strike⁷⁸."

Section 39(2) of the Constitution required that the interpretation of legislation and the development of the common and customary law's should always *"... promote the spirit, purport and objects of the*

⁷³ Act 108 of 1996 (as amended)

⁷⁴ Chapter 2 of Act 108 of 1996 (as amended).

⁷⁵ S23 (1) of Act 108 of 1996.

⁷⁶ S23 (2) (a) of Act 108 of 1996

⁷⁷ S23 (2) (b) of Act 108 of 1996

⁷⁸ S23 (2) (c) of Act 108 of 1996

Bill of Rights." The rights bind all organs of state;⁷⁹ natural or juristic persons,⁸⁰ to the obligations and rights that have resulted therefrom.⁸¹

The use of the term '*workers*' in the Bill of Rights limited the application of this section to those that fell within the ambit of that word. The term '*worker*' can have a wider interpretation than that which was intended by the legislature, however. It was for this reason that the Constitution made provision for the enactment of legislation to give effect to all the rights contained within it.⁸² The new Labour Relations Act⁸³ replaced the old 1956 Act⁸⁴ and formalised labour relations in within the context of a democratic and non-racial South Africa. The Act's main focus was to formalise fair and structured interaction between employers and employees.

3.2 "Employee" in conformity with the Constitution

Section 3 of the Labour Relations Act⁸⁵ provided for its interpretation, so as to give effect to its primary objects, purport and spirit of the

⁷⁹ Chapter 2, Section 8 (1) of Act 108 of 1996 (as amended)

⁸⁰ Chapter 2, Section 8 (2) of Act 108 of 1996 (as amended)

⁸¹ Basson et al (2000) *Individual Labour Law 2nd Edition*; P16.

⁸² Chapter 2, Section 23 (5) of Act 108 of 1996.

⁸³ Act 66 of 1995

⁸⁴ Act 28 of 1956 (now repealed)

⁸⁵ 66 of 1995

Constitution. The Act placed an onus on the courts to interpret it, while being mindful of the public international law obligations of the Republic of South Africa. In ***National Education Health & Allied Workers Union v UCT & others***⁸⁶ the Constitutional Court held that s3 was an express injunction to interpret the provisions of the LRA purposively.⁸⁷

That “purposive” approach to interpretation required that its provisions were to be interpreted as broadly as possible so that effect was given to the Constitution and its statutory purpose. This meant that if more than one interpretation is possible in a given circumstance, the one that gives the most effect to the Constitution should be chosen.

It has however been noted by O’ Regan J of the Constitutional Court in ***NUMSA & others v Bader Bop (Pty) Ltd and another***⁸⁸ by, that if the Act:

“... is capable of a broader interpretation that does not limit fundamental rights, that interpretation should be preferred. This is not to say that where the Legislature intends legislation to

⁸⁶ (2003) 24 *ILJ* 95 (CC).

⁸⁷ At para [41].

⁸⁸ (2003) 24 *ILJ* 305 (CC).

*limit rights, and where that legislation does so clearly and justifiably, such an interpretation may not be preferred in order to give effect to the clear intention of the democratic will of parliament.*⁸⁹

The Labour Court has similarly shown that it is sensitive to its constitutional obligations in a number of cases. In ***Building and Bargaining Council (Southern and Eastern Cape) v Melmons Cabinets CC & another***,⁹⁰ the first respondent entered into contracts with its employers in terms of which they purportedly became 'independent contractors'. The court held that this amounted to a 'cruel hoax' designed to deprive the employees of their rights.⁹¹

In ***NUCCAWU v Transnet Ltd t/a Portnet***,⁹² the court held that people forming a pool from which casual workers were regularly chosen on a rotational basis were employees for the purpose of the LRA even though they were not actually rendering service. Similarly; in ***Wyeth SA (Pty) Ltd v Manqele & others***⁹³ the Labour Appeal Court expanded the meaning of 'employee,' for the purposes of that

⁸⁹ At para [37].

⁹⁰ (2001) 3 BLLR 329 (LC)

⁹¹ At 329.

⁹² (2000) 21 ILJ 2288 (LC).

⁹³ (2005) 6 BLLR 523 (LAC).

judgment, to include a person who has concluded a contract of employment but has not yet commenced working for the employer.

The objectives and purport of the Labour Relations Act have consequently been given significant effect within South Africa's contemporary labour relations environment. Every court, tribunal or forum it has given rise to is now very active in resolving the disputes that individuals experience within the context of their employment relationship. It is the employment relationship to which we now turn.

3.3 Statutory definitions

The definition in section 1 of the BCEA, section 1 of the EEA and section 1 of the SDA are practically identical and therefore the discussion that follows can be applied equally to all of these statutes. The definition of the term '*employee*' is also, but for the express exclusion of independent contractors, similar to the definition of employee in the 1956 LRA.⁹⁴ Section 213 of the LRA defines an employee as:

⁹⁴ Labour Relations Act 28 of 1956.

- (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.*

Discerning an employee from an independent contractor has remained the most challenging issue to face the courts when dealing with this question. As commented by Zondo AJ (as he was then):

“To define the word “employee” in such a way that it is easy to make a distinction between an employee and an independent contractor... is one of the most difficult questions which courts have grappled with for decades... Indeed the complexity of this problem has led some Judges to make remarks which tend to reveal despair.”⁹⁵

Nevertheless; the first part of the definition (a) in the LRA has been held to refer to a person who works for another in terms of the

⁹⁵ In *Medical Association of SA v Minister of Health and Another* [1997] 5 BLLR 562 (LC) at 566 “

common law contract of employment or service,⁹⁶ as opposed to the common law contract of work (generally known as the contract between principal and independent contractor).⁹⁷ The definition within the LRA excludes those who do not, or who are not entitled to receive remuneration⁹⁸ for the services they render. The difference between these contracts has been articulated by the courts as follows:

*"[The] object of the contract of service is the rendering of personal services by the employee... to the employer... The services or the labour as such is the object of the contract."*⁹⁹

*"The concept of employment... requires one person to have placed his productive capacity at the disposal of another. The independent contractor, by contrast, commits himself only to deliver a product, or the end result, of that capacity."*¹⁰⁰

⁹⁶ *SA Broadcasting Corporation v McKenzie* (1999) 20 ILJ 585 (LAC), [1999] 1 BLLR 1 (LAC) at [7].

⁹⁷ *Grogan Dismissal, Discrimination and Unfair Labour Practises* (2005) Juta: Cape Town at 13.

⁹⁸ *Du Toit op cit* at 66: says that 'remuneration' has been defined to include all cash, and non-cash payments or benefits given in return for the rendering of services. These payments can include accommodation, food or the use of another's assets, in compensation for their services rendered.

⁹⁹ *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) at 61A-B.

¹⁰⁰ *Liberty Life Association of Africa Ltd v Niselow* (1996) 17 ILJ 673 (LAC) at 681D-E.

The second part of the definition (b) in the LRA is stated in such terms that a wide interpretation could bring an independent contractor within the scope of it, and other labour legislation “via the back door”.¹⁰¹ The courts have thus resorted to using the common law when applying the second part of the definition of ‘employee’ to cases brought before them. The fear was that absurdities might emerge in which those classed as professional¹⁰² people or entities that assist in their client’s businesses, could be included under the definition of employee.¹⁰³

3.4 Introduction to the applicable labour law

To understand more accurately how the term “employee” is defined under South African law, one must take into account the statutory definitions as to who qualifies to be regarded as such and the presumptions set out in the LRA¹⁰⁴ that stipulate a check-list approach to achieving this. Although numerous cases have addressed this issue in depth, one must first gain an understanding of how the courts have arrived at a meaning to the term ‘employee’.

¹⁰¹ Grogan op cit.

¹⁰² Accountants, lawyers, agents or suppliers.

¹⁰³ *Borcherds v CW Pearce & F Sheward t/a Lubrite Distributors* (1993) 14 ILJ 1262 (LAC) at 388D – E and *Nieslow v Liberty Life Association of Africa Ltd* (1998) 19 ILJ (SCA).

¹⁰⁴ Act 66 of 1995

The term 'employee' is of major importance in this piece as only those persons identified as such have recourse to the dispute-resolution provisions of the Labour Relations Act¹⁰⁵ (LRA), the Basic Conditions of Employment Act¹⁰⁶ (BCEA), the Employment Equity Act¹⁰⁷ (EEA) and the Skills Development Act¹⁰⁸ (SDA). The central focus is how the LRA uses various tests to define the word 'employee'.

According to Landman J in ***Building Bargaining Council (Southern and Eastern Cape) v Melmons Cabinets CC and Another***:¹⁰⁹

*"The law takes a special interest in persons who hire out their labour as employees. It provides them, currently, with a set of minimum terms and conditions, and provides some measure of protection regarding job security. The health and safety and employment needs are catered for by various statutes. All this protective legislation rests upon the employee being an "employee" as defined in the applicable statute."*¹¹⁰

¹⁰⁵ Act 66 of 1995

¹⁰⁶ Act 75 of 1997

¹⁰⁷ Act 55 of 1998

¹⁰⁸ Act 97 of 1998

¹⁰⁹ [2001] 3 BLLR 329 (LC).

¹¹⁰ At para [8].

A large focus of this section looks at how the term 'employee' has been interpreted by the courts, and pays special attention to the tests that those courts have used to determine a person's status as 'employee', or otherwise. Since the introduction of the new labour statutes the courts have continued to apply the common law tests, while maintaining the imperative of interpreting the definition of the term, so as to further the objectives of the Constitution.

Over time three tests have been used by the courts to determine whether a person is an 'employee' or an independent contractor. Although some have been more useful than others, the courts have identified the tests as follows:

1. The control or supervision test;
2. The organisation or integration test;
3. The dominant impression test;

The economic realities test has also recently gained status as a means of proving (or disproving) employee status. Due to externalisation and casualisation of various sectors in recent years there emerged a need to establish the degree to which an individual is

dependent upon an employer as a source of income.¹¹¹ Cheadle (2002) argues that this is more likely the interpretation that the designers of the Constitution envisaged with the inclusion of the term 'worker'.¹¹²

Since the enactment of the new Constitution,¹¹³ the courts have been bound to interpret the labour legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights. While most case law has not dealt explicitly with the constitutional impact of interpreting the word 'employee' there is a growing trend to broaden the definition in order to protect fair labour practices, as afforded in the Bill of Rights.

3.5 The Contract of Employment

The identification of a contract between two or more parties is crucial in determining the employment status. The Labour Courts¹¹⁴ have consistently taken the view that the starting point of an enquiry into whether a relationship between parties constitutes employment begins with the contract entered into between them. The employment

¹¹¹ Theron; *Employment is not what it used to be* (2003) 24 *ILJ* 1247 at 1272

¹¹² Cheadle; *South Africa constitutional law: The bill of rights*. 2002. Butterworths

¹¹³ Act 108 of 1996

¹¹⁴ Including the Labour Appeal Court in *SA Broadcasting Corporation v McKenzie* (1999) 20 *ILJ* 585 (LAC)

contract is an agreement for the letting or hiring of labour services by one party to another and as such imposes certain rights and obligations on them both.¹¹⁵

As noted by Grogan, the most important principles underlying the common law contract of employment are consensus, capacity, possibility and lawfulness. The need for consensus ensures that the contracting parties are aware of the contract's rights and obligations. The parties should have the capacity to contract in the sense that they should be of sound mind to do so. The contract must be both possible and lawful. Should the duties or obligations on either party be impracticable or unlawful, the contract would be void from the start.¹¹⁶

The agreement reached between the parties can be both verbal or written, and as cited by Cloete in *Mackay & another v Comtec Holdings*:¹¹⁷

"...In so far as the essentials [of a contract] are concerned there is no difference between express and tacit agreements ... [T]he

¹¹⁵ Basson *et al* Individual Labour Law (2000) Creda: Cape Town P22

¹¹⁶ Grogan *Workplace Law* 8th Edition (2005) accessed at: <http://products.jutalaw.co.za/nxt/gateway.dll?f=templates&fn=default.htm> at P31. Last accessed on 19 January 2007.

¹¹⁷ *Mackay & another v Comtec Holdings (Pty) Ltd* (1996) 7 BLLR 863 (IC)

*only difference lies in the method of proof, the former being proved either by evidence of the verbal declaration of the parties or the production of the written instrument embodying their agreement, the latter by inference from the conduct of the parties.*¹¹⁸

Section 29 of the BCEA provides that the typical contract of employment should contain particulars of employment, and should be provided to the employee on commencement. Grogan notes that the inclusion of the points listed in Section 29 of the BCEA amount to a contract.¹¹⁹ It is the duty of the employer to stipulate such terms as what the work will entail, the sorts of remuneration and benefits the employee can expect, how long the contract will endure, and any policies or procedure the employee will be subject to whilst the contract is in force.

In ***Liberty Life Association of Africa Ltd v Niselow***,¹²⁰ the Labour Appeal Court held that in terms of the common law tests, the nature of the legal relationship between the parties must be determined primarily by the terms of their agreement. However, the

¹¹⁸ *Ibid* at

¹¹⁹ Grogan *Workplace Law* 8th Edition (2005) at P34

¹²⁰ *Op cit* at 683D-E.

parties' own perception of their relationship and the manner in which the contract is carried out in practice may sometimes assist in determining the relationship.¹²¹ The Labour Appeal Court reiterated this in *SABC v McKenzie*,¹²² and said that the label the parties have chosen is of less use, as compared with the reality of the relationship.

3.6 The common law "tests"

A contract of employment can be devised in such a way so as to misrepresent the true reality of the relationship between the parties. The courts have therefore been forced to devise tests to assist in distinguishing between employees and contractors where the contract is of little help in achieving this goal.

The worldwide reality of micro and macro-economic trade liberalisation has given rise to a multitude of non-standard forms of employment. The increased use of outsourcing and casualisation continues to be used as a prominent tool at the disposal of entrepreneurs to stay ahead of their competition.¹²³ Many factors thus

¹²¹ *Borcherds v CW Pearce & J Sheward t/a Lublite Distributors* (1993) 12 ILJ 1262 (LAC) at 1277H-I.

¹²² At para [10].

¹²³ Theron; *Employment is not what it used to be* (2003) 24 ILJ 1247 at 1248

need to be considered before one can accurately identify an individual as an employee or as an independent contractor.

The distinction between a traditional employee and an independent contractor is theoretically not difficult to discern. A typical employee works full-time for a single employer on a permanent basis. Because of the exclusivity of their relationship, the employee is required to dedicate their entire productive capacity to their work for the employer. The employee receives (or is at least entitled to receive) remuneration in return for the services they render. The employment arrangement can persist even in the event of the employer failing to provide the employee with work¹²⁴ and, also need not terminate in the event of the employer's death.¹²⁵ The employee is provided with the tools to perform their work function, and is required to adhere to the rules and policies made by the employer.

The preceding description of an employee is contrasted with that of an independent contractor. Take the example of a plumber who comes into a residential home and performs plumbing services for the home-owner. The plumber is not bound to make his productive

¹²⁴ The employee is not responsible for the losses made by the employer if markets bust, but similarly, does not share in the profits when markets boom.

¹²⁵ If the employer is a sole trader; it is assumed that short of business transfer, the business will cease to operate when its proprietor passes away.

capacity over to the home-owner, or at least, is not required to do so unless contracted to do so in a specific instance. The plumber is permitted to delegate the job to a staff member should they be busy with other work at the time. The plumber provides his or her own tools of trade and bears the entire risk should the work be of a poor quality. The plumber is paid in return for the completion of a specific job. Although the home-owner has the right to dictate what work is done the plumber is not controlled or supervised during the course of his work.

Although the example given above is an over-simplified one, in reality, South Africa's economy is still characterised by a large proportion of individuals who are in typical forms of employment. A growing trend is the tendency to use atypical workers, thus the courts have developed tests to distinguish the typical from atypical relationships. No one test is conclusive, and the courts have progressively looked for an overall or dominant impression as to the reality of the relationship between the parties.

3.6.1 'Control' and 'Supervision' Test

Of the tests that have been used when discerning between an employee and independent contractor, the so-called 'control' or 'supervision' test, is the oldest. The 'control' test has as its premise the idea that an employee is subordinate to his or her employer and that the element defining the employment contract is not only the employer's right to prescribe what work is to be done by the individual but also the manner in which that individual performs their work.¹²⁶ In the case where the individual is subject to the control of an employer, the employer has the right to dictate when, where and how the employee is to carry out the assigned tasks. It is theoretically not necessary for the employee to show initiative. He or she need only obey the employers' instruction.

The control test has been used in many cases to differentiate between an employee and independent contractor. In ***Liberty Life Association of Africa Ltd v Niselow***,¹²⁷ Nugent, J said that the control test was a prominent tool in defining employee status. While citing *Brassey*; the learned judge said that:

¹²⁶ *Colonial Mutual Life Association v MacDonald* 1931 AD 412 at 426.

¹²⁷ *Supra*

" [The tests'] prominence has been ascribed to policy considerations underlying the concept of vicarious liability more than to its true role in the employment relationship".¹²⁸

That notwithstanding, Nugent J went further to quote Schreiner JA, and mention that:

" [I]f the employer can control, or at least has the right to control the detailed manner of [a]other person's work, it is not ... unreasonable to hold the employer liable. But if the right of detailed control is crucial in deciding whether a person is a common law servant for the purposes of law... there seems to be no reason... why it should not be crucial in deciding whether a person is or is not an employee..."¹²⁹

According to Grogan,¹³⁰ the courts have historically taken a strict view in the application of this test and have on various occasions spoken of the right to control: *" not only the end to be achieved by the other's labour, and the general lines to be followed, but the detailed*

¹²⁸ Op Cit 19 at 832D

¹²⁹ *Liberty Life Association of Africa Ltd v Niselow* (1996) 7 BLLR 825 (LAC) at 832D

¹³⁰ Grogan *Workplace Law* (2005)

<http://products.jutalaw.co.za/nxt/gateway.dll?f=templates&fn=default.htm>. Last accessed on 21 January 2007.

*manner in which the work is to be performed".*¹³¹ Grogan qualifies this by saying that the strict approach taken probably meant that the right to control was one *of principle*, and that the employer need not actually exercise that right in order for a contract to qualify as one of employment. The control test is, however, not an absolute indicator of an employee-employer relationship. As mentioned previously, modern labour markets have given rise to the emergence of varying levels of semi and highly-skilled employees with significant decision-making powers.

In criticizing the test, Grogan notes that the test requires demonstration of the degree of control exercised by the employer over their employees. It has been noted that this varies from case to case.¹³² The employer may realistically have very little control over the manner in which the employee carries out their tasks especially when the individual bears a fair amount of responsibility for the attainment of certain outcomes. As commented by the court in *Colonial Mutual Life Assurance Society Limited v Macdonald*:¹³³

¹³¹ Grogan *Workplace Law* (2005) at P19

¹³² Op Cit at 16.

¹³³ *Colonial Mutual Life Association v MacDonald* 1931 AD 412.

*"... [B]eyond dispute ... 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 workplace what work has to be done, but also the manner in which such work has to be done"*¹³⁴

The court went further to clarify the difference between employee and independent contractor as follows:

*"'Line workers', for example, can be and usually are subject to fixed rules regarding when, where and how they perform their duties. Managerial employees and 'lone operators' like sales persons usually enjoy more freedom in deciding when, where and how they will work. Conversely, the principal in independent contractor relationships may rigorously control the manner in which contractors perform their work. Control alone cannot therefore determine the existence or otherwise of an employment relationship."*¹³⁵

¹³⁴ *Colonial Mutual Life Association v MacDonald* 1931 AD 412 at 434 - 435.

¹³⁵ *Colonial Mutual Life Association v MacDonald* 1931 AD 412 at 436

The question of the 'degree of control' continues to make the use of this test problematic. Grogan, however, reiterates that the essential difference between an employment relationship and that of principal and contractor, is that in the latter the principal does not possess a legal right to dictate the manner in which the contractor must bring about the desired result.¹³⁶

3.6.2 The 'Organisation' or 'Integration' Test

Another test used by the courts to distinguish between employees and independent contractors is the 'organisation' or 'integration' test. The test was first developed under the French system of law and has been used by the South African courts to assist in drawing the distinction. Due to the inadequacy of the 'control' and 'supervision' test the courts began to enquire whether the person concerned worked as 'part and parcel' of the business and not merely as an accessory to it.¹³⁷

The concept which the test seeks to clarify is whether the individual is a part of the employer's organisation. The courts have taken into account the fact that employment in the contemporary corporate environment has been de-personalised and that modern

¹³⁶ Grogan *Workplace Law* (2005) at P19

¹³⁷ Basson *et al* *Essential Labour Law* (2000) Creda: Cape Town at 27.

employees are seen as corporate entities.¹³⁸ The courts subsequently rejected the test as vague and nebulous as stated by the Appellate Division in *Smit v Workmen's Compensation Commissioner*.¹³⁹ The court commented that the test helped little with establishing the legal nature of the relationship between the parties.

The demise of the test can be ascribed to many factors, not least of which was the fact that it left more questions than answers. As noted in the English courts by MacKenna J in *Ready Mixed Concrete (South East) v Minister of Pensions and National Insurance*:¹⁴⁰

*"This [test] raises more questions than I know ... to answer. What is meant by being "part and parcel of an organization"? Are all persons who answer these descriptions, servants? If only some are servants, what distinguishes them from the others if it is not their submission to orders?"*¹⁴¹

The rejections by the court in *Smit* and *Ready Mixed Concrete* aside, the test could still be useful in enquiring whether an individual is

¹³⁸ Grogan, *ibid.*

¹³⁹ *Supra.*

¹⁴⁰ *Ready Mixed Concrete (South East) v Minister of Pensions and National Insurance* (1968) 2 QB 497

¹⁴¹ At 524B-C

related to the organisation of the employer, i.e. they are subject to the policies, practices and procedures that the employer dictates. Whether or not these policies, practices and procedures are enforced are of little consequence, but whether or not the individual is subject to these policies is helpful in determining that person's status. It however continues to remain difficult to measure the degree to which an individual is integrated into an organisation.

3.6.3 The dominant impression test

The courts became disillusioned with the 'control' and 'organisation' tests as the *sine qua non* of showing that master-servant relationships existed in practice. In various judgments the courts said that the tests often failed to answer the questions they imposed, satisfactorily¹⁴². Brassey¹⁴³ refers to Kahn-Freunds' comments about the inadequacy of tests and their tendency to collapse in marginal cases. Where hints of employee-employer relationships exist, coupled with signs of independence, the tests helped little to distinguish whether one arrangement or another was in fact the reality.

¹⁴² See Brassey's comments in 'The Nature of Employment' (1990) 11 ILJ 889 regarding *Simmons v Heath Laundry Co* (1910) 1 KB 543; *Cassidy v Ministry of Health* (1951) 2 KB 343 and *R v AMCA Services* (1959) 4 SA 207 (A).

¹⁴³ Brassey; 'The Nature of Employment' (1990) 11 ILJ 889 at 919

In place of the control and organisation tests the courts adopted a third test known as the 'dominant impression' test (DIT). The very nature of the test was to solicit information pragmatically which related to the relationship as a whole. The very nature of the test is rooted in the fact that no single factor indicates an employment contract decisively, but that the court should evaluate all aspects of the reality of the relationship and arrive at a decision based on the overall impression formed.

It was in *Smit*¹⁴⁴ that the Appellate Division first identified certain factors as being the most important legal characteristics contrasting the contract of service (employee) from the contract of work (independent contractor). The court *a quo* said that there was significant overlap between the criteria used in terms of both the control and organisation tests and the DIT. The DIT uses the concepts of control and supervision as contributing factors in discerning the reality of a relationship between two parties. The DIT also asks other questions, all of which are aimed at establishing the true reality of the relationship.

¹⁴⁴ Supra at 61A-H.

The DIT uses various criteria (as tabulated below) to show various factors which contribute to the determination of either employee or independent contractor status. The factors were updated and repeated in *SA Broadcasting Corporation v McKenzie*¹⁴⁵ and are tabulated below:

DIT Grid¹⁴⁶	
<i>Employee</i>	<i>Independent Contractor</i>
Object is the rendering of personal services between employer and employee	Object is the production of a certain specified service or the production of a certain specified result
Employee renders service at the behest of employer	Independent contractor is not obliged to perform work personally unless otherwise agreed
Employer may decide whether it wishes to have employee render service	Independent contractor is bound to perform specified work or produce specified result within a specified or reasonable time
Employee obliged to obey lawful instructions regarding work to be done and manner in which it is to be done	Independent contractor is not obliged to obey instructions regarding manner in which task is to be performed
Terminated by the death of the employee	Not terminated by the death of the contractor
Terminates on completion of the agreed period	Terminates on completion of the specified work or production of the specified result

As tabulated above, the nature of an employment contract is that the employee renders their personal services to the employer.

¹⁴⁵ Op cit at 590F-591D.

¹⁴⁶ Summarised from the judgment arrived at in *SA Broadcasting Corporation v McKenzie* (1999) 20 ILJ 585 (LAC) at 590-591.

The employee is not empowered to outsource their own function to a third party. The independent contractor by contrast is only required to perform certain specified work or to produce a specified result; and is permitted to have others achieve the result for them. An employment relationship generally requires the employee to be at the 'beck and call' of the employer and the employee must perform the services personally. The independent contractor on the other hand may usually perform through others.

The employer in a contract of service may choose when to make use of the services of their employee. Should there be no way of making use of those services; the employer is still bound to remunerate the employee. The independent contractor is bound to perform a certain specified work, or produce a certain result within a time fixed by the contract of work, or within a reasonable time where no time has been specified and is not paid unless work is actually done.

The employee usually performs his or her services under the supervision and control of the employer and he or she is obliged to obey the lawful commands, orders or instructions of the employer. The independent contractor, however, is notionally on a footing of equality

with the employer. He or she is subservient only to the contract. The so-called master-servant relationship which is present under a contract for services (employee) is vastly altered under situations where a contract for work (principal-independent contractor) is present.

A contract of service is terminated by that death of an employee whereas the death of the parties to a contract for work, does not necessarily terminate it. A contract of service can, under some circumstances, terminate on the expiration of the period of time. The fixed-term contract is entered into in order to satisfy the completion of a specific task, or range of tasks, after which the contract naturally expires. A contract of work can also terminate on completion of the specified result; however the difference is that the contract of work can endure intermittently, whereas the contract for services is generally of a full-time nature.

In *Liberty Life Association of Africa Ltd v Niselow*,¹⁴⁷ the Labour Appeal Court held that in terms of the DIT, the nature of the legal relationship between the parties must be determined primarily by the terms of their agreement. However, the parties' own perception of their relationship and the manner in which the contract is carried out

¹⁴⁷ Op cit at 683D-E.

in practice may sometimes assist in determining the relationship.¹⁴⁸ As the Labour Appeal Court held in **SABC v McKenzie**,¹⁴⁹

“In seeking to discover the true relationship between the parties, the court must have regard to the realities of the relationship and not regard itself bound by what they have chosen to call it.”

In **LAD Brokers (Pty) Ltd v Mandla**¹⁵⁰ the Labour Appeal Court went further to state that although the starting point for the determination of the legal relationship is the contract, it is the duty of the court *“to have regard to the realities of the relationships and not regard [itself] bound by the label chosen by the parties.”*¹⁵¹ The courts have subsequently applied the DIT in many cases and there seems to be consensus that it is the test that should be used to determine whether someone is an employee, or not.¹⁵²

¹⁴⁸ *Borcherds v CW Pearce & J Sheward t/a Lublite Distributors* (1993) 12 ILJ 1262 (LAC) at 1277H-I.

¹⁴⁹ At para [10].

¹⁵⁰ (2001) 9 BLLR 993 (LAC).

¹⁵¹ At [18].

¹⁵² See, amongst others, *Apsey v Babcock Engineering Contractors (Pty) Ltd* (1995) 5 BLLR 17 (IC); *Building Bargaining Council (Southern & Eastern Cape) v Melmons Cabinets CC and Another* supra; *Caitlin v CCMA and Others* (2004) 8 BLLR 748 (LC); *De Greeve v Old Mutual Employee Benefits/Life Assurance Co (SA) Ltd* (2004) 2 BALR 184 (CCMA); *Democratic Nursing Organisation of SA & others v Somerset West Society for the Aged* (2001) 22 IJL 919 (LC); *Erasmus v Saambou Versekeringsmakelaars (Edms) Bpk & 'n ander* (1995) 2 BLLR 57 (IC); *Hansen v Martin Hansen Estates* (1996) 7 BLLR 993 (IC); *LAD Brokers Pty (Ltd) v Mandla* (2001) 9 BLLR 993 (LAC); *Medical Association of SA and others v Minister of Health*

Given the atypical work arrangements that have emerged as a consequence of a globalised and thus highly competitive business environment, the courts have been more persuaded by the DIT as opposed to reliance on one or more factors that the parties to choose to identify. In accordance with the 'holistic' nature of the DIT, different weightings have been attached to various aspects of the relationship.¹⁵³

In ***Borcherds v C W Pearce & J Sheward t/a Lublite Distributors***¹⁵⁴ the purpose of the relationship (i.e. whether it was aimed at the rendering of personal services or the production of a result) was regarded as the dominant factor. In ***Board of Executors Ltd v McCafferty***,¹⁵⁵ the power to dismiss was regarded as decisive. Many cases which have purported to apply the DIT have focused on the element of control or supervision.¹⁵⁶ Nugent J remarked in ***Liberty Life Association v Niselow*** that:

and Another (1997) 5 BLLR 526 (LC); *Nkonkobe v Grey Revenue Protection* (2000) 11 BALR 1253 (CCMA);

¹⁵³ Grogan, at 14-15.

¹⁵⁴ Supra.

¹⁵⁵ (1997) 18 ILJ 949 (LAC).

¹⁵⁶ See, amongst others, *Caetano v Carosel Dance and Dine* [1999] 4 BALR 397 (CCMA); *Opperman v Research Surveys (Pty) Ltd* [1997] 6 BLLR 807 (CCMA); *SADTU v Ebrahim's Taxis* [1998] 11 BALR 1480 (CCMA).

*"[While] I think I am bound to conclude that control is not essential, in my view it is at least of such 'prime importance'... that its absence should cast serious doubt upon whether the relationship is one of employment."*¹⁵⁷

It was similarly found in ***Dempsey v Home and Property***¹⁵⁸

that:

*"... [the] right of supervision and control over the employee remains an important indicium of a contract of service and the greater the degree of supervision and control, the stronger the likelihood that the contract is one of service and the contrary obviously also applies."*¹⁵⁹

Through applying an approach of determining a dominant impression, the courts have classified managing directors,¹⁶⁰ freelance writers,¹⁶¹ and sole members of close corporations who hire out their labour through the CC,¹⁶² as employees. Insurance salesmen, sales

¹⁵⁷ Op cit at 682G-H.

¹⁵⁸ (1995) 3 BLLR 10 (LAC)

¹⁵⁹ At 13.

¹⁶⁰ *Oak Industries (SA) (Pty) Ltd v John NO and another* (1987) 8 ILJ 756 (N).

¹⁶¹ *Tuck v SA Broadcasting Corporation* (1985) 6 ILJ 570 (IC).

¹⁶² *CMS Support Services (Pty) Ltd v Briggs* 19 ILJ 271 (LAC); *Denel v Gerber* [2005] 9 BLLR 849 (LAC).

agents,¹⁶³ consultants¹⁶⁴ and market research field workers¹⁶⁵ have been held to be independent contractors.

3.7 Criticisms of the DIT.

The DIT has been severely criticised almost since judgment was delivered in **Smit**. In a 1980 article written by Etienne Mureinik, the author commented that the dominant impression test fails to provide any guidance as to the legal nature of the contract of employment and fails to assist in cases on the penumbra between employment and self-employment.¹⁶⁶ About a decade later Brassey wrote that the DIT:

“...falls into the intuitive camp and suffers from all the weakness of that approach. As one commentator has remarked, to say that an employment contract is a contract that looks like one, tells us nothing about the legal nature of the contract... No doubt there is some value in spelling out that the impression which counts is the dominant one – though... one would hardly give effect to an impression that was subordinate. But beyond that the test is

¹⁶³ *Liberty Life Association of Africa Ltd v Niselow* [1996] 7 BLLR 825 (IC), confirmed on appeal *Niselow v Liberty Life Association of SA Ltd* (1996) ILJ 673 (LAC).

¹⁶⁴ *FPS Ltd v Trident Construction (Pty) Ltd* 1989 (3) SA 357 (A).

¹⁶⁵ *Opperman v Research Surveys (Pty) Ltd* [1997] 6 BLLR 807 (CCMA).

¹⁶⁶ E Mureinik ‘The Contract of Service: An Easy Test for Hard Cases’ (1980) 97 SALJ 246 at 258.

*unhelpful; indeed, it is no test at all, but merely a shorthand way of saying that the decision must not be taken without considering all the relevant factors.*¹⁶⁷

In ***Medical Association of South Africa & others v Minister of Health & another*** Zondo AJ noted that the DIT is unsatisfactory due to the uncertainty it creates.

*"... [The DIT] is still unsatisfactory but, it seems to me that, it is as unsatisfactory as is the question of how one decides whether a dismissal is fair or unfair and indeed, whether certain conduct is reasonable or unreasonable. In all these situations until a court has made a ruling whether a dismissal is fair or unfair or whether certain conduct is reasonable or unreasonable, there will be a lot of uncertainty and the court will make such a ruling upon consideration of all the matters relevant to such an enquiry."*¹⁶⁸

Zondo AJ also noted that the final two distinguishing factors identified in ***Smit*** are of little value in distinguishing employment from

¹⁶⁷ M Brassey 'The Contract of Employment' (1990) 11 *ILJ* 889 at 919-920.

¹⁶⁸ At 569.

self-employment.¹⁶⁹ Such criticism profoundly undermines the DIT, and while certain critiques have been noted in judgments such as *McKenzie*,¹⁷⁰ there has not as yet been a judicial response to these criticisms.

Another challenge faces courts when determining who qualifies an employee in that; on the whole the entire employment sector has been transformed gradually in recent years as employers have sought to reduce their employment commitments. Du Toit *et al* notes that permanent, full-time and regular employment has increasingly given way to new varieties of employment, usually referred to as 'atypical employment'. Flexi-time, home-based, temporary and part-time employment, are "*becoming ever more 'typical' as employers try to 'manage time, space, and people more effectively within the complex fluctuations of a global economy'.*"¹⁷¹

Some contracts may be worded specifically to exclude the relationship of employment when in reality this relationship exists. In *CMS Support Services (Pty) Ltd v Briggs*¹⁷² the LAC held that

¹⁶⁹ At 573-574.

¹⁷⁰ At 5.

¹⁷¹ D Woolfrey in Du Toit et al *Labour Relations: A Comprehensive Guide* (2006) LexisNexis Butterworths: Durban at 77.

¹⁷² (1998) 19 *ILJ* 271 (LAC).

Briggs, who had registered a close corporation of which she was the sole member for the purpose of ensuring that she paid less income tax, and later claimed she was an employee, was in fact an independent contractor. In handing down the judgment; Myburgh JP cited the remarks of Bulbulia in *Callanan v Tee-Kee Borehole Casings (Pty) Ltd and another*¹⁷³ as saying that:

*"... [He] cannot have his proverbial cake and eat it. He cannot say that he was not the respondent's employee as a machinist for purposes of taxation (or for wishing to avoid the pension scheme of the industrial council), but simultaneously be regarded as an employee for the purpose of the Labour Relations Act."*¹⁷⁴

The conclusion in *Briggs*¹⁷⁵ was arrived at based on the fact that she had elected not to be an employee because she wanted certain benefits and advantages that went with being an independent contractor. She could thus not claim to be an employee for the purposes of seeking protection under the relevant sections of the LRA,

¹⁷³ (1992) 13 *ILJ* 1544 (IC) at 1550 D–E

¹⁷⁴ (1997) 5 *BLLR* 533 (LAC) at 540 B

¹⁷⁵ *Supra*.

when she was claiming to be the opposite in terms of her fiscal responsibilities.

In *Denel (Pty) Ltd v Gerber*¹⁷⁶ this approach was rejected by the Labour Appeal Court and a new kind of test was introduced; namely the 'economic realities' test. The court held that judgment handed down in *Briggs* placed undue emphasis upon the election made by the employee and lost sight that the enquiry was whether it could be objectively established whether the person was an employee. The answer to that question could not be dictated almost solely by the election or choice made by the person. This meant that it was not the label the parties attached to the relationship, but the *reality* of the relationship that was decisive. In the words of Zondo JP

*"In my judgment that approach, which for convenience, I call the reality approach, takes account of all relevant factors as well as the public interest and ensures that parties have no licence to take themselves out of the scope of such important legislation as the LRA and the BCEA."*¹⁷⁷

¹⁷⁶ (2005) 26 ILJ 1256 (LAC).

¹⁷⁷ At para [96].

Consequently, Zondo JP pointed out that the labels the parties had chosen to give one another, or the contracts used to divorce their respective selves from their legal responsibilities, were of no use in defining the true reality of their relationship.¹⁷⁸ He found that what was of more importance was the degree to which the *employee* was economically dependent upon the *employer* for their living.

3.8 Statutory presumption of employment

To assist in identifying the various classes of employees within the scope of the protection afforded by labour statutes, the legislature amended the LRA¹⁷⁹ and BCEA¹⁸⁰ to include statutory 'presumptions of employment'. The presumptions are rebuttable, thus, if triggered, the burden of disproving employment shifts to the employer. An individual alleging unfair treatment must first satisfy the adjudicating body that they fall within scope of the definition of employee by using the presumptions set out in s200A and 83A of the LRA and BCEA respectively.

In terms of these sections:

¹⁷⁸ *Denel (Pty) Ltd v Gerber* (2005) 26 ILJ 1256 (LAC).

¹⁷⁹ S200A of Act 66 of 1995.

¹⁸⁰ S83A of Act 55 of 1997.

"A person who renders service to another is presumed, regardless of the form of the contract, to be an employee if 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 direction or control 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 previous three months;*
- (e) the person is economically dependent on the 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;*

- (g) *the person only works for or renders services to one person.*¹⁸¹

The presumptions include elements of the control, organisation and the DIT respectively, and introduce a new test to identify the economic reality of the relationship. The economic realities test focuses on the underlying economic relationship between the parties. Whether or not the *alleged* employee is economically dependent on the *would-be* employer is important in determining the true reality of the relationship. In today's modern commercial environment, the test asks the question as to who profits from the work done by the services performed.¹⁸²

In approaching the presumption a two-stage process is required. First, the person alleging an employment relationship must prove the existence of one or more of the listed factors to trigger the presumption. He or she is regarded as an employee "regardless of the form of the contract". The other party (the purported employer or

¹⁸¹ S200A of Act 66 of 1995.

¹⁸² Grogan *Workplace Law* (2005) at P23

employee) must then try to rebut the presumption on a balance of probabilities. Thus the common law tests for determining a contract will continue to apply in some form.

The Act sets out the presumptions, but expressly excludes¹⁸³ persons earning more than amounts to be determined by the Minister from time to time (currently R115 572, 00).¹⁸⁴ This results in a curious situation as the status of an employee is not normally lost when a person reaches a particular salary level. The presumption seems to be an attempt to cure the instances in which poor, uneducated, and mostly legally ignorant workers are manipulated into contracting themselves out of a contract of employment to the ultimate benefit of the employer.¹⁸⁵ However, it would be anomalous for a court to apply two different sets of criteria to two seemingly arbitrary groups of people.¹⁸⁶

The approach used by the Labour Appeal Court in *Denel (Pty) Ltd v Gerber*¹⁸⁷ may be helpful in making use of the factors listed in the presumption effectively. In this case, the dispute arose prior to the

¹⁸³ S200A (2) of Act 66 of 1995.

¹⁸⁴ GN 356 dated 14 March 2003.

¹⁸⁵ As occurred in *Building Bargaining Council (Southern & Eastern Cape) v Melmons Cabinets CC and Another*, supra.

¹⁸⁶ The level, as opposed to the method of payment, of earnings is quite irrelevant to the common law test for whether a person is an employee.

¹⁸⁷ Supra.

enactment of the presumption in s83 of the BCEA, however, the Court still made reference to this section as a 'guide'¹⁸⁸ in order to arrive at the reality of the arrangement. The appellant had entered into a preferred-supplier agreement with the respondent, under which the respondent was to provide services, through a propriety company called Ultimate Care (Pty) Ltd, exclusively to the appellant.

The approach the court took, of using the presumptions¹⁸⁹ to guide the analysis of whether a relationship was one between employer and employee, and deemed that even where there was an agreement between one legal entity such as a company and another legal entity, the person who owns the company may be an employee of the other entity. This approach has been followed subsequently in a number of cases before the Commission for Conciliation, Mediation and Arbitration (CCMA).¹⁹⁰

¹⁸⁸ At paragraph 99.

¹⁸⁹ The court considered the contract in detail, and drew significant parallels between its wording; and the fact that the realities of the arrangement would have triggered a rebuttable presumption in terms of Section 83A of the Basic Conditions of Employment Act 75 of 1997.

¹⁹⁰ Amongst others: *Rodgers and Assist-U-Drive* (2006) 27 ILJ 847 (CCMA); *Taljaard and Basil Real Estate* (2006) 27 ILJ 861 (CCMA); *Palmer and AA Speedy Locksmith* (2005) 26 ILJ 2462 (CCMA); *Van Zyl & Others and WCPA (Department of Transport & Public Works)* (2004) 25 ILJ 2066 (CCMA) and *Schoeman and Longgrain CC* (2006) 27 ILJ 2496 (CCMA).

The statutory presumptions are particularly helpful given the approach taken in cases like *Taljaard*¹⁹¹ and *Palmer*.¹⁹² The cases demonstrate the ease with which mistreated individuals can approach the CCMA for assistance. Similarly, *Denel v Gerber*¹⁹³ was equally insightful in that the case gave greater guidance as to the question of whether the legislature would have contemplated a particular relationship being covered by the definition of employee. The court held that it mattered less what the parties had decided to call the relationship, and more that the substance or reality of the relationship was that of employment. The legislature's intention thus becomes 'more pressing'¹⁹⁴ under the current labour legislation which must protect and give effect to the constitutional provisions relating to labour rights.

3.9 Conclusion

Individuals who believe that they are the employees of another - and who can demonstrate that they fall within the scope of S200A of the LRA - are better off using this section to prove their status. Should

¹⁹¹ *Taljaard and Basil Real Estate* (2006) 27 ILJ 861 (CCMA).

¹⁹² *Palmer and AA Speedy Locksmith* (2005) 26 ILJ 2462 (CCMA)

¹⁹³ Supra.

¹⁹⁴ Grogan at 17.

any one of the factors in S200A¹⁹⁵ be present in their working relationship (and with the proviso that the individual earns below the stipulated amount of remuneration) the onus of disproving an employment relationship rests with the alleged employer. Should the evidence suggest an employment relationship, the *now* employee is afforded the protections under the relevant labour statutes.

If the alleged employee fails to trigger the rebuttable presumptions, and fails to show that a contract for service exists, the onus then falls on the alleged employee to prove on a balance of probabilities that they are, in fact, one. A labour court or tribunal faced with determining whether or not someone is an employee for the purposes of the LRA or BCEA will then, *in all probability*, still apply the dominant impressions test to arrive at a conclusive finding.

Notwithstanding this the courts' first resort will be to look at the contract which governs the relationship and attempt to discern the relevant facts from it. The courts have stated in numerous cases, that they are mindful of the reality of the relationship and consequently feel less bound by the wording of the contract than by this reality. The court should then, using the factors listed in *Smit* and *McKenzie*, as

¹⁹⁵ Of Act 66 of 1995.

well as those elucidated in the presumptions in s200A, decide whether the dominant impression it gains from the construction of the relationship between two persons is one of a contract of *service* or a contract of *work*.

Having discussed the Constitution, the subsequent legislation it gave rise to, and common law tests used to demonstrate an employment relationship, we now turn to the research survey which was conducted as a means to expose the realities of the relationship between a tour guide and the tour operators.

CHAPTER FOUR: The Research Survey

4.1 Introduction to the research survey

The Minister of Labour commissioned a report (in terms of the BCEA) to research wages and conditions of employment in the hospitality sector.¹⁹⁶ From the report, insight into conditions of employment in establishments such as hotels and related accommodation, restaurants and the catering sub-sectors was achieved. The objective of the report was to combine four varying sectoral determinations with respect to different parts of the industry, into one, all-encompassing determination, which would take into account the need for minimum wage levels and set minimum standards for conditions of employment.¹⁹⁷

One of the failings of the report was that it gave little or no insight into the conditions of employment in the tourist guides sector. The report failed to recognise that attention was needed regarding the conditions of employment within the tour guiding sector. This oversight has given impetus to the survey discussed below. By posing

¹⁹⁶ Department of Labour (2006); Research Report: Investigation into wages and conditions of employment in the hospitality sector. *Government Gazette* No 28526 of 24 February 2006

¹⁹⁷ At page 6.

a set of questions relating to the guides' conditions of employment the survey aims to enlighten the reader to that which the report disregarded.

The survey took into account only those respondents who were registered guides and who were working within the industry at the time of administering it,¹⁹⁸ in order to gain an understanding of what the reality of the relationship between the tourist guide and tour operator was at that time. By posing questions aimed at establishing the nature of the relationship between tour guide and tour operator, it was hoped to gain a sufficient understanding of the tour guiding profession, and enable a purposeful discussion relating to whether tour guides are employees of the operators for whom they work.

4.2 Research methodology

The research survey was administered using three different methods to ensure consistency of the results. It was felt that any misunderstanding of a particular question could potentially alter the results to significant degree. The survey was initially administered by conducting face-to-face interviews with tour guides at well known

¹⁹⁸ See Annexure 2 for the complete survey

tourist sites within the Cape Town area. The personal interviews allowed refinement of the questions posed so as to ensure that any ambiguity could be resolved.

With respect to the face-to-face interviews; the sites chosen ensured that a sufficient number of potential respondents would be available to answer the survey. Sites such as Hout Bay Harbour, the Table Mountain Cableway (Lower Cable Station), and the Cape Point National Park were chosen because they are regular stopping points for tour groups (tourist guides are known to bring their clients to visit these sites while fulfilling a Cape Point Tour) and thus for accompanying tour guides. It was assumed that on any given day at least 10 tourist guides could be interviewed.

In the case of Hout Bay Harbour, guides generally congregated at a nearby curio-shop whilst their passengers undertook a 45 minute boat-cruise to Duiker Island (a natural habitat for Cape Fur Seals). In the case of Table Mountain, guides would often wait for the return of their clients at the Lower Cable Station (approximately 1.5 hours) while the clients explored the top of the mountain. At Cape Point, however, due to the more detailed explanation needed on the part of the tourist guide to their clients relating to the site, this site was one

of the least productive points to administer the survey. The survey was administered on approximately 38 days during the course of 2006. A total of 66 completed questionnaires were collected from this group.

On approaching a potential respondent, permission was asked to interview them, and the objective of the survey was explained. In cases where the respondent showed a reticence to take part, a brief indication of how the survey could potentially benefit them in the future was given. The respondent was reminded from the outset that at no stage during the administration of the survey were they in any way obliged to divulge any personal information, and further reminded that should they wish to not answer any particular question that they had the right to refuse. Like all the interviews administered in the manner, the first question posed was whether the individual was registered to act as a tour guide in terms of the applicable tourism legislation.¹⁹⁹ On receiving an affirmative answer, the interview proceeded with the specific questions asked in the survey.

The other method use to administer the survey was to e-mail electronic copies to a list of registered guides provided to me by the Department of Environmental Affairs and Tourism's Cape Town office.

¹⁹⁹ The Tourism Act 72 of 1993 (as amended).

The local tourism office provided a list with contact (specifically e-mail) details for each guide who was currently registered with that department. Over the course of approximately two weeks, almost 820 copies of the survey were emailed to these individuals. From this group of respondents slightly more than 25% replied, amounting to 207 completed surveys. The main reason for the low reply rate was that many of the e-mail addresses were returned as invalid. This was possibly due to the fact that tourist guides are only obliged to renew their registration with the department every two years.

This group of respondents took the longest amount of time to reply to the survey and it was assumed that this was due to the increased work-load that guides would normally have in this period. The two weeks chosen to e-mail the survey were around the time of the Easter weekend (14 – 17 March) of 2006. The respondents nevertheless had little difficulty in answering the questions contained in the survey, with only 6% refusing to answer any question relating to their daily rates charged.

The results gathered from this group of respondents were materially similar to the respondents who were interviewed face-to-face in that this group seemed to have understood the questions and

few answers given indicated any misunderstanding as a result of any question's ambiguity. This group was, however, more valuable in terms of the recorded results, as many additional comments were included as justifications to the answers given.

The final method used to interview potential respondents was at the Cape Tourist Guides Associations' Annual General Meeting (AGM), held at the Nelson Mandela Gateway Conference Centre on 19 April 2006. The governing committee gave me permission to distribute the survey at the meeting and afforded me a 5 minute time slot in which to explain the basis for the survey. Approximately 100 copies of the questionnaire were distributed and the Association offered to publish a copy of the survey, with a brief explanation of its objective, in its monthly newsletter which was sent to all their members via e-mail after the AGM. The total number of completed surveys returned from this group was 73, approximately a quarter of which were collected on the night of the meeting. The rest of the completed surveys were faxed to my private fax number.

Although the survey took a substantial period of time to conclude, a total of 346 completed surveys was collected and now form the basis of the findings described below. The estimated number

of registered tour guides in the Western Cape is approximately 4150 individuals. Of this number, it was assumed²⁰⁰ that 10% no longer acted as tour guides, or, at least, do not act in this capacity sufficiently to qualify for the survey. The total number of surveys collected therefore represented approximately 9.2% of all Western Cape Tourist Guides and it was decided that this justified an analysis of the responses in terms of the survey's objectives.

We now turn to the structure of the survey, the findings which have emerged, and the implication of how the information can be used within the context of the labour statutes and the case law regarding employment status.

4.3 Structure of the Survey²⁰¹

The survey was structured so as to make it as easy as possible for the respondents to answer. Many of the questions that were posed were aimed at getting yes-or-no answers. Where this was not feasible (i.e.

²⁰⁰ In my dealings in the tourist guide sector, I found on many occasions that a substantial number of guides included on the list had left the industry, or were no longer practicing as guides, due to a wide variety of reasons, including the fact that they were unable to generate sufficient income from the profession, that they had decided to retire due to having reached a certain age, and that they had been offered, or had secured alternative gainful employment outside of the tourist guide sector. This led me to conservatively estimate that 10% of the 4150 guides no longer functioned as such.

²⁰¹ See Appendix 2 for the full survey questionnaire.

there existed multiple possibilities) the question offered a range of possible answers for the respondent to choose from. As mentioned the respondents that had the survey emailed to them tended to include the highest number of additional comments as justification for their answers.²⁰²

4.3.1 Tourist Guide Information

The first part of the survey served to establish basic information relating to the respondent. Only registered guides were surveyed²⁰³ and preliminary information relating to their age, first year of registration,²⁰⁴ gender and ethnicity²⁰⁵ were captured to establish demographic information about the sample population. The respondents were asked if they were in possession of a valid driver's licence and other questions relating to necessary permits.

²⁰² The reason for this was the time constraint faced by the tour guides who were interviewed face-to-face. Many of them were keeping to a tight schedule for the day, and thus were not able to provide any additional comments.

²⁰³ It would have been counter-productive to have surveyed non-registered guides, as tour operators are bound by the tourism statute to make use of registered guides only.

²⁰⁴ This is in order to have some idea as to the guide's experience, and to serve as a proxy for their frequency of work. On the whole, guides that are more experienced tend to work more.

²⁰⁵ The ethnic profile of the tourist guide industry has changed since the new political dispensation. The aim of this question is to ascertain to what extent persons of colour regard tourist guiding as a viable employment alternative.

The respondents were asked to provide information relating to their areas of registration, language competencies, fees per language spoken,²⁰⁶ cancellation policy, and whether they would be prepared to be negotiated away from their fee structure should the need arise. The last three questions were used to establish - subject to responses given later in the survey - whether the power balance between the tourist guide and tour operator was one of relative equality, or whether there was one party who was compelled to abide by the procedures and policies of the other.

4.3.2 The guides' most recent tour undertaken

The objective of this section was to gather as much information relating to the respondents most recently completed tour as possible. All of the questions attempted to gain insight into the manner in which the relationship between the tourist guide and tour operator was structured. The survey asked about the number of tour operators the respondents worked for so as to establish the degree of economic dependence the guide might have on one, or more of them.

²⁰⁶ Each language competence is remunerated at varying rates of pay. Furthermore, guides are differentially remunerated for various types of services.

Further questions related to the contract that had been entered into between the guide and operator and what details could be adduced from it. This section aimed to establish the degree of control and supervision the operator exercised over the guide, by way of how and what were the methods used to achieve control. The survey tried to establish who the guides' employer might be by asking *who* had contracted their services. This was done to establish whether temporary employment services were prevalent.

The remainder of the questions related to the guides' remuneration, deductions from their fees, and whether the guide was paid any supplementary allowances by the operator. There were two questions relating to who provided the guide with the necessary tools to perform their work and whether they were paid supplementary fees for work on Sundays or Public Holidays.

4.3.3 The guides' working environment

The final part of the survey was aimed at establishing what direct methods of control the respondents were subject to; the level of integration into the tour operators' organisation; and the extent to which, and how they calculated, additional fees charged in

circumstances where services ran late. This was to establish the existence of overtime work.

The respondent was required to state whether they *would* charge the operator cancellation fees if their services were cancelled one day before the services were set to commence and in that event, what they believed would be the most realistic outcome. The final section related to whether the respondent had ever been injured whilst on tour and, if so, who had paid the resultant medical expenses. The aim was to establish what level of responsibility the tour operator takes with respect to the respondents getting injured whilst fulfilling services for them.

4.4 The findings of the survey

As the previous section explained, the aim of the survey was to establish to what extent the relationship between the tour operator, and tourist guide could be classified as one of employment, using the criteria and tests used by the courts – and the CCMA – to prove that either an employment relationship, or a an independent contractor relationship, exists. This section will separate the collated data as it

relates to the concepts used by the courts to deduce whether employee status exists or not.

4.4.1 Demographic and related information

The survey results confirmed that 100% of the respondents were registered as tour guides with the Department of Environmental Affairs and Tourism (DEAT).²⁰⁷ The average respondent was a South African,²⁰⁸ white,²⁰⁹ male,²¹⁰ between the ages of 51 and 60,²¹¹ who had practiced within the tour guiding sector for less than five years,²¹²

²⁰⁷ It would have been counterproductive to have surveyed unregistered tourist guides as, by law, they are not permitted to fulfill guiding services within the Republic without the requisite registration.

²⁰⁸ 65% of the respondents were South African. Slightly more than a quarter of the respondents stated that they possessed dual nationality (26%), that being South African citizenship and that of another country, however no further details were given as to the other nationality. The remaining respondents held German (3%); Ukrainian (2%); Italian (2%); Austrian (1%) and British (1%) passports

²⁰⁹ The race profile of the surveyed guides was unsurprising. Only 17% of the surveyed guides fell into the previously-disadvantaged groups, and 2% were of Asian decent. The majority of the respondents were white.

²¹⁰ The gender profile of the respondents was slightly biased in favour of men (56% versus 44%) leading one to believe that more men than women view tourist guiding as viable employment.

²¹¹ A small proportion of respondents were between the ages of 21 and 30. The inference is that younger people do not view tourist guiding as a viable employment alternative.

²¹² Approximately 19% of the respondents had more than 10 years experience, 39% of the respondents possessed between five and nine years experience, with the remaining 42% having less than five years experience. A correlation coefficient of 0.96352 confirmed a strong positive correlation between years of guiding experience and hours worked (on their most recently completed tour). This infers that more experienced guides tend to get longer tours from operators; and hence tend to work more for that operator.

and was registered as a Western Cape guide.²¹³ All the respondents stated that they were in possession of valid drivers licences, and the majority (86%) held code 08 licences.²¹⁴ Only 2% of the respondents indicated that they did not have a Professional Driving Permit (PrDP)²¹⁵ and in fact indicated that they worked exclusively on coach tours.²¹⁶ The average guide spoke only one language,²¹⁷ with those who spoke Spanish, Portuguese and Italian working the greatest number of hours on their last tour.²¹⁸

²¹³ 80% of the respondents were registered to guide in 2 provinces, 30% in 3 provinces, 20% in 4 provinces or more and 15% said that they were nationally qualified. A strongly positive relationship (correlation co-efficient of 0.9369) emerged between guides who were registered nationally and those who had fulfilled the most services on their most recently completed tour, produced a strong positive correlation

²¹⁴ One-tenth stated that they held code 10 licences and the remainder (3% each) holding code 11 and code 14 licences respectively. In terms of the new drivers licence codes, introduced with the new card-licences: Code 08 = B; Code 10: = EC1; Code 11 & 14 = EC.

²¹⁵ If a guide was not in possession of a valid PDP, this meant that they were not able to act as a driver-guide, and would thus be restricted to work on coaches exclusively. Only a minority of guides would not hold a valid PDP.

²¹⁶ If the respondent only worked on coach tours, this meant that they were always provided with the services of a driver.

²¹⁷ Approximately one-third spoke two languages (30%), a quarter (25%) were fluent in three languages and only one-tenth were competent to guide groups in four languages (10%) or more

²¹⁸ A correlation between the number of hours worked and the number of languages in which guides had competence²¹⁸ showed a tendency that those respondents who spoke more than one language, tended to work more than those respondents who were only competent in one language. The correlation coefficient was equal to 0.9173.

4.4.2 Is there a contract between the parties?

The existence of a contract between a tour operator and tour guide is vital in proving that the parties should respect the obligations that follow from it. If it is the case that no contract exists, then any dispute that may arise may prove difficult to resolve. The survey asked the respondent to state how they were booked for their most recently completed tour. This would be where the contract for service was assumed to arise. If the guide was available over the dates requested, and confirmed their services to the operator, the contract would have come into being.

The majority (40%) stated that they had received a request via e-mail; 30% stated that they had received a telephone call from the operator and the balance (30%) stated that they had been booked either via faxed request or had been asked to book and confirm their services when they were last in the offices of the operator.

The responses given provide evidence that some form of contract is entered into between the tour guide and the tour operator. In most cases, some form of written proof is available to provide evidence that an agreement had been made, and even in the case of

those respondents who were booked verbally (telephone or face-to-face conversation) it is assumed that supplementary information relating to the tour was provided.²¹⁹

The information the respondent had received when first booked for the services is also important to prove that an arrangement of some defined form was concluded. From the data gathered, it emerged that 34% of the respondents were only receiving dates of the services from the operator²²⁰ and 31% were receiving the tour dates accompanied by an approximation of the services needed.²²¹ The remaining 35% of the respondents stated that they had received a detailed booking.²²²

It seems evident that a contractual relationship exists between a tour operator and tour guide. The contract is in most cases written,

²¹⁹ The guide would have gotten some form of indication as to the structure of the tour from the operator. This is very normal in circumstances where a guide is booked face-to-face.

²²⁰ The guide would be asked to book themselves for a set of dates, and no other information would be given as to the types of services needed.

²²¹ Vague information implies that the guide had not received enough detail regarding flight arrival times or services needed. This has a two-fold effect; the guide may have been able to fulfill other services on the days in question, and the rate paid for the days booked might differ from that which was originally anticipated. The guide thus suffers in an economic sense.

²²² A detailed booking would entail all information regarding the services requested. This would include all flight times; pick-up times for the tours, as well as routings and passenger manifests. The guide would have no doubt as to what to bill the operator for his or her services; and would know exactly whether or not other services might be able to be fulfilled for another client.

but there are also occasions where an arrangement is entered into verbally. The details given to the guide regarding the booking; and the fact that the guide is happy to fulfill the services, satisfy the need for the contractual principles of consensus, capacity, possibility and lawfulness. We now turn to identifying who the parties to the relationship are, so as to ascertain who the alleged employer may be.

4.4.3 Who are the parties to the contract, in reality?

The respondents were asked if the tour operator paid them directly for the services they had rendered, or whether their fees were paid by a third party.²²³ It emerged from the results that in many cases the guide was not contracted directly by the operator, but rather through a third party provider. Although 54% of the respondents stated having been contracted and paid by the operator themselves, 46% said that they were paid by another company, on behalf of the tour operator.²²⁴

Of the 46% indicated above who had been paid by a third party, 45% stated that they had been paid by a transport provider that had contracted vehicle services to the operator. A further 18% had been

²²³ Third parties could be transport operators, guide broking services, a guide association, a foreign agent or a hotel concierge company.

²²⁴ The aim was to establish whether it was possible to identify labour brokers within the tourist guiding sector.

paid by a foreign agent,²²⁵ 17% said they had been paid by a hotel concierge company and the remaining 8% cited being paid by a guide-broker service.²²⁶

Comments were added by those guides that had been paid by a third party, which illustrated a problems that exist in these instances. One area of concern, as indicated below was the fact that the guide did not know who was responsible for paying their invoice.

"The tour operator only informed me after the tour had finished that they were not going to pay my invoice, and that I must send the invoice to XYZ Tours."²²⁷

Another problem related to the amount of time it took for invoices to be settled.

"The transport company that gave me the vehicle told me that they were going to pay me within 5 days of sending my invoice. I waited 35 days to have my money paid into my bank account, and I had to call

²²⁵ When a foreign agent hired the guides' services; the time taken to settle their invoice was negligible. All those that stated having been hired by a foreign agent said that they had been paid before the tour (30%); or immediately after (70%).

²²⁶ Of those that said they were paid by a third-party provider on behalf of the operator; a staggering 100% also complained that they were often made to wait extremely long periods for their salaries to be paid over.

²²⁷ Respondent 61

them 20 times to please ask them to do it. Why must I deal with these people? I work for the operator, not the transport company”²²⁸

The results thus indicate a tendency on the part of tour operators to outsource their tour guide needs to third party operators. Of the responses given it seemed that transport operators are the most commonly used by tour operators.²²⁹ It is apparent that tour guide’s are confused with this relationship, as the true parties to the relationship are not always evident.

4.4.4 Policies & Procedures (Tour Guide or Tour Operator)?

By gathering information relating to the respondents’ cancellation fee structure it was hoped that information would emerge as to whether tour guide’s have terms or conditions of service. In this paper, the fee structure serves as a proxy for the guide’s own terms or conditions, and helps in determining whether the guide can be regarded as an independent business, with its own policies and procedures, or rather dependent, and therefore subject to the policies and procedures of the tour operator.

²²⁸ Respondent 276.

²²⁹ Transport operator’s attracted the most negative comments from the respondent guides.

All the respondents provided some form of cancellation fee structure; a summary of which is tabulated below:

Days prior to tour commencement	Average Cancellation Fee
0 - 7 day prior	100%
8 - 13 days prior	75%
14 - 20 days prior	50%
21 - 24 days prior	0%

The information provided by the majority (85%) of the respondents indicated that they *would*²³⁰ charge the operator cancellation fees if their services were to be cancelled before a tours' commencement. Of those that indicated that they would *not* charge (15%) cancellation fees, the vast majority said that feared never getting work from the operator in the future.²³¹

When the respondents were asked if they *could*²³² realistically charge the operator cancellation fees for canceled services;²³³ 90%

²³⁰ This was asked so as to establish how strongly the guide felt about the operator cancelling their work. If the guide would charge; this meant that they felt prejudiced by the operator canceling their services.

²³¹ Although not directly asked by the survey; the guides that answered both yes they would, and no they would not, stated that they relied on the operator as a principal source of income, and would re-consider charging cancellation fees should the circumstance arise. This indicates some form of economic dependence on the operator for the guides' income.

²³² This was asked so as to establish whether the guide knew the operators' general policy as it pertained to cancellation fees. If the guide could charge, this meant that the operator would more than likely pay the said cancellation fees due.

said that they *could not* charge cancellation fees.²³⁴ Only 10% of the respondents stated that they *could* charge cancellation fees. In the same vein, of those that said they *could* charge (10%) the cancellation fees, 44% stated that the operator would replace the lost days of work,²³⁵ 18% and stated that they would negotiate the cancellation fees payable with the operator.²³⁶ Slightly more than 20% of the respondents stated that they would negotiate with the operator regarding cancellation fees.²³⁷ A little over one-tenth (18%) of the respondents stated that they would need to resort to some form of legal recourse in order to recover their lost income from the operator.²³⁸

²³³ The guide was given the possibility of multiple answers. The most likely outcome was the objective.

²³⁴ Many of the respondents added comments. The majority stated that if they were to charge the operator cancellation fees; they felt certain that they would never get work from the operator again.

²³⁵ Although this is common within the tourist guiding sub-sector; it fails to take into account the fact that the guide would have experienced a diminished income at that immediate point in time. Should the operator replace lost days only in the following month; the guide has in effect been prejudiced for the current month.

²³⁶ If a longstanding relationship exists between the operator and the guide, the guide would tend to be more flexible with respect to the charging of cancellation fees.

²³⁷ This is the optimal outcome for the guide. The guide should negotiate with the operator as to how the lost income would be dealt with.

²³⁸ There are two means whereby the guide (if they are to be defined as independent contractors) can seek remedy for a cancelled service. The guide could approach the Small Claims Court; or the guide could make a claim in the High Court. The issue here; however, is that significant costs would be incurred in order for the guide to institute a claim in this Court.

Some of the comments given illustrated the manner in which the tour operator viewed the payment of cancellation fees:²³⁹

"The operator I work for has cancelled me many times in the past. I asked if cancellation fees were going to be paid, but they just laughed at me!"²⁴⁰

"I had a tour, consisting of 20 full-days of work cancel 1 week prior to arrival ... the operator replaced 5 of those canceled days, with work in the Cape Town area. I landed up loosing almost R6000.00 income in February [2006]."²⁴¹

"An operator I worked for last year [2005] booked me for a series of tours which would have kept me busy from September [2005] till February [2006]. About 1 month prior to the series starting, they phoned me and told me that they had found someone else to take the tours. I have turned away countless bookings because I thought I had confirmed work. The operator

²³⁹ Only those comments that illustrated the dire nature of the situation were included. The comments given indicated that tour operators refused to pay guides cancellation fees.

²⁴⁰ Respondent 29's comments illustrate the negative view taken by the tour operator regarding cancellation fees.

²⁴¹ Respondent 77's comments demonstrate that it is very difficult for an operator to completely replace lost days.

just said sorry, and said that they did not have any other work for me."²⁴²

The additional comments given indicate that, on the whole, tour guides are subject to the policy of the tour operator where cancellation fees are concerned.²⁴³ It can be said therefore that the majority of the respondents were subject to the policies and procedures of the tour operator.

4.4.5 Remuneration (statutory thresholds)

The per-service rates charged by tourist guides were initially assumed to offer some assistance in indicating whether, on the whole, tourist guides earned yearly incomes below those legislated by the Minister²⁴⁴ in terms of the LRA and BCEA. It was however discovered that it would not be possible to extrapolate these fees, and lead to a result which could be interpreted accurately, or be realistic, to any degree.

²⁴² Respondent 133's comments indicate the level of financial prejudice often suffered by the tour guide.

²⁴³ This section aimed at highlighting the problems experienced by tour guides in their interactions with tour operators; and to establish whether tour guides can be said to adhere to the policies and procedures of the company's they worked for.

²⁴⁴ The earnings ceiling was R115,572.00 as published in GN 356 dated 14 March 2003.

On discovering this; an e-mail was sent to a group of 95 guides that had responded to the original survey and for who e-mail address details were available. The e-mail briefly explained the need for the supplementary information and posed one question to the respondent, as follows:

“With reference to your income for the last financial year (2006 – 2007) please indicate which one of the following options best describes your total earnings from the operator you worked for the most last year and for which you have been issued with an IRP5:

1. *R1,000 – R10,000*
2. *R11,000 – R25,000*
3. *R26,000 - R50,000*
4. *R51,000 – R100,000*
5. *R101,000 – R115,000*
6. *more than R115,000”*

From the 95 e-mails sent, 57 responses were received as at 2007/03/22. The results confirm the fact that most of the respondents

emailed had earned less than R115,572.00²⁴⁵ in the previous financial year, from the operator for whom they had worked the most.

Of the 57 replies received, almost 17.5% (10 individuals) confirmed earning less than R50, 000.00, 54.5% (31 individuals) between R51, 000.00 and R100, 000.00, 19.5% (11 individuals) between R101, 000.00 and R115, 000.00 and the remaining 9.5% (5 individuals) had earnings in excess of R115000.00 in the last financial year. Because the total number of responses received accounted for approximately 16% of the main survey's sample population it was felt that an inference based on the results gathered from the e-mailed question would not be completely without merit.

Notwithstanding the average rate information gathered in the main survey, it appeared that the rates applicable to Italian guides were all identical. This was possibly as a consequence of those guides being members of the Italian Tourist Guides Association. This association, in theory, dictated per-service rates to all its members, as negotiated with tour operators, on a yearly basis. It is however not certain whether all the respondents quoted the rates in principle, or whether the rates actually applied in practice.

²⁴⁵ As per GN 356 dated 14 March 2003.

This section sought to establish whether it could be said that tourist guides, on average, earn below the threshold income stipulated in section 200A (2) of the LRA. Although it was not possible to establish this from results collected from the main survey; the supplementary email sent, and responses received, confirmed that a large proportion of the respondents did earn below this threshold. This fact assists in aiding the tour guide to avail themselves of the services of the CCMA in cases of unfair treatment.

4.4.6 Deductions

The respondents were asked what deductions had been made from the invoice they had submitted to the tour operator. To this question 89% of the respondents stated that the operator had deducted PAYE tax at a rate of 25%; and 11% had PAYE tax deducted at a lower rate.²⁴⁶ Furthermore 39% of the respondents stated that the operator had deducted amounts for Unemployment Insurance²⁴⁷ contributions (UIF); from their fees.

²⁴⁶ If an individual provides an operator with a tax directive from the SARS, the operator would then only deduct tax at a rate of 18%. The only way that the tour guide could achieve this was by representing themselves as a propriety company, or close corporation to the SARS.

²⁴⁷ In terms of Ch 2, Sect 5 (1) & (2) of the Unemployment Insurance Contributions Act 63 of 2001 (as amended).

4.4.7 Payment Periods (employee integration)

The survey required the respondent to estimate what period of time would elapse between the time their invoice was submitted to the operator and the date of payment. The answers revealed the fact that only 14% of the respondents generally expected payment from the operator within one to five days of invoicing; 10% within six to ten days; 30% within eleven to twenty days; 10% said within twenty-one to thirty days and the remaining 26% cited receiving payment after more than 30 days.

The question relating to payment periods was again aimed establishing whose payment policy was of importance. Many of the respondents related the problems they experienced with terms of payment. The comments are provided below:

“The operator always makes me wait a long time before paying me. I have to always ask for my money over and over again. I once had to wait 3 months for my money to be paid. The operator always says that they are waiting for money from the agent in Italy.”²⁴⁸

²⁴⁸ Respondent 14

"I had to take a tour operator to court because they took almost one year to pay me my fees. On my invoice it says that my payment terms are STRICTLY seven days."²⁴⁹

As can be seen from the comments given, the conclusion that the respondents are required to adhere to the policies of the tour operator, specifically their payment policies, is not difficult to assume. The integration test requires that the individual be part and parcel of an employer's organisation. In the event of an individual having to fit in with the policies and procedures of an employer; this could indicate some form of integration.

4.4.8 Control and supervision of the tour guide.

In order to establish the extent of control and supervision the tour guide was subjected to by the tour operator, it was necessary to find out which measures the operator employed. If the operator permitted the tour guide to use their discretion with respect to decision making while providing services, this would indicate a degree of independence, as the possible repercussions would fall solely on the

²⁴⁹ Respondent 158.

tour guide.²⁵⁰ Conversely; should the operator not permit the use of discretion; this would indicate that the relationship was one where 'power' was disparately apportioned. In general, a guide is issued with a detailed itinerary of the day's events by the operator before the commencement of any tour.²⁵¹ The guide was to stick to the program of events to the best of their ability.

In order to establish the plausibility of supervising the tour guide, the respondent was asked if the tour operator had an office in the city where the guide resided. The operator could use many means to supervise the guide such as satellite vehicle tracking systems which are fitted to the vehicle and can give an exact placement of the vehicle at any given time. The operator might also contact the tour guide telephonically during the services, to check on their progress. From the results of these questions a more accurate idea of the degree of control and supervision used, could be possible.

More than half of the respondents (53%) said that they were compelled to confirm all changes to the itinerary before acting upon

²⁵⁰ The respondent was permitted to give multiple answers. This was in order to fully gauge what level of control and supervision was applicable.

²⁵¹ This itinerary should not be confused with that which the guide would have received when their services had been booked initially. This form of itinerary is far more detailed, and includes all times that need to be respected with respect to excursions, lunch bookings, and return times. The operator also generally includes supplementary client information in this itinerary.

them; 20% stated that the operator would call them during their tour to monitor their progress and to enquire if the clients were happy with the services; 10% of the respondents stated that it was a standard policy of the operator that no changes were permitted to the itinerary and that the guide needed to stick to the pre-defined route rigorously. Only 6% of the respondents reported that they only contacted the operator in the case of major problems; with a further 3% stating that they were permitted to use their discretion regarding problems or changes to the itinerary.²⁵²

Although control over the tour guide is not direct; the results do demonstrate a master-servant relationship between the operator and the guide. This is strictly for the duration of the said itinerary; and only with respect to those services provided for. Furthermore, if the guide is aware of the operator's policy, it would mean that to some extent the guide was compelled to adhere to the operators' policies and procedures. It could therefore be said that if a tour guide would most likely form part and parcel of the tour operator's organisation.

²⁵² Problems that a guide might encounter can range from differences in the local as opposed to the foreign itinerary; vehicle issues; passenger needs etc... If the guide is able to remedy a problem themselves, they would, in general, contact the operator to inform them of the issue in question, and then inform them that it has been resolved.

Almost two-thirds of the respondents (62%) stated that the operator had offices in the same city where they resided, with the remaining 38% stating that the operator had booked them from Johannesburg (66%); Durban (29%); the United Kingdom (3%); Italy (3%), and Denmark (1%) respectively. Of those respondents that stated having the operator outside of their city of residence; 52% reported that the operator had installed satellite tracking systems in the vehicles used, and monitored their movements using this system.

An operator is less likely to be able to control or supervise a guide if their offices were in a city outside of where the guide resided. The fact remains that the operator used various means to supervise the daily work of the tour guide. Whether the method is direct; as in the case of telephonic communication, or indirect, as is the case with the use of satellite tracking technology, the guide's work is still monitored by the operator. This is another means of demonstrating an employment relationship; albeit only in small part.

4.4.9 Infrastructure Provision (employee integration)

The survey sought to establish if the respondent was in any way integrated into the organisation of the tour operator. The respondents

were offered various ways of showing this; and were asked if the operator provided them with an office or any other facilities that were for their use during the course providing services for that operator.

Of the information gathered it emerged that 65% of the respondents stated that the operator did not provide any facilities to them; and that they provided their own infrastructure. The remaining (35%) respondents stated that the operator provided them with telephone facilities (15%); fax facilities (15%) or an office (25%), where the guide could conclude any administrative functions relating to the services fulfilled.

From the responses it seems that most tour operators do not provide tour guides with any infrastructure, and expect them to provide these facilities for themselves. This said though; some operators do provide some infrastructure to facilitate the smooth running of services. Nevertheless, the profession of a tourist guiding is a mobile function within the ambit of an operators' organisation - their work involves constant travel – and the provision of dedicated infrastructure facilities would be unfeasible. This fact lends credibility to the assumption that tourist guides do not need permanent infrastructure to carry on their profession. They would however need

the tools necessary to provide the services for which they are contracted.

4.4.10 Subordination: Who has the power?

The fact that an individual is subordinate to another in terms of a contractual arrangement is a defining factor in determining whether that relationship is one of employment. The survey required the respondent to state whether they were prepared to be negotiated off their rate structure by an operator. Although the first question did not indicate subordination;²⁵³ the next question asked whether the guide dictated their own rate structure to the operator, or rather the operator to the guide. The answer to the second question gives an indication as to the power arrangement which exists between a guide and a tour operator.

A majority (85%) of the respondents said they were prepared to be negotiated off their rate structure by an operator, with the remaining 15% stating that they never negotiated. Of those that were prepared to negotiate, many stated that the operators they worked for had their own guide-fee structure - which they dictated- and that they

²⁵³ Rather, this indicates a willingness to be competitive; within a already highly competitive market.

were forced to accept their fee structure, if they wanted to work for that operator.

It is a fact that most operators sell travel packages to foreign operators, or direct clients abroad. These packages guarantee a fixed rate for a set of services; and thus entail a specific costing on the part of the tour operator. As such - and only with respect to the time when the guide works for the operator - the guide is subordinate to the operator in terms of rates to be charged. In some sense; the guide could be said to also be integrated into the operator's organisation, due to the fact that they must adhere to the operator's policy as it concerns their tour costing structures.

Some of the comments provided by the respondents regarding rates highlight an area of particular concern. The first is the apparent departure from the agreed upon rates between the guide and respective operator:

"The operator agreed when they hired me to my rates. When the operator paid me after the tour; I found that they had paid me far less than my normal rate. I called them to find out why, and

*they said that I must accept their rates, because otherwise they would make losses on the tours.*²⁵⁴

The issue of whose rate structure applies is also of concern. If the tour guide dictates the fees due, then they can be said to be independent, as they are not dictated to. If not; the guide is submitting to the power that the operator has over them. The comments below confirm this thought:

*“If I want to work for XYZ Tours; I must accept their rates. I do not have a choice, if I want work. If I am freelance; why am I not able to say what my rates are?”*²⁵⁵

From the responses gathered through the survey, and the supplementary comments given; it is clear that the balance of power is firmly tilted in favour of the tour operator. Other comments provided reiterated the fact that *if* the respondents were not prepared to submit to the fee structure of the respective tour operator; that they would practically never work for them. The concepts of power, and integration are intertwined in term of the answers to these questions.

²⁵⁴ Respondent 15.

²⁵⁵ Respondent 153.

4.4.11 Tools of the trade

The survey specifically asked if the operator had provided the guide with any equipment in order to fulfill the service for which the guide had been contracted. The equipment could either come in the form of a coach – often hired from third party providers – or smaller vehicles which the guide would generally drive. The question gave the respondent a number of options to choose from; namely a public address system in the case of driver-guiding, or a detailed itinerary to inform the guide as to what duties were expected of them.

All of the respondents said that the operator had provided some form of equipment; the majority indicated that it was a vehicle of some sort. Of these; 68% said that the operator had provided them with a vehicle – a sedan car or a 7 seater kombi²⁵⁶ - with the remaining 32% stating that the operator had contracted a coach company to provide coach services for the duration of the tour.

It appeared that many of the respondents did not completely understand the question, resulting in only 28% stating that the

²⁵⁶ 'Kombi' is a generic term used in South Africa to describe a multi-passenger carrying vehicle. Manufacturers of these sorts of vehicles include General Motors, Volkswagen and Mercedes Benz.

operator had provided a microphone (70% of the guides that had been involved in coach tours, stated that the coach company had provided a microphone) and 15% stating that the operator had provided the guide with a '*cooler-box*' filled with soft-drinks and water for the clients.

The respondent was also asked whether the operator had provided expense fees before the commencement of the tour. A majority (65%) of the respondents stated that the operator had deposited tour expenses into their banking accounts prior to the commencement of the services;²⁵⁷ 25% stated that they had an agreement with the operator to advance expenses for the tour and claim those fees back from the operator on completion of the tour²⁵⁸ and the remaining 10% stated that cash had been disbursed to them before the start of the tour.²⁵⁹

²⁵⁷ Many of the respondents added comments relating to the bank charges incurred as a consequence of the said deposits; and consequent withdrawals. The major complaint was that these costs were never refunded to them, and the operator would not allow this amount to be charged for in terms of guide fees. A small percentage of the respondents gave actual Rand figures for the costs incurred, and the amounts were often substantial. Specifically, those guides that had had cash deposited into their accounts stated that there had been a fee equal to 1.5% of the total deposit value, levied.

²⁵⁸ All these transactions attract bank charges as a percentage of each withdrawal amount. Some respondents commented that they used a credit card to make these purchases; and complained that these charges were similarly not recoverable from the operator. As a security measure, it would seem safer to use a credit card for the large transactions which are often incurred whilst fulfilling tour services.

²⁵⁹ This practice carries with it a significant degree of risk for the guide. Should the guide fall victim to a robbery or mugging, it is unclear who would be liable for the

It can be assumed that the vehicle provided by the tour operator to the guide is a tool of the guides' trade. Other equipment like microphones can be similarly classed, as without them the guide would not be able to provide their services effectively. There is however some debate²⁶⁰ as to whether an itinerary should be classed as a tool or rather as a set of instructions, thus possibly rendering this answer more accurately placed under the section relating to 'control' and 'supervision'.

4.4.12 Economic dependence

The survey asked the respondents the number of operators they generally worked for, and to stipulate the services they had provided with respect to their last tour undertaken for the operator. This information was used to establish whether a tour guide is generally dependent on one tour operator; and whether they had worked for a

disbursed funds. If it is the case that the guide is liable, then he or she would have to have personal insurance against this sort of occurrence. This would obviously have associated costs attached.

²⁶⁰ At the time when the SARS were involved in discussions with tour operators regarding the issue of defining tour guides as employees for the purposes of taxation; there was much debate about the role played by the itinerary as a tool of the trade. The final outcome was that the itinerary serves as a set of instructions to the guide; however it was similarly conceded that the itinerary could also be described as a tool of trade. This is the reason for having included this topic under the section of tools of the trade.

minimum of 40 hours per month, for that operator, in the last three months.

The results showed that 42% of the respondents worked for one operator only; the majority (50%) worked for two operators and only 8% worked for three operators or more. In the case of the respondents who stated working for only one operator; a positive correlation²⁶¹ emerged showing a tendency for language guides²⁶² to commit to working for fewer operators.

From the results it can be said that a large proportion of tour guide's are economically dependent on *one* tour operator only. Although the proportion did not equate to a majority of the sample population, it can be concluded that many guides are dependent for their income, on one operator only. In the majority of cases, the respondents indicated working for the same operators on a regular basis,²⁶³ which further lends credibility to the fact of economic dependence.

²⁶¹ A correlation co-efficient of 0.859 emerged.

²⁶² Language guides are identified as all those that spoke at least one European or Asian language.

²⁶³ Many comments given stated only ever working for two operators.

4.4.13 Hours worked

The survey asked the respondents to itemize the services they had provided during their last completed tour.²⁶⁴ From the aggregation of the respondent result it emerged that the average guide had worked 90 hours on their last tour. Almost one-quarter (24%) of the respondents worked between 150 and 200 hours,²⁶⁵ and a small percentage had worked as many as 250 hours on their last tour.²⁶⁶ The number of respondents that indicated having worked less than 40 hours on their last tour was only 5% of the sample population.

In terms of the above, it can be confirmed that the majority of guides had worked more than 40 hours in the last month for one tour operator. The statutes require that an individual works "*an average of at least 40 hours per month, for the last three months*"²⁶⁷ for one employer. Given the fact that the questionnaire did not ask for a recount of the guides preceding 3 months work schedule, it could not

²⁶⁴ Each type of service was used to calculate the amount of hours worked by the guide. For instance, an airport transfer takes an average of two hours to complete; a half day – five hours; a full day - 10 hours; overland service – 24 hours (as the guide was on call should the client become ill); a dinner transfer – five hours; and a meet and greet – two and a half hours.

²⁶⁵ Those guides that had worked more than 150 hours, but less than 200 hours had worked on tours that had a large overland component to the itinerary. Thus the high amount of hours worked.

²⁶⁶ 8.75% of the guides reported to having worked more than 250 hours, but less than 300 hours. These were predominantly national tours that traversed the whole of South Africa.

²⁶⁷ S200A (1)(d) of Act 66 of 1995.

be established whether this trend continued beyond the period of the survey. It does however give a good indication of what that trend may well be though.

4.4.14 Liability: who bears the risk?

It has been established earlier in this chapter that respondents had been given vehicles to use by the operator or another third party, to fulfill their services. The survey asked the respondent who bore the financial risk should the vehicle be damaged during the course these services. The respondents were also asked if they had ever been injured whilst providing services for a tour operator. These questions were merely aimed at establishing whether there might be other problem areas within the relationship between tour guide and operator.

It was interesting to note that in the case of the tour guide damaging the asset of a tour operator that a large proportion of operators expect to be reimbursed completely for the cost of the damages. This seemed peculiar given the fact that it is a standard within the tourism industry for tour operators with vehicles - or transport providers for that matter - to have comprehensive insurance.

This follows from the fact that most companies purchase their vehicles on hire-purchase agreements; and in terms of those, comprehensive insurance policies are mandatory.

15% of the respondents stated that they were in no way liable should they damage the tour operators asset; 62% indicated that if the damages were a consequence of their negligence, they would be forced to reimburse the operator for the entire extent of the damages;²⁶⁸ while 20% stated that they would only be held liable for the insurance excess.²⁶⁹ A small proportion (5%) of the respondents stated that they held personal accident insurance and would claim against this insurance if they were to be involved in an accident.²⁷⁰

The final question of the survey asked whether the guide had ever been injured whilst providing services for an operator. Although 62% indicated that they had never been injured; 38% said that they

²⁶⁸ The operator would not want to claim against its insurance policy; and thus increase its premiums in the future.

²⁶⁹ This is a percentage of the value of the claim against the insurance company. Generally, a minimum threshold value (based on a percentage purchase value of the asset (for instance 5%)), which if reached, meant that the excess payment would be equal to that value, and no more.

²⁷⁰ None of the respondents gave particulars regarding payments they would be liable for in terms of their personal insurance paying the cost of the damages. It is assumed that they would be liable for a percentage of the claim value.

had been injured in some or other way.²⁷¹ Of the 38% who had been injured whilst on duty; all (100%) indicated that they had paid their own medical bills personally, and that the operator had not instituted any claim against the Workmens Compensation Fund, to the best of their knowledge.

The fact those respondents that had been injured whilst working for a tour operator, had paid their own medical bills points to a particular area of concern. The chapter that follows will apply all these results to the tests used to establish employee status; and attempt to establish whether it would be feasible to recognise tour guides as such.

We now turn to the application of the findings of the survey. The next chapter will tie up how the information gathered relates to the concepts set out in chapter 3, and attempts to draw some conclusion on whether it would be possible for a tour guide to approach any of the statutory dispute resolution institutions.

²⁷¹ Almost 60% of those guides that did answer in the affirmative indicated in notes on the survey sheet, the extent of the injuries that they had sustained. There were those that had fallen while on tour and sustained either broken limbs, or abrasions. Five guides reported having been involved in vehicular accidents, resulting in injuries as serious as cracked vertebrae; broken limbs; concussion; whiplash and the resulting muscle spasms related thereto.

CHAPTER FIVE: The application of the research survey

5.1 Applying the research findings to the law

From the outset of this chapter it must be understood that it is unclear whether tour guides, in general, would prefer to be labeled as employees, or independent contractors. What can however be said is that if the status of the tour guide were to be definitively established; many of the areas of concern would no doubt be remedied in their daily interactions with tour operators.

The research survey indicated many facts within the relationship between the operator and guide that would, under normal circumstances, be associated with an employment relationship. The survey dealt in-depth with the question of control by the tour operator *vis-à-vis* the guide. In this respect, the courts have held in various cases²⁷² that a vital ingredient in establishing employment status is the degree to which one party is at the beck-and-call of another. The *so-called* employer is entitled to dictate not only what work is to be done, but also the manner in which it is to be affected.

²⁷² Most prominently in *Colonial Mutual Life Association v MacDonald* 1931 AD 412 and *Liberty Life Association of Africa Ltd v Niselow* [1996] 7 BLLR 825 (LAC).

This chapter will discuss the concept of control and relate the findings of the survey; so as to draw some conclusions on whether tourist guides can be shown to have employee status. The survey results failed to show that any significant degree of integration of the respondents' *vis-à-vis* the tour operator's organisation, existed. This was reinforced by a vast majority of tour operators not providing any form of infrastructure to the tour guide. In conceding to this however; the survey did demonstrate conclusively that the guide was subject to the various policies and procedures of the tour operator; and this - it will be argued - can act as a form of integration into the tour operator's organisation.

Chapter 3 discussed the fact that, amongst others, the DIT is the main test used by the courts to demonstrate employee status, under our current labour legislation. The fact that the indicators of control and integration are merely two facets of that test, requires that the overall impression of the relationship between tour guide and tour operator to be one of employment. This therefore required an investigation into the contract between the parties, which was similarly dealt with in chapter 3.

The DIT used by the labour courts to answer this question is the same as that which is used in terms of Income Tax Act²⁷³ to define an individual as an employee for tax purposes. The question that then needs answering is that if the dominant impressions test used in terms of the two respective pieces of legislation are identical; would the same result emerge in both instances? The second part of this chapter will deal with this question in detail.

The survey revealed the presence of temporary employment services within the tour guiding sector. Many of the respondents stated that they had been booked and paid by third party providers who had contracted *their* services to a tour operator. The fact that the existence of these 'third party provider' arrangements was so prolific, begs the question whether one can classify the tour guide as an employee of the temporary employment service, or merely an independent contractor offering its services to them? The courts have used the same tests of control, integration and dominant impression to quantify the relationship between an individual and an alleged temporary employment provider; can it be the same in terms of the tour guide, and that provider?

²⁷³ Act 58 of 1962

This chapter looks at S200A of the LRA;²⁷⁴ and answers the questions posed within the context of the information gathered in the research survey. This should be the starting point for any tour guide that feels that they have been unfairly; and wishes to approach the CCMA for resolution of the situation.

5.2 Control and supervision

The key characteristic; if not one of the key characteristics, of an employment relationship is the employer's ability (or the potential) to exercise control and supervision over its employees.²⁷⁵ The fact that control is the right of one party over another is the defining concept which separates employees from independent contractors.

The services performed by a tour guide are similar to those that staff who are not office-bound, fulfill when outside of their employer's immediate office environment. They are generally allowed a certain amount of discretion when marketing, selling or consulting. Because of the discretion allowed; these sorts of employees tend to only contact their employer in cases where approval is needed on issues beyond

²⁷⁴ Act 66 of 1995

²⁷⁵ Grogan *Dismissal, Discrimination and Unfair Labour Practices* (2005) Juta: Cape Town at 47.

the scope of their responsibilities. The degree of discretion that tour guides have; is in many ways similar to that of the individuals mentioned above.

The tour guide *is* subject to the direction of the tour operator in instances where an issue may arise that could potentially prejudice the operator. The guide is required to contact the operator and discuss the way it is to be resolved. A good example of this would be if the tour guide were to have a client complain about the state of a hotel. The guide is in no way empowered to have the client upgraded to a higher class of room, and thus cause additional costs for the tour operator. The guide would thus need to contact the operator, discuss the problem with them, and leave it to the tour operator to make any necessary arrangements with the hotel establishment direct.

The survey showed that tour operators regularly – and in a variety of ways - supervise the tour guide through the use of satellite tracking technology, and telephonic communication. Although this is not a direct form of supervision; it does represent a concerted effort on the part of the operator to monitor the guide, which can be classified as supervision. Having said this however, the control test simply requires the 'right to exercise control', and not the physical

exercise of it.²⁷⁶ In *SA Taxi Drivers Union v Ebrahim's Taxis*;²⁷⁷ a similar type of control and supervision was present. It can therefore be concluded that the tour guide is controlled to a significant degree by the tour operator.

5.3 A dominant impression of the relationship

In 2003 the South African Revenue Service (SARS) identified the tourist guiding sector as a new and viable profession for income tax collection. To make this determination; the SARS used the DIT to classify tour guides as employees. The DIT used by SARS, as explained in the Interpretation Note²⁷⁸ to the Income Tax Act²⁷⁹, is no different to that which has been used in cases heard by both the Industrial and Labour Courts to distinguish between an employee, and independent contractor, for resolution of unfair dismissal disputes.

The Interpretation Note²⁸⁰ cites a variety of case law examples relating to the relationship between an employer and alleged employee to explain how the DIT is used to indicate a contract for work, or

²⁷⁶ Grogan *Supra* citing *Rodrigues v Alves & others* 1978 (4) SA 834 (A); at 19.

²⁷⁷ (1999) 20 ILJ 229 (CCMA)

²⁷⁸ Interpretation Note No 17 to the Fourth Schedule to the Income Tax Act 58 of 1962; released on 28 March 2003.

²⁷⁹ 58 of 1962.

²⁸⁰ *Supra*.

service. Reference is made to *Smit v Workmen's Compensation Commissioner*;²⁸¹ *Liberty Life Association of SA Ltd v Niselow*;²⁸² *Niselow*²⁸³ v *Liberty Life Association of SA Ltd* and *SABC v McKenzie*.²⁸⁴

The cases showed how the common law tests of control, integration and DIT have been used to indicate employee status; and the SARS have applied them equally within the fiscal context. It therefore stands to reason that if the test applies positively in terms of the Income Tax law, surely it should apply in an equivalent manner in terms of labour law.

To understand if this could also be the case for the purpose of this paper; reference is made to the findings of the research survey. The dominant impressions grid²⁸⁵ uses indicators which are taken into account when deciding whether an individual is an employee of another, or not. The indicators are listed, in descending order of importance, as follows:

***"Near conclusive:** factors [which] indicate the extent to which the employer is able to control the manner in which the person*

²⁸¹ (1979) (1) SA 51 (A)

²⁸² (1996) 17 ILJ 673 (LAC).

²⁸³ (1998) (4) SA 163 (SCA).

²⁸⁴ (1999) 1 BLLR 1 (LAC).

²⁸⁵ See below for the dominant impressions grid.

carries out the service, and the extent to which the employer enjoys exclusive acquisition of the services of the person; and

Persuasive: *factors [which] indicate the extent of control in respect of issuing instructions, demanding reports... and determining productive time; and*

Relevant: *...factors [which are]...resonant of control and supervision.²⁸⁶*

Dependent upon the extent all the indicators apply to an individual; they can be either classified as being independent, or dependent, and thus an employee. The data collected from the survey results can be used in a similar way to determine the employment status of the respondents to the research survey. The table below gives an indication of the data's applicability to the DIT. The table only looks at those factors that are said to be either nearly conclusive, or persuasive, of an employment relationship.

²⁸⁶ Sourced from https://www.saica.co.za/integritax/1125_Independent_contractors.htm. Last accessed on 15 December 2007

Table 3: COMMON LAW DIT GRID (NEAR CONCLUSIVE FACTORS)

		INDICATOR	Surveyed Tourist Guides
NEAR CONCLUSIVE	Control of manner / Exclusive / Acquisition	Control of Manner of working	Tour operator issues instructions to the tour guide by way of an itinerary; tells guide which vehicle to use, and disburses expense fees for the tour. The tour operator dictates route that must be taken, and which sites to visit.
		Payment Regime	Large majority of operators generally pay their tourist guides according to their own payment regime. In certain circumstances this is done twice monthly, or on a stipulated date each month.
		Person must render service	No tourist guide is obliged to render service to any operator. However, once a guide has been contracted to do a particular tour, the guide is bound in terms of the agreement to fulfill those services.
		Nature of obligation to work	A tourist guide only works for an operator when he or she is booked. Should the clients decide that they do not want to do any activities for a particular day, but the guide has already been booked for that day, the guide is still required to report for duty.
		Employer (client) base	A large proportion of tour guides work for one operator only. As a consequence of the way in which tours are scheduled, it is rarely feasible to work for only more than two operators.
		Risk/Benefit of Profit & Loss	The tour operator bears the risk of loss in the case of under quoting or poor market performance. The tour operator takes the profits from normal business operations. The guide bears the risk of slow markets, specifically during low-season periods.

Workmen's Compensation Commissioner;²⁸⁷ they can be equally applied in terms of the survey results, as follows:

[Is] the object of the contract ... the rendering of personal services by the [tour guide] ... to the [tour operator]...?

The tour guide must render their personal services to the tour operator, or third-party provider. The work for which the guide is contracted cannot be 'outsourced' to another tour guide, unless express permission is given by the tour operator, or third-party provider.

[Is the tour guide] ... at the beck and call of the tour operator; to render [their] personal services at the behest of the [tour operator]?

The tour guide must perform all lawful acts as outlined by the tour operator. These acts must however be within the confines of the client's specific needs, or within the scope of the itinerary and associated services paid for by the clients.

²⁸⁷ *Smit v Workmen's Compensation Commissioner* (1979) (1) SA 51 (A) at 62

Are the services to be rendered [by the tour guide] in terms of the contract ... at the disposal of the [tour operator]; who may in his own discretion decide whether or not [it] wants to have them rendered?

The tour operator is legally bound to offer all those services which the client has included in their itinerary. Only the client (foreign visitor) may choose whether to go-ahead with, or cancel, certain services. The guide must provide the services stipulated in the itinerary.

Is the [tour guide] in terms of the contract ... subordinate to the will of the [tour operator]? Is [The tour guide] obliged to obey the lawful commands, orders or instructions of the [tour operator] who has the right of supervising and controlling [the tour guide] by prescribing ... what work he/she has to do as well as the manner in which it has to be done?

As has been shown by the results of the survey; the tour guide accepts all instructions from the tour operator. The tour operator supervises the guide using satellite tracking technology, and through periodic telephone contact. The guide must stick to the routing

rigorously, and the necessary visits as set out by the tour operator in the itinerary must be obeyed.

[The] contract ... is terminated by the death of the [tour guide]?

If the tour guide dies, the tour operator is forced to find someone else to provide the services. The tour guide is not a company, with its own employees, which could arrange a substitute and continue to provide the services.

[Does the] contract ... terminate on expiration of the period of service entered into?

The tour guide enters into a specific fixed-term contract, for the duration of the tour. Once the services have been fulfilled, or the itinerary completed, the contract comes to an end.

It remains an unanswered question however whether one can use the DIT; as used in terms of the Income Tax Act,²⁸⁸ to define the tour guide as an employee in terms of the LRA or BCEA. It seems to be

²⁸⁸ Act 58 of 1962

a anomaly of law that one can use the DIT in one circumstance, and apply the result to one piece of legislation, but not in another.

5.4 Temporary employment services

The results of the survey indicated that a large percentage of guides were being contracted by third party service providers to the tour operators. The survey showed that almost 46% of the respondents had been contracted in this manner; almost 50% of which had been contracted by a transport operator and 8% by a guide broking service.

These third party providers presumably offered this service for some form of financial reward, to tour operators. With respect to guide broking services; it is widely known that these companies add a mark-up, over and above the daily rate charged by the guide, and sell their services to a tour operator. It is therefore necessary to discuss the implication of this fact, with specific respect to the identification of temporary employment services.

The Labour Relations Act²⁸⁹ defines a temporary employment service as being:

²⁸⁹ Act 66 of 1995

- “ (1)... *[Any] person who, for reward, procures for or provides to a client other persons -*
- a) [Who] render services to, or perform work for, the client;*
 - and*
 - b) [Who] are remunerated by the temporary employment service.²⁹⁰*

The exact nature of the ‘reward’ necessary, to qualify as a temporary employment service, is not defined in the Act.²⁹¹ However it is assumed that any form of reward will suffice. In the case of transport operators; it is a well known fact that these entities offer the services of tour guides, and charge the tour operator only those fees which will be necessary to remunerate the guide. The commercial rationale for doing this is that they are more likely to enhance the possibility of offering transport services to those tour operators, and make a profit therefrom. There *is* thus some form of reward to the third party provider; although not directly generated from the tour guiding services.

²⁹⁰ Section 198 (1) of Act 66 of 1995.

²⁹¹ Act 66 of 1995

The Act specifically precludes independent contractors from the definition;²⁹² thus the previous discussion relating to control, integration and the overall or dominant impression of the relationship needs to be considered equally here. The concepts of control, integration and the overall impression of the relationship point to one of employment, in most cases. It should therefore be relatively easy to use the results of the survey to indicate that tour guides are employees of the third-party service providers they work for.

5.5 S200A of the LRA:²⁹³ Can the presumptions be triggered?

As mentioned in Chapter 3, S200A of the LRA only requires one of the factors be present within a commercial relationship in order for an individual to refer a dispute to the CCMA for resolution. From the research survey it emerged that most of the factors required in terms of S200A were present and therefore the onus to disprove the employee status of a guide would fall on the tour operator. Below is an adaptation of each factor:

Is the manner in which the tourist guide works, subject to the control or direction of the tour operator?²⁹⁴

²⁹² Section 198 (3)

²⁹³ Act 66 of 1995

Tour operators exercise control over the tour guide; however the control is not direct due to the nature of the work. The operator issues the tour guide with a detailed itinerary which contains work instructions. The itinerary outlines work hours; and must be rigorously followed. The tour guide can be monitored or supervised by means of vehicle-satellite tracking systems, and constant telephone contact.

*Can it be shown that the guides' hours of work are subject to the control or direction of the tour operator?*²⁹⁵

The tour guide is issued with an itinerary which outlines their working hours.

*In the case of a tour guide who works for a tour operator, does the tour guide form part of the tour operators' organisation?*²⁹⁶

The tour guide probably does not form a part of the organisation of the tour operator, as required by this presumption. A significant degree of collaboration between the tour guide and operator is needed

²⁹⁴ S200A (1)(a) of Act 66 of 1995

²⁹⁵ S200A (1)(b) of Act 66 of 1995

²⁹⁶ S200A (1)(c) of Act 66 of 1995

for the services to be effected efficiently. The guide submits to both the policies and procedures of the operator.

*Has the tour guide worked for the tour operator for an average of at least 40 hours, per month, over the last three months?*²⁹⁷

The average guide worked 90 hours on their last successfully completed tour. This number represents more than one and a half times that required to trigger the rebuttable presumption, in only one month. Given the fact that the period in which the survey was administered fell in a relatively busy period; it is assumed that the respondents would not have much difficulty in showing that they had worked at least the required hours, per month, in the 3 months prior to the survey being administered.

*Is the tour guide economically dependent on the tour operator for whom they render services?*²⁹⁸

It cannot be conclusively said that all tour guides are dependent on one tour operator only. Although a large proportion of tour guides are dependent on one tour operator for their income; there are many

²⁹⁷ S200A (1)(d) of Act 66 of 1995

²⁹⁸ S200A (1)(e) of Act 66 of 1995

guides that work for two or three operators regularly. This is primarily due to the nature of the industry, and the fact that the guide builds relationships with the tour operators. Even if it must be conceded that a large percentage of tour guides are not economically on one employer; the mere nature of the tourism industry precludes them from having multiple employers, as is the case with the typical independent contractor.

Is the tour guide is provided with tools of trade or work equipment by the tour operator?²⁹⁹

The guide is provided with the tools to fulfill guiding services for the operator. The tools include vehicles, microphones, itineraries and entrance fees.

Does the tour guide only work for one tour operator?³⁰⁰

A large minority of the surveyed tour guides were dependent on one tour operator for their income. A further majority were also dependent on two operators. Although a single employer was not a

²⁹⁹ S200A (1)(f) of Act 66 of 1995

³⁰⁰ S200A (1)(g) of Act 66 of 1995

reality; the nature of the industry dictates that guides need to work for a minimum of two operators.

It is clear that in terms of S200A, a tour guide that suffers unfair treatment at the hands of a tour operator, or third-party provider, can approach the CCMA and use one of the presumptions mentioned to prove that they are employees; and therefore have the right to resolve their dispute with the operator at that forum. Whether or not the individual manages to prove their employee status however, will depend on their specific working history and relationship with that organisation, and their ability to show that as an overall impression; their relationship is one of employment.

CHAPTER SIX: Conclusion

The current situation within the tour guiding sector is, in my opinion, not sustainable. The areas of concern highlighted in this paper are very real; and the tourism industry continues to rely on outdated labels given to tour guides at a time when it was more likely the case that they were *freelance* and therefore, independent. The situation has persisted for many years but is now beginning to have negative effects. The dramatic growth within the profession in the last 13 years requires a new way of thinking on the part of both tour guides and tour operators.

Tour guides are caught in a catch-22 situation. If they challenge the actions of the operators that cancel their services without the prospect of compensation, or those that take excessively long periods to pay them their fees - or any other issue identified in this paper - they will most likely be labeled as trouble-makers, and not get given further work in the future. A pressing concern is that this situation becomes a self-perpetuating cycle of exploitation and has the potential to stifle an already significant job-creating industry.

The new Constitution³⁰¹ and subsequent labour legislation³⁰² have not only gone a long way to formalise relations between collective's of labour and employers; but it has also laid a solid foundation for the fair and just treatment of previously exploited individuals. The Basic Conditions of Employment Act³⁰³ sets out minimum standards for the employment relationship including the necessities regarding contracts of employment³⁰⁴, annual³⁰⁵ and sick-leave³⁰⁶ entitlements, working hours³⁰⁷, overtime³⁰⁸ payments, salary payment deadlines³⁰⁹ and work on Sunday's and Public Holidays³¹⁰. Tour guides need to familiarize themselves with how they can access these inalienable rights; through the use of S83A of the Act.³¹¹

The Labour Relations Act³¹² can help to protect tour guides against unfair discrimination,³¹³ and the subsequent dismissals that have resulted therefrom. The Act gives them the concomitant right to

³⁰¹ Act 108 of 1996

³⁰² Labour Relations Act 66 of 1995 and Basic Conditions of Employment Act 55 of 1997

³⁰³ Act 55 of 1997

³⁰⁴ Section's (21) through (35) of Act 55 of 1997

³⁰⁵ Section (20) of Act 55 of 1997

³⁰⁶ Section (22) of Act 55 of 1997

³⁰⁷ Section's (7), (8) & (9) of Act 55 of 1997

³⁰⁸ Section (10) of Act 55 of 1997

³⁰⁹ Section (32) of Act 55 of 1997

³¹⁰ Section's (16) through (18) of Act 55 of 1997

³¹¹ Act 55 of 1997

³¹² 66 of 1995

³¹³ I am personally aware of instance where tour guides have been removed from tours due to their gender, race and political belief.

organise and use their collective voice to fight against the unfair treatment. The first step however; is to show that they are a class of individuals which the Act recognises.

A great deal of evidence gathered by the survey showed that a large proportion of the tour guiding population could theoretically show that they are the employee of the operator; provided they based their argument on the DIT discussed earlier. This would assist those that could demonstrate their potential for employee status, to at least approach the CCMA with their dispute. For those, on the other hand, that prefer to maintain their status as independent contractors; they would need to continue to take action against operators in terms of other legislation, as they are doing (or not) currently.

It is thus up to the individual tour guide to decide whether they are happy with the status and treatment that they have been subjected to. Having practiced as a tourist guide for many years; I feel that it will be to the betterment of the industry as a whole if a decision is made with respect to the status of tourist guides. With the possibility of positively establishing employee status; tour guides should no longer be in a position where the treatment, as commented by the respondents to the survey, is considered acceptable.

The fact that the legislature deemed it necessary to include S200A in the LRA and S83A in the BCEA means that any person has the right to request an advisory award as to their status within any organisation. The CCMA has shown a willingness to carefully consider the realities of the relationship between parties to a dispute; and it is with this in mind that I feel that tour guides should approach them for an advisory award.

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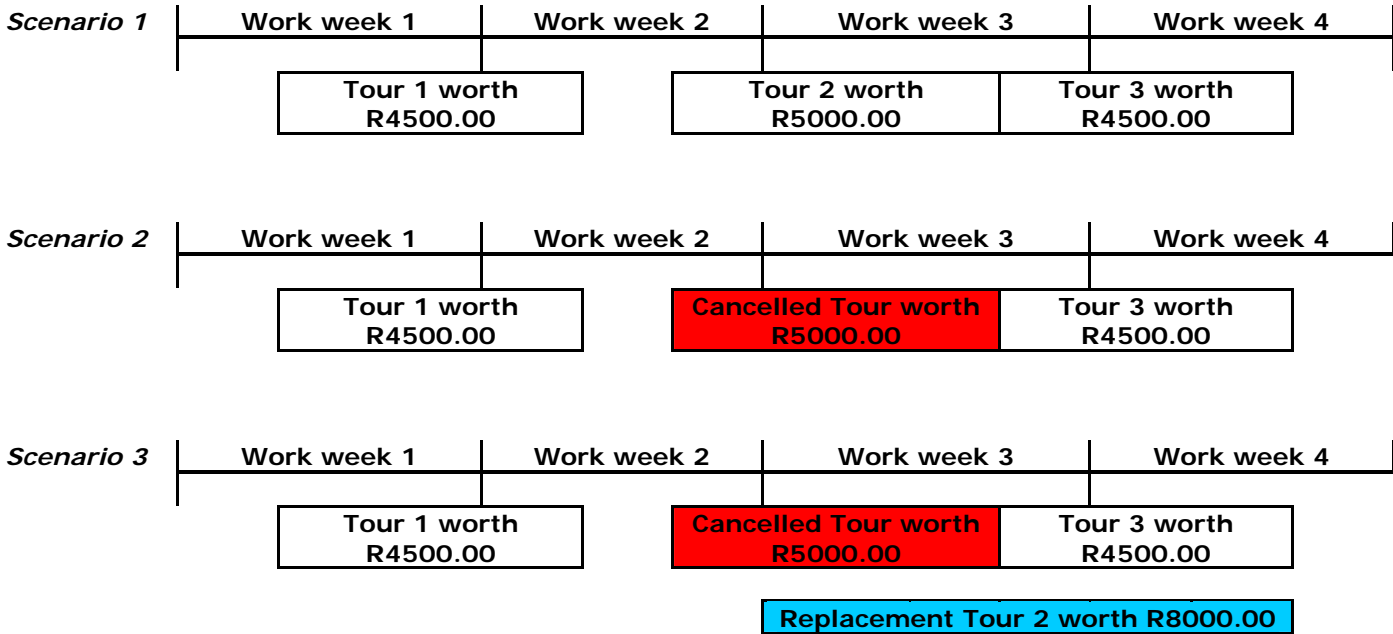
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Appendix 1



Probable scenario outcomes	
Scenario 1	
Expected monthly remuneration:	R 14,000.00
Scenario 2	
Expected monthly remuneration:	R 14,000.00
Value of Lost tour 2:	R -5,000.00
New expected remuneration:	R 9,000.00
Scenario 3	
Expected monthly remuneration:	R 14,000.00
Value of Lost tour 2:	R -5,000.00
Value of lost tour 3:	R -4,500.00
Addition of replacement tour:	R 8,000.00
New expected remuneration:	R 12,500.00

Scenario 1

Guides plan their work months, and thus their incomes, on tour bookings from their 'core' operators. Under this scenario, the guide could potentially earn R14000.00.

Scenario 2

Assume that the guide is cancelled for a Tour 2, and the operator does not offer to replace the lost days. The guides income is significantly reduced from R14000.00 to R9000.00.

Scenario 3

Assume the guide is cancelled for a Tour 2, and the operator offers to replace the lost days with a tour over another set of dates. The guide may not be able to take the replacement work as they may have another booking (Tour 3) that overlaps with the proposed replacement tour. The decision to cancel tour 3, and take the replacement tour has the effect of mitigating the initial loss of income *albeit* not to the same extent. The guide risks losing future income if the other tour (Tour 3) was booked through another operator. The guide is, in any event, prejudiced to a minimum value of R1500.00; and to a maximum value of R5000.00.

Appendix 2

1. Tourist Guide Information

1. **Are you a registered Tourist Guide?** _____ (Yes or No)
2. **How old are you?** _____ (years old)
3. **Year of first registration:** _____ (when you first became a guide i.e. 1980)
4. **Gender:** _____ (Male or Female)
5. **Ethnic group:** _____
6. **Citizenship:** _____ (If dual, state other country)
7. **Do you have a drivers licence:** _____ (Yes or No)
If yes, select class of drivers licence held: _____
8. **Do you hold a valid PDP:** _____ (Yes or No)
9. **Regions of registration:** _____
 (i.e. WC; EC; KZN; MP; FS; GP; LIM; NC; NW)
If you are site or special interest guide, state which groups you are qualified to guide for:

 (i.e. *economics; Robben Island; marine science; Township tour etc...*)
10. **Foreign Languages Spoken** (in order of proficiency i.e. English = 1st Language; Italian = 2nd Language etc...):

11. **At what rates do you generally bill operators for your services (in Rands) for the various languages you speak (as stated in question 10 above)?**

<u>Service</u>	<u>1st Language</u>	<u>2nd Language</u>	<u>3rd Language</u>	<u>4th Language</u>
Transfer:	R _____	R _____	R _____	R _____
Half Day:	R _____	R _____	R _____	R _____
Full Day:	R _____	R _____	R _____	R _____
Overland:	R _____	R _____	R _____	R _____
Dinner Transfer:	R _____	R _____	R _____	R _____
Meet & Greet:	R _____	R _____	R _____	R _____
12. **Please state your cancellation policy below (if you have one):**

_____ Day(s) before the tour	_____ % of rate forthcoming
_____ Day(s) before the tour	_____ % of rate forthcoming
_____ Day(s) before the tour	_____ % of rate forthcoming
_____ Day(s) before the tour	_____ % of rate forthcoming
13. **Are you generally prepared to be negotiated off the rates mentioned above?** _____ (Yes or No)

2. Most recent work undertaken

1. In the last month, how many operators have you worked for? _____ (state number)
2. With regard to your most recent tour undertaken, how many times in the last month have you worked for THAT operator? _____ (state number)
3. With regard to the most recent tour undertaken and completed, state the services you fulfilled, and for which you have billed that operator?

<u>Service fulfilled</u>	<u>How many</u>	<u>Definition</u>
Transfers	_____	(Max 2 hours)
Half Day(s)	_____	(Max 5 hours)
Full Day(s)	_____	(Max 10 hours)
Overland(s)	_____	(Full Day & Dinner & Sleep away from home)
Dinner Transfer(s)	_____	(Max 5 hours)
Meet & Greet(s)	_____	(Max 2.5 hours)

4. With regard to the most recent tour undertaken, in which of the following ways did you receive work from the operator for whom you last worked? (Example: Telephonic; Email; Fax; Face-to-face booking or other)

Stipulate how you were booked: _____

5. With regard to the most recent tour undertaken, when the operator booked your services, what details did you receive? (Example: A detailed Itinerary; Just an outline of the itinerary; Only the dates of the services)

Stipulate what you received: _____

6. With regard to the most recent tour undertaken, does the operator have an office in the city where you live?

_____ (Yes or No)

If No, state city where offices are located: _____

7. With regard to the most recent tour undertaken, when the operator booked your services, did you confirm the fees payable?

_____ (Yes or No)

If yes, did you have to negotiate the fees payable? _____ (Yes or No)

8. With regard to the most recent tour undertaken, in which language guide?

_____ (state the language used)

9. With regard to the most recent tour undertaken, when the operator booked your services, did you discuss cancellation fees?

_____ (Yes or No)

10. With regard to the most recent tour undertaken, which amounts are due to you by the operator in addition to those of question 7?

<u>Specific Allowance</u>	<u>Amount</u>
Lunch Allowance	R _____
Dinner Allowance	R _____
Cell Phone Allowance	R _____
Laundry Allowance	R _____
Traveling Allowance	R _____

Other Allowance (Annotate below) R _____

Other allowances not stipulated: _____

11. With regard to the most recent tour undertaken, which amounts are you expecting to be deducted from your invoice? (Example: PAYE @ 25%; PAYE @ 18%; UIF; Pension/Provident Fund; Medical Aid etc...)

Stipulate deductions: _____

12. With regard to the most recent tour undertaken, did the operator give you entrance fees before the start of the tour? (Example: No, I advance the monies, and claim after the tour; or the operator deposits all tour funds into my banking account before the tour; or the operator gives me all tour funds in cash before the tour)

State manner: _____

13. With regard to the most recent tour undertaken, how long after invoicing do you expect to receive payment? (Example: 1 – 5 days; 6 – 10 days; 11 – 20 days; 21 – 30 days; more than 30 days)

14. With regard to the most recent tour undertaken, does the operator pay you directly, or are you paid through another company? (Example: The operator pays direct; or Another company pays me)

15. If your answer to question 13 was 'Another Company', state type of business the other company is engaged in? (Example: Transport operator; Guide Broker; Guide Association; Foreign Agency; Hotel Concierge Company)

State type of organisation: _____

16. With regard to the most recent tour undertaken, did the operator provide any equipment (microphone etc...) or transport (a coach or a smaller vehicle like a car or kombi) in order to guide the clients?

_____ (Yes or No)

If yes, state the type of equipment provided: _____

17. With regard to the most recent tour undertaken, if you had damaged the operator's assets (vehicles or related accessories like a microphone etc...); what recourse does the operator have against you? (Put an X in the most appropriate choice)

_____ (No recourse (I am not liable))

_____ (Deduction from salary (entire cost of damage))

_____ (Deduction from salary (excess on the insurance claim))

_____ (I have personal insurance that covers me against liability)

18. With regard to the most recent tour undertaken, did you have to work on either a Sunday, or a Public Holiday?

_____ (Yes or No)

If YES, please state which (Sunday / Public Holiday)? _____

Did the operator pay you more for these days? _____ (Yes or No)

3. Work Environment

1. What level of control does the operator have over you while fulfilling services for them? (Put an X in the most appropriate choice – you can have more than 1 answer):

_____ (None; I am allowed to use my discretion)
_____ (I must confirm ALL changes with the operator first)
_____ (A vehicle tracking system in the vehicle tracks my progress)
_____ (The operator calls me while on tour, to check up on me)
_____ (NO changes are allowed – this is the operators STANDARD POLICY)
_____ (I only call the operator when a MAJOR problem arises)
_____ (I call to inform the operator of ALL problems)

2. What resources does the operator provide for you in terms of their own infrastructure? Which resources are you allowed to use (Put an X in the most appropriate choice – you can have more than 1 answer):

_____ (None, I provide my own infrastructure)
_____ (Fax Facilities)
_____ (Telephone Facilities)
_____ (Parcel Delivery Services)
_____ (The operator provides me with a vehicle for my use)
_____ (The operator provides an office with all facilities available to me)

3. If for unforeseeable circumstances you finish a tour late, do you claim overtime from an operator?

_____ (Yes or No)

If yes, explain how you would calculate the extra amount owing:
(Example: we come to an agreement; I bill per hour for overtime (state the rate you can bill at))

4. If your services get cancelled for a tour the day before it is set to commence, would you charge the operator cancellation fees?

_____ (Yes or No)

5. If Yes, check the most realistic outcome(s) in your circumstance (Put an X in the most appropriate choice – you can have more than 1 answer):

_____ (Full Cancellation Fees Due)
_____ (We negotiate on a case-by-case basis)
_____ (The operator refuses to pay cancellation fees)
_____ (The operator replaces my days of lost work)
_____ (I have to follow legal steps to recover my lost monies)

6. Have you ever been injured while fulfilling guiding services? _____ (Yes or No)

If Yes, please state who paid your medical expenses _____

If the operator paid, do you know whether the operator claimed from the Workmen's Compensation Fund?

_____ (Yes or No)