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Aadil Patel/01917894  
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**Attention: Thembinkosi Mkalipi and Maria Briedenhann**

16 February 2011

**BY EMAIL**

Dear Sir

**SUBMISSION ON BEHALF OF THE INSTITUTE OF ESTATE AGENTS OF SOUTH AFRICA, THE ESTATE AGENTS HOLDING COMPANY GAUTENG LIMITED, THE ESTATE AGENTS HOLDING COMPANY (PROPRIETARY) LIMITED AND THE ESTATE AGENTS JOINT VENTURE KWAZULU NATAL ON THE EMPLOYMENT AMENDMENT BILL, 2010 PUBLISHED IN GN1112 OF 2010**

Enclosed are the submissions on behalf of The Institute of Estate Agents of South Africa ("IEASA"), the Estate Agents Holding Company Gauteng Limited, the Estate Agents Holding Company (Proprietary) Limited and the Estate Agents Joint Venture Kwazulu Natal ("**Estate Agency Companies**") in respect of proposed amendments to the Labour Relations Act, 1995, the Basic Conditions of Employment Act, 1997, the Employment Equity Act, 1998 and an Employment Services Bill, 2010, for general information and comment.

Yours faithfully

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Dear Sirs

**SUBMISSION ON BEHALF OF THE INSTITUTE OF ESTATE AGENTS OF SOUTH AFRICA ,  
THE ESTATE AGENTS HOLDING COMPANY GAUTENG LIMITED, THE ESTATE AGENTS  
HOLDING COMPANY (PROPRIETARY) LIMITED AND THE ESTATE AGENTS JOINT  
VENTURE KWAZULU NATAL ON THE EMPLOYMENT AMENDMENT BILL, 2010  
PUBLISHED IN GN1112 OF 2010**

**1 INTRODUCTION AND BRIEF BACKGROUND**

- 1.1 The Institute of Estate Agents of South Africa ("**IEASA**"), the Estate Agents Holding Company Gauteng Limited, the Estate Agents Holding Company (Proprietary) Limited and the Estate Agents Joint Venture Kwazulu Natal ("**Estate Agency Companies**") makes submissions contained in this letter in response to the invitation to all interested parties to submit written comment on the draft Employment Amendment Bills ("**Bills**"), identified in GN1112 of 2010 on or before 17 February 2011.
- 1.2 The Estate Agency Affairs Board ("**EAAB**") was established in 1977 in terms of the Estate Agency Affairs Act 112 of 1976 ("**the Estate Agency Act**"). The EAAB has the power to maintain and promote the standard of conduct of Estate Agents and to prescribe rules to regulate the activities of Estate Agents. Pursuant to such powers, the EAAB has prescribed certain minimum qualification criteria for Estate Agents. The EAAB is listed as a public entity in terms of the Public Finance Management Act 1 of 1999 ("**PFMA**").The PFMA places responsibility on the EAAB, as the accounting authority, to manage the resources in a manner that encourages efficiencies and accountability for the use of public funds. A core function of the EAAB is to manage and control the Estate Agents Fidelity Fund.
- 1.3 IEASA is a voluntary association of estate agents (both companies and individuals) who are registered with the EAAB to render services as estate agents ("**Estate Agents**"). IEASA has approximately 5 100 members. IEASA's main objects are to promote professionalism with the estate agency industry ("**EA Industry**") and to protect the interests of its members in regard to all matters that may impact them in their capacity as Agents. The Estate Agency Companies are companies which have been established for the purposes of enabling various Estate Agents to jointly advertise their business in newspapers and other publications in particular provinces. Estate Agents are shareholders of these companies. The Estate Agencies Companies have in aggregate 6 180 shareholders and such shareholders represent approximately 10,000 Estate Agents which equates to approximately 56% of the industry.
- 1.4 This letter sets out IEASA and the Estate Agency Companies' submissions in respect of the proposed amendments to the Employment Bills and trusts that the Portfolio Committee, in its deliberations on the proposed amendments, will properly and meaningfully consider the submissions and legal arguments raised.
- 1.5 While IEASA and the Estate Agency Companies have made every effort to make submissions in respect of issues in the Employment Bills which are of material concern, the submissions in this letter should not be regarded as a complete list of our concerns and we reserve the right to raise further issues through other processes that may become available.
- 1.6 The submissions are only based on those sections which we believe will impact on the EA Industry.

**2 STRUCTURE OF SUBMISSION**

- 2.1 We do not deal with each Employment Bill independently; rather, we collectively refer to the relevant sections which directly impact on the EA Industry.
- 2.2 The submission on the relevant sections of the Employment Bills are divided into the following main categories:

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- 2.2.1 Fixed Term Contract employees;
  - 2.2.2 Sub-contracting;
  - 2.2.3 Section 197 transfers;
  - 2.2.4 Sectoral determinations;
  - 2.2.5 Offences and penalties;
  - 2.2.6 Definitions;
  - 2.2.7 Section 6, 20(7); 21; 27 and Schedule 1 of the Employment Equity Bill; and
  - 2.2.8 The Employment Services Bill with specific reference to the reporting of vacancies and filling of positions.
- 2.3 Prior to dealing with each category we deal with the following –
    - 2.3.1 Publication of the Bills;
    - 2.3.2 General Nature of the Business of estate Agents;
    - 2.3.3 Key Principals in terms of the Estate Agency Act;

### 3 PUBLICATION OF THE BILLS

- 3.1 On 17 December 2010, the Department of Labour announced the publication of four new Bills namely the Labour Relations Amendment Bill ("**LRA Bill**"), the Basic Conditions of Employment Amendment Bill ("**BCEA Bill**"), the Employment Equity Amendment Bill ("**EE Bill**") and the Employment Services Bill ("**ESB**"). It is noted that the Department of Labour is currently holding public discussions in different regions of the country.
- 3.2 It is evident from GN1112 of 2010 that the Bills were not submitted to National Economic Development and Labour Council ("**NEDLAC**") for discussion and debate prior to its publication. In terms of section 5 of the National Economic Development and Labour Relations Council Act 35 of 1994 NEDLAC is empowered to consider all proposed labour legislation before it is introduced in Parliament. Although some NEDLAC discussions on the labour legislation took place in 2009, the content of the recently published Bills is considerably different from the issues discussed in 2009. Thus, the procedure required for the promulgation is incorrect and the Bills should not have been published.
- 3.3 The Estate Agency Companies further point out its concern that the Bills were published on 17 December 2010, during the festive season, which allowed for a relatively short period for the process of public participation and comment. This despite the fact that the Bills have major implications on our current labour dispensation and consist of several discrepancies and provisions which are not entirely clear. The time allowed by the Department of Labour ("**DoL**") has not been adequate to enable the Estate Agency Companies to consult fully and properly on all aspects with all its members in order to submit comprehensive representations.
- 3.4 An adequate opportunity and extension of time in this regard is requested. The right to supplement these representations in due course and the right to challenge the process on the basis that unreasonable and inadequate time has been allowed for such public participation is strictly reserved.
- 3.5 It must be pointed out that various proposals contained in the current form of the Employment Bills lacks rational justification, inter alia, in the respects referred to below. These concerns are raised in the constructive spirit of seeking to have them addressed and resolved in a mutually acceptable and legally sustainable manner.

## 4 GENERAL NATURE OF THE BUSINESS OF ESTATE AGENTS

- 4.1 The business of Estate Agents are as follows:
- 4.1.1 the main business of estate agencies involves brokering of the sale and purchase of property between owners and purchasers and the brokering and management of rental agreements between lessors and lessees;
- 4.1.2 an estate agency is an entrepreneurial business and Estate Agents have to seek and secure mandates from third parties to market and put up for sale or lease property owned by such third parties; and
- 4.1.3 revenue is generated predominantly from the commission that is paid to the estate agencies when a sale of a property or rental agreement is concluded.
- 4.2 The business model of the residential estate agency industry relies on a compensation model where Estate Agents do not earn a fixed or basic salary but are paid by way of commission. They negotiate their own commission. The amount of commission paid to an Estate Agent is determined by the value of the property sold and is only paid upon registration of transfer of the property to the purchaser which generally occurs 90 (ninety) to 180 (one hundred and eighty) days after the sale agreement has been concluded. Commission paid on the conclusion of a rental agreement is determined by reference to the amount of rental which is payable and is generally paid upon receipt of the deposit and rental from the lessee. Estate Agents decide their own working hours and leave arrangements. They are not obliged to attend any training sessions.
- 4.3 South African estate agencies are predominantly small, family-run businesses operating either as franchisees of the larger, well known principal estate agents, or as a stand-alone business. Franchisee Estate Agents are usually entitled to use the name and other related marketing material of the franchisor, but are not owned by the franchisor in any way nor are they owned by the franchisor. They are independently owned and managed businesses. The large, well-known agencies are also fragmented based on their business models. Some of these agencies operate on a franchise basis while others are single entities with multiple branch offices. Estate agencies are always in the process of looking for new agents and recruits.
- 4.4 It takes a special type of sales person to fit into the real estate industry and many estate agents are not successful. There is about 5%- 10% success rates of new agents still being in the estate agency business after six months. As a business, estate agencies are purely risk based in that income is only generated on the successful registration of a property, whilst the estate agency has to continue carrying on business and bear the financial burden of overheads and marketing

## 5 KEY PRINCIPALS IN TERMS OF THE ESTATE AGENCY ACT

The following key definitions appear from the Estate Agency Act:

- 5.1 **"employ"** includes using the services of an independent contractor";
- 5.2 **"employee"** includes an independent contractor";
- 5.3 We attach as annexure "A", the definition of **"estate agent"** as it appears from the Estate Agency Act.
- 5.4 Government Notice R1922 published in Government Gazette 10443 of 9 September 1986 provides as follows:
- "(2) Renders as an independent contractor, any service referred to in paragraph (a)(i), (a)(ii) or (a)(iii) of the definition of "estate agent" in section 1 of this Act.*

- (3) *For the purposes of this Act a person rendering any of the aforesaid services as an independent contractor shall be deemed to do so as employee of an estate agent."*

## 6 TYPICAL ROLE PLAYERS IN THE ESTATE AGENCY INDUSTRY

6.1 One would typically find the following persons working in the South African real estate industry.

### 6.1.1 Principals

6.1.1.1 These are owners of real estate agencies and the persons who own equity in those agencies. This is any person referred to in paragraph (a) or (c)(i) of the definition of "estate agent" in section 1 of the Estate Agency Act.

### 6.1.2 Non-principals

6.1.2.1 A non-principal Estate Agent is a qualified Estate Agent who is employed by a principal Estate Agent, but is not an owner. These arrangements are typically not styled as employment relationships and the parties thereto typically do not regard themselves to be employer and employee respectively. Such a non-principal Estate Agent is therefore typically regarded as an independent contractor (or sub-contractor). This is any person referred to in paragraph c(ii) to the definition of "estate agent" in section 1 of the Estate Agency Act.

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

### 6.1.3 Employees

6.1.3.1 These are persons who are employed in the normal sense by principals or non-principals.

### 6.1.4 Intern Estate Agents

6.1.4.1 Intern Estate Agents are regulated by the Estate Agency Act. An unqualified entrant to the industry must serve as an intern estate agent, under the supervision of a principal estate agent, for a continuous period of 12 months from the date of the first issue to that person of an intern fidelity fund certificate by the Board. They simultaneously enroll as learners at an accredited training provider and must obtain their FET Certificate Real Estate within the 12 month period. They normally are remunerated in accordance with their agreement with the principal estate agent.

## 7 INTERPLAY BETWEEN THE ESTATE AGENCY ACT AND THE CURRENT LABOUR LEGISLATION

7.1 The definition of "employee" and "employ" in the Estate Agency Act, expressly "includes an independent contractor" and "includes using the services of an independent contractor" respectively.

7.2 These definitions were inserted by the last amendment to the Estate Agency Act in 1998 as there was a *lacuna* in the Estate Agency Act. An independent contractor rendering services as an estate agent was required to be in possession of a fidelity fund certificate, but was not subject to the remainder of the provisions of the Act. The definitions of "employee" and "employ" was aimed at rectifying this position – [see Memorandum on the Objects of the Estate Agents Amendment Bill, 1998.]. Therefore the purpose of fixed term contractor or employee was to ensure that they are brought within the ambit of the Estate Agency Act.

7.3 The definition of "employee" in the Estate Agency Act should not be confused with the definition of "employee" in the Labour Relations Act 66 of 1995, as amended ("**LRA**"). The definition of employee in the LRA, by contrast, defines an employee as –

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

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

- 7.4 The definition of "employee" in the LRA specifically excludes "independent contractors".
- 7.5 The definition of employee takes precedence over the definition of employee in the Estate Agency Act [see section 210 of the LRA].
- 7.6 The South African courts have over the years developed a list of guidelines to determine whether a person is an "employee" or an "independent contractor". In **SA Broadcasting Corporation v Mckenzie (1999) 20 ILJ 585 (LAC)** the Labour Court distilled from earlier case law certain characteristics of an employment contract that distinguishes it from a contract with an independent contractor. In the EA Industry there are divergent views on whether estate agents are "employees" or "independent contractors". In the matter of *State Information Technology Agency (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others (2008) 29 ILJ 2234 LAC Davis JA* held that when a court questions the criteria of an employment relationship, the following three primary criteria apply:
- (a) an employer's right to supervision and control;
  - (b) whether the employee forms an integral part of the organization with the employer; and
  - (c) the extent to which the employee was economically dependent upon the employer.
- 7.7 In **Taljaard and Basil Real Estate (2006) 27 ILJ 861 (CCMA)** the CCMA held that the estate agent had not been required to render personal services to the real estate business but to produce certain results and as such was an independent contractor.
- 7.8 In **PAM Golding Properties (Pty) Ltd v Erasmus & Others (2010) 31 ILJ 1460 (LC)** and **Linda Erasmus Properties Enterprise (Pty) Ltd v Mhlongo & Others (2007) 28 ILJ 1100 (LC)** the labour court held that the estate agents were employees in that the estate agents were found to be under the supervision and control of the principal. The courts used the dominant impression test.
- 7.9 Currently there is thus confusion in the EA Industry as to whether an Estate Agent is an "employee" or an "independent contractor". This confusion affects the business in the EA Industry and needs to be resolved.

## **SUBMISSION ON THE EMPLOYMENT LAW BILLS**

We set out our submission on the relevant sections of the Employment Bills below.

### **8 DEFINITIONS**

8.1 The Employment Bills have introduced a number of new definitions and amended a number of the current definitions. We will deal with those definitions which will have an impact on the EA Industry.

#### **8.2 Employee**

8.2.1 The potential problems with the new definition of "employee" are endless. In terms of the new proposed definition of "employee", there are three requirements to be an employee. These requirements must all be satisfied. The requirements, all of which must be satisfied before a person could be classified as an "employee" in terms of the LRA Bill, can be set out as follows:

8.2.1.1 the person must be employed or working,

8.2.1.2 the person should receive or should be entitled to receive remuneration or reward or benefit,

8.2.1.3 the person must work under the direction or supervision of an employer.

8.2.2 In terms of most estate agency agreements, estate agents are employed as independent contractors. In **Taljaard** the CCMA held that the estate agent *"had not been required to render personal services to the real estate business but to produce certain results"*. The CCMA followed the reasoning in **Erasmus v Home & Property (1995) 16 ILJ 441 (IC)** where it was held that a insurance broker was an independent contractor as his remuneration was specifically related to the produced results and he worked on a commission only basis, he determined his own office hours and he was not subject to the control and supervision of the company.

8.2.3 The courts have however found on different occasions that estate agents are "employees" and not "independent contractors".

[See **PAM Golding Properties (Pty) Ltd v Erasmus & Others (2010) 31 ILJ 1460 (LC)**

**Linda Erasmus Properties Enterprise (Pty) Ltd v Mhlongo & Others (2007) 28 ILJ 1100 (LC)**]

In these cases the labour court held that the estate agents were employees in that the estate agents were found to be under the supervision and control of the principal. The courts used the dominant impression test.

8.2.4 The definition of "employee" in the LRA has evolved for the purpose of distinguishing employees from independent contractors. This is clear from the introduction of a definition of "independent contractor". The proposed definition of an "employee", elevates "direction and supervision" to be a mandatory requirement to be classified as a statutory employee.

8.2.5 **By introducing in the definition of "employee" in the LRA Bill, the words "*direction or supervision*", it has the potential of confirming that Estate Agents are "employees", taking into consideration the reasoning in the case law as set out above. This has a drastic effect on the EA industry.**

8.2.6 There is no definition for "*employee*" in the EE Bill. The proposed definition of "*employee*" in the LRA Bill is different to the definition of "*employee*" in the Basic Conditions of Employment Act 75 of 1997 ("**BCEA**"). The BCEA has not been amended with the new proposed definition. Further, the proposed definition is different to the definition of "*employee*" in the EEA. The EEA has not been amended with the new proposed definition. It is therefore suggested that the definition of employee be aligned with the LRA Bill.

### 8.3 Independent Contractor

8.3.1 An "independent contractor" is defined as follows in the LRA Bill:

*"means a person who works for or supplies services to a client or customer as part of the person's business, undertaking or professional practice"*.

8.3.2 **IEASA and Estate Agency Companies welcome the new definition of "independent contractor". It would assist courts in interpreting whether estate agents are independent contractors. The estate agents would be able to illustrate that the business of selling property is part of their trade/occupation and service. However the element of direction and supervision creates confusion. Further, the definition of an 'independent contractor' presupposes that the independent contractor (read estate agent) must own a business undertaking or be in a position to provide a professional service (a business or practice owner) (who will have to register at the EAAB as a Principal Estate Agent) in order to be able to work for or supply services to a client (read principal estate agent). This does not provide for intern estate agents as per the**

regulations of the Estate Agency Act. It is therefore suggested that the above 2 concerns be addressed in the definition.

- 8.3.3 In addition it is contended that the definition is technically unsound having regard to the words "works for" and "as part of the person's business or undertaking or professional practice". These concepts need not necessarily be present to be classified as an independent contractor, apart from that, the definition is vague and will lead to confusion. Further, an independent contractor does not "work for" a client. An independent contractor contracts with the client to provide the end result of his work efforts and produce it as a completed job to the client.

See **SA Broadcasting Corporation v Mckenzie (1999) 20 ILJ 585 (LAC)**.

- 8.4 Currently, there is a presumption of employment is a person earn below the threshold determined by the Minister. As Estate Agents earn a commission it is contended that the presumption apply to those persons who earn a fixed and defined remuneration as oppose to those persons who are paid on a commission basis.

## 9 FIXED TERM CONTRACT EMPLOYEES

- 9.1.1 It appears that section 186 of the LRA Bill, section 200B of the LRA Bill and section 32 of the BCEA Bill will regulate fixed term contract employees.
- 9.1.2 Fixed-term contracts are a widely used, legitimate mechanism to provide flexibility and responsiveness to the changing labour force requirements. The presumption that workers should be employed indefinitely, unless the employer can establish a justification for employment on a fixed-term, is too broad and vague in its current form and is open to misinterpretation.
- 9.1.3 Section 186 of the LRA Bill creates confusion when it is read with section 200B of the LRA Bill. In terms of section 186(1)(b)(ii) there will be an onus on the employee to prove the existence of a "reasonable expectation" of permanent employment and in terms of section 200(B) the employer will have to prove that there is justification for a fixed-term contract in addition to having to rebut the "reasonable expectation" allegations in section 186. These two sections seem to contradict each other.
- 9.1.4 The extension of the ambit of the definition of dismissal to include employees engaged under a fixed term contract of employment substantially increases the ambit of dismissal disputes for fixed term contract employees. The CCMA could, in providing relief for such employees, possibly exercise a power to create permanent employment. This constitutes a substantial intrusion on the freedom to contract.
- 9.1.5 Section 200B creates a presumption of permanent employment and in dismissal proceedings involving fixed term employment contracts employers will now have the onus of proving a justification for the fixed term contract of employment. The proposed amendments involving fixed term contract workers will prolong dismissal disputes, increase their complexity, increase the number of reviews and rescission applications and would increase the financial costs of litigation and potential liability of employers.
- 9.1.6 Section 32 of the BCEA Bill deals with the payment of remuneration to employees.
- 9.1.7 This amendment is not supported. The BCEA Bill fails to define "*benefits*" and as such creates uncertainty and confusion which prolongs the existing uncertainty about the use of that term. The Labour Appeal Court in the case of **Hospersa v Northern Cape Provincial Administration 2000 (21) ILJ 1066 (LAC)** held that the unfair labour practice provision was only concerned with disputes of right arising *ex contractu* an *ex lege*.
- 9.1.8 If this definition is retained there would be no difference between terms and conditions of employment and benefits. These difficulties were identified in **Protekon (Pty) Ltd v Commission for Conciliation Mediation and Arbitration (C335/2003) [2005] ZALC 75**.



- 9.1.9 The amendment seeks to provide to fixed-term employees the same benefits as permanent employees with a total disregard to the different nature and duration of contracts of employment.
- 9.1.10 The proposed amendment is too wide and does not take into account employment relationships where employees are employed on a commission only basis with no company benefits, such as medical aid, pension fund and the like. In the EA Industry, it would be impracticable for the principal to comply with this section due to the nature of the relationship with non-principal members.
- 9.1.11 The section is further not qualified by for example requiring employers to make adjustments to benefits only in respect of employees who perform the same type of work at the same company and with the same employer. The proposed amendments to the Employment Equity Act 55 of 1998 ("EEA") require an employer to equalise pay for employees performing the same or substantially the same work or work of equal value.
- 9.1.12 The amendment seems to create a form of strict liability without providing the employer with an opportunity to justify any differentiation in providing benefits to its employees. Section 6(2) of the EEA allows an employer to justify discrimination if it is fair. The EEA defines employment policy or practice so as to include employment benefits and allows fixed term contract employees to exercise the remedies available to them based on the unfair discrimination laws promulgated in the EEA.
- 9.1.13 **As indicated many Estate Agents are independent contractors. If the confusion regarding whether or not an Estate Agent is an employee or an independent contractor is not resolved, these independent contractors may potentially be regarded as fixed-term contract employees. If Estate Agents are regarded as fixed-term contract employees it will place an onerous burden on the EA industry.**
- 9.1.14 **Principals and non-principals may employ employees on fixed-term contracts. Consequently, should the new amendment be enacted principals and non-principals, utilising the services of fixed-term employees, will now have to employ such employees on a permanent basis. In an already competitive market it will place an additional financial burden on the principal and/or non-principal Estate Agent.**
- 9.2 **SECTION 197 TRANSFER**
- 9.2.1 South African estate agencies are predominantly small businesses operating either as franchisees of the larger well known principal estate agents, or as stand-alone business. Franchisees Estate Agents are usually entitled to use the name and other related marketing material of the franchisor, but are not owned by the franchisor in any and are independently owned and managed businesses.
- 9.2.2 Transfer of business undertaking provisions are set out in section 197 of the LRA. The purpose of section 197 is twofold. Firstly, it is aimed at protecting employees against loss of employment in the event of a transfer of a business and, secondly, it facilitates the sale of a business as a going concern. There have been a line of cases in the context of applying section 197 to different transactions. Judgments dealing with section 197 tend to place an interpretation on it which will enhance the protection of employees. This is in accordance with the Constitutional Court's decision of *National Education Health and Allied Workers Union v University of Cape Town and Others* (2003) 24 ILJ 95 (CC) ("NEHAWU v UCT").
- 9.2.3 In *Sanders v Cell C Provider Company (Pty) Ltd & Others [2010] JOL 25754 (LC)*, the Labour Court had to apply section 197 in the context of franchising arrangements. In *Sanders* the employee applied for an order declaring that the transfer of the business from the "old" employers to the "new" employer was a transfer of a business as a going concern as contemplated in section 197 of the LRA. Cell C, a mobile phone operator which sells airtime, mobile phones and accessories to the public, had previously entered into franchise agreements with the "old" employers by whom the employee was employed as a General

Manager. Cell C subsequently terminated the franchise agreements with the "old" employers and entered into a new franchise agreement with a third party (the "new" employer). The "old" employers received notice of termination of the franchise agreements from Cell C. Cell C advised that the "old" employers' employees should be retrenched and that section 197 was not applicable as it was a mere *termination* of the franchise agreements. It was pointed out that the "old" employers had removed all of their possessions and stock from the premises and that there was "no transfer of goodwill". The court held that the business conducted by the "old" employer was similar to the business conducted by the "new" employer in that *inter alia* the nature of the business remained the same. It was held that should section 197 not be properly applied to franchise arrangements, franchisees would be in a position to place the new franchisee in a position to "cherry pick" employees, which is untenable in law.

- 9.2.4 The proposed amendment to section 197 is clearly intended to make second generation transfers subject to section 197. This amendment would be consistent with the "purposive construction" adopted by the Labour Appeal Court in **AUSA v SAA Ltd (2009) 30 ILJ 2849**. The deletion of the word "by" and its substitution with the word "from" is clearly intended to have this consequence. However, the intended amendment fails to take into account the recent decision of the Supreme Court of Appeal in **South African Airways (Pty) Ltd v Aviation Union of South Africa (123/2010) 2011 ZASCA 1 (11 January 2011)** ("SAA v AUSA").
- 9.2.5 **IEASA and Estate Agency Companies submit that there should be no amendment to section 197 and that section 197 should only be applicable to first generation transfers only. It is concerning that second generation outsourcing will impact on ordinary commercial transactions such as one where a company cancels a contract with contractor A and appoints contractor B instead.**
- 9.2.6 In addition, by replacing the word "by" with "from" creates unintended consequences. In this regard, if an estate agency franchises its business the employees employed at the franchisor may transfer to the estate agency even though they would not have been employed, initially, by the estate agency. Consequently, a franchisor may attract liability by simply concluding a franchise agreement.

## 10 SUB-CONTRACTING

- 10.1 Section 200C of the LRA Bill deals with sub-contracting.
- 10.2 The definition of an unfair labour practice in section 186(2) has been extended to allow employees to institute unfair labour practice disputes against both the employer and the client company in sub-contracting cases. This must be read together with section 200C of the LRA Bill which provides that an employee must have recourse against an employer and client company where there is an unfair labour practice.
- 10.3 The words "*client company*" and "*sub-contractor*" are not defined in the amendment. In addition, reference to the word "*must*" in this section may lead to potential absurdity. In terms of this clause an employee will be legally compelled to have recourse against his/her employer and the client company. This has far reaching consequences for legitimate sub-contracting arrangements. The amendments in effect discourage legitimate and viable sub-contracting arrangements.
- 10.4 In genuine sub-contracting arrangements, the client has no control over sub-contracting relationships. The client will now have to deploy an operational person to oversee all activities between the sub-contractor and its employees.
- 10.5 The amendments seek to extend the liability of the principal client, so as to hold the client responsible for acts committed by the contractor. This is beyond what is permissible by the common law. Under the common law a principal is liable for the acts of their agents, under limited circumstances

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See **Chartaprops 16 and another v Siberman [2009] 1 All SA 197 (SCA)**

10.6 The extension of liability to clients for acts of their sub-contractors undermines the rule of law and the constitutional guarantee available to employers to fair labour practices and the freedom of trade as is guaranteed in section 22 of the Bill of Rights.

10.7 The Regulatory Impact Assessment Report by Paul Benjamin sets out the following comments in respect of the risks associated with the proposed amendments:

*"Outsourcing and sub-contracting of services such as security, cleaning and catering is a common business model in South Africa and internationally. There appears to be no international precedent for joint liability to be applied generally in the area of sub-contracting and outsourcing.*

*This is a critical area of opportunity for small business . . .*

*A regulatory requirement that the client business should share in the liability of its sub-contractors and outsourced service providers creates a significant disincentive to supply chain diversification, and could have a negative impact on small business and job creation.*

*The current proposals as set out in the Bill give rise to various legal ambiguities. The term 'subcontracting' is not used elsewhere in South African legislation and various meanings could be ascribed to it. While sub-contracting may involve delegation to a third party of some, or all, of the work that the principal contractor has contracted to do, it may also be used to describe outsourcing arrangements.*

*The Amendment Bill contains no definition of the term "sub-contractor." There is no indication as to the context in which it is used. The difficulty in ascertaining the meaning is exacerbated by the use of t e [sic] term "client company" to describe the party that sub-contracts work. There are several difficulties with this term: firstly the relationship created by sub-contracting is not typically one involving a "client." Secondly, the party to a sub-contracting arrangement may not be a company."*

10.8 **There is no definition in the LRA Bill for "client-company" or "sub-contracting". It is thus unclear whether principals and non-principals in the EA Industry will fall within the ambit of the proposed section 200C and section 186 of the LRA Bill.**

10.9 **As stated above estate agencies are relatively small businesses and there is a low rate of Estate Agents staying on in the EA Industry. Should principals and non-principals fall within the ambit of the proposed section 200C and section 186 of the LRA Bill, these amendments may increase the operational cost of estate agencies. One typically finds a principal Estate Agent and non-principal Estate Agent in the EA Industry. A non-principal Estate Agent renders services to the principal Estate Agent and is typically regarded as an independent contractor. The non-principal Estate Agents may potentially employ people as employees or independent contractors. Should section 186 and section 200C of the LRA Bill be enacted, the principal Estate Agent can be held liable for acts of the non-principal Estate Agent that it employed, based on the contract of employment, and for acts of the employee of the non-principal agent. In order to ensure that the Principal Estate Agent has control over the non-principal Agents it may have to employ these persons and their employees in order to have control over them.**

10.10 **A regulatory requirement that the client businesses should share in the liability of its sub-contractors and outsourced service providers creates a disincentive to estate agencies to employ these categories of employees and could have a negative impact on small business and job creation in an already struggling EA industry.**

11 **SECTORAL DETERMINATION**

- 11.1 Section 55 of the BCEA Bill deals with sectoral determinations and allows the Minister to prohibit or regulate sub-contracting. The Minister's wide power to prohibit sub-contracting is unconstitutional in that it interferes with the right to trade.
- 11.2 The BCEA Bill does not define "temporary employment service" and "sub-contracting".
- 11.3 **IEASA and Estate Agency Companies have difficulty with this amendment. It empowers the Minister to make a sectoral determination. There are no recognized trade unions operating within the EA Industry. Thus employees are regulated by the BCEA. The Minister may pass a sectoral determination in the EA Industry to establish basic conditions of employment for employees in that sector which would include minimum wage levels. This may potentially have huge economic impact on the EA Industry bearing in mind the nature of the businesses, which are mainly small business with a large number of family businesses.**
- 11.4 The extension of liability of clients of sub-contractors and the right of the Minister to prohibit sub-contracting is opposed in that it interferes with the right to trade, rendering it unconstitutional. The appointment of fixed-term contractors may be a term of sub-contractors. In the absence of a definition it is unclear. If fixed-term contractors fall within the ambit of sub-contractors it would make it impossible for estate agencies to effectively run its business which relies heavily on sub-contractors. Should the amendments be enacted in its present form it will mark the death knell for all sub-contracting arrangements.

## 12 OFFENCES AND PENALTIES

- 12.1 IEASA and Estate Agency Companies are opposed to the amendment on penalties and offences as this will have the undesired effect of criminalizing even petty contraventions. It will also result in flood gate litigation in our already struggling criminal justice system. High monetary fines for contraventions such as failure to pay overtime could lead to the collapse of an employer's business especially having regard to small businesses and family business which will in turn lead to job losses.

## 13 EMPLOYMENT EQUITY BILL

- 13.1 IEASA and Estate Agency Companies are fully committed to the eradication of unfair discrimination and the promotion of affirmative action in the workplace and are in support of a number of the proposed amendments in the EE Bill. However, there is a number of amendments which cannot be supported as they are unclear as to the intent or have unintended consequences. We set out our concerns below.

## 14 Section 6 of the EE Bill

- 14.1 IEASA and Estate Agency Companies submit that the existing provisions of the EEA provide employees with sufficient protection in cases where they have been discriminated on either an arbitrary or non-arbitrary ground. The Labour Court analysed these protections in **Mangena and Others v Fila South Africa Pty Ltd and Others (2009) ZALC 81**. The Labour Court held as follows:

*"Section 6 of the Act prohibits unfair discrimination in any employment policy or practice, on any of the grounds listed in s 6 (1) or on any analogous ground, if an applicant is able to show that the ground is based on attributes or characteristics that have the potential to impair the fundamental human dignity of persons or to affect them in a comparably serious manner...Similarly, although the EEA makes no specific mention of claims of equal pay for work of equal value, the terms of the prohibition against unfair discrimination established by s 6 are sufficiently broad to incorporate claims of this nature."*

- 14.2 There is already an obligation upon an employer to report income differentials and to deal with such differentials systematically to enable an employer to do away with any illegitimate pay differentiation.

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- 14.3 The amendment seeks to allow employees the right to launch equal pay claims if they perform work of equal value. This introduces an unnecessarily complex concept into our law as can be seen from foreign jurisdiction, such as the United Kingdom, where the Legislature had introduced the Equality Act 2010. This is a comprehensive Act that deals specifically with the issue of equal pay. IEASA and Estate Agency Companies therefore submit that South Africa should have a similar act, rather than a provision, introduced in the EEA. This will allow the regulation of equal pay to its fullest extent, but at the same time will not create the unnecessarily complications that will be caused by the proposed provision due to its lack of elaboration.
- 14.4 IEASA and Estate Agency Companies suggest that this clause be deleted in its entirety, alternatively if it is to be retained then the words "*of equal value*" must be deleted from the definition not only for purposes of clarity, but also because there will be no comparator to make this judgment, which will extend the application of such a provision too broadly.
- 14.5 Should this amendment be enacted, it would increase the number of equal pay claims. This would be problematic in the EA Industry in that estate agents are remunerated on a purely commission basis. The commission based model is highly reliant on sales and fluctuations in the market and cannot in one month or one year possibly be the same for any one person. It would be impracticable to implement this section in the EA Industry.
- 14.6 **SECTION 20(7) OF THE EE BILL**
- 14.6.1 In terms of section 20(7) of the EE Bill the Director General may to apply to the Labour Court to impose a fine if a designated employer fails to prepare and implement an employment equity plan. The employment equity plan is by its very nature a futuristic document which sets out objectives for a designated employer.
- 14.6.2 There may be a number of legitimate factors which could justify a designated employer's failure to implement the plan. The Bill does not provide for any defenses to be raised by an employer and it is suggested that the Bill sets out defenses or provide for an opportunity to raise defenses, if it is unable to implement the plan in strict terms.
- 14.6.3 This is concerning as the fines which could be imposed are extremely high and could cause a small business to close its doors. It is proposed that provision should be made for legitimate defenses to be raised by employers.
- 14.6.4 Furthermore, section 20 conflicts with section 37(1)(g) of the EE Bill. Under section 20(7), the Director General is empowered to approach the Labour Court to request that a fine be imposed if an employment equity plan is not prepared and implemented. Under section 37(1)(g) a labour inspector is empowered to issue a compliance order to a designated employer if that employer fails or refuses to prepare and implement an employment equity plan in accordance with section 20 of the Act.
- 14.6.5 Consequently, it is unclear whether a compliance order should be given prior to the Director General approaching the Labour Court for the relief claimed in terms of section 20(7).
- 14.6.6 Section 42 contemplates that there may instances when a designated employer is unable to implement the employment equity plan. In this regard see section 42(b) of the EE Bill. This understanding is not reflected in section 20 or 37 of the EE Bill.
- 14.7 **SECTION 21 OF THE EE BILL**
- 14.7.1 The EEA defines a "designated employer" as:
- "(a) an employer who employs 50 or more employees;*
  - (b) an employer who employs fewer than 50 employees, but has a total annual turnover that is equal to or above the applicable annual turnover of a small business in terms of Schedule 4 to this Act;*

(c) a municipality, as referred to in Chapter 7 of the Constitution;

(d) an organ of state as defined in section 239 of the Constitution, but excluding local spheres of government, the National Defence Force, the National Intelligence Agency and the South African Secret Service; and

(e) an employer bound by a collective agreement in terms of section 23 or 31 of the Labour Relations Act, which appoints it as a designated employer in terms of this Act, to the extent provided for in the agreement;"

14.7.2 IEASA and Estate Agency Companies does not support the amendment in that smaller designated employers will also now have to annually report in future.

14.7.3 This amendment will be onerous, time-consuming and labour intensive for smaller employers and will directly impact on the smaller estate agencies in the industry.

14.7.4 The inclusion of the words "or invalid" in subsection (5B)(b) should be deleted. It is unclear what the words "invalid" seem to imply.

14.7.5 The definition of "designate groups" includes white women. However, the draft Property Charter excludes white women for the purposes of determining an entity's Broad Based Black Economic Empowerment status. This confusion should be resolved.

#### 14.8 SECTION 27 OF THE EE BILL

14.8.1 In terms of section 11 of the EEA it is for an employee to establish a *prima facie* case of unfair discrimination. The burden of establishing a *prima facie* case is therefore placed on the employee and only shifts to the employer if a *prima facie* case is made out. It is nonsensical to compel an employer to report alleged unfair discrimination of its own accord without an employee establishing in a court of law or at arbitration that discrimination exists.

14.8.2 The financial and administrative burden placed on employers to report their own wrongdoing is not justifiable. The provision also offends against the presumption of innocence. An employer may be fined and may attract criminal responsibility for not complying with the EEA and it is submitted that the proposed amendment is unconstitutional.

#### 14.9 SCHEDULE 1 OF THE EE BILL

14.9.1 The economic impact of the linking of fines to turn over may potentially be disastrous for the EA Industry and/or any other organisation.

14.9.2 IEASA and Estate Agency Companies are of the view that annual turnover as a measurement to impose fines for contravention of the EEA could pose serious threats to companies and could potentially push companies into financial distress, especially smaller companies and/or family businesses. This would in turn lead to job losses.

14.9.3 The DoL must ensure that fines imposed do not have the unintended consequence that the continued existence and viability of the particular company that it is imposed on is threatened. The aim of the fine should be to persuade a company to comply with the provisions of the EEA, and not to push a company into financial distress. We are of the view that any penalties should be a Rand amount as opposed to a percentage of annual turnover.

14.9.4 We further support the Impact Assessment Report in that "a thorough economic risk assessment should be undertaken before proceeding with amendments to penalty provisions."

### 15 THE EMPLOYMENT SERVICES BILL

#### 15.1 Reporting of vacancies and filling of positions

- 15.1.1 These provisions create much uncertainty and confusion given the use of numerous and different terms such as "placement opportunity", "vacancy", "new position" etc. These terms need to be addressed and employers should be given the necessary latitude to implement their internal processes first prior to reporting process being required.
- 15.1.2 The ESB unduly infringes upon the EA Industry and in particular estate agencies' ability to manage the recruitment and selection of estate agents in terms of its business requirements. The requirement that all vacancies be reported to the Department may delay the filling of vacancies in an already problematic industry having regard to the fact that there is about 5% - 10% success rate of new agents still being in the business after 6 (six) months.
- 15.1.3 In terms of section 5(1)(d) the Department must provide a service to facilitate the placement of work seekers with employers or in other placement opportunities. It is not clear what "facilitate" means, and how far this extends insofar as the placement of workers is concerned. IEASA and Estate Agency Companies reiterate that this constitutes a serious intrusion into its right to recruit and appoint as it will impact on a estate agencies ability to place agents and will delay the filling of vacancies. We are unable to obtain employees who are Estate Agents within the parameter of these provisions.
- 15.1.4 Non-compliance is further criminalized and is irrational, unreasonable and at odds with the legislative policy to decriminalize labour law.
- 15.2 **SECTION 10 OF THE ESB**
- 15.2.1 Section 10(1) of the ESB states that all new vacancies must be reported to the Department. Section 10(3) states that an employer must notify the Director-General of the filling of a vacancy. There is no indication as to why there are different reporting lines.
- 15.2.2 Section 10(1) of the ESB further states that all new vacancies must be reported to the Department within 14 working days. Section 10(3) states that an employer must notify the Director-General of the filling of a vacancy within 14 days. It is unclear why there are different time periods for reporting.
- 15.2.3 The validity of the filling of a vacancy or new position in an organisation without complying with section 10 is not dealt with. IEASA and Estate Agency Companies suggest that this clause be deleted in its entirety. If it is not deleted, a section should be introduced to clarify whether or not non-compliance invalidates the filling of a new position.
- 15.2.4 IEASA and Estate Agency Companies submit that the 14 (fourteen) day period within which the Department should be notified of any vacancy should be increased. The failure to report vacancies should not be criminalised.
- 15.2.5 **The provisions create undue administrative burdens in the reporting and filling of positions. This section will have a huge administrative impact on the EA Industry in that a multitude of opportunities arise in each year.**
- 16 Having regard to the above, we trust that our comments will be taken into account. Our comments will assist us in ensuring the survival of an industry that is already struggling. We are amenable to engage with the DoL.

## ANNEXURE "A"

**"estate agent"**

- "(a)** means any person who for the acquisition of gain on his own account or in partnership, in any manner holds himself out as a person who, or directly or indirectly advertises that he, on the instructions of or on behalf of any other person -
- (i)** sells or purchases or publicly exhibits for sale immovable property or any business undertaking or negotiates in connection therewith or canvasses or undertakes or offers to canvas a seller or purchaser therefor; or
  - (ii)** lets or hires or publicly exhibits for hire immovable property or any business undertaking or negotiates in connection therewith or canvasses or undertakes or offers to canvass a lessee or lessor therefor; or
  - (iii)** collects or receives any moneys payable on account of a lease of immovable property or any business undertaking; or
  - (iv)** renders any such other service as the Minister on the recommendation of the board may specify from time to time by notice in the Gazette;
- (b)** for purposes of section 3 (2) (a), includes any director of a company or a member who is competent and entitled to take part in the running of the business and the management, or a manager who is an officer, of a close corporation which is an estate agent as defined in paragraph (a);
- (c)** for purposes of sections 7, 8, 9, 12, 15, 16, 18, 19, 21, 26, 27, 30, 33 and 34B, includes -
- (i)** any director of a company, or a member referred to in paragraph (b), of a close corporation which is an estate agent as defined in paragraph (a); and
  - (ii)** any person who is employed by an estate agent as defined in paragraph (a) and performs on his behalf any act referred to in subparagraph (i) or (ii) of the said paragraph;
- (cA)** for the purposes of sections 7, 9 (1) (a), 16, 26, 27, 28 and 33, includes any person who is employed by an attorney or a professional company as defined in section 1 of the Attorneys Act, 1979 (Act No. 53 of 1979), otherwise than as an attorney or an articulated clerk, and whose duties consist wholly or primarily of the performance of any act referred to in subparagraph (i) or (ii) of paragraph (a) on behalf of such attorney or professional company;
- (d)** does not include an attorney who, on his own account or as a partner in a firm of attorneys or as a member of a professional company, as defined in section 1 of the Attorneys Act, 1979 (Act No. 53 of 1979), or an articulated clerk as defined in the said section of that Act, who performs any act referred to in paragraph (a), in the course of and in the name of and from the premises of such attorney's or professional company's practice: Provided that such an act is not performed -
- (i)** in partnership with any person other than a partner in the practice of that attorney as defined in section 1 of the Attorneys Act, 1979 (Act No. 53 of 1979); or
  - (ii)** through the medium of or as a director of a company other than such professional company;
- (e)** for purposes of section 30 (2), (3), (4), (5), (6), (7) and (8) and of regulations made under section 33 (1) (h), includes any person who was an estate agent at the time when he or



*she was guilty of any act or omission which allegedly constitutes conduct deserving of sanction referred to in section 30:*

*Provided that, for the purposes of this definition, "advertise" does not include to advertise in compliance with the provisions of any law;"*