

The Employment Status of Magistrates in South Africa and the Concept of Judicial Independence

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Abstract

Protection in terms of labour law is primarily available only to persons with status as employees. In South Africa the courts have over the years developed different tests to establish who is an employee and therefore entitled to the protection afforded by labour law. These tests have been incorporated into legislation. The *Labour Relations Act* 66 of 1995 provides for a definition and presumption of who is an employee. The Act also excludes certain categories of persons from its application and ambit. Although magistrates have not expressly been excluded from the application of the Act, it has been held that they are not employees, because such a categorisation would infringe the principle of judicial independence as guaranteed by the *Constitution of the Republic of South Africa*, 1996. The purpose of this contribution is to evaluate whether magistrates could be categorised as employees in terms of the traditional tests of employment and still be able to maintain judicial independence as required by the South African Constitution.

Keywords

Magistrates; judicial independence; employment; meaning of employee.

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1 Introduction

A person's employment status is relevant for a number of reasons. The main reason is that protection in terms of labour law is primarily available only to employees.¹ Such protection includes a number of rights.² For example, employees have the right not to be unfairly dismissed and not to be subjected to unfair labour practices.³ Employees are also afforded extensive collective bargaining rights⁴ and they are protected in that their contracts of employment may not go beyond certain minimum conditions of employment.⁵ Furthermore, certain common-law remedies are available only when there is an employer-employee relationship. For example, when an employee commits a delict in the performance of his or her duties, the injured party may institute a claim against the employer on the basis of the doctrine of vicarious liability.⁶

It is also of great importance for an employer to determine whether someone is an employee, as an employment relationship creates certain duties for the employer. For example, an employer is obliged to deduct tax from the remuneration paid to an employee.⁷ An employer is also in certain circumstances obliged to make deductions from such remuneration for the purposes of the Unemployment Insurance Fund.⁸

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¹ Brassey 1990 *ILJ* 890. Also see *Khanyile v CCMA* 2004 *ILJ* 2348 (LC) (hereafter *Khanyile*), where the court confirmed that it is necessary for the applicant to show that he is an employee before he is entitled to rely on remedies in terms of the *Labour Relations Act* 66 of 1995 (hereafter "LRA").

² See Diedericks and Van Eck 2015 *THRHR* 476 for a brief discussion of the rights of employees.

³ Section 185 of the LRA provides that every employee has the right not to be unfairly dismissed and not to be subjected to unfair labour practice.

⁴ See ch II of the LRA for the general protection afforded to employees regarding collective bargaining.

⁵ Section 2 of the *Basic Conditions of Employment Act* 75 of 1997 (hereafter "BCEA") sets out the establishment and enforcement of basic conditions of employment as one of the purposes of the said Act.

⁶ Du Bois *Wille's Principles* 1216; Van Jaarsveld and Van Eck *Principles* 69.

⁷ The rules regarding the deduction of employees' tax are set out in para 2 of the Fourth Schedule to the *Income Tax Act* 58 of 1962.

⁸ In terms of ch 2 of the *Unemployment Insurance Contributions Act* 4 of 2002 an employer is obliged to deduct 1% from the remuneration paid or payable to an employee as a contribution to the unemployment insurance fund. The employer is then obliged to pay that deduction over to the Commissioner of Revenue Services or the Unemployment Insurance Commissioner.

Therefore the first step to determine whether a person is entitled to protection in terms of labour law and whether an employer has certain legislative duties is to establish if that person is an employee.

In the case of *Khanyile*⁹ the question arose whether a magistrate as a member of the judiciary is an employee and therefore entitled to rely on the protection afforded by labour legislation. In that case a magistrate had been denied promotion to the status of senior magistrate and as a result filed an unfair labour practice dispute under the auspices of the LRA¹⁰ against the Minister of Justice, whom the magistrate regarded as his employer. The court held that at face value it would seem that a magistrate could be categorised as an employee, taking into consideration the definition of an "employee" in terms of the LRA¹¹ and the fact that magistrates are not explicitly excluded from the ambit of this Act.¹² However, the court noted that the statutory definition of an employee should be construed within a broader constitutional framework.¹³ The court took the enquiry of the employment status of a magistrate beyond the traditional tests for the existence of employment or an employment relationship. It was held that a judicial officer cannot be an employee, in view of the fact that the South African *Constitution*¹⁴ provides that the courts are independent and subject only to the *Constitution* and the law.¹⁵ The *Constitution* requires the judiciary to apply the law and *Constitution* without interference from any person or organ of state.¹⁶ Accordingly the court refused to bring magistrates within the protective measures of the LRA and found that the constitutional guarantee of an independent judiciary would be compromised if judicial officers were to be categorised as employees. The court concluded that it would be difficult to reconcile an employment relationship between a magistrate and the state (as the employer) with judicial independence. It was clear to the court that an employment relationship between a magistrate

⁹ See Brassey 1990 *ILJ* 890 and *Khanyile*.

¹⁰ Section 186(2) of the LRA prohibits unfair conduct by the employer relating *inter alia* to promotion.

¹¹ Section 213 of the LRA defines an employee as a) "any person, excluding an independent contractor, who works for another person or the State and who receives or is entitled to receive any remuneration; and b) any person who in any manner assists in carrying on or conducting the business of an employer".

¹² *Khanyile* para 10. S 2 of the LRA expressly excludes members of the National Defence Force and the State Security Agency from its scope and application.

¹³ *Khanyile* para 10.

¹⁴ *Constitution of the Republic of South Africa, 1996* (hereafter the "*Constitution*").

¹⁵ *Khanyile* para 30.

¹⁶ Section 165 of the *Constitution*.

and the state and the maintenance of an independent judiciary cannot co-exist.¹⁷

The purpose of this article is to investigate whether the need to preserve judicial independence is a valid reason for excluding magistrates from being categorised as employees. The investigation commences with a discussion of the traditional tests for employment. This discussion is aimed at establishing whether magistrates could indeed qualify as employees in terms of the traditional tests. This will be followed by a discussion of the core of the concept of judicial independence, with the aim of determining whether the classification of magistrates as employees would give the state the authority to interfere in the judicial functions of magistrates and thereby infringe the principle of judicial independence. Finally, the article provides a brief overview of the labour rights of members of the judiciary in England, for the purpose of illustrating that judicial independence and employment are not mutually exclusive.

2 Traditional tests to establish employment

2.1 Common law tests

2.1.1 Introduction

Traditionally the existence of a contract of employment served as the foundation for an employer-employee relationship.¹⁸ Three main tests have been applied by the courts to identify a contract of employment, namely the control test, the organisation test and the dominant impression test.¹⁹ These tests distinguish between an employee and an independent contractor. If a person is an independent contractor, no employment relationship exists and generally the rights and duties applicable to an employment relationship would not apply.

The control test entails that when a principal has the right to supervise and control the work to be done, the relationship between the parties would be one of employment.²⁰ The application of this test entails that the greater the degree of control and supervision the employer is entitled to exercise, the

¹⁷ *Khanyile* para 31.

¹⁸ *Department of Health, Eastern Cape v Odendaal* 2009 30 ILJ 2093 (LC) 2111G; Radley and Smit 2010 *Obiter* 250; Nkosi 2015 *De Jure* 239.

¹⁹ *Cole Management Theory and Practice* 408.

²⁰ *Colonial Mutual Life Assurance Society Ltd v MacDonald* 1931 AD 412 435. Also see *Smit v Workmen's Compensation Commissioner* 1979 1 SA 51 (A) 53D (hereafter *Smit*); *SABC v McKenzie* 1999 20 ILJ (LAC) 589D-E (hereafter *Mckenzie*); *R v AMCA Services Ltd* 1959 4 SA 207 (A) 212H.

greater the probability would be that a contract of employment exists.²¹ The courts began to acknowledge that although the presence of the right to supervision and control is an important factor in determining the existence of a contract of employment, it is not the only factor, but merely one of a number of factors.²²

In accordance with the organisation test, the existence of a contract of employment depends on whether or not the person performing the work is part of the organisation.²³ The organisation test was rejected by the courts as it is regarded as too vague and fails to provide clarity on the nature and extent of the integration into the organisation.²⁴

The dominant impression test is the salient test to establish the existence of a contract of employment.²⁵ This test was first introduced by the court in *Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB*²⁶ and then reinforced in the case of *Smit*.²⁷ The dominant impression test entails the weighing-up of a number of factors against one another, and the dominant impression gained after the weighing exercise is determinative of the type of contract, for example a contract of employment. The factors taken into account are not exhaustive and the courts have held that there is no single factor that is decisive in determining the existence of a contract of employment.²⁸

2.1.2 The dominant impression test

The courts have continued to apply the dominant impression test. In the case of *McKenzie*²⁹ the court identified some of the important characteristics of a contract in order to distinguish between an employee and an independent contractor. The court found that if the object of the contract was for the performance of specified work or a specified result, it would be an indication that the person is an independent contractor. If the person

²¹ *Mandla v LAD Brokers (Pty) Ltd* 2000 21 ILJ 1807 (LC) 1809C-E.

²² *Stein v Rising Tide Productions (CC)* 2002 23 ILJ 2017 (C) 2018D-E; *Smit* 53E. This acknowledgement by the courts led to the formulation of the dominant impression test, which will be discussed in more detail below.

²³ *Bank Voor Handel En Scheepvaart NV v Slatford* 1952 2 All ER 956 (CA) 971. Also see *Smit* 63D; *McKenzie* 589E.

²⁴ *R v AMCA Services Ltd* 1962 4 SA 537 (A) 540H; *Smit* 63D-E.

²⁵ Olivier 2008 TSAR 3.

²⁶ *Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB* 1976 4 SA 446 (A) 457A.

²⁷ *Smit* 53D.

²⁸ *Colonial Mutual Life Assurance Society Ltd v MacDonald* 1931 AD 412 435. Also see *Smit* 53D; *McKenzie* 1589D-E; *R v AMCA Services Ltd* 1959 4 SA 207 (A) 212H.

²⁹ *McKenzie* 1589D-E.

rendering the service was subject to the supervision and control of the employer or was obliged to render the service personally, it would be indicative of an employment contract. The court further considered when the relevant contract would terminate. If it terminated on the death of the person rendering the service, that would be an indication that the person was an employee.³⁰

Almost a decade after *McKenzie*, in *State Information Technology Agency (Pty) Ltd v CCMA*,³¹ the court reduced the criteria used to determine whether a contract of employment exists. The court identified three main criteria, namely:

- (a) the principal's right to supervision and control;
- (b) the extent to which the person forms an integral part of the organisation of the principal; and
- (c) the extent to which the person is economically dependent on the employer.³²

The first two criteria are a combination of the control and organisational tests as discussed above. The court, however, introduced an additional criterion, namely the degree of economic dependence on the employer of the person performing the work.

2.1.2.1 Application of the dominant impression test to the position of magistrates

If one were to apply the above three criteria to the position of magistrates, the latter two criteria – at least on the face of it – would be satisfied. In my view magistrates do indeed form an integral part of the organisation of the principal, in the sense that they have their chambers at court and they perform their duties at court on a daily basis. Magistrates would also pass the criterion of economic dependence. With regards to "economic dependence", Benjamin³³ states the following:

Economic dependence relates to the entrepreneurial position of the person in the marketplace. An important indicator that a person is not dependent

³⁰ See *McKenzie* 590F-591D for the listed differences between an employee and an independent contractor.

³¹ *State Information Technology Agency (SITA) (Pty) Ltd v CCMA* 2008 7 BLLR 611 (LAC) (hereafter *SITA*).

³² *SITA* para 12.

³³ Benjamin 2004 *ILJ* 787.

economically is that he or she is entitled to offer skills or services to persons other than his or her employer ... [D]epending upon an employer for the supply of work is a significant indicator of economic dependence.³⁴

It is submitted that magistrates are not in a position to offer their skills to various principals, because they are expected to be readily available to perform services should their head of office require them to do so. In terms of section 36 of the *Magistrates Act*,³⁵ magistrates may be required to perform official service at any day of the week or any time of the day or night and to be present at their normal working place or elsewhere to perform the said service. It is important that magistrates should be remunerated adequately and thus placed in a position whereby it will not be necessary for them to engage in other activities in order to supplement their salaries. If there is no economic dependence and security, their ability to act independently may be jeopardised.³⁶ They may, for example, be tempted to become involved in corruption by accepting bribes to reach certain verdicts in particular matters in which they preside.

The criterion of control and supervision has, however, been a contentious one. It is argued that should a judicial officer be categorised as an employee, the state will have control over the magistracy and thus be permitted to influence the outcome of a decision, which will result in judicial independence being compromised.³⁷ At first glance this seems to be a valid argument, but the issue requires further analysis, which will take place below.

However, even if it is accepted for argument's sake that magistrates can never be subject to supervision and control, an employment relationship could still be present with reference to the other criteria used to establish an employment relationship. This is so because all the criteria need not necessarily be complied with.³⁸ What is conclusive is the dominant impression that is gained from the weighing-up of all of them.

³⁴ Benjamin 2004 *ILJ* 803. Also see *Pam Golding Properties (Pty) Ltd v Erasmus* 2010 31 *ILJ* 1460 (LC) 1468E-H (hereafter *Pam Golding Properties*).

³⁵ *Magistrates Act* 90 of 1993.

³⁶ *Association of Regional Magistrates of Southern Africa v President of RSA* 2013 7 *BCLR* 762 (CC) para 43.

³⁷ Wallis 2012 *SALJ* 653-654; *LDM Du Plessis obo L Pretorius v Department of Justice* (unreported) award number GA 26670 considered by Commissioner PJ van der Merwe of 17 December 2002 (hereafter *LDM Du Plessis*). Also see *Khanyile*.

³⁸ *SITA* 803.

2.2 Statutory test

2.2.1 Employee defined

As already stated, the LRA provides for a definition to establish who is an employee.³⁹ In order to analyse the definition, it is worth quoting it in this section as well. Section 213 of the LRA defines an employee as:

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

In terms of subsection (a) of the definition, an independent contractor is expressly excluded. However, subsection (b) is wide enough to include an independent contractor. For example, it could be argued that an independent plumber assists in carrying on the business of a hair salon by repairing the blocked taps in the salon. However, while subparagraph (b) is open to wide interpretation, the courts have tended to interpret it conservatively so as to not include an independent contractor.⁴⁰

Irrespective of the statutory definition of an employee, the courts have continued to apply the common-law dominant impression test.⁴¹ The factors developed by the courts are therefore still relevant to assisting the courts to establish who is an employee. The factors as listed in the *Smit* case have been codified in the Code of Good Practice: Who is An Employee.⁴² Although these factors are still influential in determining who is an employee, less emphasis is being placed on the existence of a contract of employment. Now the focus has shifted to the existence of an employment relationship as the basis for protection in terms of labour law.⁴³ For example, in *Kylie v CCMA*⁴⁴ the Labour Appeal Court provided labour law protection to a sex worker even in the absence of a valid contract of employment. The court found that the criminalisation of sex work does not necessarily deny a

³⁹ Section 213 of the LRA.

⁴⁰ *Casale Employment Relationship* 9. Also see *Liberty Life Association of Africa Ltd v Niselow* 1996 17 ILJ 673 (LAC) 683A-D, where the court acknowledged that the latter part of the definition may extend beyond its common meaning. The court, however, held that a literal interpretation of the provision would result in absurdity.

⁴¹ *Pam Golding Properties* 1467C-J. Also see *Stein v Rising Tide Productions* CC 2002 23 ILJ 2017 (C), where the court applied this test irrespective of s 213 of the LRA; *Casale Employment Relationship* 11.

⁴² GN 1774 in GG 29445 of 1 December 2006 (hereafter "Code of Good Practice").

⁴³ Van Niekerk *et al Law@work* 59.

⁴⁴ *Kylie v CCMA* 2010 31 ILJ 1600 (LAC).

sex worker protection in terms of the constitutional right to fair labour practices. It was further held that within the broader constitutional right to fair labour practices, the LRA protects employees by ensuring that employers adhere to and give effect to these rights within the context of an employment relationship.⁴⁵

The case of *Discovery Health v CCMA*⁴⁶ is a further example of where the court did not focus on the contract of employment as the sole basis upon which to establish protection in terms of labour law. In that case an illegal immigrant without a valid work permit was granted labour law protection. In this regard the court found that the definition of an employee in terms of section 213 of the LRA is not dependent on the existence of a valid contract of employment.⁴⁷

The legislature has also now broadened the scope of the application of labour law with the recent amendments to the LRA.⁴⁸ In this regard the definition of a dismissal⁴⁹ has now been amended to mean a termination of employment.⁵⁰ Prior to the amendment, dismissal in terms of the relevant provision meant a termination of the contract of employment by the employer. Now, the termination of an employment relationship rather than an employment contract satisfies the requirements of the term "dismissal".

If one takes cognisance of the courts' and legislature's understanding that the contract of employment is not the sole basis for offering protection in terms of labour law, it can be argued that the employment status of magistrates, and ultimately their entitlement to labour rights, can be established without necessarily having to prove the existence of a contract of employment. What should be proved, instead, to establish that magistrates are entitled to labour law protection, is the existence of an employment relationship.

Section 200A of the LRA now contains a presumption of employment. This presumption strengthens the notion that the contract of employment is not the only basis for establishing labour law protection.⁵¹

⁴⁵ *Kylie v CCMA* 2010 31 ILJ 1600 (LAC) paras 39, 40 and 54.

⁴⁶ *Discovery Health v CCMA* 2008 29 ILJ 1480 (LC).

⁴⁷ *Discovery Health v CCMA* 2008 29 ILJ 1480 (LC) paras 49 and 54.

⁴⁸ The LRA was amended by the *Labour Relations Amendment Act* 6 of 2014.

⁴⁹ Section 186(1) of the LRA provides for a definition of dismissal and lists various situations which would constitute a dismissal.

⁵⁰ Emphasis added; see s 186(1)(a) of the LRA.

⁵¹ *Le Roux* 2007 SALJ 470.

2.2.2 *Presumption of employment*

In 2002 the legislature introduced a rebuttable presumption in the LRA to establish who is an employee.⁵² The introduction was in response to the practice of disguised employment, whereby employers attempted to avoid the provisions of the labour statutes by contracting the work to be done to independent contractors.⁵³ It is clearly stipulated that the presumption applies irrespective of the form of the contract between the parties.

It is worth noting that the presumption does not alter the statutory definition of "employee". All it means is that if the presumption applies, it shifts the onus onto the employer to prove that the alleged employee is not an employee. Failure to satisfy the burden of proof on the part of the employer will result in the person in question's being deemed to be an employee.⁵⁴

In terms of the presumption, a person who works for or renders services to another person is presumed to be an employee if at least one of seven listed factors is present. The factors listed are as follows:

- (a) whether the person is subject to the control or direction of another person;
- (b) whether the person's working hours are subject to the control or direction of another person;
- (c) whether the person forms part of the relevant organisation;
- (d) whether the person has worked an average of 40 hours per month over the last three months;
- (e) whether the person is economically dependent on another person;
- (f) whether the person makes use of the tools or trade or work equipment of another person; and
- (g) whether the person works for or renders service to only one person.⁵⁵

⁵² Section 83A of the BCEA contains a similar presumption of employment for the purposes of that Act.

⁵³ Casale *Employment Relationship* 16.

⁵⁴ Van Niekerk *et al Law@work* 64.

⁵⁵ The seven factors are listed in s 200A(1) of the LRA.

The presumption operates only if the person alleging to be an employee earns below a certain threshold amount⁵⁶ and will certainly not be applicable to magistrates, because magistrates earn in excess of the threshold amount.⁵⁷ As already stated, it is important that magistrates receive adequate remuneration as it is an important aspect of judicial independence. If they lacked such security that might lead them not to act independently.⁵⁸ However, the Labour Appeal Court has held that where the presumption is not applicable as a result of a person's earning above the threshold, the listed factors may still be applied in order to provide guidance towards establishing whether an employment relationship exists.⁵⁹

In terms of section 200A(4) of the LRA, NEDLAC⁶⁰ was required to prepare and issue a Code of Good Practice setting out guidelines to determine whether persons, including those who earn in excess of the threshold amount, are employees. NEDLAC complied with this provision and developed and issued the required Code of Good Practice. This Code incorporated the approach in the *Denel* case and provides that the factors listed in the presumption may be used as guidelines to determine whether or not an employment relationship exists.

2.2.2.1 Application of the presumption of employment to the position of magistrates

In the light of the above, even though the presumption does not apply to magistrates, the latter six of the factors in terms of the presumption listed above would be satisfied in the case of magistrates. A magistrate's working hours are set out in regulation 35 of the *Magistrates Act*, which states that a magistrate's office hours will be from 07:45 to 16:15 on Mondays to Fridays with a lunch interval of not more than 45 minutes. Also, in terms of regulation 37, a magistrate may not be absent from his or her place of duty during office hours without the consent of the head of office.

⁵⁶ The threshold amount is currently R205 433.30. It is determined from time to time by the Minister of Labour in terms of s 6(3) of the BCEA.

⁵⁷ In 2016 a magistrate earned R835 444 per annum in terms of a proclamation by the President in GN 327 in GG 38568 of 17 March 2016. Higher scales apply in respect of different categories of magistrates - a senior and a regional magistrate earn more than a magistrate, for example. In terms of the proclamation any reference to "magistrate" refers to all ranks of magistrates appointed on a permanent basis.

⁵⁸ See *Association of Regional Magistrates of Southern Africa v President of RSA* 2013 7 BCLR 762 (CC) para 43.

⁵⁹ *Denel (Pty) Ltd v Gerber* 2005 26 ILJ 1256 (LAC) (hereafter *Denel*).

⁶⁰ In terms of s 213 of the LRA, NEDLAC means the National Economic Development and Labour Council established by s 2 of the *National Economic, Development and Labour Council Act* 35 of 1994.

These regulations are firstly an indication that the working hours of magistrates are subject to the control or direction of another person. Regulation 35 requires that magistrates work an average of 40 hours per month over a period of three months. In this regard they would satisfy the factor as listed under paragraph (d) above. Furthermore, magistrates would also be regarded as satisfying the requirement that they form part of the relevant organisation. This is borne out by the amount of time they are required to be at work. As noted above, magistrates are expected to be at work from Monday to Friday, in other words five days a week. Also, as stated above, magistrates are economically dependent on their remuneration and do not render services to different organisations.⁶¹

Finally, magistrates are provided with tools or work equipment. For example, they are required to use a cloak when they preside over matters and are provided with chambers at court and all the facilities that enable them to exercise their duties.

In the light of the above, it is submitted that magistrates comply with at least six of the seven listed factors, only one of which – any one - must be present in order for the presumption of employment to take effect. It is only the first factor, namely, supervision and control, which may not be satisfied conclusively at this stage. However, as stated above, an analysis of that factor will be conducted in the subsequent discussion.

3 Judicial independence and employment

3.1 Introduction

The exclusion of magistrates from employment status has been justified by the fact that the *Constitution* requires that the judiciary be independent.⁶² In *Van Rooyen v The State*,⁶³ the Constitutional Court noted that magistrates are not entitled to engage in collective bargaining due to their judicial independence.⁶⁴ The CCMA in the case of *LDM Du Plessis* followed a similar approach when it held that a magistrate who referred to it an unfair labour practice dispute was not an employee and therefore not entitled to

⁶¹ *Magistrates Act* 90 of 1993; *Association of Regional Magistrates of Southern Africa v President of RSA* 2013 7 BCLR 762 (CC) para 43.

⁶² Section 165 of the *Constitution*.

⁶³ *Van Rooyen v The State* 2002 5 SA 246 (CC) para 139 (hereafter *Van Rooyen*).

⁶⁴ It is argued that the court did not give a conclusive judgment on this issue. The central focus of the case was the extent of the independence of the magistracy and this *obiter* statement was the only instance in the entire case where the court remarked on the status of magistrates as employees. In this regard see Van Eck and Diedericks 2014 *ILJ* 2707.

rely on the dispute resolution mechanisms established by the LRA. The CCMA relied on the reference made in *Van Rooyen* regarding the issue of the employment status of magistrates.

In *Khanyile* the Labour Court in no uncertain terms held that magistrates cannot have the status of employees due to the fact that the *Constitution* requires the judiciary to be independent.⁶⁵ This decision established a clear precedent in the matter.

In 2010 the issue of the employment status of magistrates again arose in the matter of *Reinecke v The President of South Africa*,⁶⁶ where a magistrate claimed that the chief magistrate had repudiated the contract of employment between the parties by making his (the magistrate's) continued employment intolerable. Although the High Court took cognisance of the constitutional right to fair labour practices, it remarked that the LRA was not directly applicable to a judicial officer.⁶⁷ The court concluded, however, that a contract of employment existed between the parties, and awarded a substantial amount of damages to the aggrieved magistrate for breach of contract. On appeal, the Supreme Court of Appeal⁶⁸ left open the question whether a magistrate is entitled to protection under the LRA. However, the court remarked on the issue of judicial independence and stated that it is not a valid justification for excluding magistrates from labour law protection. In this regard the court stated:

Nothing in the judgment affects the constitutional position of magistrates as part of the judiciary and the judicial authority in this country in terms of chapter 8 of the Constitution. The narrow question is simply whether ... magistrates were employees of the State in terms of contracts of employment ... A finding that they were so employed does not impact upon their independence, which is constitutionally guaranteed.⁶⁹

The above quotation raises the question whether the *Reinecke* case overturned the precedent set by *Khanyile*, namely that magistrates cannot be employees due to the fact that the *Constitution* guarantees judicial independence. In this regard the difference between the *ratio decidendi* and the *obiter dicta* of a case becomes relevant. The *ratio decidendi* sets a

⁶⁵ *Khanyile* para 30.

⁶⁶ *Reinecke v The President of South Africa* (unreported) case number 25705/2004 of 4 September 2012.

⁶⁷ *Reinecke v The President of South Africa* (unreported) case number 25705/2004 of 4 September 2012 para 45; also see Van Eck and Diedericks 2014 *ILJ* 2708, where the authors argue that the High Court was misdirected in that finding.

⁶⁸ *President of SA v Reinecke* 2014 3 SA 205 (SCA) (hereafter *Reinecke*); for a detailed discussion of the case see Van Eck and Diedericks 2014 *ILJ* 2700.

⁶⁹ *Reinecke* para 7.

precedent and consists of the legal principles upon which the court based its decision, while *obiter dicta* are mere remarks which the court makes in passing and do not set any precedent.⁷⁰

If the above statement formed part of the *ratio decidendi*, it overturned the *Khanyile* decision on the basis of *stare decisis*.⁷¹

In my view, the court's statement relating to judicial independence and employment was made in passing and therefore formed part of the *obiter dicta* of the judgement. This is so, because it was never argued before the court that judicial independence was a basis for excluding magistrates from employment status. The statement made by the court was also the only reference to the co-existence of employment and judicial independence in the entire case. Therefore it is submitted that the principle set in *Khanyile* prevails, that judicial independence and employment are mutually exclusive.

However, if one were to assume, for argument's sake, that the Supreme Court of Appeal indeed overruled the principle set by *Khanyile*, it is still important to analyse the view that judicial independence and employment cannot exist at the same time. Because judicial independence is constitutionally guaranteed, a potential infringement of such an important constitutional principle is worth investigating.

3.2 Judicial independence in the context of employment

3.2.1 The core of judicial independence

Although there is no universally agreed definition of judicial independence,⁷² it is accepted that the principle is based on two fundamental doctrines of constitutional governance.⁷³ In the first instance, it stems from the doctrine of the separation of powers between the different branches of government, namely, the executive, the legislature and the judiciary.⁷⁴ Judicial

⁷⁰ Kleyn and Viljoen *Beginner's Guide* 62-63.

⁷¹ This principle entails that a court is bound by the prior decisions of a higher court and by its own decisions in similar matters; see Hahlo and Kahn *South African Legal System* 214.

⁷² Malleson 1997 *MLR* 657.

⁷³ Ajibola and Van Zyl *Judiciary in Africa* 107.

⁷⁴ *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 4 SA 744 (CC) para 123; *Van Rooyen* para 17; *Carpenter* 2005 *TSAR* 499-500.

independence is also derived from the supremacy of the rule of law,⁷⁵ which is foundational to the *Constitution*.⁷⁶

Consensus also exists regarding the core of the principle. In broad terms it essentially entails that judicial officers should be independent from any influence, direction, control or any other form of interference when they perform their judicial functions, which is mainly to adjudicate.⁷⁷ Accordingly, it is argued that should a judicial officer be categorised as an employee, the state as the employer would have control over the magistracy and thus be permitted to influence the outcome of decisions, which would result in judicial independence's being compromised.⁷⁸ An analysis of this argument follows below, with reference to the factor of supervision, in establishing who is an employee.

3.2.2 *Supervision and control, and judicial independence*

As stated above, the three main criteria to establish employment are supervision and control; the extent of the alleged employee's integration in the organisation, and his or her economic dependence. It was concluded above that the position of magistrates would at least satisfy the latter two criteria. However, the first criterion, namely control and supervision, has been a contentious one.⁷⁹

The control or direction of the alleged employer is one of the listed factors to be taken into account for the presumption that a person is an employee to take effect.⁸⁰ This factor raises the question whether control, in the context of employment, entails that the state will be entitled to direct or instruct a magistrate to reach a specific outcome in a case, for example, and thereby compromise the core of judicial independence. The Code of Good Practice provides the following explanation regarding the factor of supervision and control:⁸¹

The factor of control or direction will generally be present if the applicant is required to obey the lawful and reasonable commands, orders or instructions of the employer or the employer's personnel (for example, managers or

⁷⁵ *Van Rooyen* para 17.

⁷⁶ Section 1(c) of the *Constitution* provides that the Republic of South Africa is founded on the values of the supremacy of the *Constitution* and the rule of law.

⁷⁷ *Ajibola and Van Zyl Judiciary in Africa* 107; *De Lange v Smuts* 1998 3 SA 785 (CC) para 70; *Van Rooyen* para 19; also see *Carpenter* 2005 TSAR 500.

⁷⁸ Wallis 2012 SALJ 653-654; *LDM Du Plessis; Khanyile*.

⁷⁹ Wallis 2012 SALJ 653-654; *LDM Du Plessis; Khanyile*.

⁸⁰ As stated above under part 2.2.2, the same guidelines may be applied even to persons to whom the presumption does not apply, such as magistrates.

⁸¹ Paragraph 18(a) of the Code of Good Practice.

supervisors) as to the manner in which they are to work. It is present in a relationship in which a person supplies only labour and the other party directs the manner in which he or she works ... It is an indication of an employment relationship that the 'employer' retains the right to choose which tools, staff, raw materials, routines, patents or technology are used.

From the above explanation it is clear that supervision and control entail that the person alleging to be an employee is required to obey only the *lawful* and *reasonable*⁸² commands, orders or instructions of the "employer". Should magistrates be categorised as employees, there will be control over them in the sense that they are not entitled to set their own working hours and thus their own routines. They are also subject to a specific dress code at work, for example. They may also be subjected to performance appraisal and are furthermore provided with the tools necessary in order for them to be able to perform their functions, such as a cloak and chambers.

It is submitted that the mere fact that control and direction may be present does not mean that the state or any other person will be authorised to demand or instruct a magistrate to act in breach of the constitutional duty of judicial independence. The Code of Good Practice clearly states that control and direction entail that the person will be required to obey only the lawful and reasonable demands of the employer. Also, in terms of the regulations under the *Magistrates Act*, a magistrate may be accused of misconduct only if he or she failed to execute a lawful order.⁸³ The common law also requires an employee to carry out the lawful and reasonable instructions of the employer.⁸⁴ The LRA furthermore protects employees in that they may not be prejudiced for a failure to do something that an employer may not lawfully permit an employee to do.⁸⁵ If an employee is dismissed on the basis of refusing to carry out an unlawful instruction, such a dismissal will automatically be unfair.⁸⁶

In the light of the above, it is submitted that it would not be lawful and reasonable for the state to instruct a magistrate to reach a specific outcome in a case, for example. Such interference would be contrary to the

⁸² Emphasis added.

⁸³ Regulation 25 contains general provisions regarding misconduct and in essence describes the circumstances in which a magistrate may be accused of misconduct. These include, but are not limited to, situations in which the magistrate is found guilty of an offence, contravenes a provision of the regulations, is negligent in the performance of his or her duties, and refuses to execute a lawful order.

⁸⁴ Van Niekerk *et al Law@work* 88.

⁸⁵ Section 5(2)(c)(iv) of the Act.

⁸⁶ Section 187(1) of the LRA provides that a dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to the provisions of s 5 of the Act.

Constitution, which expressly provides that the courts are independent. Therefore, in terms of the *Constitution* a magistrate would not be obliged to obey instructions from the state which would have the effect of breaching judicial independence.

Should a magistrate indeed submit to such unlawful demands, judicial independence would be infringed by the individual magistrate and not by virtue of magistrate's being an employee. The judiciary has been appointed as the guardian of judicial independence and should they be swayed to compromise the principle, the judiciary itself would be responsible for it.⁸⁷

Although the constitutional guarantee of an independent judiciary and the structures to protect courts and judicial officers against interference⁸⁸ are aimed at protecting the judiciary from improper pressures, it cannot assure that they will indeed apply independence.⁸⁹ The state of mind of the magistrate or his or her attitude in the actual exercise of judicial independence is referred to as individual independence.⁹⁰ However, it is possible for magistrates to consider that if they go against what the state would expect them to do, they may jeopardise their promotion or may even be transferred.⁹¹ In this regard the Magistrates' Commission could play an important role. The Commission was established in terms of the *Magistrates' Act* to ensure that the appointment, promotion, transfer of, discharge of, or disciplinary steps against, magistrates take place without favour or prejudice and to ensure that no victimisation takes place against magistrates.⁹² Although the *Magistrates' Act* provides for conditions of service of magistrates, it does not mean that they cannot be regarded as employees. The mere fact that another statute regulates the conditions of their employment does not alter the nature and character of the employment relationship.⁹³

The fact that institutional independence is provided for by the *Constitution* does not mean that control and supervision in the context of employment may not be exercised over the magistracy. Therefore, in my view,

⁸⁷ Nugent 2000 *Advocate* 37-38.

⁸⁸ This notion is referred to as institutional independence.

⁸⁹ Clark *Comparative Law and Society* 195.

⁹⁰ See *De Lange v Smuts* 1998 3 SA 785 (CC) para 71, where the court quoted a passage from the Canadian case of *Valente v The Queen* 1986 24 DLR (4th) 161 (SCC) 169-170, where a distinction was drawn between institutional and individual independence; also see *Van Rooyen* para 19.

⁹¹ Van Dijkhorst 2000 *Advocate* 39.

⁹² Section 4 of the *Magistrates Act* 90 of 1993.

⁹³ Nkosi 2015 *De Jure* 238. See *Reinecke* para 13, where the Supreme Court of Appeal accepted that an employment relationship exists between a magistrate and the state.

independence and employment can be present at the same time and the two concepts are accordingly not mutually exclusive.

As mentioned above, it may still be possible for an employment relationship to exist in terms of the criteria formulated in the *SITA* case, even though it may, for the sake of argument, be accepted that magistrates can never be under the supervision and control of the state.⁹⁴

3.2.3 *Public confidence as an aspect of judicial independence*

It has been stated above that the essence of judicial independence is that judicial officers should be free from interference when they perform their duties. However, the concept has other dimensions too, and includes more than the idea that the judiciary should not be taking instructions from the government.⁹⁵ Judicial independence and public confidence in the courts are interrelated values of justice. Other fundamental values include procedural fairness, efficiency and accessibility. The preservation of judicial independence is vital to ensuring the administration of justice by an efficient and reliable judiciary.⁹⁶

In the past, magistrates occasionally featured prominently in the news because of their conduct.⁹⁷ The Magistrates' Commission raised concern that the cases for misconduct against magistrates were not being timeously resolved. One of the cases before the Commission was of a magistrate who had been found guilty of murder and provisionally suspended in 2011, but years after the incident the magistrate's suspension had not yet been confirmed by Parliament.⁹⁸ Another matter concerned the provisional suspension of a magistrate where the matter remained unresolved for 10 years.⁹⁹

The delays in effectively resolving disputes regarding the suspension and removal of magistrates from office have given rise to delays in court proceedings, as magistrates on suspension cannot perform their judicial duties. Delays in the judicial process undermine judicial independence because they destroy the public's confidence in the judiciary.¹⁰⁰

⁹⁴ *SITA* 803.

⁹⁵ Ajibola and Van Zyl *Judiciary in Africa* 172; Carpenter 2006 *CILSA* 364.

⁹⁶ Shetreet and Forsyth *Culture of Judicial Independence* 18, 41.

⁹⁷ Wagner 2014 <http://bit.ly/1NkkrtY>; Du Plessis *Beeld*.

⁹⁸ Hartley 2014 <http://bit.ly/1YEDQ2J>.

⁹⁹ Hartley 2014 <http://bit.ly/1YEDQ2J>.

¹⁰⁰ *Pharmaceutical Society of South Africa (Pty) Ltd v Tshabalala-Msimang; New Clicks South Africa (Pty) Ltd v Minister of Health* 2005 3 SA 238 (SCA) 260G-261H; *National Director of Public Prosecutions v Naidoo* 2011 1 SACR 336 (SCA).

Furthermore, the public will lose confidence in the judiciary if it seems that appropriate action is not being taken against magistrates who misbehave. The loss of the public's confidence in the judiciary would hamper judicial independence. The delays in the judicial process and the resulting loss of confidence could be prevented if magistrates were afforded status as employees and labour legislation made applicable to them. The LRA provides for disciplinary processes and dispute resolution mechanisms which are aimed at ensuring that labour disputes are resolved efficiently and expeditiously.¹⁰¹

This contribution, however, acknowledges the potential argument that the recognition of magistrates as employees of the state might create the public perception that magistrates are not independent and only an extension of government.¹⁰² This perception might hamper the public's confidence in the magistracy.

However, historically magistrates formed part of the public service and in *Reinecke* the court remarked that magistrates were not completely removed from the public service.¹⁰³ The court suggested that if the legislature had intended to remove them completely, the relevant legislation should have expressly stated so in clear language. This, the court stated, would have entailed the removal of the rights of magistrates, which they had as members of the public service, and the replacement thereof by other rights.¹⁰⁴

In this regard the court referred to section 18(3) of the *Magistrates Act*, which provides that "the conditions of service applicable [to magistrates] immediately prior to the commencement of section 12 shall not be affected to his or her detriment".¹⁰⁵ This, the court held, indicates that magistrates are entitled to the same rights under the *Magistrates Act* as they were as members of the public service.¹⁰⁶

Therefore, the *Magistrates Act* did not extinguish the relationship between magistrates and the state in its entirety.¹⁰⁷ Consequently, the classification of magistrates as employees would not mean that a new relationship with

¹⁰¹ Benjamin 2009 *ILJ* 46.

¹⁰² Franco and Powell 2004 *SALJ* 562.

¹⁰³ *Reinecke* paras 12-14.

¹⁰⁴ *Reinecke* para 12.

¹⁰⁵ Section 12 of the *Magistrates Act* 90 of 1993 provides for the remuneration of magistrates.

¹⁰⁶ *Reinecke* para 12.

¹⁰⁷ *Reinecke* para 14.

the state would be created. A relationship already exists, and therefore an argument that the categorisation of magistrates as employees would create a public perception that the magistracy is not independent and merely an extension of the state could not hold.

The rationale for excluding magistrates from protection in terms of labour law is said to be the protection of judicial independence. However, the current disciplinary regime applicable to magistrates in terms of the *Magistrates Act* gives rise to delays in disciplining magistrates.¹⁰⁸ As stated above, these delays have the effect of jeopardising judicial independence by eroding public confidence. Public confidence and judicial independence would be protected if the disciplinary processes provided for by labour legislation were applicable to magistrates. It therefore seems that the exclusion of magistrates from employment status has the effect of jeopardising judicial independence. In the light of the above, it is submitted that relying on the need for judicial independence as a reason for excluding magistrates from protection in terms of labour law is inappropriate.

4 Judicial independence and employment in England

4.1 Introduction

The uncertainty surrounding the employment status of magistrates in South Africa has been illustrated above, as well as the significance of a person's holding employment status. It was said that the primary reason for the courts' reluctance to confer employment status on magistrates is the fact that the South African *Constitution* provides for the independence of the judiciary. However, an analysis of South African labour law principles has demonstrated that there is no necessary link between judicial independence and an employment relationship with the state.

The following discussion sets out the position regarding the employment status of judicial officers in England and the extent to which they are protected in terms of labour law.¹⁰⁹ The position is illustrated with reference

¹⁰⁸ The procedure for disciplining magistrates is *lengthy and is set out under part five of the regulations in terms of the Magistrates Act 90 of 1993*. It broadly entails that an investigation must be conducted when there are allegations of misconduct against a magistrate. If the magistrate is found to be guilty of misconduct, the Minister may suspend or relieve the said magistrate from office. The suspension or removal of a magistrate must then be confirmed by Parliament in terms of s 13(4)(c) of the Act; also see fns 100-102 and the accompanying text.

¹⁰⁹ The English position is discussed with reference to judicial officers in general. In this regard no distinction is drawn between the different types of judicial officers, for

to a case in which the English Supreme Court had to decide whether a part-time judge could be classified as a "worker" and was therefore entitled to pension benefits upon his retirement.¹¹⁰

The purpose of a discussion of the English position is to illustrate the issue regarding the co-existence of employment and judicial independence. The discussion intends to demonstrate that South African magistrates could be protected by labour law without the principle of judicial independence being jeopardised.

4.2 The case of *O'Brien*

4.2.1 Facts

The appellant, a part-time judge, claimed entitlement to a retirement pension from the then Department of Constitutional Affairs. However, his request was declined on the basis that the *Judicial Pensions and Retirement Act* of 1993 placed the position held by the appellant outside the scope of judicial officers for whom provision was made for a pension.¹¹¹ A further reason advanced by the Department for declining the appellant's claim was that under European Law he was not a worker but an office-holder, and therefore not entitled to a pension.¹¹²

The aggrieved appellant lodged a discrimination claim in the Employment Tribunal against the Department on the basis that he was being discriminated against because he had been a part-time worker. The Employment Tribunal ruled in favour of the appellant, but on appeal to the Employment Appeal Tribunal his claim was rejected because of a procedural issue, namely that he had failed to bring the initial claim within the prescribed time limitations. Nevertheless, it was consented that the Court of Appeal would adjudicate the case on both the procedural and substantive issues on a test basis.¹¹³

The Court of Appeal allowed the appellant's appeal regarding the time limitations, but on the issue of substance rejected the Employment

example between judges and magistrates. The South African Act deals only with the position of magistrates.

¹¹⁰ *O'Brien v Ministry of Justice (formerly the Department of Constitutional Affairs)* 2013 UKSC 6 (hereafter *O'Brien*).

¹¹¹ Section 1 of the Act sets out the categories of persons who qualify for a pension under the Act.

¹¹² *O'Brien* para 5.

¹¹³ *O'Brien* para 6.

Tribunal's finding and in effect the appellant's claim, on the basis that judges are not workers.¹¹⁴

4.2.2 *Issues before the Court of Justice of the European Union ("CJEU")*

In 2010 the appellant appealed to the Supreme Court, which in turn referred two questions to the CJEU for a preliminary ruling.¹¹⁵

The first issue for consideration by the CJEU was whether or not national law should determine whether judges are workers as contemplated in clause 2 of the Framework Agreement.¹¹⁶ In this regard the CJEU ruled that it is for member states to determine whether judges fall within the category of workers.¹¹⁷ It was noted that an exclusion from the protection provided by the relevant Directives would be permitted only if the relationship between judges and the Ministry of Justice was substantially different from that between employers and employees.¹¹⁸

This ruling seems to be consistent with the approach taken by South African courts, namely that protection in terms of labour law should be determined with reference to an employment relationship as opposed to the existence of a contract of employment.¹¹⁹ However, as stated earlier, even though the Supreme Court of Appeal in the case of *Reinecke* accepted that an employment relationship existed between the aggrieved magistrate and the Department of Justice, the court was not prepared to extend protection in terms of labour legislation to the magistrate.¹²⁰

The second question for consideration before the CJEU was that if it is established that judges are indeed workers, was it permissible for national law to draw distinctions between different kinds of judges in relation to the provision of pension. With regards to this issue it was ruled that national law

¹¹⁴ *O'Brien* para 7.

¹¹⁵ *O'Brien v Ministry of Justice* C-393/10. Article 267 of the *Treaty for the Functioning of the European Union* (2007) provides that the CJEU shall have jurisdiction to make preliminary rulings regarding questions on the interpretation of treaties and the validity and interpretation of statutes.

¹¹⁶ This issue is referred to as the "worker" issue. Clause 2.1 of the Framework Agreement under the *European Union Directive on Part-time Work* (1997) provides that the agreement applies to part-time workers engaged in an employment contract or an employment relationship.

¹¹⁷ *O'Brien* para 32.

¹¹⁸ *O'Brien* para 42.

¹¹⁹ Van Niekerk *et al Law@work* 59.

¹²⁰ *Reinecke* para 13.

should not draw a distinction between different types of judges unless objective reasons existed for doing so.¹²¹

The discussion below focusses primarily on the issue of whether or not judicial officers are workers and thus entitled to labour law protection (the worker issue).

4.2.3 *Judgment on the worker issue*

The CJEU stated that the decision to determine whether judges are workers was to be made by the Supreme Court.¹²² However, the CJEU laid down certain guidelines to be considered by the Supreme Court in order to establish whether the relationship between part-time judges and the Ministry of Justice was substantially different from the relationship between employers and employees.¹²³ The following factors and criteria were to be considered:

- (a) the difference between judges and self-employed persons;
- (b) the rules relating to the appointment and removal of judges as well as their working hours; and
- (c) judges' entitlement to sick, maternity and paternity pay as well as other benefits.¹²⁴

The CJEU also confirmed that the fact that judges were judicial office-holders did not preclude them from the protection afforded by the Framework Agreement.¹²⁵ The Supreme Court was obliged to determine the issues before it in accordance with the above guidelines and laid down by the CJEU.¹²⁶

In evaluating the relationship between judges and the Ministry of Justice in accordance with the principles laid down by the CJEU, the Supreme Court concluded that the appellant had been engaged in an employment relationship as contemplated in clause 2.1 of the Framework Agreement and accordingly had to be treated as a worker.¹²⁷

¹²¹ *O'Brien* para 67.

¹²² *O'Brien* para 43.

¹²³ *O'Brien* para 43.

¹²⁴ *O'Brien* paras 44-46.

¹²⁵ *O'Brien* para 41; also see Holland, Burnett and Millington *Employment Law* 30.

¹²⁶ Section 3(1) of the *European Communities Act, 1972*.

¹²⁷ *O'Brien* para 42.

It was also held that the work performed by judges differed from the work done by self-employed persons. Judges were furthermore obliged to work within set times and were entitled to various benefits.¹²⁸

The court adopted the guidance of the CJEU regarding the issue of employment and judicial independence and confirmed that the status of judges as workers would not impede their judicial independence.¹²⁹ In this regard the court referred to the view of the CJEU that an entitlement to a pension strengthened the economic independence of judges rather than jeopardising the core of judicial independence.¹³⁰ It was accordingly concluded that judicial independence was not an appropriate justification for the exclusion of judicial officers from the protection afforded by the Framework Agreement.¹³¹

In the light of the above, the appellant judge's appeal was upheld and his entitlement to pension benefits confirmed. The order of the Court of Appeal was accordingly set aside.¹³²

Should one apply the factors laid down by the CJEU to the position of magistrates in South Africa, one would not be able to arrive at a conclusion other than that the relationship between magistrates and the Department of Justice is substantially no different from the relationship between an employer and employee. As noted above, magistrates are obliged to work within defined periods of time and their work differs from that of self-employed persons.

The confirmation by the English courts that the judicial independence of judicial officers does not preclude them from the protection and benefits afforded by labour law illustrates the view that judicial independence and employment are not mutually exclusive concepts.

5 Conclusion

It is important for parties to know whether or not their relationship is one of employment. This is so because an employment relationship creates rights, remedies and duties for the parties. Over the years the courts have

¹²⁸ O'Brien para 30.

¹²⁹ O'Brien para 30.

¹³⁰ O'Brien para 34.

¹³¹ O'Brien para 34; also see Shetreet and Turenne *Judges on Trial* 175, where the authors accept the view in O'Brien that judicial independence is not a valid justification for excluding members of the judiciary from an entitlement to labour law protection.

¹³² O'Brien para 76.

developed different tests to establish whether a contract of employment existed between the parties. These tests have been incorporated into legislation and remain relevant in the enquiry as to who is an employee. As stated above, the courts have adopted an approach to establish an employment relationship rather than the existence of a contract of employment.¹³³ A similar approach was adopted by the legislature with the introduction of a broadened definition of dismissal to provide protection against unfair dismissal to those who are not necessarily engaged in a valid contract of employment.¹³⁴ The shift in focus to an employment relationship instead of a contract of employment affirms the inclusive approach of the courts in respect of protection in terms of labour law.

In the case of *Reinecke*, the Supreme Court of Appeal was prepared to accept that an employment relationship existed between the state and the aggrieved magistrate.¹³⁵ The court in *Khanyile* also acknowledged that a magistrate could qualify as an employee in terms of the statutory definition of an employee.¹³⁶ However, the court was not prepared to make the protection of labour law available to the aggrieved magistrate in view of the constitutional guarantee of judicial independence.

The inclusion of magistrates under the LRA will not necessarily result in the undermining of judicial independence. Instances exist where the executive is involved in the administration of justice.¹³⁷ The judiciary cannot operate as an island and it has certain connections with the executive, relating to issues such as funding, for example.¹³⁸ The challenge is to have in place proper protection against influences that may interfere with the judiciary's independence in performing its duties.¹³⁹ In this regard the *Constitution* provides for institutional independence and the *Magistrates Act* could also be useful in ensuring that magistrates comply with the requirements of judicial independence.

Furthermore, if it was intended that labour legislation should not apply to magistrates, they should have been excluded from the application of labour

¹³³ Van Niekerk *et al* *Law@work* 59; *Kylie* paras 39, 40 and 54; *Discovery Health v CCMA* 2008 29 ILJ 1480 (LC) paras 49 and 54; *Labour Relations Amendment Act* 6 of 2014; s 186(1) of the LRA.

¹³⁴ Section 186(1) and 186(1)(a) of the LRA; *Labour Relations Amendment Act* 6 of 2014.

¹³⁵ *Reinecke* para 13. Also see Nkosi 2015 *De Jure* 238.

¹³⁶ *Khanyile* para 10. Also see ss 2 and 213 of the LRA; *Khanyile* para 10.

¹³⁷ Shetreet and Forsyth *Culture of Judicial Independence* 25.

¹³⁸ Hatchard and Slinn *Parliamentary Supremacy* 76-77

¹³⁹ Russell and O'Brien *Judicial Independence* 21.

law in express terms.¹⁴⁰ Labour legislation failed to do so, and it is therefore submitted that it was not intended for magistrates not to have recourse in terms of labour legislation. Even if the legislation had such intention, the *Constitution* affords the right to fair labour practices to "everyone", including magistrates.¹⁴¹

If the trend of a more inclusive labour regime as applied by South African courts were to be adopted consistently, there would be no need for magistrates to be excluded from the protection afforded by labour law. In this regard South Africa can learn lessons from the English position, that a person may have status as an employee without judicial independence being compromised. On the contrary, benefit and protection in terms of labour law can strengthen judicial independence.

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¹⁴⁰ *Khanyile* para 10; s 2 of the LRA.

¹⁴¹ Nkosi 2015 *De Jure* 237. Also see *Reinecke v The President of South Africa* (unreported) case number 25705/2004 of 4 September 2012 para 44; and *Murray v Minister of Defence* 2009 3 SA 130 (SCA), where protection against unfair dismissal was afforded to a member of the National Defence Force (who is expressly excluded from the ambit of the LRA) based on the constitutional right to fair labour practices.

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List of Abbreviations

BCEA

Basic Conditions of Employment Act

CILSA	Comparative and International Law Journal of Southern Africa
CCMA	Commission for Conciliation, Mediation and Arbitration
CJEU	Court of Justice of the European Union
ILJ	Industrial Law Journal
LRA	Labour Relations Act
MLR	Modern Law Review
NEDLAC	National Economic, Development and Labour Council
SALJ	South African Law Journal
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg