

**UBER DRIVERS: SAD TO SAY, BUT NOT
EMPLOYEES OF UBER SA**

OPSOMMING

Uberbestuurders: Jammer, maar nie werknemers van Uber SA nie

“Uber” is ’n wyse van vervoer wat wêreldwyd groot afmetings aanneem. Hierdie moderne verskynsel ondermyn gevestigde taxiondernemings in groot stede en regerings wend verskillende maatreëls aan om Uber te reguleer. In Duitsland, Spanje en China is dit byvoorbeeld verbied en in die Verenigde State van Amerika en in Engeland het die houe Uberbestuurders as “werknemers” bestempel. In Suid-Afrika het die Kommissie vir Versoening, Bemiddeling en Arbitrasie hulle aanvanklik as werknemers beskou, maar in *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers* het die Arbeidshof beslis dat hulle nie werknemers van Uber SA is nie. Hierdie bydrae bevestig die Arbeidshof se benadering. Uit ’n grondwetlike hoek beskou, moes die hof internasionale regspraak oorweeg het; sou dit sin gemaak het om op die omskrywing van “werkgever” ingevolge artikel 200B van die Wet op Arbeidsverhoudings te steun; en moes ’n breër grondwetlike benadering gevolg word deur diensverhoudings van die bestaan van ’n formele kontrak te skei.

1 Introduction

“Uber” is a mode of transport that operates in approximately 84 countries and 674 cities worldwide. It is estimated that more than 40 million trips take place through the Uber Mobile Device Application (the “Uber App”) every month. There are roughly 2 million Uber drivers of which approximately 4 000 operate in South Africa (Uber Statistics Report 2017, available at <http://bit.ly/2g5o03q>)

(accessed on 13 February 2018); Mokoena “Are Uber drivers employees? A look at emerging business models and whether they can be accommodated by South African labour law” 2016 *ILJ* 1574; Henama and Sifolo “Uber: The South African experience” 2017 *AJHTL* 6 3).

Uber undercuts taxi transportation costs for commuters mainly in large cities (Dong *et al* “Uber: Driving change transportation” (2014) 2, available at <http://bit.ly/2FLiSk7>, accessed on 10 February 2018). As a consequence, a number of countries have grappled with the question how best to regulate Uber. For example, Uber has been banned in Germany, Spain and China to protect their regulated passenger industries (Isaac “Disruptive innovation: Risk-shifting and precarity in the age of Uber” (2014) 10, available at <http://bit.ly/1I4JRNw>, accessed on 10 February 2018). In other countries, such as England and the United State of America, courts and tribunals have held that Uber drivers should be regarded as employees for purposes of labour legislation (*O’Connor v Uber Technologies Inc* (Calif DC) Case nr C-13-3826 (EMC); *Aslam v Uber* [2017] IRLR 4 (2016)).

Locally, Uber has also been in the news. Press reports confirm that several Uber drivers have been assaulted by rival metered taxi drivers in some part of the country (Cilliers “Uber confirms driver attacked and burnt at Loftus on Saturday” *Citizen* 12 June 2017). South African courts are also coming to terms with the conundrum whether Uber drivers should be labelled as employees of the corporate institution which owns the mobile App.

In *Uber South Africa Technology Services (Pty) Ltd v NUPSAW and SATAWU obo Tsepo Morekure* unreported case WECT12537-16 7 July 2017 (“*Uber SA* (CCMA)”) the Commission for Conciliation, Mediation and Arbitration (the “CCMA”) held that Uber drivers are employees. However, in a surprising development and contrary to the situation in England and the USA, the Labour Court in *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers* 2018 *ILJ* 903 (LC) (“*Uber SA* (LC)”) held that Uber drivers are not employees. This contribution explains how Uber functions and questions the approach adopted by the Labour Court. Arguments are advanced in support of the view that *Uber SA* (LC) should have reflected on international developments and should have considered the definition of “employer” in terms of section 200B of the Labour Relations Act 66 of 1995 (“the LRA”). In the final instance, the contribution suggests that a broader constitutional approach should have been adopted rather than a narrow contract-based outlook.

2 How does Uber work?

On its website (cl 2 of the “Uber legal terms” available at <http://ubr.to/2poAya>, accessed on 15 January 2018), Uber BV describes itself as a company which

“offers information and a means to obtain transportation services by third party transportation providers, drivers or vehicle operators (the ‘Transportation Provider’) which may be requested through the use of an application supplied by Uber and downloaded and installed by an individual on his or her mobile device”.

The Uber App facilitates demand between two groups, namely, transportation providers and users seeking transportation (Karppanen “Regulating ridesourcing companies and the employment status of drivers in the sharing economy – A study of Uber” (2017) 56, available at <http://bit.ly/2FQYsSB>, accessed on 13 February 2018). The parent company, Uber BV, which is incorporated in the Netherlands, owns and operates the Uber App. Uber SA is a subsidiary company

of Uber BV and commercial arrangements between the two companies allow Uber SA to provide specified services to Uber BV. These include marketing, training and support services rendered on behalf of the holding company in South Africa.

Uber BV and Uber SA do not own any vehicles in South Africa. Uber contends that it only connects transportation providers via information technology (Sidak “Is Uber unconstitutional?” 2016 *CJI* 1 182). To access Uber, users simply have to download the App, create an account and input their credit card details (Moon “Uber: Changing the way the world moves” (2017) 3, available at <http://bit.ly/2IxPsUg>, accessed on 11 February 2018). There are three types of transportation providers. Firstly, there is the registered “partner” who owns, but does not drive, a vehicle that is registered with Uber BV. Secondly, there is the “partner-driver” who owns and drives a registered vehicle. Thirdly, there is the “driver” only, who does not own an Uber registered vehicle, but who is registered with Uber BV and drives for a registered partner. The driver is bound by Uber BV’s standard contracts, but the driver receives remuneration from the owner of the vehicle (para 1.4 of the Uber BV Services Agreement, available at <http://bit.ly/2GGbofx>, accessed on 19 February 2018).

Each driver creates a profile on the Uber BV website, uploads a valid South African driving license, attends a driver competency test and undergoes a screening and background check. The drivers then attend an information session at the office of Uber SA in Cape Town or at designated place of Uber SA (see <http://ubr.to/2pml86k>, accessed on 20 February 2018). During that session, drivers are provided with information on how to use the Uber App and how to maintain good ratings from users. The driver’s profile then is activated. The question before the courts have not been whether drivers are employees of the first or second categories of transportation providers (partner-drivers and partners), but whether they are employees of the Uber brand.

3 South Africa’s Uber decisions

In *Uber SA (LC)* Van Niekerk J considered a review application against a ruling pertaining to the employment status of Uber drivers issued by the CCMA on 7 July 2017. In *Uber SA (CCMA)*, the commissioner considered whether a number of drivers who were all “deactivated” by Uber for some reason were employees of Uber SA and were eligible to refer their unfair dismissal disputes to the CCMA.

From the facts before the CCMA, Uber BV and Uber SA emerged as two possible employers of the Uber drivers (*Uber SA (CCMA)* para 8). In essence, Uber SA denied that there was any contractual relationship between it and the drivers. They argued that all contractual relationships between the drivers and Uber existed between them and Uber BV and that they were not a party to the dispute. Uber SA further contended that the drivers were in any event independent contractors of Uber BV (*Uber SA (LC)* para 20).

Subsequent to the referral and conciliation of the dispute with Uber SA, the Uber drivers lodged an application for a joinder of Uber BV for the purpose of the arbitration proceedings. Based on *NUMSA v Intervolve (Pty) Ltd* [2015] 3 BLLR 205 (CC), in which the Constitutional Court held that in any unfair dismissal dispute employers not cited in the referral to conciliation cannot subsequently be joined in Labour Court proceedings, the CCMA held that it was not

possible to join Uber BV as a second employer at this stage of the proceedings (*Uber SA (CCMA)* para 4).

Having considered the facts, and despite the non-joinder of Uber BV, the commissioner held that Uber drivers operating in South Africa are employees of Uber SA as defined in section 213 of the LRA (*Uber SA (CCMA)* para 58). The effect of the ruling was that the CCMA had jurisdiction to arbitrate unfair dismissal claims referred to it by Uber drivers (*Uber SA (LC)* para 3). Given the nature of the test that applies in review proceedings where a jurisdictional ruling is at issue, the Labour Court had to decide whether the commissioner's decision was correct. The answer to that question depended on whether the drivers were employees of Uber SA (*Uber SA (LC)* para 65).

The Labour Court analysed the reasoning adopted by the CCMA to conclude that Uber drivers are employees of Uber SA. The court held that the commissioner relied mainly on the *Code of good practice: Who is an employee* ("the Code") which, according to the CCMA, in essence establishes a new test that depends on the "reality of the relationship" (*Uber SA (CCMA)* para 41). This test requires that, despite the form of the agreement, the decision-maker must consider the real relationship between the parties by taking a basket of factors into account to form a dominant impression. The commissioner made factual findings in relation to Uber in general, without differentiating between the legal entities Uber SA and Uber BV.

Firstly, the commissioner found that drivers render personal services and that the relationship between Uber and the driver would terminate upon the driver's death. They are engaged through their personal identity documents and licenses, drive in their own name and may not request other drivers to drive on their behalf (*Uber SA (CCMA)* para 43). Secondly, the relationship continues for an indefinite period until deactivated (para 44). Thirdly, drivers are subject to the control of Uber. In this regard, the commissioner took into account that even though drivers choose their hours of work, Uber regulates their productive capacity by setting strict performance standards in their Deactivation Policy. Through technology, even the movement of the automobile can be monitored to detect reckless driving. In this regard, item 37 of the Code provides that a "relevant factor would be the extent to which the employer exercises control over a decision to terminate the services of persons engaged by the sub-contractor" (paras 45 46). Fourthly, the commissioner found that the driver is "economically dependent on the ability to drive for Uber, an infinitely more powerful juristic person than the individual drivers" (para 48). Finally, Uber drivers form an essential part of Uber's organisation, as passengers are not interested in acquiring technology from Uber, but "want rides . . . and [the] app merely provides an extremely convenient and accessible tool for riders to get a lift" (para 49).

In a disappointing development, Van Niekerk J overturned the CCMA's ruling and rather tersely arrived at the opposite conclusion. *Uber SA (LC)* faulted the CCMA's decision on three main grounds. Firstly, the court relied on the somewhat controversial matter of *Universal Church of the Kingdom of God v Myeni* [2015] 9 BLLR 918 (LAC) ("*Universal Church*") where the Labour Appeal Court held that the existence of a contractual relationship between an employee and a putative employer is a necessary precondition to the existence of an employment relationship. In that instance, the court held that only after proving the presence of a contractual agreement should other tests, such as the LRA presumption as to who is an employee (s 200A of the LRA) be applied. Whilst

considering whether a preacher was an employee of a church, *Universal Church* held that “even during the ‘pre-section 200A’ era, the existence of an employment contract or contractual working arrangement was . . . [and] still is a prerequisite for the creation of an employment relationship” (paras 49–51).

Secondly, the court held that the CCMA was wrong to conflate Uber SA and Uber BV when it applied the different indicators of the reality test to Uber as a whole. The court surmised that the test should have been applied to Uber SA only. The court held that despite having turned down the request to join Uber BV and Uber SA as respondents, “the commissioner proceeded to make a jurisdictional finding oblivious to the material distinction drawn between Uber BV and Uber SA” (*Uber SA (LC)* para 81). This, the court held, was based on what the drivers had done in their answering affidavits when they interchangeably relied on Uber SA and Uber BV as “Uber” (*ibid*).

Thirdly, the court held that had the CCMA applied the Uber drivers’ building blocks for the existence of an employment relationship on Uber SA only, the commissioner should, on the drivers’ own version, have found that they had failed to prove the existence of an employment relationship (*Uber SA (LC)* para 98). For example, the drivers argued that Uber SA recruits and screens drivers. However, the record of proceedings suggested that the on-boarding process entails establishing an online profile on Uber BV’s website (para 84). The drivers contended that Uber SA assists them to obtain the necessary operating permits. However, the affidavits disclosed that the City of Cape Town’s requirement for a metered taxi operating license relates only to vehicle-owning partners and not to drivers (para 86). The fact that Uber SA trains drivers to use the Uber App merely refers to the support functions provided by Uber SA to Uber BV (para 87). Finally, the drivers argued that Uber SA is the entity that pays the partner-drivers. However, the facts indicate that Uber BV provides the digital payment platform and Uber BV operates a local bank account in South Africa under the name “Uber BV South Africa” (paras 89–90).

Van Niekerk J concluded that it is not sufficient to

“assert, as the drivers do, that ‘Uber’ is a valid designation for a well-known brand with a global presence, or that Uber SA holds itself out as Uber or that the same legal team represented . . . both Uber SA and Uber BV” (para 96).

Bearing the above in mind, Van Niekerk J held that the commissioner erred by failing to distinguish between Uber SA and Uber BV as separate legal entities. Had the commissioner done so she would have come to the conclusion that, on the drivers’ own version, they had failed to discharge the onus to establish the existence of an employment relationship with Uber SA (para 98).

Even though *Uber SA (LC)* only considered whether the drivers were employees of Uber, it left the question open whether Uber drivers may be involved in an employment relationship with Uber BV. The court held that the latter issue “is a matter that remains for decision on another day” (para 99). *Uber SA (LC)* unfortunately failed to take into account the interpretation clause in the Constitution of 1996; the definition of an “employer” under section 200B of the LRA; and a broader constitutional approach in relation to the interpretation of who is an employee.

5 Commentary

5.1 Constitutional interpretation

High-tech borderless networks and globalisation have undeniably resulted in rapid economic integration among countries across the world (ILO *Non-standard employment around the world: Understanding challenges, shaping prospects* (2016) 221; Van Staden *Identification of the parties to the employment relationship: An appraisal of teleological interpretation of statutes* (LLD thesis UP (2018) 193 243)). Uber's transportation system is an excellent example of this phenomenon. Despite the positive effects that technological advances may have on economic activity and growth in new jobs, they also have negative consequences. Complex networks make the problem of identifying the parties to the employment relationship a universal concern. There are strong arguments that it would have been fitting for *Uber SA (LC)* to examine the lessons learnt in other countries in order to inform the South African understanding of the rise and regulation of Uber.

Section 39(1)(b)–(c) of the Constitution makes it clear that when “interpreting the Bill of Rights, a court, tribunal or forum . . . must consider international law . . . and may consider foreign law”. Even though national circumstances pertaining to institutions may be diverse, international and foreign law should still serve as a useful, if not indispensable, interpretive aid (*Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) para 98). However, in *K v Minister of Safety and Security* 2005 6 SA 419 (CC) the Constitutional Court cautioned that it is important not “to equate legal institutions which are not, in truth, comparable” (para 34). The court held that “the approach of other legal systems remains of relevance to us” and “[i]t would seem unduly parochial to consider that no guidance, whether positive or negative, could be drawn from other legal systems’ grappling with issues similar to those with which we are confronted” (para 35). In *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 34 the Constitutional Court also warned that “it is important to be astute not to equate legal institutions which are not, in truth, comparable” as this would constitute “shallow comparison”.

Our argument is that there could hardly be a better example of an instance where the construct of legal institutions are so similar that it could go without comparison. As is illustrated by the cases below, Uber BV established a pattern of a mother company working in conjunction with local subsidiary companies in cities like New York and London. There can be no doubt that the decisions in other countries of the world would have enlightened our understanding of Uber concerning drivers engaged in their services. Therefore it is of concern that Van Niekerk J did not adopt a constitutional approach when he was referred to international research and case law and declined to consider these authorities (*Uber SA (LC)* para 2). Added to this, the court unfortunately did not provide any convincing reasons why it elected to disregard international rulings in this regard.

As stated by Isaac, technological advances have established a “legal void” in the grey area between employers and employees (“Disruptive innovation: Risk-shifting and precarity in the age of Uber” *Berkley Roundtable on the International Economy* (2014) 12, available at <http://bit.ly/2G0wur9>, accessed on 10 February 2018). Yet, despite this paradigm of uncertainty, *Uber SA (LC)* steered away from the murky waters of modern tests applied in the UK and the USA which relate to who an employee is during this technological age (Oxford

Research Group *The employment status of Uber drivers: A comparative report* (2017) 4, available at <https://bit.ly/2GK49pU>, accessed on 10 February 2018).

For example, in 2015 the District Court of California considered a class action in *O'Connor v Uber Technology, Inc* (ND Cal 2015) 82 F Supp 3d 1133 82F which was filed against Uber, alleging that the drivers were incorrectly classified as independent contractors. *O'Connor* applied the presumption of who is an employee and concluded that Uber drivers are employees until proven differently (1141–1145). The court relied on the California Supreme Court's multi-factor control test formulated in *SG Borello & Sons, Inc v Department of Industrial Relations* (1989) 48 Cal 3d 341 357 to determine the employee status of Uber drivers.

Also in 2015, the Californian Labour Commission in *Barbara Ann Berwick v Uber Technologies, Inc, A Delaware Corporation, and Rasier* 11-46739 EK ruled that an Uber driver was a company employee and not an independent contractor. The Labour Commission compared Uber drivers to pizza deliverers who are clearly employees despite often using their own vehicles to conduct a separate company's business. In *Uber Technologies, Inc v Barbara Berwick* CGC-15-546378 the Supreme Court of Appeal upheld the Labour Commission's ruling. The court confirmed that but for Uber and its subsidiary's intellectual property, Ms Berwick would not have been able to perform her work. The court also relied on the *SG Borello* factors and confirmed that the Uber driver was in fact an employee.

Following these decisions, California's Labour Commission, the Bureau of Labour and Industries of the State of Oregon ("BOLI") in October 2015 released a proactive advisory opinion regarding the employment status of Uber drivers (*Advisory opinion of the commissioner on the employment status of Uber drivers* (14 October 2015)). The opinion relied on the economic realities test, as set forth by the United States Department of Labour in determining worker classification under the Fair Labour Standard Act, 1938 29 USC. Having analysed the facts under each factor as applied to Uber drivers (including degree of control, worker's profit and loss, and extent to which work performed is an integral part of the alleged employer's business) BOLI declared that "under Oregon law . . . Uber drivers are employees". (See in this regard Keeton "An Uber dilemma: The conflict between the Seattle rideshare ordinance, the NLRA and for-hire driver worker classification" GLR (2017) vol 52.2 259, available at <http://bit.ly/-2tYLQYf>, accessed on 4 March 2018.)

In 2017, the New York State Unemployment Insurance Appeal Board in *AK, JH and JS v Uber Technologies Inc* ALJ case no 016-23858 ("*AK, JH and JS*") also held that three Uber drivers were employees and not independent contractors. The Board held that "Uber exercised supervision and control over substantial aspects of their work as drivers" and that "Uber did not employ an arms' length approach to the claimants" which would typically be present in an independent contractor relationships (15).

Similar to the situation in the USA, Uber drivers have also been labelled as employees in the UK in *Aslam, Farrar v Uber BV, Uber London Ltd and Uber Britannia Ltd* Case no 2202550/2015 ("*Aslam (ET)*"). In this matter, current and former Uber drivers in the London area brought various claims in the Employment Tribunal, which required them to be "workers" in terms of section 230(3)(b) of the Employment Rights Act, 1996 ("ERA"), regulation 36(1) of the

Working Time Regulations, 1998 (“WTR”) and section 54(3) of the National Minimum Wages Act, 1998 (“NMWA”). *Aslam* (ET) concluded that any Uber driver who had the Uber App switched on, and who was within the territory in which they were authorised to work, was willing and able to accept assignments from Uber London Ltd (“ULL”) under a “worker” contract. In the alternative, the Employment Tribunal held that Uber drivers should be considered workers, supplied by Uber BV to Uber London Ltd or to passengers pursuant to extended definitions contained in labour legislation (see s 43K of the ERA, s 34 of the NMWA and reg 36(1) of the WTR).

Similar to the reasoning adopted by *Uber SA* (LC), Uber argued on appeal before the Employment Appeal Tribunal in *Uber BV, Uber London Ltd and Uber Britannia Ltd v Aslam, Farrar* UKEAT/0056/17/DA (“*Uber BV* (EAT)”) that there was no contract between the claimants and ULL. There were only agreements between the drivers, Uber BV and the passengers and this was inconsistent with the existence of any worker relationship. In dismissing the appeal, *Uber BV* (EAT) held that *Aslam* (ET) did not err in its conclusions when rejecting the contention that the contract was between driver and passenger only. Based on the factual reality of the situation, the court *a quo* was correct to conclude that there was an agreement between ULL and the drivers who personally undertook work for ULL as part of its business of providing transportation services to passengers in the London area (*Uber BV* (EAT) para 116).

From the above cases it seems that the courts in the USA and in England are prepared to go beyond arguments that rely on the existence of a contractual relationship. Such an approach, it seems, may be more apposite in the technological era. Today, institutions build their businesses on computer programmes and mobile apps and, like Uber, they declare that they are a technology company rather than one that offers a transportation service.

5.2 Definition of “employer”

In contrast to developments in the USA and in the UK, Van Niekerk J in *Uber SA* (LC) was at pains to unravel the intertwined relations between Uber BV, Uber SA and the Uber drivers to reach the conclusion that there was no contractual relationship between the two last-mentioned parties. This occurred despite the fact that the drivers seemed to be uncertain about whom they should cite as employer in the proceedings against Uber. *Uber SA* (LC) rejected the view of the drivers that “Uber SA holds itself out as Uber” and “‘Uber’ is a valid designation for a well-known brand with a global presence” (para 96).

Both locally and abroad, labour law scholars have argued that difficulties surrounding the scope of labour law’s coverage can be resolved, or at least be better understood, by shifting the focus of the debate from the question who is an employee to the question who is an “employer” (Davies and Freedland “The complexities in the employment enterprise” in Davidov and Langille (eds) *Boundaries and frontiers of labour law – Goals and means in the regulation of work* (2006) 274–293). The South African courts on occasion have also unravelled schemes where one company, “usually an empty shell”, undertakes the administrative tasks of an employer (*August Lapple (South Africa) v Jarret* [2003] 12 BLLR 1194 (LC) (“*August Lapple*”); *Footwear Trading CC v Mdlalose* [2005] 5 BLLR 452 (LAC) (“*Mdlalose*”); Van Niekerk and Smit *Law@work* (2018) 83–85).

In 2005, 10 years before the introduction of a definition of “employer” into South African labour legislation, the Labour Appeal Court in *Mdlalose* para 39 concluded “that Fila and Footwear were separate legal personalities but the effect of the machinations of Kokin and his staff was such that they were in effect joint or co-employers”. In line with the understanding that complex models may obscure the true identity of employers, a definition of “employer” was for the first time introduced into the LRA in January 2015 (Labour Relations Amendment Act 6 of 2014). Section 200B(1) of the LRA provides:

“For the purposes of this act and any other employment law, ‘employer’ includes one or more persons who carry on associated or related activity or business by or through an employer if the intent or effect of their doing so is or has been to directly or indirectly defeat the purposes of this act or any other employment law.”

This section seeks to put an end to complex schemes between multi-faceted employers, such as Uber BV and Uber SA, which could potentially circumvent the obligations established by labour legislation (Grogan *Workplace law* (2017) 20). It is argued that without the establishment of Uber SA as a subsidiary company, Uber BV would have found it extremely difficult to operate in South Africa. *Ex parte Gore* 2013 2 SA 437 (WCC) para 28 accepted the principle that in some instances it may be appropriate to look behind complex company structures to determine the true state of affairs. The court held that:

“A consideration of the South African authorities shows that despite the request affirmation that the courts enjoy no general discretion to do so merely because it would be just and equitable, courts will ignore or look behind the separate legal personality of a company where justice requires it.”

A powerful argument could be made that *Uber SA* (LC) should have relied on section 200B of the LRA to determine whether the two entities should be deemed to be one employer or joint employers. The court could have taken a leaf from *Mdlalose* where the court was prepared to pierce the veil and accept that the two entities were in fact “joint or co-employers”. As such, the section provides that the term “employer” could include one or more persons who carry on “associated or related activity”. It is highly probable that the Uber BV and Uber SA agreements were crafted in such a way as to specifically circumvent employer responsibilities as far as possible. Unfortunately, the South African Labour Court was not prepared to consider this possibility by considering foreign decisions dealing with the same company (Uber BV) and local companies similar to Uber SA.

The section further provides for joint and several liability regarding employer obligations when simulated corporate structures are established (s 200B(2) of the LRA). Uber BV formed a subsidiary company in South Africa through Uber SA and the two entities should not, in our view, be separated from their joint liability in their dealings with Uber drivers. Uber drivers should not be disadvantaged by the denial of Uber SA that it has any contractual relationship with them. It would be a sad day should overseas companies with employees in South Africa be permitted to circumvent South African labour laws by virtue of their foreign status even though they have a close relationship with a local subsidiary company (*August Lapple* para 48).

Although this definition has drawn little scholarly attention thus far, it is disappointing that *Uber SA* (LC) did not seize this opportunity to rely on the definition of “employer” to include rather than exclude entities which establish

complex arrangements that could lead to the curtailment of social protection of workers engaged in modern forms of work.

5.3 A broader approach

Uber SA (LC) missed a golden opportunity to establish a new framework for the debate pertaining to employees engaged in the gig-economy. Taking account of the developments pertaining to the extension, rather than the limitation of who are and who are not employees, the following road markers emerged.

Firstly, in 1999 the Constitutional Court in *SA National Defence Union v Minister of Defence* 1999 ILJ 2265 (CC) (“*SA National Defence Union*”) held that uniformed soldiers are “akin” to employees and that they have the right to establish trade unions.

Secondly, in 2003 a rebuttable presumption as to who is an employee was for the first time introduced into section 200A of the LRA and section 83A of the Basic Conditions of Employment Act 75 of 1997. This was partly in response to the “casualization” and “externalization” of work which rapidly grew in post-apartheid South Africa (Theron “Employment is not what it used to be” 2003 ILJ 1247 1271; Van Niekerk and Smit 65).

Thirdly, in 2008 the Labour Court in *Discovery Health v CCMA* [2008] 7 BLLR 633 (LC) para 42 (“*Discovery Health*”) held that irregular migrants may be classified as employees for the purpose of social protection. The court held that even if the contract with the worker was invalid, the definition of “employee” does not necessarily presuppose a valid contract of employment and that they fell under section 23(1) of the Constitution’s right to fair labour practices.

Fourthly, also in 2008, the Labour Appeal Court in *State Information Technology Agency (SITA) (Pty) Ltd v CCMA* [2008] 7 BLLR 611 (LAC) para 12 (“*State Information*”) held that the focus has shifted from the existence of a formal contract of employment to the presence of an employment relationship. In finding that the LRA did apply, the court reduced the tests to three primary criteria for the employment relationship, namely, an employer’s right to supervision and control; whether an employee forms part of the employer’s organisation; and whether the employee is economically dependent upon the employer.

Finally, in 2008 the Labour Appeal Court in “*Kylie*” v CCMA [2010] 7 BLLR 705 (LAC) held that despite the fact that Kylie was a sex worker with no valid contract of employment she was entitled to unfair dismissal protection under the LRA. This, the court held, is justified in the constitutional framework which establishes a right to fair labour practices for “everyone” in terms of section 23(1) of the Constitution. It concluded that Kylie was in an employment relationship despite the fact that there was no valid contract of employment.

What is clear from this sequence of pointers is the fact that there has been a trend to expand, rather than limit, the scope of application of labour protection to workers in the grey area between formal employment and externalised workers. Therefore it is argued that the decisions in *Universal Church* and the recent *Uber SA (LC)* came as somewhat of a surprise when reliance was placed on the existence of a formal contractual arrangement as prerequisite for labour law protection. This constitutes the adoption of a narrower contractual approach, rather than a broader constitutional way of reasoning.

6 Conclusion

This contribution argues that *Uber SA (LC)* may have followed the wrong direction by finding that Uber drivers are not employees because there is no formal contractual arrangement between Uber SA and the drivers. This misgiving can largely be ascribed to the narrow outlook adopted by the Labour Appeal Court in *Universal Church*. It would have been appropriate for Van Niekerk J rather to adopt a broader constitutional approach. This could have entailed a consideration of foreign authorities such as *O'Connor* and *Uber BV (EAT)*; delving into the question of who the employer is rather than focusing on who is an employee (s 200B of the LRA); and adopting a broader constitutional approach such as that taken in *SA National Defence Union*, *Discovery Health*, *State Information* and “*Kylie*”.

It is suggested that when *Uber SA (LC)* is considered on appeal, the court should take cognisance of foreign law and disregard a strict reliance on the existence of a formal employment agreement between Uber SA and the drivers. It is also suggested that Uber should be seen for what it is. It is not a mere technological firm, but provides transportation services through an intertwined holder company and subsidiaries in various countries. This interwoven institution should not be allowed to hide from its employer responsibilities because of its complex structures which cause uncertainty in the minds of drivers and their passengers.

STEFAN VAN ECK
NDIVHUWO ENERST NEMUSIMBORI
University of Pretoria