

DEPARTMENT OF LABOUR

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LEGAL OPINION

TO : DIRECTOR: EMPLOYMENT STANDARDS

FROM : PRINCIPAL LEGAL ADMINISTRATION OFFICER

**SUBJECT : LEGAL OPINION ON DEDUCTIONS FOR COMMUNAL LIVING –
FARM WORKERS**

1. PURPOSE

A legal opinion is requested on the following:

- (i) how deductions for communal accommodation in terms of clause 8(6) of the Sectoral Determination 13: Farm Worker Sector, South Africa ("SD 13") must be made;
- (ii) When does clause 8(5) of SD 13 apply; and
- (iii) The distinction between a father, mother and son all working on the same farm and staying in the same house, that is, a family and when is it communal.

Furthermore the definition of communal accommodation is requested.

2. BACKGROUND

There is a divergence of views with regard to deductions for communal accommodation in the case of farm employees and in particular with regard to clause 8(6) of SD 13. One view interprets clause 8(6) of SD 13 as stating that in total an employer may deduct 25% of the minimum wage irrespective of the number of farm employees residing in communal accommodation subject to not

more than 10% of the farm employee's wage. This interpretation is said to be aligned to clause 8(6) of SD 13.

Another view is that an employer may deduct 25% of the minimum wage for all farm employees residing per room and not the total number of employees residing in a particular accommodation. According to this view, it is said that using the total of the farm employees housed in an accommodation will lead to absurd results because some farm employees on different farms will pay much less for the same benefit depending on the number of farm employees.

Clarity is required on the correct interpretation of clause 8(6) of SD 13.

3. APPLICABLE LAW AND DISCUSSION

3.1 SECTORAL DETERMINATION 13: FARM WORKER SECTOR, SOUTH AFRICA ("SD 13")

Section 8 – Deductions

(6)(a) Subject to clause 1(b) where more than two farm workers reside in communal accommodation, the maximum deduction that an employer may make in total in respect of all the farm workers who reside in that accommodation is 25% of the applicable minimum wage payable to an individual farm worker.

(b) An equal amount must be deducted in respect of each of the farm workers residing in accommodation contemplated by paragraph (a).

It is evident from clause 8(6)(a) of SD 13 that subject to clause 1(b) (the employer may make a deduction for accommodation not exceeding 10% of the farm workers wage), where more than two farm employees reside in communal accommodation, the employer may not deduct in total in respect of all the farm employees who reside in that accommodation more than 25% of the minimum wage of an individual farm employee.

In terms of clause 8(6)(b) of SD 13, the employer must deduct an equal amount for each farm employee in communal accommodation.

Clause 8(6)(a) of SD 13 has a footnote which states *"If the applicable minimum wage is R994.00 per month, the maximum deduction that may be made in total from the workers living in communal accommodation as a whole is R248. 50 per month. The deduction to be made from an individual farm worker may not exceed 10% of that worker's wage.*

This footnote gives a practical example of how the 25% is calculated where two or more farm employees are living in communal accommodation and the fact that the deduction to be made from each individual farm employee may not exceed 10% of that farm employee's wage. If we take this example further with regard to clause 8(6)(b) of SD 13, and hypothetically we say that there are 5 farm employees living in the communal accommodation, then an amount of R49. 50 will be deducted from each of the 5 farm employees (R248.50 divide by 5). This amount of R49.50 does not exceed the 10% of each individual farm employees' wage which in this case would have been R99.40.

Research (Norma Krieger, "Keep your head Down": Unprotected Migrants in South Africa, 2007 page 90) has shown that an employer may deduct 25% of the minimum wage irrespective of the number of farm employees residing in communal accommodation subject to not more than 10% of the farm employees wage rather than 25% of the minimum wage for all workers residing per room. Norma Krieger illustrates this interpretation by giving an example: *"Using the current minimum wage of R885 per month, the employer may not charge more than a total of R221.25. Assuming 5 workers share the accommodation, because each of the 5 workers must have an equal amount deducted, each will pay R44.25 per month".*

This example given by Norma Krieger demonstrates that an employer may not charge more than 25% of the minimum wage of all farm employees sharing communal accommodation and not for all farm employees sharing a

room. The amount of R44.25 to be paid by each worker is arrived at by taking 25% of the minimum wage (R885.00) per month which gives the amount of R221.21 and dividing this amount by all 5 workers sharing the communal accommodation.

Further research has shown the same interpretation as given by Norma Krieger: www.fruitsa-ethical.org.za – “Guide to the law and best practice in Accommodation in the South African fruit industry” – First Edition 2007, Page 7). The following is stated:

“Deductions for Accommodation

...Communal accommodation: Where more than two workers live in communal accommodation, the maximum deduction that the employer may make in total in respect of all the farmworkers who live in that accommodation is 25% of the applicable minimum wage payable to an individual farmworker. For example, if the current minimum wage is R1503.90 per month, where 10 employees are living in communal accommodation, the maximum amount that can be charged will be 25% of R1503.90 divided by 10 employees, which equals R37.60 per employee per month.

The example given is further evident of the fact that 25% of the minimum wage is divided by the employees who live in the communal accommodation and not divided by the number of employees who reside per room.

Clause 8(6) of SD 13 is very clear in that it states that an employer may deduct in total in respect of all the farm employees who reside in that accommodation and not of all the farm employees who reside per room in that accommodation. To deviate from the ordinary and clear meaning of the word “accommodation” to mean a room rather than the accommodation as a whole for the fact that it produces a result which is absurd will not be applicable in this case. As stated by Cornelius SJ “Principles of the Interpretation of Contracts in South Africa” 2ed Lexis Nexis Page 178, “However, it is not permissible to deviate from the ordinary meaning of a word simply because the contract is a hard bargain for one of the parties”.

Accordingly, the fact that some farm employees may pay less for accommodation because more of them share a communal accommodation than in a case where some farm employees will pay more for accommodation because less farm employees share communal accommodation, which is a "hard bargain" for the latter case, it is not permissible to deviate from the ordinary meaning of the word "accommodation" (according to the Oxford Concise Dictionary, the ordinary meaning of the word accommodation means "a place to live"/ "lodging") simply because there exists a "hard bargain" for some of the farm employees . Furthermore clause 8(5) of SD 13 makes reference to a farm worker residing in a house and further reference in clause (8)(5) is made to subclause 1(b) wherein accommodation is referred to. Accordingly if one cross references clause 8(5) to subclause (1)(b) of clause 8 in SD 13, it is inferred that an accommodation is a house. Therefore it stands to reason that accommodation in clause 8(6)(a) refers to a house and not a room.

As far as the definition of "communal accommodation" is concerned as there is no such definition in SD 13, BCEA or other legislation, we look to the definition in the Oxford Concise Dictionary: *communal means "common" and accommodation means "place to live/lodging"*. In essence communal accommodation means "common place to live". This is the ordinary meaning according to the Oxford Concise Dictionary and should not be deviated from to mean a "room" in a house, hostel etc. merely for the fact that it drives a "hard bargain" for some farm employees.

Another query is the distinction between a father, mother and son all working on the same farm and staying in the same house, that is, a family and when is it communal. When one examines clause 8(6)(d) of SD 13, it clearly states "...where two or more farm workers reside in communal accommodation..." Where a father, mother and son are all working on the same farm and living in the same house, such father, mother and son are actually farm workers and as stated in clause 8(6)(d) of SD 13, this clause is applicable to farm workers and will therefore be applicable to a father, mother and son mentioned above. Accordingly, there is no distinction between a father, mother and son who are

farmworkers on the same farm and living in the same house and farmworkers living in communal accommodation. This means in this case the maximum deduction that the employer may make in total in respect of the father, mother and son who work on the same farm and reside in the same accommodation is 25% of the applicable minimum wage of the individual father, mother and son. An equal amount will be deducted from the father, mother and son.

The further query is when clause 8(5) of SD 13 applies. Section 8(5) of SD 13 states *"An employer may only make a deduction in terms of subclause (1)(b) in respect of one farm worker residing in any house"*. Clause 8(1)(b) states *"An employer may not make any deduction from a farm worker's wage except a deduction not exceeding 10 percent of the farm worker's wage made in accordance with subclause (4) for accommodation in which the farm worker ordinarily resides"*. Subclause (4) states *"An employer may not make any deduction for accommodation in terms of subclause (1)(b) in respect of a farm worker who is under 18 years of age"*. Accordingly, clause 8(5) of SD 13 will apply where one farm employee who is over the age of 18 years resides in any house and in such a case an employer may only make a deduction not exceeding 10% of the farm employee's wage for accommodation.

5. FINDINGS

5.1 In terms of clause 8(6) of SD 13, an employer may deduct in total 25% in respect of all farm employees who reside in that accommodation (house) and not 25% of all the farm employees who reside per room in the house.

5.2 "Accommodation" in clause 8(6)(b) of SD 13 refers to a house and not a room.

5.3 The definition of "communal accommodation" is a "common house".

5.4 A father, mother and son living in the same house and working on the same farm are farm employees and clause 8(6)(b) of SD 13 will be applicable to them.

5.5 Clause 8(5) of SD 13 is applicable where one farm employee who is over the age of 18 years, resides in a house and in which case an employer may make a deduction not exceeding 10% of the farm employee's wage for accommodation.

6. RECOMMENDATION

6.1 Where more than two farm employees reside in communal accommodation, the employer may deduct in total 25% of the minimum wage of all employees sharing the communal accommodation and not deduct 25% for all employees sharing a room. The employer must deduct an equal amount for each such farm employee in communal accommodation and the deduction to be made from each such farm employee may not exceed 10% of that farm employee's wage.



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