

**AN APPRAISAL OF THE STATUS OF UBER DRIVERS IN SOUTH AFRICAN
LABOUR LAW**

by

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Declaration

I, **NDIVHUWO ENERST NEMUSIMBORI** of Student Number: **17370460** declare that an appraisal of the status of Uber in South African labour law is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

(Signature and date)

Dedication

I dedicate this dissertation to members of my family, more specifically to my wife Tsireledzo and my daughters, Andani and Vhugalahawe. Throughout my studies you were all supportive to me.

Acknowledgement

I would like to express my sincere gratitude and much appreciation to my study promoter, Prof. Stefan van Eck, for his valuable time, skills, encouragement and assistance throughout this dissertation. It was an honour and privilege to have him as my study promoter. To all those whom I spent most of my time discussing my research, particularly, Adv Tembe C.H, I thank you. Lastly I thank the Almighty God for His grace, mercy and favour into my life. Amen!

Abstract

The South African labour dispensation is straddling between the common law and the ever-changing employment relationships. The narrative is demonstrated by the emerging business model of Uber, which has changed the labour market globally and taps into the fabric of employment law. The major concern that came with the Uber business model was its implication in the labour market which makes it difficult to determine the existence of employment relationship between Uber and its drivers. It has been argued in various jurisdictions, including the UK and the US, that Uber does not employ its drivers or either owns any vehicles and this make its drivers independent contractors. This has been rejected and the courts have concluded that drivers render their services to Uber and not to themselves and this make Uber to be their employer.

This dissertation seeks to asses an appraisal status of the Uber drivers in the South African labour law context. The definition of employee as provided for under section 213 of the Labour Relations Act, 1995 only applies to persons who are defined as “employees”. This definition is characterized by the common-law contract of employment despite the fact that there is a shift to employment relationships, which is guided by the facts, and not by the form given to it by the parties. The definition of “worker” as preferred in the UK and that of “employee” used in the US is broader to be inclusive to address the question of legal status of Uber drivers under this technological era. The classification and treatment of Uber drivers as employee should enable them to have access to other employment benefits and social security that will enable them to provide for their families.

CHAPTER 1

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1. BACKGROUND

New forms of work have emerged in the global economy, attributable mainly to employers' quest for flexible working arrangements, technological innovation and result shift to service-based economies that place a premium on "knowledge work".¹ The innovative business models have so far disrupted long-standing systems and standards in various sectors.² This has been confirmed by the Supreme Court of Appeal's judgment that strengthened the view that the focus has finally shifted from the formal contract of employment to the existence of an employment relationship.³

As a result of this emerged technological innovation, app-based platforms, such as Uber, provide a host of services, which threaten the traditional taxi industry. This type of service has penetrated modern economies at an alarming rate. There is far-reaching

¹ Van Niekerk et al (2015) 57.

² Mokoena *ILJ* (2016) 1574.

³ *State Information Technology Agency (SITA) (Pty) Ltd v CCMA & others* [2008] 7 BLLR 611 (LAC). See also Van Niekerk et al (2015) 62.

concern that new technology associated with a sharing economy⁴ will fundamentally alter the future of work by displacing traditional jobs. There is also uncertainty regarding legal status of the Uber drivers who are displaced from a wide range of the common traditional jobs.⁵

Uber is a transportation network company developed to connect passengers and drivers through a smartphone application. Uber describes itself as a company which “offer information and a means to obtain transportation services offered by third party transportation providers, drivers or vehicle operators which may be requested through the use of an application supplied by Uber and downloaded and installed in one’s single mobile device”.⁶ Despite the fact that it has grown and expanded internationally it has received contested response between the taxi industry and customers. It faces legal and social issues such as uproar among taxi drivers and operators due to the fact that it has become an industry disruptor.⁷ The Uber transportation service, which ingeniously connects drivers with customers through a mobile device app, is especially popular in big cities such as Johannesburg, Pretoria, Cape Town and Durban. The service is used as a cheap and efficient mode of transport and the drivers enjoy the opportunity of extra income.⁸

For the last few years, Uber has taken over the South African taxi industry by creating a technology-based solution which attempts to make it considerably easier and cheaper for commuters to use taxi services.⁹ It is convenient to many users as the smartphone-based app easily connects them to drivers. Customers can pay mileage-based fares through a third party, using the Uber X platform that scans or takes a picture of their

⁴ There is no official definition of “sharing economy”, the Oxford English Dictionary released its definition of the sharing economy as “an economic system in which assets or services are shared between private individuals, either for free or for, typically by means of the internet.” See also Stephany (2015) 1.

⁵ Berg, Chen and Frey (2017) 10.

⁶ Uber website (2017).

⁷ Nistal and Regidor (2016) 1.

⁸ Davidov (2017) 1.

⁹ Mokoena *ILJ* (2016) 1574.

credit card with the smartphone's camera.¹⁰ Despite this beneficial service to commuters, its implications and challenges on the labour market cannot be ignored.

Despite the fact that the Commission for Conciliation, Mediation and Arbitration (the "CCMA") has pronounced on this, the question as to whether Uber drivers are independent contractors or employees remains contentious in South Africa.¹¹ With the constant transformation of working relationships and the concomitant rise in atypical employment, drawing the line between an employee and an independent contractor is often problematic.¹² As a result of the above South African courts have so far developed various tests for distinguishing an employment relationship from that between an independent contractor and his or her client. The tests formulated by courts, among others, includes the control test, organisation test, economic realities test and the dominant impression test.¹³ These tests have at times become somewhat impractical since the distinction between an independent contractor and an employee has become less defined and the presence of atypical employees more prominent.¹⁴

The most favoured test among others, which courts has turned to and has achieved a popular pre-eminence is one called the "dominant impression" test.¹⁵ Within the existing realm of this test, the emphasis has now squarely been placed on the employment relationship rather than determining the existence of a valid and binding contract of employment.¹⁶ The test makes use of several indicators for determining the existence of an employment relationship.

Bearing in mind that the determination of the question as to whether Uber drivers fall within the ambit of the definition of employee or independent contractor in South African labour law is at an early stage, the tests adopted so far to establish whether a person is an "employee" or an "independent contractor" remains contentious. According to

¹⁰ Ansari et al (2015) 2.

¹¹ *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Tsepo Morekure and others* Case No. WECT12537-16 (7 July 2017) unreported. See full discussion in chapter 4 below.

¹² Frahm-Arp and Searle *Without Prejudice* (2013) 75.

¹³ See para 12 of *State Information Technology Agency (SITA) (Pty) Ltd v CCMA & others* [2008] 7 BLLR 611 (LAC)

¹⁴ *Vettori SA Merc LJ* (2009)119.

¹⁵ See *SA Broadcasting Corporation v McKenzie* (1999) 20 ILJ 585 (LAC). See also *Brassey ILJ* (1990) 889.

¹⁶ Van Niekerk et al (2015) 59.

Brassey, the “dominant impression” test, for instance, amounts to nothing more than saying that the decision must be taken in the light of all relevant factors.¹⁷

In the UK¹⁸ and in the US¹⁹ the question as to whether Uber drivers fall within the definition of an “employee” or an “independent contractor” has been answered in those countries, however, recently the CCMA has an opportunity to determine as to whether Uber drivers are employee for the purpose of the LRA. Section 200A of the Labour Relations Amendment Act²⁰ (the “LRAA”) that amended the Labour Relations Act²¹ (the “LRA”) does not provide clarity regarding Uber drivers.

The amendments introduced a new section 200A intended to enable workers who might formally be classified as independent contractors but are to all intents and purposes employees to be brought more easily within the definition of “employee”.²² While South Africa is undergoing a concerted drive to promote entrepreneurship, specifically among young people, the innovative technology–based businesses like Uber emerged and this require sufficient protection of the Uber drivers to enjoy the benefits of labour law in South Africa. The UK and the US who also adopted this emerged innovation of Uber services have within their legal system ensure that protection is given unto the drivers of Uber thereby, determining their legal status within the employment relationship.

A judicial determination and legislative reform in South African labour law should be considered to ensure adequate protection of Uber drivers while supporting the technology-based business of Uber in South Africa and a lesson can be learned from the UK and the US.

¹⁷ Brassey *ILJ* (1990) 920.

¹⁸ *O’ Connor et al v Uber Technologies Inc. et al* (California District Court) Case no. C-13-3826 (EMC).

¹⁹ *Aslam v Uber B.V and others* [2017] I.R.L.R 4 (28 October 2016).

²⁰ 6 of 2014.

²¹ 66 of 1995.

²² In *Phaka and Other v Bracks and others* [2015] 5 BLLR 514 (LAC) at para [26], the court agreed with the arbitrator’s observation: “that section 200A of the LRA seeks to assist vulnerable individuals in establishing employee status. Although section 200A leaves the definition of “employee” unchanged, it creates a rebuttable presumption that a person who renders services to any other person is presumed, regardless of the form of the contract, to be an employee, if any one or more of a list seven factors are present. Thus even if the contract of work purports to be that of independent contractor, if any one of the listed factors is present, that person is presumed to be an employee.”

2. RESEARCH QUESTIONS

The following research questions will be answered:

1. Do Uber drivers fall within the scope of application of South African Labour Law?
2. To what extent can lessons be gained from the UK and the US a regarding the protection of Uber drivers?
3. What reforms are necessary in South Africa to establish appropriate balance in the protection for Uber drivers?

3. THE IMPORTANCE OF THE STUDY

Persons involved in an employment relationship are the traditional subject of employment law. The level of uncertainty of Uber drivers regarding their legal status remains a thorny issue that seeks judicial determination and legislative intervention. The CCMA have recently had an opportunity to determine an appraisal status of Uber drivers under the South African labour law context. However, the CCMA was unable to pronounce on the deservedness of labour law protection such as maximum hours, sick leave, and worker's compensation. Internationally, states have been grappling with the issue of whether Uber drivers fall within the scope of labour laws and regulation. Countries like the UK and the US have ruled that Uber drivers are employees and they are not independent contractors. While our courts, arbitrators and academics have long sought a formula for distinguishing employees from independent contractors, that quest has not yet resolved the uncertainty regarding Uber drivers.

To qualify as a beneficiary of the right to fair labour practice, a person must be in an employment relationship. The study purports to explore this topical issue and to determine the actual status of Uber drivers in the South African milieu. This study may be of significance for future legislative reforms.

4. RESEACH METHODOLOGY

A critical analysis of applicable statutes, case law, books and articles will be done. My approach will also be descriptive and comparative (in terms of considering international jurisprudence).

5. HYPOTHESIS

The last decade has witnessed a significant expansion in the range of people who may be defined as “employee” by the applicable statutes. The developments which have resulted from legislative incorporation of the presumption and judicial interpretation have been a response to initiatives to remove workers from the scope of labour regulation through the use of direct and externalized non-standard work.²³ Consequently, the definition of an “employee” revolves around being a gatekeeper between the “formal” and “informal” sector employment.

The current law does not specify as to whether Uber drivers are employees in terms of LRA and whether they are entitled for protection envisaged under the LRA other than reliance on section 23 of the *Constitution of the Republic of South Africa, 1996*²⁴ (the “Constitution”). Unlike other European countries that have adapted their legal system, there is only recent decision made by the CCMA in the South African labour law that determined the question as to whether Uber drivers are employees for the purpose of the LRA, in particular the right not to be unfairly dismissed. The CCMA ruling does not pronounce on the entitlement of Uber drivers to labour law protections, including employment benefits and this issue remain unresolved.

6. PRELIMINARY STRUCTURE OF CHAPTERS

The dissertation will be divided into 6 chapters.

Chapter 1 will outline the background, rationale, methodology and significance of the study.

²³ Van Niekerk et al (2015) 67. See also Du Toit et al (2015) 94.

²⁴ The Constitution, 1996.

Chapter 2 will outline the international labour standards and the concept of employment relationship as commonly used to define the relationship between an employee and an employer. The chapter will also deal with the International Labour Organisation (the “ILO”) Employment Relations Recommendation 198 of 2006 and how South Africa as a member state to the ILO has adhered to its international obligation.

Chapter 3 will give an overview of section 23 of the Constitution and some of the Constitutional Court judgments dealing with the unfair labour practices in the context of an “employee” or a “worker”.

Chapter 4 will give an overview and outline the legal framework in South African labour law context. The protection offered to persons who fall within the ambit of employment relationships and how our courts have interpreted the concept of an employee as compared to an independent contractor.

Chapter 5 will outline the legal position in South Africa, in the United Kingdom and in the United States in a comparative point of view to identify the gap and establish any possible adaptation of the legal system of these jurisdictions within the labour laws of South Africa through legislative reforms so to meet some international standards in the current development and to ensure full protection of Uber drivers within the country.

Chapter 6 provides a summary of the whole dissertation. It concludes the research by noting that the legal status of Uber drivers need a legislative reforms aimed to protect them and to include them within the definition of an “employee” in order to clear the level of uncertainty under the current labour laws. The chapter also offers some recommendations that would be effective through legislative reforms that will include the Uber driver within the definition of an “employee” and the need for their legislative protection and employment benefits.

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INTERNATIONAL NORMS

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1. INTRODUCTION

Over the past years worldwide, economic restructuring and advancement in technological innovation have allowed for the emergence of new business models that have disrupted many long-standing industries.²⁵ These technological innovations have also tended to cloud the position of many employees, leading to confusion, uncertainty and instability about their employment status. The statutory definition of an “employee” draws the line between employment and self-employment. In recent years, this line has increasingly become a contested terrain. Factors such as globalization, deregulation and technological change have combined greatly to increase the variety of forms of employment.²⁶

The process of globalization has led to the rapid disintegration of the old industrial model of employment. Modern information-based systems and technologies have given birth to a new economy, which emphasizes flexibility in the labour market and has

²⁵ Isaac (2014) 2.

²⁶ Benjamin *ILJ* (2004) 789.

hastened the change in employment norms.²⁷ As argued by Van Niekerk *et al*, the traditional foundation of labour law - an indefinite contract with a single employer arranged around a core concept of permanent employment where the employee is engaged in a workplace over which the employer exercises physical control, organizes work and directs how employees should do it, is being eroded.²⁸ These developments in labour law are international phenomena and there is a general recognition that they impact directly on employment and labour markets and challenge traditional concepts and old certainties.

With the above in mind, it is therefore necessary to investigate in this chapter the position on the international level, looking at the concept of “employment relationship”. Furthermore, the chapter will consider how the International Labour Organisation (the “ILO”) intervened to assist member States to develop their domestic labour law to meet the international demands by giving guidance to adopt international labour standards. Lastly, the chapter will also analyse the discussions that led to the adaptation of the ILO Recommendation that serves as guideline to the member States. Recommendations provide guidelines on how a particular matter might be regulated, or when adopted with a Convention, provide more detailed measures that are supportive of the terms of the Convention itself.²⁹

2. THE CONCEPT OF EMPLOYMENT RELATIONSHIP

Legal theories focus on analyzing contractual and statutory regulations of employment. In their attempts at finding adequate answers to the erosion of legal protection of employment as a result of increased use of atypical forms of employment, they tend to resort to notions of an employment relationship underlying the employment contract.³⁰ It has been acknowledged that due to dynamic changes within labour law, the concept of the employment relationship has found global recognition and that less emphasis is being placed on the existence of a contract of employment.

²⁷ Fudge and Owens (2006) 3.

²⁸ Van Niekerk et al (2015) 4-5.

²⁹ Ibid 23-24

³⁰ Rogowski (2013) 89.

During the general discussions at the 91st Session of the Conference in June 2003, many delegates emphasized that the concept of the employment relationship is common to all legal systems and traditions.³¹ There are rights and entitlements which exist under labour laws, regulations and collective agreements and which are specific to workers who work within the framework of an employment relationship. It was discovered during the discussions that one of the consequences associated with changes in the structure of the labour market, and the organization of work that the application of the law is deficient in respect of the growing phenomenon of workers who are in fact employees but find themselves without the protection of labour law.³²

The employment relationship is therefore, a legal notion which is widely used to refer to the relationship between an employee (frequently referred to as “a worker”) and an employer for whom the employee performs work under certain conditions in return of remuneration.³³ It is through the employment relationship, however defined, that reciprocal rights and obligations are created between the employee and the employer. The employment relationship has been, and continues to be, the main vehicle through which workers gain access to the rights and benefits associated with employment in the areas of labour law and social security. The protection of workers is central to the ILO’s mandate. Mechanisms should be adopted on the national level by member States to ensure that persons engaged in an employment relationship should have access to protection.³⁴

3. INTERNATIONAL LABOUR STANDARDS

Defining the scope of employment, in particular distinguishing between dependent workers and the self-employed for the purpose of labour and social protection, has been a matter of some contention at the international level.³⁵

³¹ ILO, (2003), Report V, 3.

³² ILO, (2006), Report V (1): para 16. See also Conclusions concerning the employment relationship, in ILO: Provisional Record No.21, International Labour Conference, 91st Session, Geneva, 2003, pp. 21/52-57.

³³ Ibid para 5.

³⁴ ILO, (2003), Report V, 4.

³⁵ Fudge and Owens (2006) 202.

The ILO has so far noted that globally during the last decades of the twentieth century there was “a general increase in the precarious nature of employment and the reduction of worker’s protection”.³⁶ The developments have become increasingly diverse with an increasing proportion of work being performed by workers in non-standard employment and a number of employees remained not being protected or adequately protected by labour law. As a result of precarious nature of employment in the labour market this has led to a significant level of uncertainty of many workers, including Uber drivers.

In March 2001, the Governing Body of the International Labour Office considered the common statement of the meeting of experts which was held in 2000. It noted the problem of “the existence of a growing sector of workers who perform services for other parties in conditions of dependency and to whom labour legislation is not applied in practice” and scheduled the issue for general discussion at the 2003 Conference.³⁷ A Report on the Scope of the Employment Relationship was submitted to the 2003 Conference, and a Committee on the Employment Relationship was constituted in order to discuss the possibility of adopting an international standard. The Report characterized the issue as one of refocusing the law to better adjust with reality, and it was careful to emphasize that the concern was not self-employed worker per se, but those self-employed who were dependent workers. These workers could either be disguised employees or ambiguously self-employed.³⁸

The constituted Committee on the Employment Relationship managed to achieve consensus on adopting an international standard relating to the scope of employment. However, it did so by settling on a Recommendation, which is advisory in nature, instead of a Convention, and by dropping any reference to triangular employment relationships.³⁹ After a lengthy discussion the Committee agreed that the:

“Recommendation should focus on disguised employment relationships and on the need for mechanisms to ensure that persons with an employment

³⁶ Benjamin *ILJ* (2004) 791. See also ILO Meeting of Expert on Workers in Need of Protection: Basic technical document (Geneva 2000) at 4-6. The meeting of Experts highlighted the lack of protection of workers in certain situations in which the legal scope of the employment relationship did not accord with the working relationships.

³⁷ ILO, 2001: para 36.

³⁸ ILO, 2003a: paras 10 and 22.

³⁹ ILO, 2003b: paras 1 and 9.

relationship have access to the protection that they are due at a national level. Such a Recommendation should provide guidance to member States without defining universally the substance of the employment relationship. The Recommendation should be flexible enough to take into account of different social, legal and industrial relations traditions and address the gender dimension. Such a Recommendation should not interfere with genuine commercial and independent contracting arrangements.”

In March 2004, the Governing Body placed a Recommendation on the Employment Relationship on the agenda of 2006 session of the ILO. The main goal of the standard was to refocus the employment relationship in order to bring the scope of labour better in line with the reality of employment and to ensure that dependent workers, who are either disguised employees or objectively ambiguous self-employed, falls within the ambit of labour law and are protected.⁴⁰

4. ILO EMPLOYMENT RELATIONS RECOMMENDATION 198 OF 2006

As placed on the agenda for the 2006 session, and having been convened by the Governing Body of the International Labour Office⁴¹ on the 15th of June 2006, the Employment Relationship Recommendation, 2006 (No.198) was adopted. The Recommendation was achieved through consensus by member States. It serves as an advisory instrument rather than a Convention which is binding once ratified by a member state. The Recommendation focuses on disguised employment relationships and on the need for mechanisms to ensure that persons engaged in an employment relationship have access to the protection they are due at the national level.

Article 1 of the Recommendation provides that member States should formulate and apply a national policy for reviewing at appropriate intervals and, if necessary, clarifying and adapting the scope of relevant laws and regulations, in order to guarantee effective protection for workers who perform work in the context of an employment relationship. This Article imposes obligations on member States to develop in their domestic labour law, legislations aimed to ensure effective protection for workers in an employment relationship.

⁴⁰ ILO, 2003a: 10 and 22.

⁴¹ ILO, 2004c.

Member States are encouraged to formulate and implement national policy in accordance with their domestic law and it must be done in consultation with the employers' organizations and workers.⁴² The formulated policy should amongst others, include measures to:

- (a) Guide parties on the notion of establishing the existence of an employment relationship which is a global phenomenon and to ensure that there is a clear distinction between employees and independent contractors;⁴³
- (b) Ensure conformity on the standards applicable to all forms of contractual arrangements and employed workers are protected;⁴⁴ and
- (c) The effective compliance with laws and regulations concerning the employment relationship.⁴⁵

What is remarkable about the relationship of international and national labour law from a reflexive law perspective is its non-hierarchical approach. The standards developed in international labour law are meant to support national labour law and not as an imposition.⁴⁶ The Recommendation, for instance, deals particularly with what it terms "disguised employment", or agreements that are cast in terms that, on the face of it, establish a relationship other than employment.⁴⁷ To address the problem of disguised employees, the Recommendation provides factors that need to be established for the determination of the existence of such employment relationship. Article 9 provides that:

⁴² Article 4 of Recommendation No.197.

⁴³ In terms of Article 4(a) of Recommendation No.197, formulated policy must, "provide guidance for the parties concerned, in particular employers and workers, on effectively establishing the existence of an employment relationship and on the distinction between employed and self-employed workers."

⁴⁴ In terms of Article 4(c) of the Recommendation No.197, formulated policy must, "ensures standards applicable to all forms of contractual arrangements, including those involving multiple parties, so that employed workers have the protection they are due."

⁴⁵ In terms of Article 4(f) of Recommendation No.197, provides that formulated policy must 'ensure compliance with, and effective application of, laws and regulations concerning the employment relationship.' Despite the above three guidelines, members state are encouraged to combat disguised employment relationships in the context of, example, other relationships that may include the use of other forms of contractual arrangements that hide the true legal status, noting that a disguised employment relationship occurs when the employer treats an individual as other than employee in a manner that hides his or her true legal status as an employee, and that situations can arise where contractual arrangements have the effect of depriving workers of the protection they are due. See also discussion chapter 4.

⁴⁶ Rogowski (2013) 108.

⁴⁷ Van Niekerk et al (2015) 59.

“for the purposes of the national policy of protection for workers in an employment relationship, the determination of the existence of such relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the workers, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties.”

The above factors have tended to widen the scope of employment, as the emphasis has shifted from direct subordination to include economic dependence as the basis for extending labour protection to working people. Control continues to be a factor in determining employee status, but what is meant by control changes with the nature of the work.⁴⁸ This will be of particular relevance when determining whether Uber drivers are in fact employees for the purpose of labour law protection.

Members States are required for the purpose of facilitating the determination of the existence of an employment relationship to consider the possibility of, among others, allowing a broad range of means for determining the existence of an employment relationship. This includes one or more of the following: providing for a legal presumption that an employment relationship exists where one or more relevant indicators is present; and determining, following prior consultations with the most representative organizations of employers and workers, that workers with certain characteristics, in general or in a particular sector, must be deemed to be either employed or self-employed.⁴⁹ Other factors that should also be considered include, supervision and control, integration of the worker, economic dependence of the worker, provision of working tools and equipment and rendering of services personally by the worker concerned.

The decline of the standard employment relationship and the increase in precarious work - work that is insecure, badly remunerated, unprotected, and largely beyond the control of employees - is widely recognized as one of the most fundamental and worrying problems of the global economy.⁵⁰ As a result of this, the Recommendation acknowledges the impact of the globalized economy that has increased the mobility of

⁴⁸ Fudge and Owens (2006) 216.

⁴⁹ Article 11 (a), (b) and (c) of Recommendation No. 197.

⁵⁰ Fudge and Owens (2006) 31.

workers who are in need of protection and encourages member States to formulate and apply a national policy for reviewing at appropriate intervals the scope of relevant laws and regulations. The reviewing of domestic labour law in accordance with the international labour standards will guarantee effective protection for workers who perform work in the context of an employment relationship. It also encourages member states to define the concept of the employment relationship rather than the contract of employment.⁵¹ The Recommendation also suggests that member states should consider the possibility of adopting specific indicators of the existence of an employment relationship and should ideally in their domestic legislation provide for a statutory presumption that an employment relationship exists when one or more of the defined indicators are present.⁵²

5. THE EXTENT TO WHICH SOUTH AFRICA HAS ADHERED TO THE ILO

The ILO has been the pre-eminent international institution that shapes international labour standards and the yardstick in developing domestic labour legislation in South Africa. Since 1994 after rejoining the ILO, South Africa has ratified all of the ILO's core conventions and plays a key role in ILO affairs. Effective implementation and enforcement of norms of international law are recognized as notoriously difficult,⁵³ however, South Africa as one of member states has implemented new Conventions and Recommendations to align its domestic legislation with the international labour standard required by the ILO.

The South African Constitution accords international law a particular status and recognizes the relevance of customary international law as one of the sources of our law.⁵⁴ It is from this position that South Africa is committed in its international obligation which should be commended. Section 1 and 3 of the Labour Relations Act⁵⁵ (the "LRA")

⁵¹ Van Niekerk et al (2015) 59. See also Bosch and Christie 'Are Sex Workers Employees?' (2007) 28 *ILJ* 804 at 808.

⁵² Ibid 59.

⁵³ Owens, Riley and Murray (2011) 34.

⁵⁴ See section 232, 233 and 39 (1) (b) of the Constitution. For more discussion on the relevance of international law see also *S v Makwanyane* 1995 (3) SA 391 (CC); *NUMSA & others v Bader Bop (Pty) Ltd & another* [2003] 2 BLLR 103 (CC); and *South African National Defence Union v Minister of Defence and others, Minister of Defence and others v South African National Defence Union and others* [2006] 11 BLLR 1043 (SCA).

⁵⁵ 66 of 1995.

extends specific recognition to the international law obligations incurred by South Africa as member states of the ILO.⁵⁶

Prior the adoption of the ILO Recommendation concerning the Employment Relationship in 2006, South Africa has already taken some initiatives to address the new development in the labour market. In early 2000 the dominant impression test was modified as focus shifted to the existence of an employment relationship rather than the traditional common law contract of employment. The preferred dominant impression test has struggled to adequately capture the diversity of the modern labour market and the rise of non-standards employment associated with innovative business models. It was partly in response to these developments that the rebuttable presumption of employment was included in the amendment to the LRA under section 200A in 2002.⁵⁷ In addition, NEDLAC has issued a code entitled the “Code of Good Practice: Who is an Employee?” to assist parties in determining the existence of an employment relationship.⁵⁸ The code was gazette at the end of December 2006, less than a year after ILO Recommendation was adopted. The presumption applies regardless of the form of the contract, and therefore gives effect to the ILO Recommendation.

The language of the Explanatory Memorandum that accompanied the first draft for what became the 2002 amendments to the LRA indicates that the purpose of the introduction of the presumption was to assist vulnerable workers who were either unable to assert their rights as employees or who were classified as independent contractors despite their dependence upon the organizations or persons to whom they provided services.⁵⁹ This was self-initiated that South Africa has taken in fulfilling its international obligation under the ILO and to ensure that those vulnerable workers receive legal protection within the ambit of the labour legislation. South Africa must be commended for its good work and self-initiative that came prior to the ILO Recommendation which was found to be in line with the international labour standards.

⁵⁶ Section 1 of the Act provides that the purpose of this Act is to advocate economic development, social justice, labour peace and the democratization of the workplace by fulfilling the primary objects of this Act, which are...
(b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;

⁵⁷ See more discussion in chapter 4.

⁵⁸ Code *ILJ* (2007) 96.

⁵⁹ See Government Gazette 21407 of 27 July 2000 at 78-9. See also Benjamin *ILJ* (2004) 802.

6. CONCLUSIONS

Globalization, the shift from manufacturing to services as a source of employment, and the spread of information-based systems and technologies have given birth to a new economy, which emphasizes flexibility in the labour market and in employment relationships. These changes have led to the erosion of the standard contract of employment as the primary means by which work is performed and has extended to the employment relationship itself.⁶⁰ As a result thereof, there is increased informalisation within the labour market which is recognized as an international phenomenon.

According to the ILO, changes in the nature of work have resulted in situations in which the legal scope of employment relationships does not accord with the realities of working relationships. As a result, over the last two decades increasing numbers of workers do not enjoy labour protection. The increase in the number of unprotected workers is linked to a range of factors such as globalization, technology and transformation in the organization and functioning of enterprises, often combined with restructuring in a highly competitive environment.⁶¹

Since the foundation of the ILO in 1919, one of its core objectives has been to ensure protection of workers through the adoption of a wide range of instruments and policies that aim to ensure that workers, irrespective of their employment status, can work in condition of freedom, equity, security and human dignity. Some of the instruments have binding effect as they were adopted in the form of Conventions. However, others serve as guidelines to member states to align their domestic law with the required international labour standards. Acknowledging that the employment relationship is a universal notion which creates a legal linkage between the employer and employee, the ILO has adopted the Recommendation which seeks to provide member states with guidance on how to establish the existence of the employment relationship.⁶² South African should remain commended for its initiatives since 2000 when it introduced measures aimed to address the international concern on the non-standard employment

⁶⁰ Ibid 5.

⁶¹ Benjamin (2006) 60 *Transformations* 34.

⁶² Van Niekerk et al (2015) 59.

and protection of those who do not fall within the ambit of labour legislation definition of “employee”.

The chapter that follows will cover the constitutional framework in the South African labour law.

CHAPTER 3
THE CONSTITUTIONAL FRAMEWORK

1.	Introduction	19-20
2.	The Scope and Application of Section 23	20-22
3.	The Meaning of “Everyone” and “Worker” in the Constitutional Context ...	22-24
4.	Interpreting the LRA in Conformity with the Constitution	24-26
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1. INTRODUCTION

The employment relations that prevailed in South Africa before the establishment of the current constitutional and democracy order was fragmented in character. White, coloured and Indian workers were granted trade union rights under legislation⁶³ and in contrast, black workers were not statutorily recognized as employees and not granted trade union rights.⁶⁴ The publication in 1979 of the Report of the Wiehahn Commission was the turning point in the above chequered history of struggle against apartheid as it marked the start of modern South African labour law. By 1999, the first democratic parliament had enacted four labour statutes to give effect to the constitutional promise of protecting the labour rights of all workers and to overcome the apartheid inheritance of workplace discrimination and skill shortages.⁶⁵

⁶³ Budeli *Fundamina* (2009) 74.

⁶⁴ Steenkamp, Stelzner and Badenhorst *ILJ* (2004) 943.

⁶⁵ The four pieces of legislation are namely: Labour Relations Act 66 of 1995 (the “LRA”); Basic Conditions of Employment Act 75 of 1997 (the “BCEA”); Employment Equity Act 55 of 1998 (the “EEA”) and Skills Development Act 97 1998 (the “SDA”). See also Benjamin *ILJ* (2004) 787.

The specific entrenchment of labour rights is a unique feature of the South African Constitution.⁶⁶ Section 23 of the Constitution⁶⁷ of the Republic of South Africa (the “Constitution”) provides that “everyone” has the right to fair labour practices.⁶⁸ This provision has become influential in South African labour law.⁶⁹ It establishes a set of broadly expressed labour rights that accrue to a variety of parties including but not limited to employers, workers and their representative organizations. These labour rights are set in a skeletal outline, but are buttressed by a number of national statutes designed to give effect to those rights.⁷⁰ These fundamental rights and their interpretation by the courts have resulted in the development of a significant constitutional jurisprudence relevant to workers, employers and their representative bodies.⁷¹

As a result of the current labour market which has introduced many forms of employment relations, some atypical employees enjoy no protection in terms of labour legislation and they could conceivably turn to section 23 for protection against employer abuse.⁷² With this background this chapter seeks to explore the scope and application of section 23 to workers, such as Uber drivers, and how they could potentially be protected against any abuse by the employer. The chapter will also explore interpretation of labour rights in conformity of constitutional imperatives.

2. THE SCOPE AND APPLICATION OF SECTION 23

Section 23(1) confers first, the right to fair labour practices to “everyone”, then section 23(2) gives every “worker” the right: to form and join a trade unions;⁷³ to participate in their activities and programmes of a trade union;⁷⁴ and to strike.⁷⁵ Section 23(3) gives

⁶⁶ Currie and De Waal (2013) 473.

⁶⁷ Act 108 of 1996.

⁶⁸ Section 23(1) of the Constitution.

⁶⁹ Le Roux *CLL* (2002)91.

⁷⁰ Currie and De Waal (2013) 473.

⁷¹ Van Niekerk *et al* (2015) 37.

⁷² The only non-standard workers who do receive protection, namely employees placed by ‘temporary employment services’ (TES) or labour brokers, fixed-term employees and part-time employees. See ss 198A, 198B, 198C and 198D of the LRA.

⁷³ Section 23(2) (a) of the Constitution.

⁷⁴ Section 23(2) (b) of the Constitution.

⁷⁵ Section 23(2) (c) of the Constitution.

employers the right: to form, join and participate in the activities and programmes of employers' organizations.⁷⁶ Both trade union and every employers' organization have the right to organize and to engage in collective bargaining.⁷⁷ The wording in section 23(1) and in particular the reference to "everyone" having the right to fair labour practices has generated debates as to whether this has broadened the scope of the right beyond the employment relationship.⁷⁸

Though wide, the phrase "worker" in subsection (2) is clearly narrower than "everyone" in subsection (1). But the latter term must be restricted in some way if people who clearly fall outside an employment relationship are to be precluded from claiming "fair labour practices," unless the right itself indicates by necessary implication that it is restricted to those who "labour".⁷⁹

The choice of the term "everyone" appears to indicate that the drafters intended the right to fair labour practice to extend beyond the traditional (or common law) idea of "employee", that is, a party to a contract which entails the provision of personal services in return for remuneration.⁸⁰ It is conceivable that the courts could, under the rubric of "everyone", extend the right to fair labour practices to a wider class of persons than those covered by labour legislation. The fact is that those who do not fall within the definition of "employee" are rendered particularly vulnerable because of the tenuous nature of the employment relationship itself, or indeed the purported absence of an employment relationship altogether.⁸¹ So, for example, if Uber drivers were to be classified not to form part of the employment relationship, they would miss out on labour law protection. As a result, they may also conceivably turn to section 23 for protection

⁷⁶ Section 23(3) (a) and (b) of the Constitution.

⁷⁷ Section 23(4) (b) and Section 25 of the Constitution.

⁷⁸ Van Niekerk *et al* (2015) 39.

⁷⁹ Currie and De Waal (2013) 474. See also Cheadle "Labour Relations" in Cheadle, Davis and Hayson South African Constitutional Law: The Bill of Rights (2006) at 18-13 where author has argued that: "although the right to fair labour Practices in subsection (1) appears to be accorded everyone, the boundaries of the right are circumscribed by the reference in subsection (1) to 'labour practices'. The focus of enquiry into ambit should not be on the use of 'everyone' but on the reference to 'labour practices'. Labour practices are the practices that arise from the relationship between workers, employers and their representative organizations. Accordingly, the right to fair labour practices ought not to be read as extending the class of persons beyond those classes envisaged by the section as a whole."

⁸⁰ Ibid 474 and 475.

⁸¹ Mills *ILJ* (2004) 1204.

against employer abuse and as the law stands, they are permitted to rely directly on section 23 for relief since there is no remedy provided for them under labour legislation.

Those who are protected by labour legislation are encouraged to pursue their claims against any abuse through the mechanisms provided within the respective labour legislation and not to bypass them by relying directly on section 23 of the Constitution. Justice O'Regan confirmed the principle that "where legislation is enacted to give effect to constitutional rights, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the Constitutional standard."⁸² Only those who are not protected by the common law or labour legislation may rely directly on section 23 for a remedy.

3. THE MEANING OF "EVERYONE" AND "WORKER" IN THE CONSTITUTIONAL CONTEXT

The rights set out in section 23, thus, provide a primary framework within which labour legislation must be interpreted. The essential values promoted under section 23 are fairness at the individual level, and on the collective level, freedom of association and the right to organize, collective bargaining and the right to strike. Section 23(1) guarantees the right to "everyone" fair labour practices. The Constitutional Court in *NEHAWU v University of Cape Town & others*⁸³ extended the term "everyone" to include the employer. Ngcobo J held that:

"On the contrary, the context suggests that the word refers to every person and it includes both natural and juristic persons. Where the rights in section are guaranteed to workers or employers or trade unions or employers' organizations, as the case may be, the Constitution says so explicitly. If the rights in section 23 (1) were to be guaranteed to workers only, the Constitution would have said so. The basic flaw in the applicant's submission is that it assumes that all employers are juristic persons. That is not so. In addition, section 23(1) must either apply to all employers or none. It should make no difference whether they are natural or juristic persons."⁸⁴

⁸² *SANDU v Minister of Defence* 2007(5) SA 400 (CC) at para 51.

⁸³ 2003 (3) SA 1 (CC).

⁸⁴ *Ibid* at para 39.

Ngcobo J was of the view that the focus of section 23(1) is on the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both.⁸⁵ The right to fair labour practices as a fundamental right is therefore, not an exclusive right afforded to employees only but also to the employers. All employees and employers, whether or not they are South Africa citizens, natural or juristic persons, are afforded the right to fair labour practices within the context of “everyone”.⁸⁶

In relation to the rights contained in sections 23(2) the Constitution uses the word “worker” rather than the broader term “everyone” contained in subsection (1) or the narrower term “employee”. Although, section 2 of the LRA, for instance, expressly excludes members of South African National Defence Force (SANDF) from the ambit of the Act, they may rely directly on section 23. The Constitutional Court was called upon to determine whether soldiers are workers for the purpose of section 23(2) of the Constitution in *South African National Defence Union v Minister of Defence*.⁸⁷ In holding that soldiers are workers for the purpose of section 23(2), O’Regan J wrote:

“Clearly, members of armed force render service for which they receive a range of benefits. On the other hand enrolment in the permanent force imposes upon them an obligation to comply with the rules of the Military Discipline Code. A breach of that obligation of compliance constitutes a criminal offence...In relation to punishment for misconduct, at least, however, it is not ... [I]t would seem to follow that when s 23(2) speaks of ‘worker’, it should be interpreted to include members of the armed forces, even though the relationship they have with the defence force is unusual and not identified to an ordinary employment relationship.”⁸⁸

On this basis the Constitutional Court held that although the relationship between soldiers and SANDF is not an employment relationship in the literal sense of the word, it is “akin to an employment relationship” and that members of the defence force must be considered as “workers” for the purpose of section 23.

⁸⁵ Ibid at para 40.

⁸⁶ Gericke *PER* (2014) 2605.

⁸⁷ 1999 (4) 469 (CC).

⁸⁸ Ibid at para [24].

In the same vein, irregular immigrants⁸⁹ and prostitutes⁹⁰ have gained protection in terms of labour law. As discussed more fully in later chapter, Uber drivers have also recently been classified to be workers for the purpose of labour law protection.⁹¹

The deviation in section 23 (2) of the Constitution from the standard terminology in protective legislation by using the term “worker” instead of the narrow term “employee” was certainly no coincidence.⁹² However, this does not suggest that all workers should necessarily be entitled to the protection of all labour legislation. The nature and purpose of such legislation will often justify selected and diverse limitations.⁹³ This will demand a generous and purposive interpretation of the definition of employee capable of accommodating various forms of employment including non-standard employment i.e. that of Uber drivers. This is not circumscribed by the traditional contract of employment since there a clear move from the traditional labour law.

4. INTERPRETING THE LRA IN CONFORMITY WITH THE CONSTITUTION

The interpretation of a labour statute, it is submitted, has significant parallels with interpretation of a constitution containing an entrenched Bill of Rights.⁹⁴ This is also the position when one interprets the LRA. Section 3 (a), read with section 1(a) of the LRA, provides that the Act must be interpreted to give effect to the fundamental rights set out in section 23 of the Constitution and the Act must be interpreted in compliance with the

⁸⁹ In *Discovery Health Ltd v CCMA* [2008] 7 BLLR 633, the Labour Court made two significant findings that changed the position regarding migrant workers. In this matter the employee was non-South African whose work permit had expired. The court found that, even if the employment contract was invalid, he fell within the statutory definition of “employees” which must be reconciled with the fundamental right to fair labour practice conferred by the Constitution on “everyone” and on “workers”. The court further held that it was not the intention of the Immigration Act 13 of 2002 to render the employee’s contract of employment concluded without a permit null and void.

⁹⁰ In *Kylie’ v CCMA* [2010] 7 BLLR 705 (LAC) where the Labour Appeal Court had an opportunity to consider as to whether the definition of “everyone” extends to persons engaged in unlawful activities. Kylie worked for a massage parlour as a “sex worker” until her contract was terminated, without a hearing, on the grounds of disruptive behaviour and substance abuse. The LAC held that a sex worker is an employee deserving of legislative protection, despite the illegality of the work in question, and that a “generous approach” to the range of beneficiaries of rights provided for in terms of section 23(1) ought to be adopted.

⁹¹ *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Tsepo Morekure and others* Case No. WECT12537-16 (7 July 2017) unreported. See more discussion on the case in the following chapter.

⁹² See also *Le Roux ILJ* (2009) 53.

⁹³ *Le Roux ILJ* (2009) 53.

⁹⁴ *Du Toit et al* (2015) 82.

Constitution.⁹⁵ The Act must also be interpreted to give effect to international law obligations incurred by South Africa as a consequence of its membership of the ILO.⁹⁶

The Constitutional Court in the case of *NEHAWU* has noted that section 3 is an express injunction to interpret the provisions of the LRA purposively. Ngcobo J stated that:

“The declared purpose of the LRA ‘is to advance economic development, social justice, labour peace and the democratization of the workplace.’ This is to be achieved by fulfilling its primary objects which includes giving effect to section 23 of the Constitution. It lays down the parameters of its interpretation by enjoining those responsible for its application to interpret it in compliance with the Constitution and South Africa’s international obligations. The LRA must therefore be purposively construed in order to give effect to the Constitution. This is the approach that has been adopted by the LAC and the Labour Court in construing the LRA.”⁹⁷

A “purposive” approach to interpretation requires that a statutory provision be construed broadly to give effect to the Constitution and to the underlying purpose of the LRA.⁹⁸ The Constitutional Court has dealt, in *S v Zuma*,⁹⁹ with the approach to be adopted in the interpretation of the fundamental rights enshrined in Chapter 3 of the Constitution. It gave its approval to an approach which, whilst paying due regard to the language that has been used, is “generous” and “purposive” and gives expression to the underlying value of the Constitution.¹⁰⁰

Section 39(2) of the Constitution requires that when interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bills of Rights. This subsection has little to do with the interpretation of the Constitution,¹⁰¹ but calls for an infusion of all constitutional value into legal interpretation.¹⁰²

⁹⁵ Section 3(b) of the LRA.

⁹⁶ Section 1(b) of the LRA.

⁹⁷ *NEHAWU v University of Cape Town and others* at para 41.

⁹⁸ Benjamin *ILJ* (2004) 798-799.

⁹⁹ 1995(2) SA 642 (CC) at para 15.

¹⁰⁰ *S v Makwanyane & another* 1995 (3) SA 391 (CC) at paras 9-10.

¹⁰¹ Currie and De Waal (2013) 148.

¹⁰² Du Toit *et al* (2015) 76.

In interpreting the LRA in compliance with the Constitution requires an interpretation that ensures the protection, promotion and fulfillment of constitutional rights, in particular the labour rights contained in section 23 of the Constitution.¹⁰³ In this way the courts and legislature act in partnership to give life to constitutional rights. All labour legislation is thus subject to “constitutional scrutiny” to ensure that the rights of employees and employers are protected¹⁰⁴ and, while labour disputes are adjudicated by the competent tribunal of first instance, the Labour Appeal Court and ultimately the Constitutional Court retain an “important supervisory role to ensure that legislation giving effect to constitutional rights is properly interpreted and applied.”¹⁰⁵

5. CONCLUSION

The labour relations law is been constitutionalized under section 23 of the Constitution. Before the advent of constitutional democracy different aspects of employment law were governed by the common law contract of employment, employment legislation and administrative law respectively. These three historically disparate sources of employment law are now held together by the glue of the underlying fundamental constitutional right to fair labour practices in section 23(1) in the Bill of Rights. Their respective origins may still, however, inform and enrich the further development of the right, depending on the facts of each case, the nature of the employment relationship at stake and the remedies sought for its breach.¹⁰⁶

Nowhere is the impact of the Constitution demonstrated more clearly than in the interpretation of the contract of employment in the context of the statutory framework giving effect to the Constitution under section 23. A worker in terms of South African labour law includes, but is not limited to, a person who has concluded a contract of employment and includes a range of relationships that resemble common law employment relationships. This holds potential for Uber drivers who are arguably in a precarious situation. Reliance can be placed on section 23 for relief is for by those who cannot necessarily claim protection in veins of labour legislation. As a result of an

¹⁰³ Benjamin *ILJ* (2004) 799.

¹⁰⁴ *In re: Certificate of the Constitution of the RSA, 1996* 1996(10) BCLR 1253 (CC).

¹⁰⁵ *NEHAWU v University of Cape Town and others* at paras 14 and 35.

¹⁰⁶ *MEC: Department of Roads & Transport, Eastern Cape v Giyose* (2008) 29 *ILJ* 272 (E) at para 25.

exclusive definition of “employee” as provided in the LRA, those employees who falls outside the ambit of the Act remains vulnerable as they are not afforded protection other than relying on the Constitution. This is so despite the fact that there is a clear move away from the common law contract of employment to the existence of an employment relationship as a legal standard within the context of the labour market.

The following chapter will focus on South African labour law and the definition of “employee” in terms of section 213 of the LRA.¹⁰⁷ The chapter will also deal with the characteristics of Uber contract and the legal status of Uber drivers in South Africa as it was held by the Commission for Conciliation, Mediation and Arbitration (the “CCMA”). Since the protection of vulnerable employees has become a significant policy issue in South African labour law, the chapter will also consider the definition of employee that is fundamental in determining the nature and scope of the protection afforded by the labour law.

¹⁰⁷ See full discussion on the definition of “employee” in the later chapter.

CHAPTER 4

LEGAL FRAMEWORK IN THE SOUTH AFRICAN LABOUR LAW

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2.	Main Characteristics of Uber Contract	30-32
3.	Analyzing the Definition of an “Employee”	32-34
4.	Legal Status of Uber Drivers in South African Labour Law	34-39
5.	CCMA Ruling on the Legal Status of Uber Drivers	39-42
5.	Conclusion	42-43

1. INTRODUCTION

Increasing non-standardization of employment has emerged worldwide as a result of modern information-based and advance in technology.¹⁰⁸ This global trend emphasizes flexibility in the labour market and has hastened the change in employment norms.¹⁰⁹ The changes in the labour market imply that there is a need for protective labour legislation to those who engaged in informal employment. The South African labour market has also experience a large increase in the informalisation in line with this global trend. At the same time, there has been a profound increase in precarious work – work that departs from the normative model of the standard employment relationship.¹¹⁰ These include part-time employees, temporary employees, employees supplied by agencies, casual employees, home

¹⁰⁸ See Owens, Riley and Murray (2011) 42.

¹⁰⁹ Fudge and Owens (2006) 3.

¹¹⁰ Ibid.

workers and workers engaged in a range of contract relationships.¹¹¹ They are usually described as non-standard or atypical employees.

The terms atypical or non-standard are particularly useful in drawing attention to the way in which employment norms deviates from the traditional paradigm of the standard employment relationship.¹¹² According to Kalleberg, these terms have in common their identification of employment relations that depart from standard work arrangements in which it was generally expected that work would be performed on full-time bases, would continue indefinitely, and was performed at the employer's place of business under the employer's direction.¹¹³ Most of these employees, including Uber drivers, remained vulnerable since they cannot be called employees for the purpose of labour legislation, or if they happen to be employees, cannot effectively avail themselves of the rights available to "employees" under section 213 of the Labour Relations Act¹¹⁴ (the "LRA").

In recognition of the increased incidence of non-standard employment relationships and need to protect *de facto* employees, South Africa inserted section 200A into the LRA and Section 83A into the Basic Conditions of Employment Act¹¹⁵ (the "BCEA") to supplement the statutory definition of "employee" in 2002.¹¹⁶ This, however, leaves the legal status of Uber drivers which is a contentious issue globally to remain in limbo as to whether or not they fall within the ambit of the labour legislation. They continue to remain vulnerable and cannot meaningfully be called independent contractors because they are not in real sense independent.¹¹⁷

With the above in mind, it is therefore important to analyse the characteristics of Uber services agreement in this chapter and determine how they fit within the South African labour law. The chapter will also explore on analyzing the definition of an

¹¹¹ Fourie *PER* (2008) 110.

¹¹² Fudge and Owens (2006) 10.

¹¹³ Kalleberg *ARS* (2000) 341.

¹¹⁴ 66 of 1995.

¹¹⁵ 75 of 1997.

¹¹⁶ Tekle (2010) 206.

¹¹⁷ See also Benjamin *ILJ* (2004) 801, where the author express the view that employees should be treated as independent contractors only if they truly are independent contractors.

employee as defined in section 213 of the LRA against the characteristics of Uber services agreement. Finally, the chapter will also discuss the new ruling on the legal status of Uber drivers by the Commission for Conciliation, Mediation and Arbitration (the “CCMA”).

2. MAIN CHARACTERISTICS OF UBER CONTRACT

If there has been one technological innovation that has provoked a wide and heated discussion in the services sector in recent months in South Africa and globally, it is the emergence of Uber and its implications in the labour market.¹¹⁸ Isaac describes Uber Technologies Inc., an on-demand ridesharing service that connects passengers to local drivers in real time using smartphone technology, is one of the most disruptive, successful tech start-ups yet.¹¹⁹ Uber was founded by Travis Kalanick and Garrett Camp in San Francisco, California back in 2009. Since its discovery, Uber as it well-known became an international transportation network company, which operates in more than 84 countries including South Africa.¹²⁰ Uber describes itself as a company which offers information and a means to obtain transportation services offered by third party transportation providers, drivers or vehicle operators which may be requested through use of a mobile application supplied by Uber and downloaded and installed by individuals on their respective mobile device.¹²¹

The claim made by Uber in various legal proceedings is that it is not a transport company but a technology company – and the Uber drivers are its customers (or partners). By implication Uber argued that it owns no vehicle, instead of employing drivers, it partners with transportation providers.¹²² This has been rightly rejected by American and British courts alike¹²³ and also in a recent ruling by CCMA.¹²⁴

¹¹⁸ See also Maselli and Giuli (2015) 1.

¹¹⁹ Isaac (2014) 2.

¹²⁰ Uber Estimate (2017).

¹²¹ Uber User Terms. See also Mokoena *ILJ* (2016) 1574.

¹²² In Mokoena *ILJ* (2016), the author submitted that “transportation providers” can be businesses which provides drivers, or private individuals who drive their own vehicles, in order to provide services to those seeking transport through mobile application. See full discussion below.

¹²³ *O’Connor et al v Uber Technologies Inc. et al* (California District Court) Case no. C-13-3826 (EMC) and *Aslam v Uber B.V and others* [2017] I.R.L.R 4 (28 October 2016).

There are three types of persons involved in delivery of the transportation services:

- (a) The “partner only” owns one or more vehicles, but does not drive. Partners provide one or more vehicle for drivers to drive. The partner receives payment of fares less a fee deducted by Uber and the partner pays the driver.
- (b) A “partner-driver” is a partner vehicle provider who also drives a vehicle. As a partner, the partner-driver may appoint another person to drive, if so, that driver must be approved on the Uber app.
- (c) A “driver only” does not drive her vehicle or provide a car and drives a vehicle provided by a partner.¹²⁵

For the purpose of this study the word driver shall mean to include drivers who are either partner-drivers or drivers only as provided in clause 1.4 of the Services Agreement. Those drivers are at liberty to move between these categories provided they meet the then-current requirements of Uber. Suggestion by Mokoena that there is difficulty in ascertaining who among enlisted persons is an employee or not is contrary with the practical reality on the nature of relationship that Uber has with the drivers.¹²⁶ Uber drivers are to be treated and classified as employees or independent contractors.

The main concept of Uber is creating a connection among users¹²⁷ and drivers using their own private vehicles through the medium of mobile application that is easily and freely downloaded by the users. Once the User has downloaded the application, he or she may request transportation and Uber will then source the nearest driver. If a driver accepts a user’s request for transportation services, the Uber will provide certain user information to such driver *via* the driver app, including the user’s first name and pickup location. The driver will obtain the destination from

¹²⁴ *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and others* Case WECT12537-16 (Dated of Ruling: 7 July 2017) unreported judgment. See full discussion below.

¹²⁵ Clause 1.4 of the Services Agreement

¹²⁶ *Mokoena ILJ* (2016) 1582.

¹²⁷ In terms of clause 1.18 of the Services Agreement, “User” means an end user authorized by Uber to use Uber’s mobile application for the purpose of obtaining transportation services offered by Uber’s transportation provider customer.

the user, either in person upon pickup or from the driver's app if the user elects to enter such destination via Uber's mobile application.¹²⁸

The application computes the fare as a function of time and distance. A fare to be charged are obtained via the Uber Services and a driver has a right to negotiate or to charge a fare that is lower than the pre-arranged fare.¹²⁹ Uber also incorporated a rating system where User will be prompted by Uber's mobile application to provide a rating of such transportation services and driver and, optionally, to provide comments of feedback about such services or drivers. This rating system is also applicable to the drivers and must be done in good faith.¹³⁰

Lastly, Uber has authority to terminate the services agreement or deactivate customer or a particular driver immediately, without notice, with respect to any driver who no longer qualifies, under applicable law or the standards and policies of Uber, to provide transportation services or to operate the vehicle.¹³¹ Upon termination the driver shall return all devices to Uber and immediately delete and fully removed the driver app from the mobile device.¹³² Uber, despite being a characteristic of new business model, its existence is assumed to be within its own precarious legal void. A legal void which, in South African labour law has adversely affected the level of protection afforded to vulnerable workers such as Uber drivers.¹³³ This has so far called for determination of an appraisal of the legal status of Uber drivers in South African labour law.

3. ANALYZING THE DEFINITION OF AN "EMPLOYEE"

Over the decades, South Africa has sought to expand the definition of an "employee" in labour law. Not long after South Africa entered its own era of industrialization, the

¹²⁸ Clause 2.2 of the Services Agreement

¹²⁹ Clause 4 of the Services Agreement.

¹³⁰ Clause 2.6 of the Services Agreement.

¹³¹ Clause 12.2 of the Services Agreement.

¹³² Clause 12.3 of the Services Agreement.

¹³³ Mokoena *ILJ* (2016) 1575.

courts started grappling with the definition of “employee” contained in the labour legislation of the day.¹³⁴

The amendment to the LRA and BCEA introduced a rebuttable presumption of employment, to be applied when a person claiming to be an employee establishes the existence of any one of a number of listed factors.¹³⁵

The LRA, which embodies the statutory rights to fair labour practices, defines “employee” in terms wide enough to embrace relationships of a less conventional type, and excludes only “independent contractors” from the scope of the Act.¹³⁶ As noted in the above chapter, members of National Defence Force are also excluded from the ambit of the LRA.¹³⁷ Section 213 of the LRA defines “employee” as follows:

- “(a) any person, excluding an independent contractor, who works for another or for the State and who receives, or is entitled to receives, any remuneration; and
- (b) any other person who in any manner assists in carrying on or conducting the business of an employer.”¹³⁸

Grogan argued that this definition begs as many questions as raised by the common-law definition which has been there prior the enactment of the LRA.¹³⁹ Paragraph (a) refers to the persons who works in terms of the common law contract of service and expressly excludes the person who renders services in accordance with the so-called *locatio conductio operis*, independent contractors.¹⁴⁰ In paragraph (b) no reference is made to receiving or being entitled to remuneration. At first glance, paragraph (b) can be wide enough to include the Uber drivers as they assist in the business of Uber.¹⁴¹ However, there is a need for a clear determination as to whether Uber drivers are

¹³⁴ Van Niekerk *et al* (2015) 57-58. Section 24 of the Industrial Conciliation Act 11 of 1924 defined an “employee” to mean “any person engaged by an employer to perform, for hire or reward, manual, clerical or supervision work in any undertaking, industry, trade or occupation to which this Act applies, but shall not include a person whose contract of service or labour is regulated by any Native Pass Laws and Regulations.

¹³⁵ In *State Information Technology Agency (SITA) (Pty) Ltd v CCMA & others* [2008] 7 BLLR 611 (LAC), the Labour Appeal Court reworked on these factors into a reduced template which is more appropriate to meet the demands of the modern international and constitutional framework.

¹³⁶ Currie and De Waal (2013) 475.

¹³⁷ Section 2(a) of the LRA.

¹³⁸ “Employee” is given a different and specific meaning under section 78 of the LRA.

¹³⁹ Grogan (2014) 16.

¹⁴⁰ *SA Broadcasting Corporation v McKenzie* 1999 20 ILJ (LAC) at para 7.

¹⁴¹ Fourie *PER* (2008) 119.

employees of Uber in the context of the characteristics of Uber Services Agreement in the South African labour law. This will be so to ensure that vulnerable workers like Uber drivers received protective measures within the ambit of labour legislation as required by the International labour standard.

4. LEGAL STATUS OF UBER DRIVERS IN SOUTH AFRICAN LABOUR LAW

South African labour law and subsequent jurisprudence is fairly clear on the presumption of employment. Theron, has suggested that the post-apartheid labour market has been marked by the related phenomena of casualization and externalization.¹⁴² This entails a process whereby employers shape employment relations to informalise working arrangements and thus deprive employees of their basic statutory rights.¹⁴³ The inference is that the amendment of the LRA in 2002 to include rebuttable presumption of employment was in response to a number of innovative business models in the labour market, including Uber. This rebuttable presumption of employment applies only to persons earning below a prescribed threshold amount.¹⁴⁴

In terms of section 200A of the LRA, if a worker alleges that he or she is an “employee”, that person is presumed to be an employee if he or she renders services to another person and any one of the enlisted factors hereunder is present in the relationship:

- (a) the manner in which the person works is subject to the direction of another person;
- (b) the person’s hour of work are subject to the control or direction of another person;
- (c) in the case of a person who works for an organization, the person forms part of that organization;
- (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;

¹⁴² Theron *ILJ* (2003) 1271.

¹⁴³ Van Niekerk *et al* (2015) 63.

¹⁴⁴ GN 531 GG 29445 of 1 July 2014. The amount is determined from time to time by the Minister of Labour and is currently fixed at R205 433, 30 per annum.

- (e) the person is economically dependent on the other person for whom he or she works or renders services;
- (f) the person is provided with the tools of trade or work equipment by the other person; or
- (g) the person only works for or renders services to one person.

The presumption of employment applies regardless of the form of the contract, and is designed to give effect to the International Labour Organisation (the “ILO”) Recommendation 197.¹⁴⁵ In terms of the ILO Recommendation, the focus should be on a facts relating to the performance of work, rather than the character and content of the contractual arrangement between the parties.¹⁴⁶ The presumption assists vulnerable employees like Uber drivers, to establish their status as employees by requiring an employer disputing the existence of an employment to place appropriate evidence in support of this contention before court.

Despite the amendment to the LRA and BCEA, NEDLAC issued a Code of Good Practice titled: “Code of Good Practice: Who is Employee?”¹⁴⁷ In 2006 as required by section 200A (4) of the LRA. The Code sets our guidelines to determine whether persons are employees and this shall include Uber drivers. In terms of Item 2 of the Code the purposes of the Code includes, among other things, is to promote clarity and certainty as to who is an employee for the purposes of the Labour Relations Act and other labour legislation, and to assist persons applying and interpreting labour law to understand and interpret the variety of employment relationships present in the labour market including disguised employment, ambiguous employment relationship, atypical (or non-standard) employment and triangular relationships. In terms of section 203(3) and (4) of the LRA, any person interpreting or applying LRA, and other labour legislation must take this Code into account for the purpose of determining whether a particular person is an employee.

¹⁴⁵ See full discussion in chapter 2 above.

¹⁴⁶ Article 9 of the ILO Recommendation No.197.

¹⁴⁷ Code of Good Practice *ILJ* (2007) 96.

The Code, like presumption of employment does not alter the statutory definition of “employee” as envisaged in section 213 above but is a guideline on interpreting it and section 200A of the LRA. In *Kylie’ v CCMA & others*¹⁴⁸ it was noted that the Code cements the modern trends that focus is now on the nature of employment relationship rather than its contractual form. Courts according to the Code are encouraged to look at the realities of the relationship between the parties since the contractual relationship may not always reflect the true nature of relationship between the parties.¹⁴⁹

The Code together with the rebuttable presumption recognized that disguised employment is of reality in the South African labour market and there is a need to clarify the question of who is an employee for the purposes of the labour legislation under these new global trends. Despite the fact that Uber has always contends that it does not employ any drivers but instead partners with them. There is a need to evaluate their Services Agreement in order to see how they fit within the South African labour law to determine as to whether Uber drivers are indeed employee for the purposes of the labour legislation. As noted above there are three persons involved in delivering of the transportation services of Uber and despite their categories, they may be considered employees of Uber. Following the guidance provided by the Code, together with the enlisted factors in section 200A the following should be used in evaluating the Service Agreement of Uber:

Firstly, regarding the degree of control, Uber drivers should be subjected to the control or direction by Uber. In *Parliament of the RSA v Charlton*,¹⁵⁰ the LAC was called upon to consider the degree of control of members of Parliament since they do not fall within the ambit of the definition of employee. The court emphasized that there can, in certain circumstances, be an employment relationship even where there is a relatively low degree of control over the employee.¹⁵¹ Although Uber drivers do not physically report to Uber, there is a control via digital technology platform. In order for a driver to continue

¹⁴⁸ [2010] 7 BLLR 705 (LAC).

¹⁴⁹ In a unanimous judgment, the Labour Appeal Court in *Kylie’ v CCMA & others* held that within the framework of the constitutional right to fair labour practices, *Kylie* was in an employment relationship even if there was no valid contract.

¹⁵⁰ (2010) 31 ILJ 2353 (LAC).

¹⁵¹ Item 39 of the Code.

receiving access to Driver app and the Uber services, he or she is required to maintain an average rating by Users that exceeds the minimum average acceptable rating established by Uber. Uber, in case the driver failed to meet the required average rating, has discretion to notify the driver within a limited period to provide remedy to such failure. Shall the driver failed, Uber reserves the right to deactivate the driver's access to application and the Uber services.¹⁵² In this instance, Uber have control over a decision to determinate the services of Uber drivers by deactivating the driver's access to Driver's app and the Uber services in case there in non-compliance with the set up requirements.

Secondly, when considering economic dependence, Uber drivers operate based on the mobile application provided to them by Uber. The User who is authorized by Uber to use Uber's mobile application for the purpose of obtaining transportation services requests the service via the same application for a ride from the Uber drivers. The driver has little knowledge of the Users and is not required to contact the Users or use their personal data for any other reasons or in advancing their transportation services.¹⁵³ This serves as an indication that drivers are not independent but are economically dependent to Uber who provide works for them via their digital technology platform. Despite the fact that the driver should provide his or her services to Uber Users, he or she cannot work exclusively for Uber and there is nothing that prevents Uber drivers to acquire work in other ways. As expressly stated by Van Niekerk *et al*, part-time employees are generally free to render services to other employers during their time, but this does not diminish their status as an employee.¹⁵⁴

Thirdly, regarding hours of work, Item 18(b) of the Code provides that this factor will generally be present if the alleged employer (Uber in this case) determine the times at which work is to be performed, or if the person's hours of work are specifically included as a term of the contract. There are no determined hours of work by Uber to the drivers however, by implication Uber does determine the hours of work for drivers. When the driver's application is active, User requests for a ride will appear to a driver via the

¹⁵² Clause 2.6.2 of the Services Agreement.

¹⁵³ Clause 2.2 of the Services Agreement.

¹⁵⁴ Van Niekerk *et al* (2015) 65.

driver's application if he or she is available and in the vicinity of the User. Once he accepts such request he should avail himself to the User's location. The driver also has an option to decline or ignore a User's request or cancel an accepted request by the User.¹⁵⁵ However, repeated failure by a driver to accommodate User requests for ride while such driver is active on the mobile application creates a negative experience for Users.¹⁵⁶ Other consequences that a driver might face for such act will include deactivating or restrict the driver from accessing or using the driver application.¹⁵⁷

Fourthly, regarding the provision of tools of trade, this in terms of the Code should not be given a narrow meaning but a wider one to include other technological devices like Uber Mobile application¹⁵⁸ and it does not make any difference whether the presume employee receives the tools free of charge.¹⁵⁹ Uber does not provide the vehicle but what it provides is application that enables drivers to access the Uber services for the purpose of providing transportation services to Users. Once one meets all the requirements of Uber it will then issue a Driver ID¹⁶⁰ for each driver providing transportation service to enable driver to access and use the application on a device in accordance with the Driver Addendum and the Services Agreement.¹⁶¹

Despite the fact that drivers can install the Uber application in their respective mobiles, Uber in addition to the provision of application also encourages drivers to use Driver-Provided Devices¹⁶² for providing transportation.¹⁶³ The device provided by Uber may only be used for the purpose of enabling the driver to have access to the Uber services. This device remains the property of Uber and shall be returned upon termination of the

¹⁵⁵ Clause 2.4 of the Services Agreement.

¹⁵⁶ Clause 2.6.2 of the Services Agreement.

¹⁵⁷ Clause 2.4 of the Services Agreement.

¹⁵⁸ Item 16 of the Code.

¹⁵⁹ Van Niekerk *et al* (2015) 66.

¹⁶⁰ In terms of clause 1.7 it means the identification and password key assigned by Uber to a driver that enables a driver to use and access the Driver application.

¹⁶¹ Clause 2.1 of the Services Agreement

¹⁶² In terms of clause 1.8 it means a mobile device owned or controlled by Customer or a Driver: (a) that meets the then-current Uber specifications for mobile devices as set forth at www.uber.com/byod-devices; and (b) on which the Driver App has been installed as authorized by Uber solely for the purpose of providing Transportation Services.

¹⁶³ Clause 2.7.1 of the Services Agreement.

Services Agreement or deactivation of a driver.¹⁶⁴ With this in mind a court shall be able to determine the question as to whether Uber drivers can be presumed to be employees of Uber.

Fifthly, the fact that Uber drivers does not fits into an organizational framework of Uber is open for contention, it might be argued that they assist the same organization in carrying out its businesses then they form part of the organization.¹⁶⁵ Uber determine the fare calculation at any time and has discretion based upon local market factors to change fare calculation¹⁶⁶ and service fee¹⁶⁷, and to adjust fare.¹⁶⁸ In case the User cancels the requests made for transportation services, Uber may charge a cancelation fee on behalf of the driver.¹⁶⁹ Instead of bearing the risk for possible cancellation the driver is relieved from such risks as Uber takes care on behalf of the driver.

In terms of Item 18(d) of the Code, the Uber driver to fall within the ambit of this Code, should have worked for that person for an average of at least 40 hours per month over the last three months. Determining whether Uber drivers work for Uber in a prescribed manner it can be on case by case.¹⁷⁰ The focus should also be on the decision by the Labour Court in the case of *NUCCAWU v Transnet Ltd*¹⁷¹ where the court held that individuals who work only when the employer has a need for them do fall within the ambit of employees. This shall include Uber drivers who operate based on the requests by the Users through Uber application which is in control of Uber.

With the above factors present in the Services Agreement of Uber, a court will find that Uber drivers are indeed presumed to be employees of Uber and also for the purpose of the labour legislation.

4. CCMA RULING ON THE LEGAL STATUS OF UBER DRIVERS

¹⁶⁴ Ibid.

¹⁶⁵ Item 18(c) of the Code.

¹⁶⁶ Clause 4.2 of the Services Agreement.

¹⁶⁷ Clause 4.3 of the Services Agreement.

¹⁶⁸ Clause 4.4 of the Services Agreement.

¹⁶⁹ Clause 4.5 of the Services Agreement.

¹⁷⁰ See Mokoena *ILJ* (2016) 1580.

¹⁷¹ (2002) 21 ILJ 2288 (LC)

Despite the fact that above factors had on previous occasion not been applied by the CCMA in determining as to whether Uber drivers can be presumed to be employees of Uber, in a landmark decision of *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and others*,¹⁷² the factors came under scrutiny. The CCMA in this case was called upon to decide whether Uber drivers are employees of Uber for the purposes of the LRA, as defined in section 213 of the Act. The following are the facts that gave rise to this case: The drivers of Uber were all deactivated for one or more reasons and they then referred unfair dismissal disputes to the CCMA. Uber SA objected to the CCMA's jurisdiction in the unfair dismissal disputes, claiming that the drivers were not employees of Uber BV with whom they have a contract, and also not of Uber SA which is a subsidiary of the Uber BV.¹⁷³

In their argument before the Commissioner, Uber listed six considerable factors that according to them made it clear that they are not employers of the drivers. Firstly, they argued that there is no legal obligation on the part of any driver any Uber registered vehicle or to use the Uber App, as it is clear in the Uber BV Services Agreement. Secondly, they argued that there is also no right to instruct a driver to drive his vehicle, and the driver has a choice of where to drive and which passengers to transport. Thirdly, it was argued that a partner-driver may employ another driver to drive. Fourthly, it was argued that drivers are free to work whenever they like on anything else, including competitors. Fifthly, Uber argued that the partner and not Uber are required to supply a vehicle and to carry all associated expenses. This constitutes the tool of trade which is not provided by Uber despite the one of App which enables the drivers to operate their vehicles. Lastly, the partner bears all risk of profit and loss as an independent contractor to Uber and a driver is free to move from one partner to another.¹⁷⁴

Contrary to the above submissions, the drivers argued that they are not independent contractors but employees of Uber. The drivers submitted that Uber controls them in various ways. It control their conduct and how the perform their work through a system

¹⁷² WECT12537-16 (7 July 2017) unreported judgment.

¹⁷³ *Uber South Africa Technological Services*, para 10.

¹⁷⁴ *Ibid* para 25.

of ratings by the Users and the consequences of failure to meet the average minimum rates. Uber through the digital technology platform control how the drivers should perform their services, including chargeable fare and how they get hold of Users for transportation services and the location that they should operate their business.¹⁷⁵ To terminate and deactivate the Drivers App is within the only discretion of Uber and not the drivers.¹⁷⁶ While having a Driver ID, a driver is not allowed to share it with any other person.¹⁷⁷

In assessing the above arguments the Commissioner limited herself on determining whether Uber drivers are employees for the purposes of the LRA, in particularly the right not to be unfairly dismissed. The Commissioner adopted a generous interpretation of section 213 of the LRA in making her ruling and noted that part (b) of the definition is broad enough to include Uber drivers. This was based on the fact that Uber drivers assist Uber on their worldwide transportation business.¹⁷⁸ The Commissioner went further to consider factors enlisted in section 200A of the LRA together with the Code of Good practice and held that even though there is no direct or physical supervision, control over drivers by Uber is exercised through technology platform.¹⁷⁹ On the manner in which the drivers deal with the Users and fare which was payable for the particular requested trip, it was found that drivers are economically dependent on the ability to driver for Uber and independently running their own transportation business.¹⁸⁰ The Driver App provided to drivers are tools of trade as mentioned above and without it drivers cannot operate their business and this according to the Commissioner makes Uber drivers to form part of Uber's service.¹⁸¹

Despite Uber's argument that it neither employs drivers nor owns any cars this was rejected by the Commissioner. She was of the view that in applying the Code in particular, the realities of the relationship test, there is sufficient basis to presume that

¹⁷⁵ Ibid para 28.

¹⁷⁶ Ibid para 29.

¹⁷⁷ Ibid para 31.

¹⁷⁸ Ibid para 37.

¹⁷⁹ Ibid para 45.

¹⁸⁰ Ibid para 48.

¹⁸¹ Ibid para 49.

Uber drivers are employees of Uber SA. This was despite that fact that other factors indicate contrary to that view, but the Commissioner accepted that the identity of who is their employer remains unclear. This is supported by the general overview that vulnerable employee such as Uber drivers, need a legislative protection.

The Commissioner also noted that deactivation by Uber should be equated with dismissal since Uber has developed a policy setting out the reasons for deactivation of Drivers App much associated with company's disciplinary policy. This on its own serves as a warning to drivers that should they failed to comply with the then-current requirements prescribed by Uber they should face consequences.¹⁸² In its ruling the Commissioner held that CCMA has jurisdiction to determine the dismissal disputes by Uber drivers as they are employees of Uber SA for the purposes of the LRA.¹⁸³

The above judgment can be viewed as a first victory for Uber drivers in South African labour law. However, more protective measures need to be put in place to ensure that they don't only receive identification as employees for labour legislation purposes but also receive other benefits to include, sick leave, pension funds and medical aid provision.

5. CONCLUSION

South Africa has acknowledged the current labour market which has many forms of employment relationship that shifts from the traditional common law contract of employment. The current labour market which is associate with globalization and new technological innovation, creates a growing number of persons who cannot meaningfully be called employees and have no protection within the labour legislation. In 2002 amendments to the LRA and BCEA was introduced to create a presumption of employment as a response to the above challenges and that of Uber drivers.

The presumption as discussed above comes into play once a worker is able to establish that any one of seven listed threshold factors applies to their employment

¹⁸² Ibid para 60.

¹⁸³ Ibid para 62.

relationship.¹⁸⁴ This presumption is, according to Van Niekerk *et al*, an evidentiary device calculated to switch the onus of proof of employment in circumstances when any one of the enlisted factors is established.¹⁸⁵ In 2006 NEDLAC issued Code of Good Practice which serves as guidance to the enlisted factors. As stated above one of the purposes of this Code is 'to promote clarity and certainty as to who is an employee for the purposes of the LRA and other labour legislation. These purposes cover the question as to whether Uber drivers can be presumed employees of Uber. Despite the fact that Uber occasionally describes itself as a company which offers information and a means to obtain transportation services provided by Uber drivers through their digital technology platform, the CCMA has recently rejected this argument. The assessment based on the Services Agreement of Uber with the rebuttable presumption and Code guidance found that Uber drivers are actually employees of Uber and are deserving protection under labour legislation. The CCMA only address the question of identifying Uber driver's employer for the purposes of labour legislation and the courts will need to expand this to ensure that they also receive basic benefits in terms of the labour legislation. As noted by Mokoena, South African labour dispensation need to accommodate this business innovation while ensuring that there is sufficiently protection over workers.¹⁸⁶

The identification of Uber driver's employer for the purpose of labour legislation has been a thorny issue worldwide and courts in various jurisdictions have rejected the contention by Uber that they are not employer of Uber driver. The following chapter will deal with the legal position of Uber drivers in the United Kingdom and in the United States. The chapter will focus mainly on legal framework in these countries and the regulation of Uber drivers.

¹⁸⁴ Benjamin *ILJ* (2004) 801.

¹⁸⁵ Van Niekerk *et al* (2015) 64.

¹⁸⁶ See Mokoena *ILJ* (2016) 1583.

CHAPTER 5

LEGAL POSITION OF UBER DRIVERS IN UNITED KINGDOM AND IN UNITED STATES

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1. INTRODUCTION

Globalization and technology innovation have consistently changed the world of work dramatically.¹⁸⁷ The worker is less likely than ever before to be the employee of old who worked fulltime and on permanent basis.¹⁸⁸ Polarization of the structure of employment and the deepening of divisions within the standards employment relationships are the central features of the recent labour market development globally.¹⁸⁹ This is exemplified by the growing trends of new forms of employment which fall outside the ambit and the

¹⁸⁷ Vettori (2005) 11.

¹⁸⁸ Owens, Riley and Murray (2011) 153.

¹⁸⁹ Deakin *CJE* (1986) 225.

scope of protection provided by the labour legislation in various jurisdictions. United Kingdom (UK) and United States (US) are not exceptional to these changes and not immune from the effects of innovative business model of Uber which has disrupted long-standing systems and standards in taxi industry.¹⁹⁰ It is one of the most popular business model associated with digital technology globally, but is not without controversy. Uber has been hamstrung by various governments over regulation and unprecedented competition in the taxi industry. In some countries Uber has been criticized and banned,¹⁹¹ based on its implication on labour market and concern around licensing of public transport providers.¹⁹²

It has been argued in both the UK and the US that Uber does not employ any drivers or own vehicles, instead it provides the digital technology platform that enables the connection between drivers and users.¹⁹³ Nonetheless, the relationship between Uber and its drivers as stated in previous chapter is also based on a somewhat new model of employment relationship, which raises a valid question as to their status.¹⁹⁴

Disgruntled Uber drivers in various countries including the UK and the US have staged protests and filed lawsuits against Uber claiming that they are employees of the company and not independent contractors.¹⁹⁵ They find themselves in a dilemma and feel unprotected and legislative exploited.¹⁹⁶ There have been some interventions of kind in the UK and in the US with regard to the determinacy of whether Uber drivers are employees of Uber.¹⁹⁷ This is in accordance with the ILO Recommendation discussed in the previous chapter to ensure that vulnerable workers like Uber drivers received befitting protection and fall within the ambit of national labour legislation that is in compliance with the international labour standards.

¹⁹⁰ See Mokoena (2017) 1.

¹⁹¹ Countries that have banned the operation of Uber include among others, Bulgaria, Denmark, Italy and Hungary. On a recent accident London in UK has banned Uber effective from the 1 of October 2017 as the Transport for London has refused to renew their operation licence. Uber venture to appeal the decision. See more discussion below.

¹⁹² See Mokoena (2017) 1.

¹⁹³ See full discussion below.

¹⁹⁴ Davidov (2017) 1.

¹⁹⁵ Isaac (2014) 9.

¹⁹⁶ See also Davidov (2017) 4.

¹⁹⁷ Ibid.

Thus is therefore important to explore on the legal position of Uber drivers in the UK and in the US The chapter will also focus in the contextual background of the legal system in these jurisdictions and how Uber drivers are regulated in the respective jurisdictions.

2. UNITED KINGDOM (UK)

2.1 CONTEXTUAL BACKGROUND

Like elsewhere, the taxi industry in the UK has been facing an era of change and challenges to their established models due to the advent of Uber in the labour market.¹⁹⁸ Uber's expansion to European countries began in the UK, London in 2012 and has so far rolled out to other locations including Birmingham, Manchester and Leeds.¹⁹⁹ It is fully compliant with the private hire licence which is issued by the Transport for London²⁰⁰ ("TfL") and taxi regulation in the UK. In terms of section 2(1) of the Private Hire Vehicle Act²⁰¹ (the "PHVA"), Uber cannot make provision for invitation or acceptance of, or accept private hire bookings unless it holds private hire licence.

The origin of the legal challenge in London associated with Uber concerned the use of smartphone that use GPS technology to measure distance as well as recording time elapsed which the TfL advised Uber that they did not consider the use of a smartphone to bring it within the definition of a taximeter.²⁰² On the 11th of June 2014, London's Black Cab drivers, members of the Licensed Taxi Drivers Association ("LTDA") took part in a protest against the TfL's failure to act against the Uber's calculation of fares based on distance and time taken, as they claimed it infringed upon their rights to be sole users of taximeters in London.²⁰³

As the issue of calculation of fares increasingly becomes contentious, the TfL brought a case to the High Court to determine as to whether the manner in which Uber's

¹⁹⁸ Gloss, McGregor and Brown (2016) 2.

¹⁹⁹ Adam (2016) 2.

²⁰⁰ TfL is the regulator for both private hire vehicles and for hackney carriages in London established in terms of the Private Hire Vehicles Act of 1998, Cht 34.

²⁰¹ 1998, Cht 34.

²⁰² Gustavsson (2016) 30.

²⁰³ Brown (2014) 2. The boxes fitted to the vehicles to calculate fares in London can only be used by licensed taxi and for unlicensed taxi it was regarded as a breach of the Private Hire Vehicle Act.

application calculates a fare falls under the definition of taximeter, which is prohibited in private hire vehicles since it is a privilege afforded only to the Black Cab drivers.²⁰⁴ The Court found that Uber does not fall under the definition of a taximeter and as such the application used to calculate fares by Uber does not constitute a breach of the taximeter prohibition.²⁰⁵

Despite the fact that Uber does not breach the PHVA, it operates legally in London.²⁰⁶ However, the reality is that Uber pose fundamental challenge to established methods of regulating the employment relationship and the legal status of Uber drivers is key concern.²⁰⁷

2.2 REGULATION OF UBER DRIVERS

The contract of employment is the central gateway to one's entitlement to employment rights and only individuals' privy to that employment relationship are classified as "employees", and shall fall within the scope of employment protective norms.²⁰⁸ Most of those individuals laboring outside the narrow paradigm of standard employment relationships like Uber drivers find themselves without recourse to legislative protection provided by the labour legislation.

The labour law in UK has multiple statutes for individuals providing employment services and the status of a particular individual reflects on the rights and obligations of the worker.²⁰⁹ There three main types of employment status, which includes: employee, worker and self-employed.²¹⁰ The core definition of "worker" is in the Employment

²⁰⁴ *TfL v Uber and others*, Royal Court of Justice Strand, London, Case No. CO/1449/2015, WC2A 2LL.

²⁰⁵ *Ibid* at para 49.

²⁰⁶ There is current development in London where TfL has refused to renew the operating licence for Uber. See full discussion below.

²⁰⁷ See also Marsden (2004) 2.

²⁰⁸ Prassl (2015) 2.

²⁰⁹ Karppanen (2017) 44.

²¹⁰ In terms of section 230(1) of the Employment Rights Act, 1996, "employee" means an individual who has entered into or works under a contract of employment, and entitled to all minimum legal employment rights unlike self-employed individuals who has no employer and not entitled to employment rights and protection. See also Rajah and Tann (2016) 1.

Rights Act²¹¹ (the “ERA”), section 230. In terms of subsection 3 of the ERA, “worker” means “an individual who has entered into or works under-

- (a) A contract of employment, or
- (b) Any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by individual;
and any reference to a worker’s contract shall be construed accordingly.”

The ERA made the differentiations between an employee and worker quite clearly. Accordingly, an “employee” is someone who works under an employment contact²¹² and on the other hand a “worker”, can be working under some other kind of contract or to be categorized as a worker based on the work they are doing to someone, if they do not have the possibility to determine how they do the work, and are under the control or management of someone. The contract referred to in section 230(3)(b) is also known as the limb (b) contract²¹³ and it applies also to National Minimum Wage Act²¹⁴ (the “NMWA”) and the Working Time Regulations²¹⁵ (the “WTR”). This category of worker falls between being an employee and clearly self-employed. In terminology, this differentiation has been in the “contract of service” for an employee and “contract for services” for a self-employed person.²¹⁶

Most related questions raised in London that are associated to the new business model of Uber similar to other jurisdictions including South Africa and the U.S. is first, whether the driver are workers or employees, and thus fall within the scope of employment protective norms, and if that question is answered in the affirmative, how the responsible employer should be identified.²¹⁷ The importance with the concept of the

²¹¹ 1996, Chapter 18.

²¹² Section 230(1) of the ERA.

²¹³ The limb (b) contract encompasses all those who are not employees but who contract to provide a personal service, subject to the exception which applies where the other party to the contract is a client or customer of any professional or business undertaking carried on by an individual. See also *Westwood v the Hospital Medical Group* [2012] EWCA Civ 1005.

²¹⁴ 1998.

²¹⁵ 1998 No. 1833.

²¹⁶ Karppanen (2017) 42.

²¹⁷ Prassl (2015) 3.

employer is that, it is closely tied in with both the identification of the employee and the contract of employment.²¹⁸

Relying on a series of multi-functional tests stated above in chapter 4, Uber's exercise of functions from controlling pay to stipulating working conditions and engaging with the enterprise-external market would point directly to Uber as the employer responsible for ensuring employment compliance in the London.²¹⁹ This also came under scrutiny in a landmark case of *Aslam v Uber B.V and others*²²⁰ handed down by the Employment Tribunal when it was called upon to determine as to whether Uber drivers are deemed to be workers with certain rights, rather than being independent contractors in the UK. The dispute in this case began when group of 19 Uber drivers in the name of two, backed by the trade union, initiated proceedings against Uber, arguing that they were entitled to the national minimum wage and paid holidays.²²¹

The Claimants (Uber drivers) submitted among other things, that the written terms between them and UBV should be read skeptically as they do not properly reflect their relationship. The terms were designed to misrepresent their relationship as the truth is that they work for Uber, and not the other way around. The Claimants further claimed that they are within the core definition of "worker" for Uber under ERA, section 230(3) (b) and the extended definition, at least when they have the App switched on. Contrary to this, the Respondent (Uber) submitted that the terms are valid and fairly define their relationship with the Claimants and the fact that Uber makes (and enforces) stipulations about the way in which the Claimants may make use of the platform is unremarkable and unexceptionable.

The Tribunal salvaged the contracts of the Claimants provident by the Respondent. In determining the relationship between the two, the Tribunal accepted that the Claimants

²¹⁸ Ibid 11.

²¹⁹ See also Prassl (2015) 4.

²²⁰ [2017] I.R.L.R 4 (28 October 2016).

²²¹ Ibid at para 12.

are under no obligation to switch on the App and should they opt to switch off the App there can be no contractual obligation to provide driving services.²²²

The Tribunal further wrestles with many of the factors which have characterized the debate on the distinction between employed and self-employed persons in other jurisdictions including the US whilst coming to the conclusion that indeed, Uber drivers ought to be classified as workers for the purposes of the ERA.²²³ The Tribunal developed the following criteria that mirror the dominant impression test of South Africa to consider number of factors in determining that Uber drivers are workers and among others, include:

- (a) The fact that Uber controls the key information (in particular the passenger's personal details and intended destination) and excludes the driver from it;
- (b) The fact that Uber requires drivers to accept trips and/or not cancel trips, and enforces the requirements by logging off drivers who breach those requirements;
- (c) The fact that Uber fixes the fare and the driver cannot agree a higher sum with the passenger. (The supposed freedom to agree a lower fare is obviously nugatory); and
- (d) The fact that Uber imposes numerous conditions on drivers (such as the limited choice of acceptable vehicles), instructs drivers as to how to do their work and, in numerous ways, controls them in the performance of their duties.²²⁴

The Tribunal also determines the issue as to when the Uber driver is to be treated as working under his limb (b) contract and find that Uber driver's working time starts as soon as he is within his or her territory, has the App switched on and is ready and willing to accept trips and ends as soon as one or more of those conditions ceases to apply.

²²² Ibid para 85.

²²³ Ibid para 89.

²²⁴ Ibid at item 3, 4, 6 and 7. Other enlisted factors include: the fact that Uber reserves the power to amend the drivers' terms unilaterally; the fact that Uber handles complaints by passengers, including complaints about the driver; the fact that Uber accepts the risk of loss which, if the drivers were genuinely in business on their own account, would fall upon them; the guaranteed earnings schemes (albeit now discontinued); the fact that Uber determines issues about rebates, sometimes without even involving the driver whose remuneration is liable to be affected; the fact that Uber subjects drivers through the rating system to what amounts to a performance management/disciplinary procedure; the fact that Uber interviews and recruits drivers and the contradiction in the Rider Terms between the fact ULL purports to be the drivers' agent and its assertion of "sole and absolute discretion" to accept or decline bookings.

In case of a driver who lives within the territory in which he works, working time may start as soon as he leaves home and continue until he return home.²²⁵

Finally, in determining as to whether Uber driver's working hours are given to salaried hours work, time work, output work or unmeasured work, the Tribunal found that Uber driver performs unmeasured work which is to be computed in accordance with National Minimum Wage Regulation, 2015.²²⁶ The output work and time work were found to be inapplicable as compared to unmeasured work since Uber's driver's entitlement to pay does not depend on his setout targets.

Since the Tribunal found that Uber drivers were workers and not self-employed, the decision was that they are entitled to receive the employment rights appropriate to their status, which include minimum wage and paid holiday. In the meantime Uber drivers in London proceeds on the basis that they are workers of Uber and are entitled to enforce the right and protections afforded to them by this status.

2.3 RECENT DEVELOPMENT IN LONDON

On the 22nd of September 2017, the TfL announced that it is not going to renew the operating license which can be seeing as a banning of Uber by the regulator in London. The TfL alleged that its decision not to renew Uber's operating license is on the basis that the company is not a "fit and proper" private vehicle hire operator. Despite this decision Uber has vowed to appeal the decision taken by TfL.²²⁷ This will indeed inconvenience the users and also have impact on the workers whom the Tribunal has already confirmed that they are workers for the purpose of the ERA. Pending the outcomes of the appeal the position is that Uber operate legally in London and the legal status of the drivers as confirmed by the Tribunal shall stand.

²²⁵ *ibid* para 122.

²²⁶ Regulation 45. See also para 126 and 127.

²²⁷ Butler and Topham (2017) 1.

3. UNITED STATES (US)

3.1 CONTEXTUAL BACKGROUND

As previously discussed in chapter 4, Uber was found in San Francisco, California in the US in 2009. Like in any other jurisdictions Uber has brought major changes in the taxi industry that has been heavily regulated.²²⁸ When it was found in 2009, Uber begins to operate as UberCab and after the company received cease-and-desist orders from both the California Public Utilities Commission (CPUC) and the San Francisco Municipal Transportation Agency (SFMTA), demanding that the company immediately cease all advertisements and operations for operating without a taxi license or else face fines or jail term.²²⁹ Instead of ceasing to operate, Uber changed its name from UberCab to Uber and ignored the orders for applying for a charter permit issued by the Public Utilities Commission. In 2012 the CPUC in its ongoing commitment to public safety fined Uber \$20 000 for operating a business that provide prearranged passenger transportation without a license.²³⁰

In September 2013, the CPUC unanimously voted at San Francisco hearing to pass regulations that creates a new class of Transportation Network Companies (TNCs) that cover Uber, thereby making California the first jurisdiction to recognize such services.²³¹ The regulations place more emphasis on Uber drivers and passenger safety, requiring that Uber drivers satisfy various requirements before he or she can be accepted as a driver.²³²

Despite the fact that Uber operates legally in most of the cities in US including California, it continues to face legal challenges and most ardent opposition is the classification of the Uber drivers as independent contractors and not employees.²³³ Other issues surrounding the concern of Uber was the potential lack of labour protection over drivers and the precarious nature of employment relationship in the country.

²²⁸ Wyman *N.Y.U JLPP* (2017) 8.

²²⁹ Moon (2017) 2.

²³⁰ See Flores and Rayle (2017) 3761.

²³¹ See Haider and Nourinejad (2015) 8.

²³² O'Connor *TLR* (2016) 587.

²³³ Dong et al (2014) 5.

3.2 REGULATION OF UBER DRIVERS

Labour and employment statutes in the U.S. like in South Africa and the UK provides benefits and protection to those workers that meet each statute's definition of "employee".²³⁴ In general, most of the statutes take into account the level of control that an employer exercises over a person's work in determining whether an individual engaged in a non-traditional form of employment is covered by the definition of an "employee".²³⁵ Uber in the US has created a lot of legal uncertainty in the employment law context and those who engage in it form employment relations that take on characteristics of both entrepreneurialism and the employer-employee relationship.²³⁶ The question as to whether Uber drivers may be considered an "employee" rather than an "independent contractor" is significant for purposes of various labour law statutes in the US.²³⁷

In order to determine as to whether Uber drivers fall within the statutory ambit for the purposes of been classified as "employee" consideration should be in the definition contained in the Fair Labour Standards Act²³⁸ (the "FLSA"). The FLSA was one of the earliest federal efforts to regulate the work environment.²³⁹ It exemplifies the progressive determination to regulate at-will employment and continues to define many of the wage and hours protections that employees are entitled to receive.²⁴⁰ The FLSA defines the scope of employment relationships but only protect those who fall within the definition of an "employee" and exclude "independent contractor". In terms of section 203(e) (1) of the FLSA, "employee" is defined as any individual employed by an employer. An "employer" is defined as, any person acting directly or indirectly in the interest of an employer in relation to an employee and does not include any labour organisation or an agent of such labour organisation.²⁴¹ The FLSA further defined the

²³⁴ Other principal statutes include: Fair Labour Standards Act; and National Labour Relations Act. See also Groff, Callegari and Madden *Cri* (2015) 2.

²³⁵ Blanpain, Bamber and Potchet (2010) 86-87.

²³⁶ McCabe *KANSA L.Rev* (2016) 146.

²³⁷ Donovan, Bradley and Shimabukuro (2016) 8.

²³⁸ 1938.

²³⁹ The Fair Labour Standards Act 1938 as amended 29 U.S.C section 201 (2012)

²⁴⁰ Ibid section 202 of the FLSA. See also Means and Seiner (2016) 1523.

²⁴¹ Section 203(d) of the FLSA.

word “employ” as contained in the definition of employee. In terms of section 203(g) employ includes, to suffer or permits to work, and this was purposely drafted to create the broadest coverage possible.²⁴² Any worker under the FLSA irrespective of their skills level who is economically dependent on the employer is deemed an employee.²⁴³ To evaluate the economic reality of employment relationship, courts were required to examine all of the circumstances of the work activity and not just an isolated factor. Factors to be considered among others include:

- (a) The nature and degree of alleged employer’s control over the individual employee;
- (b) The individual’s opportunity for profit or loss; and
- (c) The extent to which the service rendered is an integral part of the alleged employer’s business.²⁴⁴

These traditional factors can be marshaled to establish that Uber driver is an independent contractor or, equally plausibly, that he or she is an employee under the California law, which closely resembles the FLSA.²⁴⁵ According to Means and Seiner these factors alone cannot resolve classification disputes in the on-demand economy since they are just illuminating the trite. What is left out according to the authors was a higher-level conceptual analysis that would enable courts to adapt existing categories in a manner consistence with economic reality of an-demand business model.²⁴⁶ This was evident in the case of *O’Connor, et al v Uber Technologies Inc. et al*,²⁴⁷ where a class action law suit was filed against Uber by the Plaintiffs alleging, among other things, that the drivers were misclassified as independent contractors, when they should properly have been classified as employees. The Plaintiffs specifically, alleged that Uber has uniformly failed to reimburse its drivers “for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties,” in

²⁴² McCabe *KANSA L.Rev* (2016) 149.

²⁴³ *Ibid* 149. In *Goldberg v Whitaker House Cooperative.*, 366 U.S. 28, 33 (1961), the Supreme Court stated that the ultimate basis for classifying workers under the FLSA should be “economic reality” rather than a focus on “technical Concepts”.

²⁴⁴ Donovan, Bradley and Shimabukuro (2016) 8-9. Other factors include: the individual’s investment in equipment or materials required for his task; whether the service rendered requires a special skills; and the degree of permanency and the duration of the working relationship.

²⁴⁵ Means and Seiner *UC, Davis L.Rev* (2016) 1527.

²⁴⁶ *Ibid* 1527.

²⁴⁷ (California District Court) No. C-13-3826 EMC.

violation of California Labour Code section 2802 and uniformly failed to pass on the entire amount of any tips or gratuity “that is paid, given to, or left for an employee by a patron.”²⁴⁸

Uber moved for summary judgment, arguing that drivers were properly classified as independent contractors. It further argued that it is a technology company rather than a transportation company, a point hotly contended by the Plaintiffs. As initial matter, the Court concluded that the drivers were presumptively employee, because they perform services for Uber. The Court then rejected Uber’s arguments that it was only a technology company and not a transportation company. The court has previously concluded that Uber drivers render services to Uber; therefore, they are Uber’s presumptive employees as a matter of law.²⁴⁹

For the purpose of determining whether a presumptive employer can rebut a prime facie showing of employment, the Court then applied the multi-factor test laid out in the Supreme Court’s decision in from *S.G. Borello & Sons, Inc. v Serv’s Inc. v. Dept Inds. Rel.*²⁵⁰ The most significant factor that the Supreme Court considered was that of punitive employer’s right to control work details. The Court concluded that material questions of the fact regarding the traditional factors (including regarding whether a driver could be terminated without cause and regarding whether Uber exercises control over the provision of services) precluded granting the motion of summary judgment and required a jury trial.²⁵¹ Based on records in the light most favourable to Plaintiffs, the Court was unable to conclude as a matter of law that Plaintiffs are Uber’s independent contractors rather than their employees.²⁵²

Uber further contended that driver’s employment classification cannot be adjudicated on a classwide basis since both its rights of control over its driver, as well as the day-to day reality of its relationship with them, are not sufficiently uniform across the proposed

²⁴⁸ Section 351 of the California Labour Code.

²⁴⁹ 1141-45.

²⁵⁰ 48 Cal.3d.341, 356 (1989).

²⁵¹ 48 Cal.3d 341, 356 (1989).

²⁵² Ibid.

class to satisfy the requirements of Federal Rule of Civil Procedure 23.²⁵³ However, the Court found that the Plaintiffs have met their burden to be certified on both threshold employment classification question and their claim for converted tips under California Labour Code.²⁵⁴ In December 2015, the Court expanded class to approximately 240,000 drivers, finding that the arbitration clauses in the agreements of most Uber drivers were invalid, and did not preclude drivers from pursuing a class action against Uber.²⁵⁵

Following three years of contentious litigation, the parties reached a proposed settlement in *casu* and Uber agreed to pay \$84 million and another \$16 million should the company went forward with an Initial Public Offering in 2016.²⁵⁶ While recognizing sizeable settlement sum and policy changes proposed by the Settlement Agreement and the significant risk that Uber drivers face in pursuing the litigation, the Court concluded that the Settlement as a whole is not fair, adequate, and reasonable and therefore denied preliminary approval to the settlement.

4. COMPARISON AND CONCLUSION

In the UK and in the US, transportation services are highly regulated and new entrants of Uber business model has faced intense resistance.²⁵⁷ With the advent of Uber in both the UK and the US main concern which is similar to that of South Africa has been that it is a disruptive to the pre-existing model of regulating of the taxi industry and its implication in the labour market.²⁵⁸ What is common is that Uber has in these jurisdictions facilitated work opportunities for many. Equally so, questions have also been asked about the rights and legal status of Uber drivers who operate outside of the traditional employment standard and as to whether their current legal frameworks provides sufficient protection and regulatory measures for these drivers. This came under scrutiny by courts where Uber has been challenged for classifying its drivers as independent contractors when they should be classified and treated as employees. In

²⁵³ Rule 23 of the Federal Rules.

²⁵⁴ Section 351 of the Labour Code

²⁵⁵ *O'Connor, et al. v Uber Technologies, Inc. et al.* 13-cv-03826-EMC (Docket No: 411) 2015.

²⁵⁶ *O'Connor, et al. v Uber Technologies, Inc. et al.* 13-cv-03826-EMC (Docket No: 518) 2016.

²⁵⁷ See Flores and Rayle (2017) 3765.

²⁵⁸ See Mokoena (2017) 1.

all these litigations Uber has further argued that it is not a transportation company but a technology company.²⁵⁹ Similar arguments were recently raised in South Africa where the Commission for Conciliation, Mediation and Arbitration (the “CCMA”) had an opportunity to consider the legal status of Uber drivers in the South African labour law.

In rebutting the arguments that Uber is a technology company, the courts established that drivers provide services to Uber and not to its clients. Accordingly, the courts applied the common-law test of employment and determined that since Uber drivers render their services to Uber, they are Uber’s presumptive employees as a matter of law. The test takes as submitted by Mokoena two-prolonged approach being that, once the Uber driver can be able to provide that he or she renders service to Uber (being the employer), he or she has established prima facie evidence of his or her employment and shall be presumed to be an employee of Uber. Once this has been attained, the onus then shifts to the Uber to rebut this presumption in order to prove that a driver is an independent contractor.²⁶⁰ The rebuttable presumption mirrors that of South Africa as contained in section 200A of the Labour Relations Act²⁶¹ (the “LRA”).

Both courts in the UK and in the US noted the importance of the right to control that Uber exercises over the drivers but also consider number of other secondary indicia that would point to the existence of an employment relationship which is similar to the South African “dominant impression” test.²⁶²

²⁵⁹ *O’Connor v Uber Technologies, Inc.* in the U.S. and *Aslam v Uber* in the UK.

²⁶⁰ Mokoena (2017) 9. See also *Yellow Cab Coop. Inc. v Worker’s Comp. Appeals Bd.*, 226 Cal. 3d 1288, 1294 (1991) where it was held that a service provider is presumed to be an employee unless the principal affirmatively proves contrary.

²⁶¹ 66 OF 1995.

²⁶² Factors to determine whether employment status exists are: “(a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the space of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the methods of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.” Other additional factors which are relevant: “(1) the employee’s opportunity for profit or loss depending on his or her managerial skills; (2) the alleged employee’s investment in equipment or materials required for his or her task, or his or her employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of performance of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer’s business.” See also De Stefano “The Rise of the ‘just-in-time workforce’: On-

What is of great significance in those jurisdictions is that Uber drivers are treated and classified as employees and they enjoy legislative protection and entitlement on basic employment rights such as national minimum wages and holiday. There is a comparative precedent for South Africa to adopt from the UK and the US to ensure that Uber drivers are entitled to other employment rights such as sick leave, pension fund and any other benefits which come with security of employment.²⁶³ There is a need to revisit our labour legislation to ensure that it protects vulnerable Uber drivers and they enjoy the employment benefits that befit their employment status.

demand Work, Crowdtwork and Labour Protection in the 'Gig-economy"', *Condition of Work and Employment Series No.71* (2016) 16.

²⁶³ See Mokoena *ILJ* (2016) 1582.

CHAPTER 6

RECOMMENDATIONS AND CONCLUSIONS

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1. RECOMMENDATIONS

The general view is that the nature of employment relationships globally has changed significantly. There has been a change in purpose and orientation, from elucidation of legal rules governing employment relationships and industry relations, to the analysis of regulatory strategies and mechanisms affecting the labour market. South Africa is not immune from these global dynamics that had some bearings on the labour market. There has been a profound increase in precarious work – work that departs from the normative model of the standard employment relationship. The employee is less likely than ever before to be the employee of old who worked fulltime in an ongoing position with the same employer. The need for the capacity of the labour law to respond to the realities of these new work relations is vital, since the central rationale of labour law has been to protect those who are vulnerable and powerless in the labour market.

While labour legislation in South Africa, in the UK and in the US applies uniformly to all who are defined as “employee”, in practice such legislation, premised on the traditional employment relationship, often makes little impact in terms of protecting atypical employees such as Uber drivers.²⁶⁴ This assertion is a stern admonition that the recasting and reshaping of labour law has become a very indispensable phenomenon in order to give effect to the aspirations of South Africa’s notion of transformative

²⁶⁴ Mills *ILJ* (2004) 1204.

constitutionalism and the objectives of the Labour Relations Act²⁶⁵ (the “LRA”). *Benjamin and Cooper* noted that:

“While the Department of Labour’s 1996 Green Paper on Employment Standards has noted the rise of non-standard employment relationships, South Africa’s post-apartheid labour law framework retained the standard employment relationship as the normative model for employment.”²⁶⁶

South Africa as a member state to the International Labour Organisation (the “ILO”) has a mandate to ensure that their domestic labour law corresponds with the international labour standards and to bring new Conventions and Recommendations adopted by the ILO to the attention of the national authorities with a view to ensure their implementation at the national level.²⁶⁷ As noted by Fourie, international labour standards must be reflected in the national legislation and policies for them to be effective, this include, among others, measures to ensure that vulnerable workers such as Uber drivers are protected.²⁶⁸

The definition of an “employee”, which determines the ambit of the labour legislation, was imported without significant changes from its apartheid-era predecessor. This leaves the emerged Uber drivers not covered as they do not fall within the ambit of the definition provided by the labour legislation and they could conceivably only turn to section 23 of the Constitution of the Republic of South Africa, 1996 for protection against employer abuse. As provided in section 213 of the Labour Relations Act²⁶⁹ (the “LRA”), part (b) of the definition of an “employee” can be viewed as broad enough to extend beyond common law contract of employment and could conceivably be read to extend the statutory conception of employment beyond the parties to an employment relationship.²⁷⁰ Since there is a shift from the contract of employment to the existence of employment relationship, there is a need to complement the definition of employee with a statutory definition of “employment relationship”. This will cover most emerging business models in the labour market including Uber drivers who find themselves

²⁶⁵ 66 OF 1995.

²⁶⁶ Benjamin and Cooper (2016) 27-28.

²⁶⁷ Article 19(5)-(7) of the ILO Constitution.

²⁶⁸ Fourie *PER* (2008) 23.

²⁶⁹ 66 of 1995.

²⁷⁰ Van Niekerk et al (2015) 61.

vulnerable and without protection. The Court has so far identified a reduced template as the primary criteria for determining the existence of the employment relationship but without defining the concept.²⁷¹ Similarly, the fact that only employee is covered under the labour legislation but not independent contractor creates another concern since there is no comprehensive definition of who is an independent contractor. The fact that Uber argued that drivers are independent contractors would have been addressed in the context of its definition as compared to that of employee. It's unfortunate that such proposed definition was omitted in the Labour Relations Amendment Act²⁷² (the "LRAA").

South African labour legislation does not define the concept of "worker" despite it been included in section 23(2) of the Constitution.²⁷³ This is unlike the UK where a "worker" is defined under the Employment Rights Act, 1996 as someone working under some kind of contract or to be categorized as a worker based on the work they are doing to someone, if they do not have the possibility of determine how they do the work, and are under the control or management of someone. This definition is broader to include employment relationship which can be adopted in South Africa in order to include Uber drivers in the scope of labour legislation.

The legislature responded to the rise of atypical employment and to the interpretation and disguised employment through amendments to the LRA and Basic Employment Conditions of Employment Act²⁷⁴ (the "BCEA") by including the rebuttable presumption of employment in section 200A of the LRA and 83A of the BCEA. The concern is that the rebuttable presumption of employment does not alter the statutory definition of employee but leaves it to the employer to rebut the existence of employment relationship between him and the employee. It's unfortunate that this presumption does not apply to every person but only those who fall within a specified threshold which make it difficult for some vulnerable employee to seek recourse in the labour legislation. As argued by Du Toit *et al*, there can be no reason for distinguishing the nature of the

²⁷¹ *State Information Technology Agency (SITA) (Pty) Ltd v CCMA & others* [2008] 7 BLLR 611 (LAC) at para12.

²⁷² 6 of 2014.

²⁷³ Section 23(2) of the Constitution provides that: "every worker has the right – (a) to form and join a trade union; (b) to participate in the activities and programmes of a trade union; and (c) to strike."

²⁷⁴ 75 of 1997.

relationship between parties solely on the basis of income. Provisions of section 200A and 83A should be invoked regardless of the earnings of a particular employee since the presumption applies regardless of the form of the contract.²⁷⁵ This gives effect to the ILO Recommendations as discussed in chapter 3.

Since the advent of Uber in the South African labour market there is a need to expand the definition of employee to include Uber drivers and to ensure that they are protected and enjoy employment rights provided by other labour legislation and social security legislation.

The question of identifying employer is also a thorny issue under this informalised labour market since there is concomitant neglect of defining the concept of the employer. The Labour Relations Amendment Bill²⁷⁶ (the “LRAB”) proposed a definition of employer to the labour legislation but it was later omitted in the LRAA.²⁷⁷ The inclusion of the definition of employer in the labour legislation will minimize the challenges of identifying the employers of atypical employee such as Uber in this modern economical era of technology that has swayed the labour market.

2. CONCLUSION

There is a move from the normative standard of employment relationship which is based on a common law contract of employment due to informalisation of labour market that has led to a notable increase of atypical employment where other forms of employment relationship emerged. The emerged changes in the labour market have resulted in situations in which the legal standard of employment relationships does not

²⁷⁵ Section 200A (1) of the LRA. The words “regardless of the form of contract” came under scrutiny in *Universal Church of the Kingdom of God v Myeni and other* (2015) 36 ILJ 2832, which involved a pastor who was dismissed by the church. The Labour Appeal Court (LAC) was called to interpret the meaning of the words “regardless of the contract” and determine whether section 200A is applicable only where there is a contract of employment or contractual arrangement between the parties. The LAC concluded that section 200A required that there must be a legally enforceable agreement or some contractual working arrangement in place between the parties for section to be applicable. The court went further and held that since on the facts the parties never intended to engage in any form of a legally binding agreement, including an employment contract, section 200A was not applicable to Myeni and for that purpose there was no employer – employee relationship that existed between the two.

²⁷⁶ Government Gazette No: 33873, 17 December 2010.

²⁷⁷ In terms of paragraph 23(b) of the LRAB, “‘employer’ means any person, institution, organisation or any organ of state who employs or provide work to an employee or any other person and directly supervises, remunerates or tacitly or expressly undertakes to remunerate or reward such employee for services rendered.”

accord with the realities of working relationships. As a result most of workers like Uber drivers find themselves falling outside the legal standard of employment relationships and do not enjoy labour protection befitting those who are defined as “employee” in the labour legislation. Since our courts have already identified indicia for determining the existence of employment relationship it is of paramount to include the definition of “employment relationship” in the labour legislation which appears to be broader enough to give workers access to other employment benefits. This has been in the ILO’s Recommendations that requires South Africa as a member state to provide mechanisms to ensure that persons with an employment relationship have access to legal protection.

There is more that South Africa can learn from other jurisdictions with commonalities in order to reform their labour dispensation is able to sufficiently protect vulnerable Uber drivers and ensure that they are entitled to other employment benefits.

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