Subordination, Parasubordination and Self-Employment: A Comparative Study of Selected African Countries

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workers survive without regular benefits or employment protection. In qualifying types of relationships terms such as ‘atypical’ or ‘non-standard’ no longer carry the descriptive power that they did some 20 to 30 years ago when they were first used to identify an emerging labour market trend in the developed economies. Precariousness has become a norm and in much of the developed world it is the dominant form of employment. Everywhere, labour law touches fewer lives than it once did. In this context, the ILO Employment Relationship Recommendation, 2006 (No. 198), seeks to ensure that the scope of application of labour legislation is appropriate and thereby provide for the protection of employees, particularly vulnerable employees in non-standard employment relationships. The Recommendation proposes that countries should adopt a policy to clarify and, if necessary, to adapt the scope of labour legislation in order to ensure the effective protection of workers ‘who perform work in the context of an employment relationship.’

This paper identifies the emerging new relationships and describes them within the framework of the current labour markets in South Africa and other African countries. This provides the context in which it is possible to examine legislative provisions, policy proposals and judicial interpretations dealing with the scope of the employment relationship and responses to the increasingly complex task of identifying employment relationships and ensuring effective protection.

In a recent paper on the challenges of labour law in Southern Africa, Fenwick, Kalula and Landau have suggested that in the developing world, the challenges to orthodox labour law concepts are greater than in the industrialized world. These challenges, they argue, arise from the extent to which work is performed by ‘own-account’ workers in the informal economy, as well as the widespread unemployment and under-employment experienced in so many developing countries. The high degree of informalization of work also poses major challenges for the foundational labour law activity: identifying and defining employment relationships. The extent of this challenge is illustrated by the fact that among Southern Africa’s total population of about 200 million, only 1 out of 10 people have a job in the formal sector. The informal sector itself is diverse, containing a myriad of different forms of work: what these forms have in common is that—to a lesser or greater degree—they are performed outside of the realm of labour law. This challenge is
not unique to Southern Africa, or even Africa, and is shared by many Latin American and Asian countries.

Informal work ranges from archetypal ‘informal sector’ activities such as street-hawking (or vending), to jobs that were formerly performed as part of public sector or large private sector entities that have been ‘outsourced’ into informal arrangements, leaving workers with reduced (and in some cases, no) labour protection. A significant example is the ‘dumping’ by South African municipalities of waste disposal services into a range of different outsourcing arrangements, all of which have resulted in a loss of benefits and protection for employees.6

Work in the formal and informal spheres is highly inter-connected. Street vendors form part of the marketing strategies of world’s largest multinationals: Unilever sells its soaps through street-traders and Coca-Cola rents out kiosks to them to sell its beverages. Issues of ‘disguised employment’, a central concern of the Employment Relationship Recommendation, permeate all levels of work in the informal economy. Recent studies in South Africa show extensive movement by workers between employment in the formal and informal economies.7

Despite increasing informalization, conventional employment remains the fundamental legal relationship regulating work. Employees have not chosen to opt out of traditional employment into entrepreneurship and other forms of self-employment to the extent that this may have occurred in developed economies. The South African workplace is less characterized by relationships involving ‘parasubordination’, in which the worker personally performs the labour in the presence of continuity and coordination by a principal, but in the absence of subordination. In Europe, this concept is used to describe a middle ground between self-employment on the one hand and employment (or subordination) on the other.

Parasubordination incorporates a notion of economic dependence to identify those relationships that contain elements of both atypical and typical employment.8 This is essentially self-employment accompanied by a number of characteristics of employment which entitles the ‘employee’ to protection under labour legislation.9

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9 Liebman (n 8) cites as examples of ‘parasubordinate’ new professions such as merchandisers and telemarketers. However, traditional professions such as corporate directors and auditors also claim this status. The professional categories that contain the greatest number of registrations are research/consultancy and teaching/training.
However the influence of this development is reflected in the fact that ‘economic dependence’ has become one of the criteria utilized to identify a statutory employment relationship.

This paper proceeds to examine the changing forms of employment in South Africa. This is followed by an examination of the criteria utilized to identify the employment relationship in South Africa and an account of how South African legislators, policy-makers and tribunals have responded to changes in the form of work. The discussion is then broadened to track these developments in a number of other countries in the Southern African Development Community (SADC). The final section examines responses in more detail, in two particular areas in which legal uncertainty has been utilized to deprive employees of labour law protection: triangular employment relationships and temporary contracts.

4.2 Changing Forms of Employment in South Africa

Recommendation 198’s challenge to governments is to review the scope of application of its labour laws to ensure that workers receive effective protection. This raises very substantial issues. It requires that the diversity of employment relationships within the labour market is identified and analysed. This requires that statistics reflect the range of non-standard and informalized work. This is no easy task, and its complexity is exacerbated by the sectoral varieties in non-standard and informalized work and employment.

In South Africa, the need for a response to informalization has begun to dominate the labour law agenda. Early post-apartheid policy documents such as the Department of Labour’s 1996 Green Paper on Employment Standards noted the rise of non-standard employment relationships, but were not able to document its extent and diversity. In 2002, 6.6 million people were engaged in full-time employment, 3.1 million were engaged in atypical employment10 and 2.2 million were engaged in informal work.11 The following year, in June 2003, the national Growth and Development Summit noted the need for ‘measures to be taken to promote decent work and to address the problem of casualization’. This led to a research project co-ordinated by the Department of Labour on the changing nature of work

10 Atypical employment includes temporary, part-time and outsourced work as well as approximately 1.1 million domestic workers.
and atypical forms of employment. Its report, which was tabled in the NEDLAC in October 2004, showed the extent to which the growth of non-standard employment had eroded the quality of labour protection and called for a reappraisal of policies and legislative provisions.

This report conceptualizes the changes in work in South Africa in terms of two interrelated processes: casualization and externalization. Both represent shifts from the norm of the standard employment relationship which is understood as being indefinite (permanent) and full-time employment, usually at a workplace controlled by the employer. Casualization refers to the displacement of standard employment by temporary or part-time employment (or both). Externalization refers to a process of economic restructuring whereby employment is regulated by a commercial contract rather than a contract of employment. In the case of externalized work, this includes situations where the nominal employer does not in fact control the employment relationship.

Informalization, as indicated above, refers to the process by which employment is increasingly unregulated and workers are not protected by labour law. ‘Informalization’ covers both employees who are nominally protected by labour law but are not able to enforce their rights and those who are not employees because they have the legal status of independent contractors.

The research attempts to quantify the extent of casualization and externalization and how this has eroded labour protection in South Africa. The report notes that these questions cannot be answered by reference to official sources of statistics and contains recommendations to address the inadequate collection and analysis of data. The report proposes an extensive package of possible legislative and institutional responses and acknowledges that any changes must take account of relevant costs and benefits to employers, workers and society. However, a NEDLAC negotiation process on this issue is still ongoing and no proposals for draft legislation have yet emerged.12

The predominant form of restructuring in South Africa’s post-apartheid labour market has been externalization through triangular employment relationships involving employees supplied by temporary employment services (‘TES’) such as ‘labour brokers’. Externalization has also taken the form of outsourcing, subcontracting and the transfer of assets to employees or former employees. There has

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also been an increase in independent contracting as a mechanism to disguise employment, casual employment, the use of short-term or fixed-term contracts and temporary and seasonal work. Firms have reduced standard employment to reduce labour costs and minimise the risks associated with employment. This has produced two forms of labour market segmentation—the first is between full-time employees and those who have been casualized (part-time or temporary workers), and the second is between ‘core’ enterprise employees and those working through externalized arrangements.

In sectors such as construction and mining, industry subcontracting has expanded to a wider range of operations, including those previously seen as ‘core’ functions. Massive retrenchment in the clothing industry have led to a marked growth in the informal production of garments, with many manufacturers and retailers sourcing directly from home workers. Similar trends have been noted in the shoe manufacturing sector, which was all but devastated by imports. Retailers have replaced full-time permanent workers with casual and part-time employees, and outsourced activities to smaller companies, or to businesses in the informal sector or home workers. Employer policies to shift the burden of risk such as ill-health (especially HIV-AIDS) onto employees and their families have also contributed to growing informalization. Local government authorities have outsourced functions such as waste disposal to a range of formal and informal contractors.13

Recent empirical studies have utilized concepts of social security in relation to work and employment in order to ascertain the extent to which the growth in the informal economy and in atypical forms of formal work has led to work being a source of risk and vulnerability for some categories of workers. An important study of residents of Kwamsane, KwaZulu-Natal divides security into eight separate components: income, health, education, employment and skill reproduction, place of work, demand, capital, and the ability to manage risk.14 The authors use 18 indicators for the wage employed and six for the self-employed to estimate the extent of formality of employment in order to assess the components of work-related security for those in different employment statuses.

The study tested for the presence or absence of the following 18 attributes for those in wage work:

(i) permanent work;

13 This overview is drawn from the following sources: Cheadle, H and Clarke, M ‘National Studies on Worker’s Protection: South Africa’ (Paper prepared for Meeting of Experts on Workers in need of Protection, Geneva, 2000); Webster (n 2); Samson (n 6).

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(ii) job acquired through formal job search;
(iii) more than five workers;
(iv) written contract;
(v) paid by cheque or electronic transfer (not cash);
(vi) work at fixed location;
(vii) regular pay;
(viii) paid leave;
(ix) paid sick leave;
(x) 13th cheque;
(xi) bonus;
(xii) employer contribution to pension fund;
(xiii) employer contribution to medical aid;
(xiv) employer contribution to life insurance;
(xv) unemployment insurance fund;
(xvi) member of a trade union;
(xvii) protection from arbitrary dismissal;
(xviii) housing allowance (from employer/through place of work).

Using these attributes, those in wage work were classified into three distinct clusters reflecting different levels of formality/informality.

Self-employed people were separated into two groups: own account workers and employers. The following attributes were used as indicators of the degree of formality of employment:

(i) regularity of employment (whether the business is considered permanent);
(ii) regularity of income (how regular income flows are);
(iii) requires a licence;
(iv) fixed premises;
(v) keeps a set of accounts.

These indicators of formality and informality were used to investigate security and risk in different types of employment.

The study concluded that the self-employed were generally more vulnerable than those in wage employment, and that women were more likely to be self-employed than men, often earning less than men. However, those in the least formal wage employment were more vulnerable in a number of respects than the self-employed. Employment status determined access to risk management mechanisms such as savings and insurance; most of those with low incomes (both wage workers and the self-employed) tended not to have work-related risk coverage and could not access services from formal or informal financial service providers. In general, the
income security of self-employed people is exceptionally vulnerable to illness, and this will become an increasingly severe constraint in the context of AIDS-related illnesses.

As the authors point out, increasing numbers of people work at the borderline between self-employment and waged employment with the result that the simple distinction between ‘formal’ and ‘informal’ conceals a great deal of variation. They therefore argue that it is necessary to find a way of exploring similarities and differences in working conditions across self-employment and waged employment, to see whether there may be a place at the more precarious end of wage employment which has similar characteristics to those found in self-employment. The identification of specific patterns and forms of insecurity may provide a basis for labour law to make a more targeted response to identifying what protections vulnerable workers may require.

4.3 The Notion of the Employment Relationship

In South Africa, as in most other Southern African countries, the employment relationship is defined primarily by distinguishing between employees and independent contractors. This is sourced in the common law distinction between contracts of employment (service) and contracts for services (independent contractor) inherited from South Africa’s Roman-Dutch law (common law) orientation.

In South Africa (as well as Namibia) the terminology of contract is introduced through the exclusion from statutory protection of ‘independent contractors’, a term which is not defined in any of the country’s statutes.

An employee is:

(a) any person, excluding an independent contractor, who works for another person (or the State) and receives, or is entitled to receive, remuneration; and

(b) any other person who in any manner assists in carrying on or conducting the business of an employer.

The definition of ‘employee’ was not at issue in the extensive negotiations that led to the adoption of South Africa’s post-apartheid 1995 Labour Relations Act. The existing definition was incorporated unaltered into that Act as well the Basic Conditions of Employment Act 75 of 1997 (‘BCEA’), the Employment Equity Act 55 of 1998 (‘EEA’) and the Skills Development Act 9 of 1999 (‘SDA’). The Namibian Labour Act 1992 used the same definition and this has been retained in
that country's 2007 Labour Act. While this definition is open to an expansive interpretation, South African courts have tended to interpret it conservatively.

More commonly in the South African Development Community region, countries that limit the scope of the employment relationship to employees engaged under a contract of employment do so by confining their application expressly to those who have a contract of employment. This includes Swaziland's 1980 Employment Act, Botswana's 1982 Employment Act, the Lesotho Labour Code of 1992 and Zimbabwe's 2005 Labour Act. This approach is typically found in older legislation with colonial-era origins in countries such as Nigeria and Kenya. Other statutes in the region that apply a purely contractual definition include South Africa's Compensation for Occupational Injuries and Diseases Act 1993. These definitions typically cover employees working under a contract of employment, whether express or implied and whether oral or in writing.

Two countries that currently have statutory definitions of employment that seek to broaden the categories of protected workers are Swaziland and Tanzania. The Swaziland Industrial Relations Act No 1 of 2000 has a definition which expressly disavows the contractual model and the Tanzanian Employment and Labour Relations Act 2004 also seeks to expand protection to dependent workers who are not employees. Zimbabwe's Labour Act 17 of 2002 introduced a definition of employee which considerably expanded its scope and made 'economic dependence' the key definitional element. However, this was short-lived and was subsequently repealed by the Labour Act 7 of 2005 which restored the previous contractual definition. The implications of these different approaches are examined in greater detail later in the paper.

Despite the preceding Green Paper, a policy document identifying regulatory problems associated with the non-standard employment, South Africa's 1997 BCEA retained the standard employment relationship as the normative model for employment. While the BCEA's cautiousness has been criticized, it can be attributed to a concern that inadequate information was available at the time on patterns of non-standard employment. The Act did extend greater protection to part-time workers and seasonal and other intermittent workers. An administrative capacity to regulate unprotected work was established within this statutory dispensation by giving the Minister the power to apply provisions in the BCEA or sectoral determination made in terms of it to persons other than employees, however the need for the substantive regulation of non-standard work was not addressed. In 2002, this power of extension was extended to all labour legislation. To date, little use has been made of these powers.

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made of the Ministerial power to extend the scope of laws. However, the Department of Labour has proposed that the Minister should use this power to broaden the restriction on work by under-age children, to achieve full compliance with international instruments regulating child labour. The power to extend the scope of application of labour law by Ministerial notice is also contained in the Namibian and Tanzanian labour statutes.

4.4 The Criteria Defining the Employment Relationship

Traditional Tests

Since 1979, the South African courts have used a multi-factoral ‘dominant impression’ test to identify who is an employee. This approach, which requires an adjudicator to take a conspectus of all aspects of the employment contract and relationship in the circumstances of each case, is now used by courts in most SADC jurisdictions.

Before this decision, the South African courts, like the courts in many other countries, sought a single definitive touchstone to identify the employment relationship. Since the 1930s, South African courts have been influenced by the English courts. In 1952 the English courts, following the publication of a seminal article by Sir Otto Kahn-Freund, rejected the ‘control’ test to adopt an ‘organization’ or ‘integration’ test. However, in the decisive Smit decision, South Africa’s highest court at the time, the Appellate Division of the Supreme Court, rejected both approaches. It held that an employer’s right of supervision and control was not the sole defining feature of an employment relationship while also rejecting the ‘organization test’ as ‘vague and nebulous’. Under the ‘dominant impression’ approach, the existence of a right of supervision or control, while an important consideration, is not conclusive proof of the existence of a contract of employment.

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16 Smit v Workmen’s Compensation Commissioner 1979(1) SA 51 (AD).
17 Kahn Freund argued that the control test is well suited to identify employment relations where there is a ‘combination of managerial and technical functions in the person of the employer’. This assists to identify a relationship such as those between a farmer and a farm worker or a factory owner and an unskilled worker. However, he argued that it was not adequate to deal with the technical and economic developments of 1950s industry (O Kahn-Freund, ‘Servants and Independent Contractors’ (1951) 14 Modern Law Review 504).
18 Smit v Workmen’s Compensation Commissioner (n 16).
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This decision identified the following factors as being the most important legal characteristics of the contract of service or subordination (employee) and the contract of work (independent contractor):

<table>
<thead>
<tr>
<th>Contract of service</th>
<th>Contract of work</th>
</tr>
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<tbody>
<tr>
<td>1. Object of a contract is to render personal services.</td>
<td>Object of contract is to perform a specified work or produce a specified result.</td>
</tr>
<tr>
<td>2. Employee must perform services personally.</td>
<td>Contractor may usually perform through others.</td>
</tr>
<tr>
<td>3. Employer may choose when to make use of services of employee.</td>
<td>Contractor must perform work (or produce result) within period fixed by contract.</td>
</tr>
<tr>
<td>4. Employee obliged to perform lawful commands and instructions of employer.</td>
<td>Contractor is subservient to the contract, not under supervision or control of employer.</td>
</tr>
<tr>
<td>6. Contract also terminates on expiry of period of service in contract.</td>
<td>Contract terminates on completion of work or production of specified result.</td>
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The Labour Appeal Court established under the 1995 LRA continued to apply interpreting the definition of an employee in the 1995 Act.

The ‘dominant impression’ test has been criticized by legal scholars from the outset because it says nothing about the legal nature of the contract of employment and gives no assistance in difficult cases on the border between employment and self-employment. In a 1997 Labour Court decision, Judge R Zondo, who subsequently became the Judge-President of the Labour Appeal Court, echoed these concerns, saying that the ‘dominant impression’ test was unsatisfactory because of the uncertainty it created. Yet the courts continued to apply it, leaving a very significant and increasing number of workers vulnerable to abuse by employers who deliberately sought to disguise employment relationships as independent contracts.

The ‘dominant impression’ test also continues to be used to determine the employer’s vicarious liability to third parties for wrongful conduct by an employee.

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20 Medical Association of SA & others v Minister of Health & another (1997) 18 ILJ 528 (LC) 536 [D]–[E].
In general terms, an employer will not be liable for the wrongdoing of an independent contractor unless the employer is in some way personally at fault. The courts have described their approach as a ‘topological’ one in which, in addition to the employer’s right to exercise control, factors to be taken into account in determining whether the individual is an employee include:

(a) the existence or non-existence of a right of supervision on the part of the employer;
(b) the manner of payment (whether the employee is paid a fixed rate or by commission);
(c) the relative dependence or freedom of action of the employee in the performance of his or her duties;
(d) the employer’s power of dismissal;
(e) whether the employee is preclude from working for another;
(f) whether the employee is required to devote a particular amount of time to his or her work;
(g) whether the employee is obliged to perform his or her duties personally;
(h) the ownership of the working facilities and whether the employee provides his or her own tools and equipment;
(i) the place of work;
(j) the length of time of employment; and
(k) the intention of the parties.21

Disguised Employment

The ILO describes ‘disguised employment’ as an employment relationship that ‘is lent an appearance that is other than the underlying reality’.22 The Recommendation proposes that states should introduce a National Policy which includes measures to combat disguised employment. In the immediate aftermath of the enactment of the post-apartheid labour law dispensation, the practice of seeking to exclude workers from labour legislation by ‘converting’ them into ‘independent contractors’ became a high-profile issue. A number of labour consultancies, notably COFESA,23 were proponents of this approach. Employees were advised that the expedient of changing the language of contracts would allow them to avoid the clutches of

21 Stein v Rising Tide Productions CC (2002) 23 ILJ 2017 (C) 2024
23 The Confederation of Employers South Africa (COFESA) was established in 1990 as both a labour consultancy and an employers’ organization.
labour laws and policies without in any way adjusting shop-floor practices. After some hesitation, the South African courts have shown an increasing awareness of the extent of this issue and have managed to fashion an effective legal response to the cruder forms of disguised employment. This has required the courts to move away from an approach focused on the wording of the contract.

The conventional approach to identifying a contract of employment proceeded from the premise that the legal relationship must be gathered from a construction of the contract between worker and employer. However, in subsequent cases, the courts have had to confront the discrepancies between contractual wording and the realities of working life. In a 1998 decision, *Niselow v Liberty Life*, the Supreme Court of Appeal indicated that when categorising an employment relationship, the terms of the contract could be departed from if a party contended that the contract was a simulated transaction, had been amended or was vague and ambiguous.\(^{24}\) However, the onus of establishing this lay on the party making that allegation: in these circumstances, the employee.

The Court’s responded to the rise of disguised employment by adopting an approach whereby the contractual relationship is not definitive as to the nature of the legal relationship, and a court must examine the true nature of the relationship between the parties, particularly where a party is induced into a relationship that deprives him or her of the protection granted by the status of employment.\(^{25}\) The courts have characterized contracts in which employees are ‘converted’ into independent contractors without any change in how they perform their work as a ‘bizarre subterfuge’\(^{26}\) and a ‘cruel hoax and sham’\(^{27}\) to deprive employees of the protection of labour law.\(^{28}\) By the time of these decisions, the Department of Labour published proposals in 2000 to introduce a presumption of employment into legislation as a response to this form of disguised employment. A number of

\(^{24}\) At 166A.

\(^{25}\) *Rumbels v Zsa-Zsa Marketing* (2003) 24 ILJ 1587 (LC). This approach is similar to that adopted by the British courts. In *Young and Woods Ltd v West* [1980] IRLR 20 (CA) the Court of Appeal upheld the approach of the Employment Appeal Tribunal to look beyond the contractual expression of the relationship to decide whether the individual was an employee as a matter of fact. The Court notes that the failure to do this would make employees vulnerable to being pressed into self-employment by employers wishing to avoid statutory responsibilities.


\(^{27}\) *Building Bargaining Council (Southern & Eastern Cape) v Melman’s Cabinets CC & another* (2001) 22 ILJ 120 (LC) [21].

\(^{28}\) Treating genuine employees as independent contractors can have disastrous consequences for the employers concerned, particularly where there is effective enforcement. Bargaining councils have succeeded in having employers who do not register with the council jailed for contempt of a court order requiring them to register with the council (*Business Day* 8 June 2000).
arbitrators also made awards in which they expressed a preference for an ‘economic realities’ approach to analysing working relationships.29

These cases dealt with low-skilled workers who were pressurized into accepting a fraudulent independent contractor status. In another line of decisions, the Labour Courts have dealt with cases of disguised employment in which skilled personnel have voluntarily assumed the status of independent contractors in order to obtain tax benefits. When this relationship sours and the contractor seeks to reclaim the status of employee in order to obtain compensation or reinstatement on the basis of an unfair dismissal, the courts initially have been unwilling to assist the employee because (in the language of one of the judgments) they are seeking to ‘have their cake and eat it’.

In CMS Support Services v Briggs30 the Labour Appeal Court dealt with a case in which a consultant had provided services through a closed corporation, to obtain tax advantages. The Court found that as there was no personal contract between the respondent and the employee—the consultant was not an employee. This conclusion was reached on the basis of an examination of the contract alone, and the court emphasized that the contractual relationship was the primary mechanism for determining the relationship. Likewise, the Labour Court case of Bezer v Cruiser International CC,31 concerned an employee who established a closed corporation at the suggestion of her employer, even though the day-to-day relationship did not change: the employer continued to set her hours of employment and the employee was not entitled to work for other clients. The court found that while the relationship remained in substance one of employment,32 the claimant was not an employee, because of her election to contract through the closed corporation.33 These two decisions gave precedence to form over substance by holding employees to a legal characterization of their employment relationship which differs from the underlying reality because they voluntarily agreed to that characterization in order to obtain benefits under different legislation. This approach, it is suggested, misconstrues the nature of disguised employment focusing only on the benefit gained by the employee and not on the advantages for the employer or the cost to the State. In neither case did the Court ask, as they are required to do by the second leg of the definition of an employee, whether the individual assisted the employer to conduct its business.34

29 Thompson and Benjamin, South African Labour Law BB1–4.
32 ibid [55].
33 ibid [57].
34 Niselow v Liberty Life Association of SA Ltd 1998(4) SA 163 (SCA) 168F.
The introduction in 2002 of presumptions of employment in s 200A of the LRA and s 83A of the BCEA, has resulted in the Court being less inclined to assist employers who persuade high-level employees to utilise alternative corporate forms to disguise employment in a manner that the parties assume to be mutually beneficial.

One such case is Denel (Pty) Ltd v Gerber which concerned an individual who claimed to be an employee even though she was ‘employed’ by a private company which in turn had been contracted to provide services to a client. The Labour Appeal Court found that in reality, Gerber was employed by Denel (Pty) Ltd and that the Labour Court had jurisdiction to consider her unfair dismissal claim. The LAC then added an important caveat. Since the employee, had represented to the tax authorities that she had been employed by a number of entities other than Denel (Pty) Ltd, she was required to correct any misrepresentation she had made to them. In other words, the Court was indicating that an employee could only expect the assistance of the Labour Courts if she accepted that all public authorities should treat her as an employee, even where this was to her disadvantage.

The prominent labour lawyer Andre Van Niekerk criticized this decision on the basis that where parties agree, quite lawfully and in anticipation of whatever advantage they perceive, services should be supplied on an independent contractor–client basis. This should not be disregarded only because on the facts the relationship bears some resemblance to a contract of employment. He argues that public policy should frown on the employee who wants the benefit of not being an employee yet, when the relationship breaks down, the benefit of being an employee. It is suggested that this argument repeats the error that distinguished the reasoning in earlier cases such as Briggs because it fails to take into account the fact that ‘disguised employment’ between an employer and a well-paid worker for their assumed mutual benefit amounts to a misrepresentation to the state by both parties as it excludes the employee from social security schemes such as skills development, unemployment and worker’s compensation. While it may not be appropriate on policy grounds to give such an employee effective unfair dismissal protection, this should be done without accepting their characterization of the employee as a self-employed person operating its own business, when this evidently is not the case. It is suggested that the approach of the South African Labour Appeal Court in Denel v Gerber is an appropriate method of resolving this dilemma.

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Paul Benjamin

*Tests Introduced by Statutory Presumption and the Code of Good Practice*

**The Presumption**

In 2002 the South African Government introduced a rebuttable presumption of employment into the principal labour statutes. This was accompanied by a direction to the National Economic Development and Labour Council to prepare a Code of Good Practice to provide guidance in identifying whether an employment relationship exists. The presumption was a response to the widespread practice of disguised employment through 'independent' contracting described above.

The presumption applies only to employees earning below a prescribed earnings threshold but applies irrespective of the contractual arrangement in terms of which a worker is hired. It is triggered if the worker can show that one of a number of factors listed in the Act is present in the working relationship. The employer must then show that the worker is not an employee. These factors are:

(a) the manner in which the person works is subject to the control or direction of another person;
(b) the person's hours of work are subject to the control or direction of another person;
(c) in the case of a person who works for an organization, the person forms part of that organization;
(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; or
(g) the person only works for or renders services to one person.

Five of the seven factors reflect considerations that formed part of the conventional approach to identifying employment relationships. However, two of the factors are worthy of particular comment because they signify an intention to break with the past. The inclusion of a version of the 'organization' test appears to indicate an intention to reintroduce elements of this approach rejected more than...
two decades earlier. However, it is introduced as one of the factors that trigger the presumption, not as a single decisive test of employment. The presumption introduces the notion of ‘economic dependence’ into South African law and the courts are now required to give meaning to this term. The Code of Good Practice provides extensive guidance on this issue which we examine in the following section.

A concrete example that highlights the significance of economic dependence as a factor is the position of ‘home workers’ who undertake work for manufacturers in the clothing industry. An application of conventional approaches might lead one to hold that they are not employees either because they are not supervised in their work or because they are engaged to perform specified tasks (for instance, sowing a garment or part of a garment). Neither of these factors relate to the relative bargaining position of the workers who may be in a position of real economic dependence on those employers who supply them with work. In evaluating, whether these home-workers are employees or not, the court must consider whether they conduct their own business.

It has been suggested that the presumption offers an opportunity to initiate a process of challenging the assumptions that underlie the traditional distinction between employees and independent contractors. While the courts have had limited opportunity to apply the presumption to the position of marginal workers, the introduction of the presumption has given the Labour Appeal Court the confidence to apply an increasingly purposive interpretation to the issue of who is an employee.

In the first of these judgments, the court held that the definition of an ‘employee’ includes a person who has concluded a contract of employment to commence work at a future date but who has not yet started work. The court acknowledged that while this construction did not accord with a literal construction of the definition of an employee, an expansive interpretation was justified to avoid hardship and absurdity and was consistent with the progressive legislative development of labour protection. This approach is consistent with that of the Constitutional Court, which adopted a purposive approach when interpreting the definition of the term ‘worker’ in s 23(2) of the Constitution to include military personnel who are expressly excluded from the ambit of the LRA and other labour legislation. In Denel v Gerber, discussed earlier, the LAC held that even where the

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41 SANDU v Minister of Defence and Another 1999 (4) SA 469 (CC).
presumption does not apply because the employee is above the threshold of earnings, the factors listed may nevertheless be used as a guide for the purposes of determining whether the true nature of the relationship between the parties is one of employment.

In a very significant decision in 2009, the Labour Appeal Court has held that there are three 'primary criteria' for determining whether a person is an employee. These are:

(a) an employer's right to supervision and control;
(b) whether the employee forms an integral part of the organization with the employer;
(c) the extent to which the employee is economically dependent upon the employer.42

The presence of any one of these three factors is sufficient to establish in ordinary circumstances that the person is an employee. The fact that these primary criteria have been identified does not preclude an employee relying on other factors associated with the 'dominant impression' test although this is only likely to occur in the most exceptional of cases.

The extent to which South African courts have moved away from reliance on a contractual model of employment is also captured by the Labour Court in White v Pan Palladium SA (Pty) Ltd,43:

The existence of an employment relationship is therefore not dependent solely upon the conclusion of a contract recognized at common law as valid and enforceable. Someone who works for another, assists that other in his business and receives remuneration may, under the statutory definition qualify as an employee even if the parties inter se have not yet agreed on all the relevant terms of the agreement by which the wish to regulate their contractual relationship.

**Code of Good Practice**

The Department of Labour’s Code of Good Practice: Who is an Employee (Notice 1774 of 2006, GG 29445, 1 December 2006) was developed to provide guidance on identifying the employment relationship. The Code was developed by the tripartite forum NEDLAC over a three-year period. Its final text was revised to ensure

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43 White v Pan Palladium SA (Pty) Ltd (2006) 27 ILJ 2721 (LC) 2727[1]–2728[1].
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consistency with the ILO Recommendation 198, a copy of which is attached to it. The Code provides guidelines for interpreting diverse forms of employment relationships, including ambiguous employment relationships, disguised employment, atypical or non standard employment and triangular employment relationships. The Code seeks to locate the issue of identifying employment relationship within the context of purposive legislative interpretation. The Code emphasizes that no single factor is decisive of an employment relationship and encourages adjudicators to examine the realities of each relationship rather than confining themselves to the legal structuring.

The Code is a ‘soft law’ policy document which serves as an aide to the interpretation of the law. It does not create new obligations or alter the statutory definition. The Code endorses the approach taken by the LAC in Denel v Gerber that where the presumption does not apply because the employee falls above the threshold of earnings, the factors listed may nevertheless be used as a guide for the purposes of determining whether the true nature of the relationship between the parties is one of employment. The Code analyses the factors listed in the presumption, as well as the distinction drawn in the common law between independent contractors and employees. It also lists other factors that are significant in determining the existence of an employment relationship. These include:

— Remuneration and benefits. The Code emphasizes that the fact that an employee receives fixed payments at regular intervals regardless of output is not necessarily definitive of an employment relationship in the same way that variable payments do not necessarily indicate the existence of an independent contracting relationship. The Code emphasizes that the manner and method of payment is one factor that may, along with others, lead to the conclusion that a person is or is not an employee. In this regard, the Code can be seen as be somewhat more equivocal than the Recommendation44 which identifies the ‘periodic payment of remuneration’ to the worker as a potential as an indicator of an employment relationship.

— Provision of training. The Code stipulates that in general the provision of training indicates an employment relationship but that training as part of a contractual relationship is not necessarily inconsistent with an independent contractor relationship.

— Place of work. The Code states that regular work at the employer’s premises generally point to employment, but that this is not necessarily the case. Where work involves repairs or other services that have to be performed at the

44 See para 13(b).
employer’s premises, or where the independent contractor leases premises from the employer, place of work is not definitive. In fact, in certain instances employees such as home workers may be required to work outside the employer’s premises but are still subject to the employer’s control and may even use the employer’s tools.

The Code suggests that ‘economic dependence’ as a factor listed in the presumption, will not be present if the applicant is genuinely self-employed or retains the capacity to contract in the market. On the other hand, a part-time employee may be economically dependent on a number of part-time employment contracts, or a full-time employee may also be allowed to take on other work in his/her spare time but this will not mean the employment relationship no longer exists. Economic dependence therefore relates to the entrepreneurial position of the person in the marketplace. An important indicator that a person is not dependent economically is that he or she is entitled to offer skills or services to persons other than his or her employer. The fact that a person is required by contract only to provide services for a single ‘client’ is a very strong indication of economic dependence. Likewise, depending upon an employer for the supply of work is a significant indicator of economic dependence.

The CCMA and Labour Court have now adopted an approach according to which they look beyond the legal structuring of the relationship and ascertain the true nature of the relationship. This has enabled them to reject fabricated independent contractual arrangements and focus on the ‘underlying economic realities’.

‘Difficult’ cases in which there has been a finding that an individual is an employee include the following:

(a) An estate agent engaged as an independent contractor and paid only commission was an employee because of the degree of control that the company and its managers had over the agent.45

(b) An individual retrenched after 30 years’ service and immediately re-engaged to do the same work as an independent contractor was not an employee even though she signed a number of contracts with the respondent and another entity to supply her services. As the individual was ignorant of the nature or purpose of the agreement with the second entity, the agreement was not binding on her.46

(c) An individual described in his contract as a ‘subcontractor’ and paid on presentation of invoices for work performed was an employee. Factors

45 Linda Erasmus Properties Enterprise (Pty) Ltd v Mhlongo & others [2007] 6 BLLR 530 (LC).
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influencing this decision were that the applicant’s pay was calculated on an hourly basis, he had been required to utilize the company’s clock card system, his assistants were also remunerated by the employer and the employer had a practice of appoint subcontractors as employees after a period if they performed their work satisfactorily.47

(d) Workers covered by a framework casual employment agreement regulating a pool of about 2,000 workers whom the employer, a parastatal operator of harbours, could draw upon to meet its day-to-day demands for labour were classified as a ‘special class of employees’, even though they did not have an individual contract and had no right to be engaged to perform casual work.48

(e) A medical intern, who was instructed to vacate her post at the end of her internship, was deemed an employee, as she had received a salary and had been occupied full-time in the service of the respondent.49

(f) A sex worker employed by a massage parlour is an employee despite the fact that prostitution is a criminal offence for both the sex worker and the client. The Labour Appeal Court concluded that despite sex work being unlawful, sex workers should be entitled to the benefit of the constitutional right to fair labour practices unless it would be contrary to public policy to grant a legal remedy. The Court held that while it would be inappropriate for a sex work to be reinstated or compensated for a dismissal without a valid reason they should nevertheless be accorded a hearing before dismissal. The court also held that it would be inappropriate to allow a trade union of sex workers to register for the purposes of collective bargaining.50

On the other hand, cases in which there has been a finding that the claimant was not an employee include:

(a) An individual who was paid a monthly cash retainer to assist a company with its labour relations and who performed certain tasks for it on one or two days a month at the company’s premises was not an employee. He had no office, the company respondent had no control over his working hours and he referred to the company in all correspondence as a client.51

(b) An individual who operated a franchise in terms of a franchise agreement was

47 Durand & another v C.A Engineering [2005] 10 BALR 1033 (MEIBC).
48 NUCCAWU v Transnet t/a Portnet (2000) 21 ILJ 2288 (LC).
49 Andreanis v Department of Health [2006] 5 BALR 461 (PHWSBC).
50 ’Kylie’ v CCMA & others (Case No. CA 10/08). The prominent labour lawyer Halton Cheadle, hearing the matter as an Acting Judge of the Labour Court had earlier concluded that while sex workers were employees, it would be contrary to public policy for the courts to grant them any relief in respect of a claim for unfair dismissal. See ’Kylie v CCMA & others (2008) 29 ILJ 1918(LC).
51 Quinn v Hendrik Sand van Heerden (Pty) Ltd [2007] JOL 1975 (CCMA)
an independent contractor and not an employee. While the franchiser company assisted him by allocating clients, he was not economically dependent as he also sourced his own clients and was responsible for his own profitability. The fact that he operated under the franchiser's brand did not make him an employee.52

(c) An applicant who was a member of an organization which placed individuals as 'independent contractors' at various sites to act as security guards was not an employee.53

(d) A newspaper art critic was not an employee, as the newspaper was not bound to accept his contributions; he was free to work for other publications and was not treated in the same way as other employees.54

(e) An applicant who was employed to file reports and was paid per report was an independent contractor. Nothing prevented the applicant from working for persons other than the respondent, and the respondent did not regulate his hours of work.55

(f) A trainee on a bursary loan from the respondent to help him attend college was not an employee, in spite of the fact that he worked occasionally for the respondent during his training.56

(g) A freelance radio talk show host was an independent contractor because the parties had a contract providing that a radio announcer would provide the talk show through a close corporation.57

(h) An individual, who had concluded a partnership agreement that was a bona fide statement of the terms of the relationship of the parties, was not an employee.58

These cases show the extent to which adjudicators have taken an increasingly wide range of factors into account in endeavouring to identify the true nature of employment relationships. Nevertheless, a tendency to resolve matters by reference to contractual language has not been totally eradicated.

56 Mokone v Highveld Steel and Vanadium [2005] 12 BALR 1245 (MEIBC).
57 Jordison v Primedia Broadcasting (Pty) Ltd [2000] 2 BALR 140 (CCMA).
58 Greyling v Appies Inc [2007] JOL 18869 (CCMA).
Sectoral Responses

A significant proportion of South African workers have their minimum conditions of employment, including minimum wages determined by sectorally specific standards. There are two sources of these standards:

Collective agreements negotiated by bargaining councils: voluntary bargaining institutions that allow trade unions and employer's organizations to bargain wages and minimum conditions of employment for their sectors. Subject to representivity criteria, these agreements may be extended by the Minister of Labour to all employees in the sector. Presently, 41 bargaining councils covering a total of approximately 900,000 employees operate in the private sector. In 2002, the statutory functions of bargaining councils were extended to include ‘extending the services and functions of the council to workers in the informal sector and home workers’.

Sectoral determinations made by the Minister of Labour on the advice of the Employment Conditions Commission which set minimum conditions of employment including minimum wages for unorganized sectors. This has led to the setting of minimum wages for the first time for domestic workers, farm workers, forestry workers and in the highly informal taxi and hospitality sectors. In addition, minimum wages continue to be set for contract cleaning, wholesale and retail and private security.

These sectoral instruments contain a range of responses seeking to ensure the adequate protection of vulnerable employees. These include:

(a) The Building Industry Bargaining Council in the Western Cape has used a range of strategies to regulate outsourcing to labour-only subcontractors get compliance with their agreements. The Council obtained the agreement of the institutions that provide and finance large-scale housing to only contract builders registered with the Council. The Council also introduced a clause into its agreement that prohibits subcontracting to unregistered firms. The Council has also offered services, including a payroll service and an employment bureau, to attract smaller employers to the Council. The result has been a steady increase in the number of employers, particularly small employers and subcontractors, registered with the Council and complying with its agreements.60

(b) Trade liberalization and the huge influx of cheap shoes brought the local footwear industry to the verge of collapse. The retrenchment of footwear workers saw an upsurge in informal shoe-making operations and home working, undermining the labour standards set by the Leather Industry Bargaining Council. Employers and unions responded by revising the footwear collective agreement to classify firms into one of three categories: formal, semi-formal and informal. Firms categorized as formal pay 100 per cent of the set wage rate and comply with the rest of the agreement (although negotiations at the company level can reduce the wage rate to 80 per cent). Semi-formal firms comply with the agreement but are required to pay only 75 per cent of the set wage rates (although negotiations at the company level can reduce the wage rate to 60 per cent). Informal firms are excluded from the agreement entirely (but must still register with the Council).61

c) The National Bargaining Council for the Road Freight Industry requires ‘owner-driver’ individuals who are employers while at the same time drivers, to comply with the limits on working hours applicable to employees.

d) A number of bargaining councils regulate the operation of temporary employment services in their sector.

e) The sectoral determination for domestic workers applies to domestic workers who are independent contractors.

(f) The sectoral determination for the retail sector deals allows part-time employees (those working less than 27 hours per week) to receive the same benefits on a proportional basis as full-time employees or to be paid a cash premium instead of benefits.62

4.5 The Scope of the Employment Relationship in other African Countries

In this section, we examine the approach taken by both legislators and adjudicators to identify employment relationships in several different Southern African jurisdictions. A range of different influences contribute to a complex pattern of

62 The determination provides two models for employing workers who work less than 27 hours a week. The employee and employer may agree that the employee receive a wage that is 25% higher than the prescribed minimum wage. Employees who conclude such an agreement do not qualify for a night shift allowance, paid sick leave, family responsibility leave and only receive two weeks of annual leave, while other employees receive three. Part-time employees who do not conclude these agreements receive all benefits on a proportional basis.
similarities and differences within the region. In this regard, mention should be made of the differences in legal traditions between, for example, the French-speaking and the English-speaking African countries. Herewith, some examples on how the determination of the criteria of the employment relationship is dealt with in law and practice.

Namibia

The Namibian Labour Act 2007 defines an employee as:

- an individual, other than an independent contractor, who—
  - works for another person and who receives, or is entitled to receive, remuneration for that work; or
  - in any manner assists in carrying on or conducting the business of an employer.

The definition is the same as that in South African labour legislation except that the exclusion of ‘independent contractors’ is contained in the stem (the opening words) rather than in sub-para (a) as in the South African version. This definition was included in Namibia’s first post-independence labour statute, the Labour Act of 1992, an omnibus labour code developed with considerable ILO assistance and retained in the 2004 Labour Act which was passed by Parliament but never came into force.

However, as the South African courts have held that persons who are independent contractors are excluded from both elements of the definition of an employee, the effect is the same. Accordingly, the Namibian definition amounts to a less ambiguous version of the South African approach.63

One consequence of locating the Namibian definition within the omnibus labour ‘code’, which deals with all aspects of employment law including occupational health and safety, is to restrict the coverage of occupational health and safety law to employees who are covered by other labour laws. This is unlike South Africa, where the Occupational Health and Safety Act 1993 has a significantly wider definition of an ‘employee’. A further consequence is that it restricts the application of the prohibition on child labour to the employment of children as employees, rather than a wider range of work performed by children.

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63 The only reported judgment in Namibia on the scope of the employment definition is one in which a judge unsuccessfully claimed to be an employee.
Swaziland

The definition of an employee in the Swaziland Industrial Relations Act No 1 of 2000 is an example of a definition that seeks to extend the scope of the legislation to workers other than contractual employees. The Act defines an ‘employee’ as:

a person, whether or not the person is an employee at common law, who works for pay or other remuneration under a contract of service or under any other arrangement involving control by, or sustained dependence for the provision of work upon, another person.

This definition explicitly extends the scope of the Industrial Relations Act to two categories of workers who may not be able to establish that they have contracts of employment. These are:

(a) any person who works under an arrangement in terms of which that person is under the control of another person;
(b) any person who works under an arrangement in terms of which there is a sustained dependence for the provision of work upon another person.

The Swaziland Labour Court has described the implications of this definition in the following manner:

This extended definition means that the Industrial Court may even have jurisdiction over independent contractors and their principals, provided that the necessary degree of control or sustained dependence for work is shown to be present in the relationship … The Act extends its protection to ‘quasi-employees’ who, while not being employees, are nevertheless to be distinguished from autonomous self-employed persons because they are subject to a degree of control or dependence which makes them vulnerable to exploitation or unfair treatment … It is not necessary to lay down a demarcation line for Swaziland, but it is safe to say that where a natural person earns his livelihood solely from services rendered to one other person or institution, then he is regarded as an employee whether the services are rendered under a contract of service or some other arrangement.64

In this case, an individual employed by Swazi TV in 1993 as a ‘commissioned salesperson’ and later as a ‘Freelance Sales Advertising Executive’ was found not to be an employee under the extended definition in the 2000 Act. He was paid a commission on all sales he generated, as well as a petrol allowance, but was responsible for his own business expenses and transport. The contract made no provision for supervision or control of the manner in which he worked. This led the

64 Percy Lokotfwako v Swaziland Broadcasting Corporation t/a Swazi TV (151/2007).
court to conclude that he was not a conventional employee and it then inquired whether he may have been a ‘quasi-employee’ in terms of the extended definition of employee because of control by, or sustained dependence for work upon, Swazi TV.

The Court found an absence of control as he had no fixed hours of work, was not subject to discipline for failing to meet his target, did not work from the company’s premises and was given free rein in the manner in which he secured advertising contracts. A requirement that he conduct and dress himself properly did not in the Court’s view indicate any significant degree of control. As the contract did not preclude him from working for others and did not require him to personally render the contracted services, the Court held that he could not be said to be dependent upon Swazi TV for work. The Court pointed out no further evidence was before the Court of his dependence for the supply of work.65

A number of aspects of this definition are worthy of comment. Firstly, the definition expressly states that there are persons who may be covered who are not employees under the common law. This makes it abundantly clear that the purpose of the definition includes covering persons who have not concluded a contract of employment. Secondly, in creating an extended category of employees beyond the confines of the common law, the statute does not make use of the terminology of contract. The use of the term ‘arrangement’ may well lower the burden of what a worker must establish to show that they fall into one of these two categories by making the question of whether a contract came into existence irrelevant. Thirdly, in creating the extended category of employees, the definition identifies two elements, either of which is sufficient to trigger coverage by the Act. These are the presence of control or a sustained dependence for the provision of work. The emphasis on control is important as in the case of vulnerable employees, the presence of control remain the most important indicator that a relationship is one of employment. The notion of ‘sustained dependence for the provision of work’ is a narrower formulation than the notion of ‘economic dependence’ included in the presumption of employment in the South African and Tanzanian statutes. However, the linking of dependence to the provision of work targets the source of dependence with greater clarity making issues of interpretation and application more certain.

Swaziland's Employment Act No 5 of 1980 continues to define an employee in purely contractual terms. An ‘employee’ is ‘any person to whom wages are paid or are payable under a contract of employment’. The term ‘contract of employment’ is

65 ibid.
in turn defined as a ‘a contract of service, apprenticeship or traineeship whether it is express or implied and, if it is express, whether it is oral or in writing’.

The inconsistent usage of the definition of an employee in Swaziland’s labour legislation creates very significant anomalies with non-contractual ‘quasi-employees’ having collective labour rights under the Industrial Relations Act, but no protection against unfair dismissal or minimum standards on issues such as hours of work and leave, for instance, which are dealt with in the Employment Act. They are also excluded from the wage-fixing machinery. This inconsistency may have the consequence that Swaziland’s Parliament is in default of its obligations under the country’s constitution. Section 32(4) of the Constitution of Swaziland requires Parliament to enact laws to:

(c) ensure that every worker is accorded rest and reasonable working hours and periods of holidays with pay as well as remuneration for public holidays; and

(d) protect employees from victimization and unfair dismissal or treatment.

The Employment Act is currently subject to review and hopefully this opportunity will be used to end this anomaly.

Tanzania

The Tanzanian Employment and Labour Relations Act 2004 defines an employee as:

an individual who has –

(a) has entered into a contract of employment;

(b) has entered into any other contract under which:
   (i) the individual undertakes to work individually for the other party to the contract; and
   (ii) the other party is not a client or customer of any profession, business or undertaking carried on by the individual.’ (section 4)

This expanded definition of an ‘employee’ is supplemented by the relevant minister having the power to deem individuals falling outside the definition as employees as well as a presumption of employment modelled on the South African provision. While there are significant influences from the South African LRA in the Tanzanian legislation, the definition of an ‘employee’ is drawn from the definition of a ‘worker’
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contained in s 230(3) of the UK Employment Rights Act 1996. The concept of worker has been described as creating a ‘middle category’ between employee and self-employed. The UK Employment Appeals tribunal has said that this provision must be understood in the light of its purpose of extending labour law to some of the people who do not fall under the definition of an employee and have used an ‘economic dependence’ test to determine whether individuals fall within this broadened definition. However, unlike the Swaziland definition discussed above, the extending provision does use the language of contract.

Lesotho

As indicated in the preceding section, the Lesotho Labour Code, 1992 has a contractual definition of an employee. The scope of the Lesotho Labour Code emerges from a series of interlocking definitions:

(a) An employee is a person who works under a contract of employment with an employer.
(b) A contract of employment is a contract in terms of which an employee enters into the service of an employer.
(c) An employer is any person who employs any person under a contract of employment.

Like Namibia, these definitions are located in an omnibus statute. A draft Bill currently being debated by Lesotho’s National Advisory Committee on Labour (NACOLA) has recommended that the definition of an ‘employee’ be broadened for the purpose of the regulation of ‘child labour’ and occupational health and safety.

The Lesotho Code contains a separate definition of a ‘domestic servant’ as ‘any person employed in or about a private residence’ in a range of different capacities which are specified in the definition. A significant difference of opinion has emerged over the significance of this separate definition. Arbitrators in Lesotho’s Directorate of Dispute Resolution and Prevention (DDPR) have interpreted the fact of this definition as signifying an intention to exclude domestic workers from the ambit of the legislation and have therefore rejected claims for unfair dismissal brought by domestic workers on the basis that they fall outside of the scope of the Act. On the other hand, the Lesotho Government treats domestic workers as falling within the scope of the law and utilises the wage-setting machinery in the Act to set

67 Davies (n 66) 88.
minimum wages for ‘domestic servants’. There is no doubt that the latter view is the preferred one. The fact of a separate definition of a specific category of employees such as ‘domestic servants’ does not in itself indication an intention to exclude them form the relevant legislation in the absence of any express exclusion. This conclusion is strengthened by the fact that the definition of domestic servants uses the term ‘employed’ which supports the conclusion that they are a sub-category of employees.

Arbitrators of Lesotho’s DDPR have had to deal with a number of cases involving triangular employment relationships. In one such case, an arbitrator ruled that workers who were employed by a cell-phone provider without written contracts but in accordance with its HR Procedures were employees of the company and not of services company to whom the cell-phone provider had outsourced the running of a call centre. The approach of the arbitrator was that, in the absence of a written contract, the nature of the relationship had to be inferred from the conduct of the parties. Factors that influenced the arbitrator to conclude that they were employees of the cell-phone provider were that it had given them an induction programme and that their entitlement to leave and staff benefits such as medical aid, death cover and cell phone had been determined in accordance with the company’s HR Manual.

Outsourcing arrangements also come to the fore in two arbitrations arising out a decision by a car-rental firm to outsource their security services to a security company that was to be formed by the company’s chief of security. The service agreement was concluded while the security company was in an incipient stage and had not obtained either a trading licence or a registered office. In the first case heard, the company raised as a defence to a claim for unfair dismissal brought against it by the security guards that they had been employed by their chief security officer in his personal capacity. This argument was rejected, on the basis that the relationship between the car-hire company and its chief security officer was not one of independent contracting. Factors that they took into account were that the company was its only client, the chief of security was guaranteed work by the car-hire company and the security company was the car-hire company’s ‘own creation’. Applying what it termed an ‘economic realities’ approach, the arbitrator found that chief security officer’s economic dependence on the car-hire firm meant that he was still one of its employees and that he had engaged the security officers on behalf of the car-hire firm. The arbitrator was severely critical of a large international company engaging an unlicensed company to meet its security commitments.

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69 Motsieloa Lebete and Itumeleng Makoetlane v Vodacom Lesotho (DDPR A0142/05).
70 Ntahli Motlane and 18 others v Imperial Fleet Services (Pty) Ltd (DDPR A 1089/02)
However, in a subsequent case, a different arbitrator reached the conclusion that because the service agreement with security officer had been concluded prior to the security guards commencing employment and because the car-hire firm had no contracts of employment with the security guards they were not its employees. The arbitrator in this case accepted the car-hire firm’s explanation that the reason it had paid the security guards was because it was assisting their former employee to set up a security business. The arbitrator in the previous case had accepted that this was an indication supporting the employee’s view that they were employees of the security company.

In another case, an arbitrator used the factors listed in the presumption of employment in South African labour legislation as a basis for concluding in a default hearing that in the absence of evidence from the employer that a sales consultant (referred to as an ‘independent field agent’) who recruited clients for a business and was paid on a commission basis was an independent contractor and not an employee. The arbitrator was influenced by the fact that the company exercised no control over the individual’s days and hours of work.

Zimbabwe

Zimbabwe has traditionally had a contractual test of a statutory employee is. For instance, the Labour Relations Act 1985 defined an employee as:

any person employed by or working for an employer and receiving or entitled to receive any remuneration in respect of such employment or work.

It also defined a contractor as:

a person who renders to an employer services which are related to or connected with the employer’s undertaking.

These definitions have been interpreted as reflecting the common law distinction between contracts of employment and contracts of service.

The Zimbabwean courts have been influenced by the approach of the South African courts. Initially a ‘supervision and control’ test was adopted, but this was
replaced by a ‘dominant impression’ or ‘composite’ test, in terms of which supervi-
sion and control remains an important factor, but is not the sole determinant of
who is an employee. A prominent Zimbabwean scholar has argued that the test was
developed to give flexibility to employers and courts and has criticized it because of
its failure to indicate the weighting that should be attached to different factors.\textsuperscript{73}
This results in a situation in which different courts can come to different conclu-
sions on the same facts.

Examples of decisions by the Zimbabwean courts are:

(a) Insurance personnel were held to independent contractors despite the fact
that they were given a list of customers by the employer, supplied with office
space, were not allowed to work for any other insurance company, were on the
company’s medical aid scheme and work under a hierarchy of managers. The
factors that lead the court to this conclusion were that they were described in
their contacts as contractors; they had flexible working hours were paid on
commission.\textsuperscript{74}

(b) A taxi driver who had flexible hours, was paid on commission and was
described in his contract as an independent contractor but who could not
work was held to be an employee because this was consistent with the purpose
of the Labour Act to advance worker’s interests.\textsuperscript{75}

The Labour Act 17 of 2002 introduced a definition of employee which considerable
expanded its scope and which made ‘economic dependence’ the key definitional
element. The definition of an employee for this period was:

any person who performs work or services for another person for remuneration or reward on
such terms and conditions that the first mentioned person is in a position of economic
dependence upon or under an obligation to perform duties for the second-mentioned
person, and includes a person performing work or services for another person:

(a) in circumstances where, even if the person performing the work or services supplies his
own tools or works under flexible conditions of service, the hirer provides the
substantial investments in or assumes the substantial risk of the undertaking; or

(b) in any other circumstances that more closely resemble the relationship between an
employee and employer that that between an independent contractor and hirer of
services.

\textsuperscript{73} M Gwisai, \textit{Labour and Employment Law in Zimbabwe} (Harare, 2006).
\textsuperscript{74} \textit{Southampton Insurance Co Ltd of Zimbabwe v Mutuma & Anor} 1990 (1) ZLR 12.
\textsuperscript{75} \textit{Chiworese v Rixi Taxi Services Co-op} HH-13-93.
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However, this was subsequently repealed by the Labour Act 7 of 2005 which restored the previous definition.\textsuperscript{76} The report of the Parliamentary Committee that preceded the 2002 Act had also proposed the retrospective transformation of all contract and casual workers who had been employed for more than 12 months into permanent workers. However, this proposal was not introduced. The 2002 Labour Act was influenced by South Africa’s post-apartheid 1995 Labour Relations Act, and was prepared by a Parliamentary Committee that included a number of trade unionist who had been elected as opposition MPs.\textsuperscript{77}

Morocco

The Labour Code 2004 of Morocco specifically includes groups of workers that are often unprotected, such as salespersons and home workers.

Section 2. The provisions of the Labour Code apply also:

(i) to workers whose enterprise manager puts them at the disposal of his or her clients in order to deliver any services requested;

(ii) to persons engaged to carry out sales-related activities in premises provided by the enterprise in a different location and under conditions set by the enterprise;

(iii) to home workers.

Section 6. ‘Wage earners/salaried workers’ include every person who is engaged to carry out a professional activity under the direction of one or more employers in return for remuneration, whatever the nature and method of payment.

In addition, s 8 of the Labour Code extends its scope of application to home workers and provides guidance as to what constitute essential elements of such employment:

Section 8. ‘Home workers’ under the present Code are considered to be wage earners/salaried workers, without there being a need to assess whether there is any legal subordination, any direct and habitual control by the employer, whether the place where they work and the tools they use belong to them or not, whether they supply with the work all or part of the basic materials used when these materials are sold to them by the person giving the work who subsequently purchases back the finished object, or are given to them by a supplier who is determined by the person giving the work and from whom the wage earners must get supplies, or whether they procure any additional materials themselves:

\textsuperscript{76} Gwisai (n 73) 55.

\textsuperscript{77} For a full discussion, see Gwisai (n 73) 26–31.
if they satisfy the following two conditions:

(i) they are responsible, either directly or through an intermediary, for accomplishing work for one or more enterprises in return for remuneration;

and

(ii) they work alone or with an assistant or with their spouse and non-salaried children.

In other countries also, one can find that the tâcheron system is practised. The principal entrepreneur is required to keep a list of all the tâcherons with whom he has signed a contract. The labour codes further regulate the joint liability of the principal entrepreneur with regard to the tâcheron’s obligations vis-à-vis his/her workers.

Benin

In Benin, the Labour Code No 98–004 of 1998 at s 75 says:

The tâcheron is a secondary entrepreneur [sous-entrepreneur] who him/herself recruits the labour force required for a job, and who signs a written contract with an entrepreneur for the execution of a given job or for the provision of certain services in return for a negotiated price. The contract must be submitted, in duplicate, to the Labour Inspector within 48 hours of being countersigned by the entrepreneur.

The following s 76 provides that when the work is performed within the premises or building site of the principal entrepreneur, the latter is entirely liable for workers’ claims arising out of their employment in the event of the tâcheron’s insolvency. However, when the work is performed within premises or building sites that do not belong to the main entrepreneur, then the latter is liable only of the payment of the workers’ wages.

Finally, s 78 states that the entrepreneur must maintain a list of the tâcherons with whom he/she has signed contracts.

Gabon

In Gabon, the Labour Code—Act No 3/94 of 21 November 1994 at s 113 states that the tâcheron is a certified and independent master worker (maître ouvrier) or secondary entrepreneur, who signs a contract with an entrepreneur or with the head of a work site/job manager for the execution of a given job or for the provision of
certain services, in return for a fee negotiated between the parties. The ‘tâcheronnaî’ contract must be in writing.

The following s 114, provides that the tâcheron is forbidden to sub-contract, in whole or in part, the contracts that he/she has entered into. This is in line with s 116, which states that in case of insolvency of the tâcheron, and in accordance with the contract signed with the principal entrepreneur or head of a work site/job manager, the co-signatory is jointly (solidairement) responsible for the obligations of the tâcheron as regards the workers and this applies up to the level of the amount due from the principal entrepreneur to the tâcheron. Workers who have a claim are entitled to lodge such claims directly against the principal entrepreneur or head of a work site/job manager without prejudice to any restitution claim that the latter themselves may make against the tâcheron.

Triangular Employment Relationships: Contrasting Approaches in South Africa and Namibia

Article 4.1 of the Employment Relationship Recommendation requires that a country’s national policy should ensure that protection is available to all forms of employment relationships, including those involving multiple parties. As one of the publications prepared in preparation for the adoption of the Recommendation noted, the challenge in respect of triangular employment relations lies ‘in ensuring that employees in such a relationship enjoy the same level of protection traditionally provided by the law for employers that have bilateral employment relationships, without impeding legitimate private and public business initiatives’.78

As indicated earlier in this paper, the primary vehicle for informalization in South Africa has been the process of externalization through triangular employment relationship. The inadequate regulatory framework for temporary employment services (‘TESs’), still more commonly referred to by their previous appellation of labour brokers, has provide the opportunity for this process. There has been an exponential growth in the number of TESs, with an increase from 1,076 in 2000 to 3,140 in 2006.79 Significantly, the largest rise came in 2000, at a stage when the courts begun to cast a more critical eye over the use of ‘independent’ contracting as a mechanism for disguised employment. An estimated 800,000 workers (equivalent to 9 per cent of the workforce) are placed daily by TESs.80 The rise of labour hire has

79 These figures reflect registrations with the Services SETA in terms of the Skills Development Act.
80 This information is extracted from the web-site from the website of the Confederation of Associations in the Private Employment Sector (CAPES): www.capes.org.za.
also been at the centre of Namibian response to informalization. In this section, we examine the contrasting policy responses to this trend in these two neighbouring countries.

South Africa

South Africa’s LRA and BCEA both define a “temporary employment service” (“TES”) as:

- any person who, for reward, procures for or provides to a client other persons
  - who render services to or perform work for, the client; and
  - who are remunerated by the temporary employment service.81

TESs fall within the broader category of private employment services agencies as defined in the Skills Development Act. Although this Act empowers the Minister to issue regulations requiring private employment service agencies to register with the Department of Labour, no such regulations have yet been published. TESs are required to register as employers with Sectoral Education and Training Authorities under the Skills Development Act as well as with bargaining council in the sectors in which they operate. However, neither of these institutions have regulatory control over TESs. The Employment Equity Act renders a client and TES jointly and severally liable for unfair discrimination,82 and under s 57(1), for purposes of affirmative action, a person whose services have been procured by a TES will be deemed to be an employee of the client if that person is placed with the client for an indefinite period or for a period of three months or longer. No similar deeming provision is contained in any other labour legislation. A TES is not the employer for the purposes of compliance with health and safety legislation.

In terms of both the LRA and the BCEA, a TES is the employer of the person placed. However, the client-enterprise is jointly and severally liable for breaches of the statutory labour standards, contracts of employment, collective agreements and arbitration awards. However, the concept of joint and several liability does not extend to unfair dismissal protections. A proposal to this effect in the initial draft.

81 A temporary employment service falls within the definition of a private employment agency as contemplated by the Private Employment Agencies Convention 181 of 1997. However, the Convention does not deal specifically with the security of employment of workers engaged through private employment services.  
82 s 57(2).
Bill that was submitted to NEDLAC for negotiation was removed during the Parliamentary hearings as a result of representations by the organization representing TESs.

Whether an individual who is on the books of a TES and is supplied to one of its clients is an employee or an independent contractor, is determined by the nature of working relationship between that individual and the client and the person placed with it.\(^{83}\) The *Code of Good Practice: Who is an Employee* points out that an adjudicator must be satisfied that the relationship between the client and the TES is genuine and not a subterfuge to avoid labour legislation. However, as Van Niekerk points out, applying the ‘dominant impression’ test to the relationship between agency worker and the client is extremely complex.

Although it is likely that the default liability of TES has encouraged more responsible contracting patterns, the lack of limitation in respect of the period for which an employee is provided by a TES has allowed employers to permanently outsource recruitment and employment functions. These employees are without security of employment because the client’s decision to terminate employment or work is conveyed from client to the TES and therefore falls outside of the employment relationship and beyond the reach of labour law. A statutory provision intended to facilitate the supply of temporary staff has therefore become a vehicle enabling permanent triangular employment of workers who are without any security of employment.

**Namibia**

The issue of labour hire has also been a dominant controversy arising out of processes of flexibilization in Namibia. According to Jauch, labour hire emerged in Namibia in the late 1990s for the supply of employees for short periods as well as those who work on a full-time and ongoing basis for the client company.

Namibia’s labour hire industry is dominated by one large company, which originated in South Africa and now operates across Namibia. Jauch estimates that there are at least 10 labour hire companies in Namibia. They supply mostly unskilled and semi-skilled workers to client companies in various industries, including mining, fishing, and retail. Their clients include private companies and also state-owned enterprises. Almost all labour hire companies retain a substantial part (15–55 per cent) of workers’ hourly wage rates as their fee. Labour hire workers are paid significantly less than permanent workers and they usually do not enjoy any benefits.

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\(^{83}\) *LAD Brokers v Mndla* (2001)22ILJ 1813(LAC).
While most employees hired in this way are registered with social security, many do not receive any paid leave or severance pay in the event of retrenchment. As in South Africa, they have no job security and their employment contract with the labour hire company is terminated as soon as the commercial contract between the labour broker and its client ends.

Namibia’s first post-independence Labour Act of 1992 did not specifically regulate the issue of labour hire. Namibia’s 2004 Labour Act and the initial Labour Bill presented to Parliament in 2007 proposed regulating the use of labour hire. However, during the debates in the National Assembly, the Bill was amended to prohibit any form of labour hire. The 2007 Act that the Namibian legislature provided that ‘No person may, for reward, employ any person with a view to making that person available to a third party to perform work for the third party’ (cl 128[1]). As a result of a legal challenge brought by the country’s largest labour hire firm, the clause never came into effect and in late 2009, Namibia’s highest court held that a total prohibition on labour hire violated the country’s constitution. Despite this development, the approach proposed in the 2004 Act and 2007 Bill deserves careful scrutiny. These proposed regulating ‘employment hire services’ (EHS), a term covering any person who runs a business of procuring or providing individuals to render services or work for a client. Individuals whose services are supplied to the client are employees of the employment hire service for all purposes under the Labour Act. However, the client of the employment hire service is jointly and severally liable for breaches of the Act, a collective agreement, contract of employment or binding arbitration award.

This approach is based on the framework of the South African approach, but there are a number of very significant differences which indicate a keen awareness of the problems of regulation and enforcement encountered in South Africa. The first of these differences is that the definition of an EHS is wider than a TES, in that it is not a requirement that the service remunerate the employee. The provisions of the section apply to any organization that supplies employees for reward, irrespective of how the remuneration takes places. Most importantly, the joint and several liabilities between hire service and employer applies to the employee’s protection against unfair dismissal. This would provide a basis for placed employees to challenge the decision of the client to terminate his or her services. A significant

84 This Act was passed but never came into effect.
procedural innovation is that an employee seeking to enforce his or her rights may do so against either the employment hire service or the client or both in accordance with this Act. In South Africa, the employee is required to proceed against the TES as employer and can only draw the client into litigation where the TES defaults on its liability. It was also proposed that an employee of an EHS would remain an employee during periods in which they do not work but remain on the EHS's books. The Bill proposed severe penalties for employment hire services and client companies who breach the law: a fine of up to N$80,000 or imprisonment for up to five years or both. In contrast, the South African statute creates no criminal liability. A final difference arises out of the fact that the EHS and client are jointly and severally liable for compliance with all the employer’s obligations under the Labour Act including occupational health and safety standards. This differs from the position in South Africa, where it is the client who has sole responsibility. While it will generally be the client who will have the day-to-day obligation to provide a healthy and safe workplace, the joint and several liabilities would require the hiring service to monitor health and safety conditions in the workplaces to which they supply employees.

This extensive package of regulation did not persuade Namibia’s law-makers that the abuses of labour hire could be controlled, and instead they opted to prohibit employment hire. The exploitative practices used by ‘labour hire’ firms were seen as being reminiscent of the contract labour system utilized prior to independence and were rejected as permitting a ‘new form of slavery’. However, the fact that the Namibian policy-makers adapted the South African model to remove its shortcomings means that the clause in the Bill, while not part of Namibian law, may serve as a welcome contribution to debates on the reform of this area in the law in South Africa as well as other African countries in which triangular employment is mushrooming.

Temporary Employment Contracts

As indicated above, the employment of workers through short-term fixed contracts has been one of the dominant mechanisms for informalizing work. In this section, we examine the extent to which labour legislation has been able to meet the Recommendation’s proposal of ‘ensuring that employed workers have the protection they are due’.

Under apartheid, virtually all African workers in South Africa were employed on fixed term (most commonly annual) contracts. Employees who were not resident in urban areas were required to return to a homeland (or in the case of foreign
workers their home country) to renew their contract. This prevented these workers gaining rights of permanent residence in urban areas in terms of the influx control legislation that controlled the South African labour market. Several of the key Labour Court cases in the early 1980s concerned whether these ‘contract’ workers were protected against unfair dismissal. The Court rejected the arguments of employers and held that employees engaged through this system on successive contracts should be regarded as having been in ongoing employment and that a failure to renew the contracts could amount to an unfair dismissal on either substantive or procedural grounds. The obvious artificiality of the contractual arrangements enabled the Court to give precedence to substance over form, a task that took considerably longer when identifying the employment relationship.

This historical context informs the provisions in the 1995 LRA that an employer’s failure to renew a fixed-term (or maximum term)\(^\text{87}\) contract amounts to a dismissal if the employee can show that he or she had a reasonable expectation that the employer would renew the contract on the same or similar terms (s 186(1)(b) of the Labour Relations Act). To succeed with such a claim, the employee must show that he or she in fact expected that the contract would be renewed and that, after taking into account all relevant factors, the expectation was reasonable.\(^\text{88}\) In the absence of these circumstances, the failure to renew a fixed-term contract irrespective of its duration is not an unfair dismissal. Factors that the courts have taken into account in determining whether an employee’s expectation of a renewal was reasonable include:

(a) the wording of the contract;
(b) undertakings made by the employer or a representative of the employer to the employee;
(c) custom and practice in regard to renewing contracts;
(d) the availability of the post;
(e) the purpose or reason for having concluded the fixed-term contract;
(f) the extent to which the employer gave reasonable notice to the employee;
(g) the nature of the employer’s business.\(^\text{89}\)

Widespread use is made of fixed-term contracts by temporary employment services, contract cleaning firms and security services, among other sectors, even where the employees concerned are in effect employed indefinitely. An indication of the

\(^{87}\) The Labour Court has pointed out that these contracts should be described as ‘maximum term contracts’, as opposed to fixed-term contracts which do not permit for early termination; *Matlala v Govan Mbeki Municipality* [2010]4 BCLR 334 (LC). However, this issue does not affect the application of s 186(1)(b).

\(^{88}\) *Mediterranean Woollen Mills (Pty) Ltd v SA Clothing & Textile Workers Union* (1998) 19 ILJ 731(SCA) 734[C].

\(^{89}\) *Dierks vs University of South Africa* (1999) 20 ILJ 1227 (LC).
extent of the use of temporary employment contracts can be obtained from the Annual Report of the Commission for Employment Equity which analyses reports, which include information concerning terminations made by large employers, under the Employment Equity Act. These reports (which cover roughly 25 per cent of workers in the formal sector) show that around one-quarter of terminations (covering both dismissals and resignations) could be attributed to the non-renewal of contracts. In contrast, only 6 per cent of the approximately 80,000 dismissal cases referred to the CCMA annually are identified as being about ‘contract renewal’. This indicates that employers in South Africa enjoy a considerable level of de jure and de facto flexibility to employ workers under fixed-term contracts.

In most other SADC countries, protection of employees against unfair dismissal is significantly undermined by the limited protection provided to employees engaged on short-term contracts. Section 35(d) of Swaziland’s Employment Act excludes ‘an employee engaged for a fixed term and whose term of engagement has expired’ from protection against unfair dismissal. Swaziland’s Industrial Court of Appeal has accepted that employees who were employed from time to time on one month fixed term contracts but had not worked for longer than three months without a break were excluded from challenging the unfairness of their termination. Likewise, in terms of s 66 of the Lesotho Labour Code, the ending of any contract for a fixed period or for performing a specific task or journey can only be a dismissal if the contract expressly provides for it to be renewed. In Namibia, a contract of employment terminates automatically if either the contract or a collective agreement provides for its termination. A termination of a contract of employment in these circumstances does not constitute a dismissal and the employee is unable to bring a challenge based on the unfairness of the failure to renew the contract.

4.6 Conclusions

Growing informalization in the labour market is a feature of several African countries. As a result, growing numbers of workers are not protected by labour law
Paul Benjamin

and policies. Legislators and policy-makers have introduced a range of policy changes to either expand the scope of legislation or to assist individuals to prove that they are employed in terms of an employment relationship. In the light of the enormity of labour market shifts it is perhaps surprising that these initiatives have not occupied a more central position in reform agendas. Nevertheless, it is possible to identify significant innovative responses. Adjudicators in the region’s courts and arbitration forums have also found themselves torn between adherence to conventional contractual approaches and a recognition of the forms of dependence that occur in the context of non-standard employment relations. This tension indicates the need for all governments in Africa to review, clarify and (if necessary) adapt the scope of their laws to ensure adequate protection for employees in tier country.