Re-evaluating the Employment Status of Uber Drivers in South Africa: Lessons from the United Kingdom and New Zealand

Kamalesh Newaj
https://orcid.org/ 0000-0001-6311-998X
Department of Mercantile Law,
University of Pretoria
kamalesh.newaj@up.ac.za

Abstract

South Africa (SA), like the United Kingdom (UK) and New Zealand (NZ), makes use of the services of Uber, which is a taxi or transportation service that connects the transport provider and passengers via a mobile application. Uber has defined itself as a technology company, as opposed to a transportation company, to avoid attracting employer status. In 2018 the Labour Court (LC) in SA was called upon to determine whether Uber drivers are independent contractors or employees. The definition is vital because employee status confers legislative protection, such as the right not to be unfairly dismissed. Somewhat surprisingly, the LC failed to come to the aid of the drivers, despite the Commission for Conciliation, Mediation and Arbitration (CCMA) affording them employee status. The UK and NZ similarly had to contend with disputes from Uber drivers. In the UK, the Supreme Court (SC) confirmed the findings of the Employment Tribunal, affording the drivers worker status. The Employment Court in NZ similarly declared drivers as employees. Considering the growth in the use of Uber and the growing traction of other forms of platform work, this article seeks to critically evaluate the South African position, considering the recent decisions in the UK and NZ.

Keywords: Workers; employees; Uber; Labour Relations Act; Employment Rights Act; Commission for Conciliation, Mediation and Arbitration; Employment Tribunal; technology; transportation

Introduction

Uber is an international transportation service brand that connects the transport provider and passenger using a mobile application.[1] It has been operating in South Africa (SA) for nearly ten years, and the number of Uber drivers has increased substantially since its inception.[2] The services of an Uber driver is commonly called platform work or employment in the 'gig' economy.[3]

A fundamental concern around platform work is that those providing the service, in this instance Uber drivers, are regarded as independent contractors instead of employees or workers.[4] Therefore, Uber defines itself as a technology company and not a transportation company.[5] Thus the Uber drivers are not furthering the interests of the Uber technology company, but are actually self-employed and are regarded as independent contractors. However, courts in the United Kingdom (UK) and New Zealand (NZ) do not agree with this position. In *Uber BV v Aslam,*[6] the Supreme Court (SC) aided Uber drivers. They conferred worker status on the drivers and found that the employer was the local associate, Uber London. In *E TU INC & ANOR v Rasier Operations BV & Ors*,[7] the Employment Court similarly found in favour of the Uber drivers, holding both Uber BV (the parent company) and the local affiliate (Rasier New Zealand Limited) to be joint employers. South African courts are yet to afford the same protection to Uber drivers.[8] Indeed, the standing of Uber drivers is largely obscured by the role of Uber BV and its local affiliate, Uber SA.[9] Encouraged by the judgment in the UK court, Uber drivers in South Africa are considering a class action to assert their rights.[10]

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1 Kgomotso Mokoena, 'Are Uber Drivers Employees? A Look at Emerging Business Models and Whether They Can be Accommodated by South African Labour Law' (2016) 37 ILJ 1574.

2 Isaiah Marcano, 'E-Hailing and Employment Rights: The Case for an Employment Relationship between Uber and its Drivers in SA' (2018) 51(1) Cornell International Law Journal 274.

3 Darcy du Toit, 'Platform Work and Social Justice' (2019) 40 ILJ 1 and 3.

4 Darcy Du Toit, Sandra Fredman and Mark Graham, 'Towards Legal Regulation of Platform Work: Theory and Practice' (2020) 41 ILJ 1497. See also Du Toit (n 3) 1 and 4.

5 *Uber BV and others v Aslam and others* [2021] UKSC 5, para 43 and *Uber SA Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* [2018] 4 BLLR 399 (LC), para 26.

6 *Uber BV and others v Aslam and others* [2021] UKSC 5.

7 [2022] NZEmpC 192 EMPC 230/2021.

8 This can be gleaned from the judgments of *Uber SA* (n 4) and *NUPSAW obo Mostert v Uber SA Technology Services (Pty) Ltd and Others* [2018] JOL 55085 (CCMA).

9 Stefan van Eck and Ndivhuwo Enerst Nemusimbori, 'Uber Drivers: Sad to Say, But Not Employees of Uber SA' (2018) 81(3) THRHR 478.

10 Webber Wentzel, 'Uber Drivers in SA: Employees or Independent Contractors?' <https://www.webberwentzel.com/News/Pages/uber-drivers-in-south-africa-employees-or-independent-contrac tors.aspx> accessed 10 October 2022.

Platform workers will undoubtedly face other challenges when future technological advances are taken into consideration.[11] Some estimates suggest that by 2025, digital platforms could account for a third of all labour transactions worldwide, which would involve up to 540 million workers.[12] It cannot be denied that information technology, which shapes platform work, will facilitate better access to meaningful work. However, worker exploitation remains a concern.[13] Because foreign law enjoys constitutional recognition and is regularly applied by South African courts,[14] consideration of the latest judgments delivered by the UK and NZ courts would assist the SA judiciary in dealing with future challenges for Uber drivers and other categories of platform work. While the UK and NZ are not the only jurisdictions that have awarded positive outcomes for Uber drivers,[15] they were chosen because the statutory frameworks that govern individual employment rights are comparable to that of South Africa.[16] Against this background, this article seeks to review the South African position considering the recent decisions in the UK and NZ.

An Overview of the South African Legal Framework

The starting point in understanding SA's legal framework is the Constitution.[17] The preamble to the Constitution explains that the supreme law seeks to establish a society

11 As explained by Van Eck and Nemusimbori (n 9) at 480 it is now a common occurrence for organisations to build their businesses on 'computer programmes and mobile applications' and to subsequently define themselves as technology companies. See also International Labour Office – Geneva, *Work for a Brighter Future – Global Commission on the Future of Work*, (ILO 2019) 44. See also Kitty Malherbe, 'Somewhere Uber the Rainbow: Seeking New Ways of Regulating New Forms of Work in SA' (2018) 4 Revue de Droit Comparé du Travail et de la Sécurité Sociale 216 and 218, URL: <http://journals.openedition.org/rdctss/1818> accessed 2 November 2022.

12 Darcy du Toit and others, 'Code of Good Practice for the regulation of platform work in SA' (The Fairwork Project October 2020) 30.

13 Du Toit (n 3) at 10. See also International Labour Office – Geneva (n 11) 43–44.

14 The Constitution of the Republic of SA 1996 s 39(1)(c). Christa Rautenbach, 'The South African Constitutional Court's Use of Foreign Precedent in Matters of Religion: Without Fear or Favour?' 2015 (18)5 PER/PELJ 1550 explains that since the establishment of the CC in 1994 until the end of 2011, the court handed down 437 judgments and in more than half of these judgments (223 in total) cited a substantial number of foreign cases (3 047 in total). At 1549 the author refers to the sentiments expressed by the CC in *S v Makwanyane* about the value of foreign authority.

15 Kenneth Thornicroft, 'Uber Technologies Inc v Heller: Implications for Ride-Hailing Drivers in British Columbia' (2021) 79(3) Advocate (Vancouver) 362 discusses the position in Canada. Silvia Lattova, 'Online Platforms and 'Dependent Work' after Uber' (2021)15 Masaryk University Journal of Law and Technology 209 refers to the position in Switzerland. Avinash Govindjee, 'Extending Social Protection in the Digital Age: The case of transportation network company drivers in SA' (2020) 83 THRHR 57–58 discusses the position in the USA.

16 Both jurisdictions provide a statutory definition of 'employee,' which played an important role in deciding whether Uber drivers were employees, similar to the South African position. Furthermore, like SA both countries are common-law jurisdictions as opposed to civil jurisdictions and are unitary as opposed to federal states. Importantly, SA has close historical ties to the UK, resulting in the English legal system having influenced the development of South African law.

17 The Constitution (n 14).

based on democratic values, social justice, and fundamental human rights.[18] To give effect to these values, several socio-economic rights are provided for in the Bill of Rights (Chapter 2 of the Constitution), which are part of the broader concept of human rights.[19] Labour relations rights are contained among the socio-economic rights.[20] Section 23(1) states that 'everyone has the right to fair labour practices.'[21] The Constitution prescribes that its spirit, purport, and objects must be promoted when interpreting legislation.[22]

The primary pieces of labour legislation are the Labour Relations Act (LRA),[23] the Basic Conditions of Employment Act (BCEA)[24] and the National Minimum Wage Act (NMWA).[25] The LRA's stated purpose is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the four primary objectives of the Act.[26] The first of these objectives is to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution.[27] Therefore, a purposive interpretation of the LRA is called for, requiring LRA provisions to be broadly construed to give effect to the Constitution and the LRA's purpose.[28]

The primary protection provided to individual employees by the LRA is the right not to be unfairly dismissed[29] and the right not to be subjected to an unfair labour practice.[30] These safeguards are limited to persons classified as employees.[31] An employee is defined as '(a) any person, excluding an independent contractor, who works for another

18 ibid preamble.

19 Christoff Heyns and Danie Brand, 'Introduction to Socio-Economic Rights in the SA Constitution' (1998) 2 LDD 153, 157.

20 ibid 163.

21 The other labour rights embodied in section 23 are the right to freedom of association, the right to engage in collective bargaining and the right to strike.

22 The Constitution (n 14) s 39 (1)(a) of. See also ss 39(1)(b) and (c) which emphasises the importance of international and foreign law. It requires that a court, tribunal, or forum must consider international law; and may consider foreign law when interpreting socio economic rights.

23 The Labour Relations Act 66 of 1995.

24 The Basic Conditions of Employment Act 75 of 1997.

25 The National Minimum Wage Act 9 of 2018.

26 Labour Relations Act 66 (n 23) s 1.

27 ibid s 1(a). The other three objectives as stated in sections 1(b), (c) and (d) is to give effect to the obligations incurred by SA as a member state of the ILO, provide a framework within which parties may collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest, and the establishment of workplace fora and the effective resolution of labour disputes.

28 ibid s 3(b). Seealso ss 61 and 62 of the 'Code of Good Practice: Who is an Employee?' GN 1774 1 December 2006. See also Paul Benjamin, 'An accident of History: Who Is (and Who Should Bbe) an Eemployee under SA Labour Law' (2004) 25 ILJ 798–799.

29 Labour Relations Act 66 (n 23) s 188(1) of the requires that a dismissal must be both procedurally and substantively fair.

30 An unfair labour practice is defined in s 186(2)(b) of the Labour Relations Act (n 23). It essentially protects employees against unfair conduct of the employer during employment.

31 ibid s 185 states that every employee has the right not to be unfairly dismissed.

person or for the state and who receives, or is entitled to receive any remuneration; and (b) any other person who in any manner assists in carrying on or conducting the business of an employer.'[32] The BCEA sets out the minimum terms and conditions that an employer is required to provide.[33] It similarly applies to employees and details the same definition of 'employee' as encompassed in the LRA.[34] To be regarded as an employee, a person must essentially work for another person in exchange for remuneration or assist in conducting another person's business in any manner.

Fundamentally, the definition of 'employee' excludes independent contractors to draw the line between employment and self-employment.[35] However, the dividing line between employees and independent contractors is not always clear,[36] owing to the phenomenon of 'disguised employment,' which is a significant reality in the South African labour market.[37] It is said to occur 'when the employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee.'[38] For this reason, additional measures have been included in the LRA and BCEA. Section 200A of the LRA[39] provides for a rebuttable presumption. It states that 'until the contrary is proved, a person, who works for or renders services to any other person, is presumed, regardless of the form of the contract, to be an employee' if one of seven factors is present. These are:

- whether the manner in which the person works is subject to control;
- whether the person's hours of work is subject to control;
- whether the person forms part of the organisation;
- whether the person worked an average of forty hours per month over three months;
- whether the person is economically dependent on the other;
- whether the person is provided with tools of the trade or work equipment; and
- whether the person only renders services/works for one person.

The provision aims to address disguised employment and to entrench the need for a purposive construction of the statutory definition of 'employee.'[40]

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32 ibid s 213.
33 Andre van Niekerk, Nicola Smit, Marylyn Christianson, Marie McGregor and Stefan van Eck, *Law@Work* (5th edn, Juta 2019) 105–106.
34 Basic Conditions of Employment Act (n 24) ss 1 and 3.
35 Benjamin (n 28) at 789. See also Govindjee (n 15) at 52.
36 Van Niekerk (n 33) at 59–61. See also Darcy du Toit, Shane Godfrey and Carol Cooper, *Labour Relations Law A Comprehensive Guide* (6th edn, Lexis Nexis 2015) 90.
37 Code of Good Practice (n 28) s 30. See also Benjamin (n 28) 789 and 794.
38 Employment Relationship Recommendation, 2006 (No 198) at 2–3.
39 Basic Conditions of Employment Act (n 24) s 83A.
40 Benjamin (n 28) 802.

In addition to the above, the Code of Good Practice: Who is an employee? (the Code) was issued in terms of the LRA.[41] The Code aims to promote clarity and certainty in awarding employee status and assist in identifying disguised employment.[42] The Code, apart from furnishing further details on the seven factors stipulated in section 200A,[43] expressly emphasises that a contrac's reference to an individual not being an employee or being an independent contractor must not be taken as conclusive proof of the person's status.[44] It further explains the dominant impression test the South African courts have applied for many years.[45] This test requires an evaluation of all aspects of the contract and the relationship, which should then enable the decision-maker to classify the relationship as one of employment or independent contracting based on the dominant impression formed.[46] Essentially, the objective is to discover the true relationship between the parties, thus giving precedence to the substance of the relationship and not its form.[47]

In *State Information Technology Agency v CCMA* (*Sita)*,[48] the court acknowledged that the existence of an employment relationship and not an employment contract had become the focal point.[49] An employment relationship was established based on three primary criteria, referred to as the 'reality test.' This was the exercise of supervision and control by the employer, the fact that the employee formed an integral part of the organisation and the employee's economic dependence on the employer.[50] Relying on the legal principles set out in *Sita*, the LC in *Workforce Group v CCMA*[51] stated that 'the terms of any agreement between the parties, the labels that they use to define their relationship and the use of any vehicle through which services are rendered by one to the other are of no consequence – what matters is the reality of the relationship between

41 Labour Relations Act 66 (n 23 s 200A(4) requires NEDLAC to prepare and issue a code that sets out guidelines for determining whether persons are employees.

42 Code of Good Practice (n 28) s 2.

43 ibid s 18.

44 ibid s 16.

45 This test is discussed in s 27 of the Code of Good Practice (n 28). The test was first applied in *Smit v Workmen's Compensation Commissioner* (1979)1) SA 51 (A), wherein it is explained that there are six factors that must be considered in line with the dominant impression test. These are the rendering of personal services; personal performance of the services; discretion of employer regarding when to make use of the services; right of control by the employer through the issuance of lawful commands and instructions which the employee must comply with; termination of the contract on the death of the employee; and termination of the contract on expiration of the period of service.

46 The dominant impression test applies to employees who earn above the income threshold, which is currently set at R224 080.48 per annum, as the presumption in s 200A is only applicable to employees earning less than the threshold.

47 Code of Good Practice (n 28) s 28.

48 [2008] 7 BLLR 611 (LAC).

49 *Sita* (n 48) para 10. See also Benjamin (n 28) 787 where it is explained that 'factors such as globalization, deregulation and technological change have combined greatly to increase the variety of forms of employment.'

50 ibid (n 48) paras 10 and 14.

51 *Workforce Group v CCMA* (2012) 33 ILJ 738 (LC).

them.'[52] The reality test is more progressive and, to some extent, addresses the criticisms levelled against the dominant impression test, notably that it is not 'a fully-fledged "multifactorial" test.'[53]

Based on court decisions such as *Discovery Health v* CCMA (*Discovery Health*)[54] and *Kylie v CCMA*,[55] there was a common understanding by the Labour Court (LC) and Labour Appeal Court (LAC) that an employment contract did not underpin an employment relationship. These conclusions are consistent with an interpretation of the LRA definition of 'employee' through the prism of the constitutional right to fair labour practices. It was stated in *Discovery Health* that 'the protection against unfair labour practices established by s 23(1) of the Constitution is not dependent on a contract of employment. Protection extends potentially to other contracts, relationships, and arrangements in terms of which a person performs work or provides personal services to another.'[56]

Disappointingly, the LAC in *Universal Church of the Kingdom of God v Myeni* (*Myeni*)[57] concluded that the words 'regardless of the form of the contract' contained in section 200A meant that the presumption only applied if there was an employment contract or some form of contractual arrangement in place.[58] In this case, despite there being no contract of employment in place, there was a clear relationship between the parties, and the respondent was able to satisfy more than one of the requirements set out in section 200A.[59] An employment relationship should have been deduced from the substance or reality of the relationship. However, the LAC was unwilling to do this despite the broad definition of 'employee,' which does not refer to a contract of employment, coupled with the progressive legal principles endorsed by the judiciary up to that point. This was a step back for the established principles, which attracted justifiable criticism.[60] Notably, the LAC did not engage with the constitutional right to fair labour practices. Instead, by adopting a narrow interpretation of section 200A, the LAC overturned the Commission for Conciliation, Mediation and Arbitration (CCMA)

52 ibid para 6.

53 Code of Good Practice (n 28) s 30. See also Benjamin (n 28) 793 and 798.

54 *Discovery Health Limited v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 1480 (LC).

55 *Kylie v Commission for Conciliation Mediation and Arbitration and Others* (2010) 31 ILJ 1600 (LAC).

56 *Discovery Health* (n 54) para 41. Similarly in *Kylie* (n 55) paras 22, 25 and 26, the LAC found that s 23 of the Constitution applies to a person engaged in illegal employment as it is premised on the existence of an employment relationship and not on the existence of a contract of employment.

57 *Universal Church of the Kingdom of God v Myeni and Others* (2015) 36 ILJ 2832 (LAC).

58 ibid para 36.

59 ibid paras 9, 17 and 20.

60 Lux Lesley Kubjana and Bongani Khumalo, 'A Rose By Any Other Name Would Smell as Sweet: Universal Church of the Kingdom of God v Myeni & Others' (2015) 36 ILJ 2832 (LAC)' (2017) SA Merc LJ 140, 145–146 and 151. See also Van Eck and Nemusimbori (n 9) 476.

decision which awarded employee status. This overlooked the purpose of section 200A, which is to protect vulnerable workers against disguised employment.

Considering the legislative provisions that exist and the tests that the judiciary has developed, SA's legal framework may be described as progressive. It provides a good level of labour law protection, and even though its protection is limited to those classified as employees or workers,[61] these definitions are sufficiently broad in nature and have been interpreted as such, albeit for *Myeni*.

With this foundation in mind, what follows is a discussion of the decisions of the CCMA and the LC with regard to Uber drivers.

The South African Case

The CCMA Award

Several Uber drivers were deactivated for one reason or another, leading to the referral of unfair dismissal disputes to the CCMA, which were consolidated.[62] The applicants fell into two categories, 'partner drivers' and 'drivers only.[63] A 'partner driver' was described as an individual who owned the vehicle and may also have driven the vehicle personally. In contrast, a 'driver only' was a person who drove the vehicle of a 'partner driver.'[64]

The applicants' referral form categorised the employer as Uber. However, the CCMA identified the employer as Uber SA[65] and denied the request made for the joinder of Uber BV.[66] The CCMA considered the jurisdictional challenge that Uber SA launched, namely that its drivers were not its employees.

Uber SA emphasised that notwithstanding the contracts between the drivers and Uber BV, these were not employment contracts but independent contracting agreements. Furthermore, Uber SA was not a party to these contracts.[67] Significantly, the agreement

61 National Minimum Wage Act 9 2018 ss 1, 2 and 3 explains that it serves to advance economic development and social justice by improving the wages of the lowest paid workers and protecting workers from unreasonably low wages. A worker is defined as any person who works for another and who receives, or is entitled to receive, any payment for that work whether in money or in kind.

62 *Uber SA Technological Services (Pty) Ltd / National Union of Public Service and Allied Workers and South African Transport and Allied Workers Union obo Morekure and others* [2017] 11 BALR 1247 (CCMA) paras 3, 8 and 10.

63 ibid paras 9 and 12.

64 ibid para 11. It must be noted that while this case dealt exclusively with 'partner-drivers' and 'drivers only' there is a third category in SA, which is called 'partner only.' This is someone who owns one or more vehicles but does not drive. It must further be noted that the ruling made use of the word driver to classify both groups in dispute, it was only when an aspect applied specifically to partner-drivers, that this term was used.

65 ibid paras 1 and 10.

66 ibid para 4.

67 ibid paras 1, 10 and 24.

did not legally obligate a driver to drive or use the Uber application. Drivers were free to work whenever they liked and were not prevented from working for other companies, or competitors. It was clarified that Uber did not supply the vehicle and did not carry the associated expenses of the vehicle, which was an essential tool of the trade. Importantly, the risk of profit or loss was borne by the partner-driver as an independent contractor. A partner-driver could employ a driver to drive, and drivers were free to move from one partner-driver to another. Essentially, the rider contracted with the driver and not with Uber, resulting in drivers being independent contractors of Uber BV and the riders they transported. The fee deducted by Uber was defined as compensation for allowing drivers to utilise the Uber application.[68]

The applicants argued they were not independent contractors as the riders did not contract with them directly; they contracted with Uber. They maintained that Uber exercised control over them by requiring them to perform their tasks personally; controlling their conduct and how they did their work through a system of ratings; by controlling the conditions under which business was done, including pricing and the number of drivers in a city or at specific locations. The ultimate exercise of control was Uber's authority to deactivate drivers and prevent them from earning an income. They regarded the Uber office in Cape Town as the face of Uber as drivers actively engaged at that office, and it was from there that they received communication.[69]

The CCMA acknowledged that the contracts were concluded with Uber BV. It further recognised that the agreement signed was of a detailed nature and defined partner drivers as independent contractors. However, it took cognisance of the role played by Uber SA in the onboarding process. This entailed facilitating the registration of drivers on the Uber application; being the custodian of the documents that partner drivers had to submit (identity and status of the driver and proof of the relevant licence); facilitating the approval of the vehicle to be used by the drivers; producing a standard business plan for the partner-drivers; and facilitating a training or information session at the Uber offices in Cape Town. It was trite that for a driver to become active and start driving, they had to meet all the requirements and accept the terms of the agreement.[70]

The CCMA detailed the working arrangements between the drivers and Uber. The salient features are:

- Uber deducted the fare from the rider. It deducted its fee from this fare and paid the balance to the partner driver. The partner-driver, where they were not the driver, could deduct a fee for using their vehicle, and the driver received the balance from the partner-driver.

68 ibid para 25.
69 ibid paras 27–30.
70 ibid paras 13–15 and 50.

- Even though a driver who accepted a trip could cancel it, drivers were required to avoid cancelling more than the average (for the city in question) to prevent being deactivated.
- Uber sets performance standards in the form of an average rating by riders. Drivers were required to maintain an average rating of 4.3 (specifically for Cape Town, which is where the applicants operated) to avoid deactivation.
- Prior to deactivation, the driver was advised that their average rating by riders had fallen or that they had higher cancellations than average. If there were no improvements following the advice, the result would be a notification to the driver that they were de-activated.

If a driver was in dispute with Uber, the laws of the Netherlands applied, and the submission of the dispute to the International Chamber of Commerce for Mediation and Arbitration could resolve disputes.[71]

The commissioner considered the definition of 'employee' provided for in section 213 of the LRA. She found that part b) of the definition was broad enough to include Uber drivers. The dominant impression and reality test was highlighted, and it was surmised that a decision maker is required to look beyond the form of the contract into the real relationship between the parties to determine whether someone was an employee.[72] This led the CCMA to find that drivers *rendered personal services* as they had to be onboarded personally with the necessary personal details, licenses, and applications. Where the driver complied with the requirements, the relationship was found to be *indefinite*. Drivers were held to be *subject to the control of Uber* as a driver that did not meet the required standards was effectively dismissed. Even though there was no direct or physical supervision, Uber's technology exercised control.[73]

The commissioner rejected, as a fiction, the contention that the rider contracted directly with the driver for each trip. She explained that the riders chose Uber to provide them with transportation through one of its drivers and had no interest in or say over which driver arrived, and the driver had no say over the fare and was not aware of the destination until the rider was picked up. The driver had minimal knowledge of the rider's personal details and was prohibited from making any subsequent direct contact with the rider in terms of the service agreement.[74]

The CCMA acknowledged the argument that partner-drivers exercised control over 'drivers only'. However, it found that this control was limited to the extent that the partner-driver controlled the car and the terms on which it was used for driving. Uber still retained control over the performance of each driver, and it had the ultimate power

71 ibid paras 15–22.
72 ibid paras 36–41.
73 ibid paras 43–46.
74 ibid para 47.

to deactivate a driver, thereby depriving him/her of the opportunity to work and earn an income.[75]

The afore-mentioned factors led to the conclusion that drivers (both drivers and partner-drivers) were by no means independent or running their own transportation businesses. They were very much at the mercy of Uber and economically dependent on the ability to drive for Uber. They were an essential part of Uber's organisation. Notably, the CCMA found that even though Uber BV provided the legal contracts; the technology; and undertook the collection and payment of monies, the relationship between drivers and Uber BV was distant and completely anonymised. Therefore, it was Uber SA that was the employer. Uber SA appointed drivers; assisted them in obtaining the necessary licenses; approved the vehicle they would drive; and were the ones with whom the drivers engaged and occasionally negotiated.[76]

The CCMA explained that it chose to adopt a broad and generous approach to the definition of 'employee' to give effect to the constitutional right to fair labour practices and to constitutional values, notably the need to promote social justice. It clarified that the promotion of social justice involved the balancing of power between those with resources and those who were in a weaker position in society. It required protecting the rights of the vulnerable and making it accessible for them to enforce their rights, which Uber BV made impossible. Therefore, an interpretation which promoted social justice had to favour the drivers.[77] The CCMA fully appreciated the fact that Uber BV provided the application and generated the contracts. However, it could not overlook that Uber SA was the contact point and engaged in operations and queries regarding deactivation. Ultimately, it stated that the local subsidiary of an international company must be regarded as the employer to avoid severe disadvantages for South Africans working for foreign companies.[78]

Judgment of the Labour Court (LC)

The LC agreed that part (b) of the definition of 'employee' applied, which provides that an employee means 'any other person who in any manner assists in carrying on or conducting the business of an employer.'[79] Concerningly, the LC applied the legal principles set out by the LAC in *Myeni,* where it was found that the existence of an employment contract or contractual arrangement was a prerequisite for the creation of an employment relationship. Given the concession made by the drivers that there was no contractual arrangement between them and Uber SA, the LC found that they were not employees of Uber SA.[80]

75 ibid para 46.
76 ibid paras 48–49.
77 ibid paras 53–56.
78 ibid paras 57–58.
79 *Uber SA* (n 6) para 67.
80 ibid paras 70–72.

However, the LC decided to look beyond the legal principles set out in *Myeni*. It proceeded to consider the factors that had to be engaged with to determine the existence of an employment relationship. The tests developed by the courts over the years were discussed, notably the dominant impression test and the reality test set out by the LAC in *Sita*. In conclusion, the LC stated that the test to determine the existence of an employment relationship remains multifactorial.[81]

In considering the relationship that existed between Uber SA and the drivers, the CCMA was criticised for disregarding 'the factual matrix in which the nature, extent and significance of the material distinction between Uber SA and Uber BV and their respective functions were expounded in vast and largely undisputed detail.'[82] This included the fact that Uber SA did not recruit, select and screen drivers; that Uber SA did not onboard drivers; that drivers did not render personal services to Uber SA; that Uber SA did not determine the remuneration of drivers through the setting of fares; and that Uber SA did not pay the partner-drivers. Therefore, there was no factual basis for the CCMA to have assigned any of Uber BV's functions to Uber SA.[83]

The LC made the point that if the commissioner had maintained the critical distinction between Uber BV and Uber SA and only considered whether the drivers were employees of Uber SA, she would have concluded that on the drivers' own version, they failed to establish the existence of an employment relationship with Uber SA.[84] The CCMA, in its adoption of a generous interpretation of section 213, was found to have departed from the binding authority it ought to have correctly applied.[85]

The crux of the LC's concern was that the CCMA applied the applicable tests to the incorrect entity. While the law requires decision-makers in terms of the reality and dominant impression test to look beyond the contractual terms and unearth the substance of the relationship, this applied to the relationship between the drivers and Uber BV, with whom the contract was concluded. The LC's engagement with the role played by Uber SA led it to the conclusion that they merely provided support services and were not entitled to negotiate or enter into any agreements for and on behalf of Uber BV. The LC noted Uber SA's assertions that they, from time to time, had interactions with Uber BV's partners and their drivers, either by email or by personal interaction at the Cape Town office; that they assisted in the onboarding process; that they dealt with routine administrative matters and problems; and that they sometimes took up issues raised by specific partners or drivers.[86] However, Uber SA denied that these limited interactions rendered them the drivers' employer, which the LC agreed with. Significantly, the LC emphasised that the judgment did not seek to pronounce whether the drivers were

81 ibid paras 73–78.
82 ibid para 79.
83 ibid paras 83–90.
84 ibid para 97.
85 ibid para 77.
86 ibid paras 47 and 85–86.

employees of Uber BV, as that was not the question before the commissioner and before the LC.[87]

Are Uber Drivers Employees of Uber BV?

The CCMA in *NUPSAW v Uber SA Technology Services (Pty) Ltd* (*NUPSAW*)[88] was faced with the question of whether Uber drivers were employees of Uber BV. Uber BV sought to avoid liability by relying on a clause in the agreement that provided that the laws of the Netherlands would govern the relationship between it and the drivers.[89] This clause was used to argue that the CCMA lacked jurisdiction to consider the matter, as South African law would not apply.[90] Legal precedence was put forward, notably the '*locality of the undertaking*' test. In line with this test, the CCMA only had jurisdiction if the location of the undertaking where the employee was employed, fell within the borders of SA.[91] In respect of foreign companies, the CCMA would only have jurisdiction if there was an independent undertaking of that foreign company in SA that was separate and divorced from the foreign undertaking.[92] The commissioner found that Uber BV, which was based in the Netherlands, not in SA, had 'no physical presence in SA.' Therefore, SA's labour legislation did not apply to the dispute.[93] This leaves Uber drivers with no remedy in SA. Firstly, they are not regarded as employees of Uber SA. Secondly, should they wish to litigate against Uber BV, South African dispute resolution bodies have no authority to consider such cases.

An Analysis of the South African Position

The manner in which the relationship between Uber and the drivers functioned, does not bear the hallmark of a typically independent contracting arrangement. The drivers were not independent entities running their own transportation businesses. Du Toit provides a good description of a genuine independent contractor in the platform economy. This is described as someone who has full control over the service provided, notably the price and terms of performance, and someone who performs a service for the platform that is part of the person's own distinct and separate business, different from the platform's main business. Therefore, Uber drivers can rightfully be characterised only as independent contractors if Uber served merely as an intermediary that enabled the drivers and passengers 'to make contact and strike their own bargains independently of any substantive preconditions imposed by the platform.'[94]

87 ibid para 98.
88 *Mostert v Uber* (n 6).
89 ibid para 7.
90 ibid para 10.
91 ibid paras 10–11. The specific case law that was referred to was *Monare v SA Tourism* (2016) 37 ILJ 394 (LAC).
92 ibid paras 10–14.
93 ibid paras 18 and 20.
94 Du Toit (n 4) 1504.

Furthermore, on an application of the reality test, Uber was revealed as the employer. It exercised a degree of control over the drivers; the work performed by the drivers was integral to Uber's business, and it cannot be ignored that the drivers relied on Uber to work and earn a living, which is a significant indicator of economic dependence.[95]

In view of the above, the CCMA's finding that drivers were not independent contractors had merit. Although the CCMA was faulted for confusing the role between Uber SA and Uber BV, it is evident from the latter part of the CCMA's decision that it was mindful of the distinction between the two. The commissioner made a conscious decision to attribute employer status to Uber SA, considering constitutional imperatives. While many of the factors engaged with were implemented and enforced by Uber BV, it is trite that Uber SA played a role in this relationship, which could not be underestimated.

It is easy to understand the social justice imperatives that underpinned the CCMA's decision, considering the outcome of the later decision of *NUPSAW*. Here, the CCMA's jurisdiction in respect of Uber BV was ousted, which essentially left drivers without an accessible and practical remedy. There is a deep flaw in a legal position that stipulates foreign companies who have employees based in SA, who were recruited here 'are 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.'[96]

Therefore, the LC's rejection of the CCMA's findings is questionable. Firstly, the LC's application of the test employed in *Myeni* is unfortunate, notwithstanding its decision to look beyond this test. Though not directly stated, it appears that the LC may have been convinced that the working arrangement between the drivers and Uber BV constituted an employment relationship. However, it was unpersuaded that employer status could be attributed to Uber SA. This was primarily because they did not recruit and onboard drivers, did not set the remuneration of drivers, and were not the ones to whom a personal service was rendered. It would have been helpful if the relationship between Uber BV and Uber SA was interrogated, other than a mere reference to the latter being a subsidiary of the former. However, it is interesting to note from Uber SA's website that it is a recruitment site for Uber drivers in SA.[97] It can also not be disputed that they played a significant role in onboarding.

Uber SA is the local face of Uber. Despite neither owning nor controlling the Uber application, its existence lends itself to a conclusion that it is an integral part of Uber BV's value chain and that Uber BV would be unable to operate in SA if it were not for Uber SA. The nexus that exists between the two cannot be ignored when establishing the existence of an employment relationship with the drivers.

95 Benjamin (n 28) 803.

96 Van Eck and Nemusimbori (n 9) 481.

97 See <https://www.uber.com/za/en/drive/requirements/> accessed 30 September 2022.

While the legislation does not provide a definition for 'employer', the meaning of the term must be 'gleaned by reference to the definition of an employee.'[98] This is defined as a person that in any manner assists in carrying on or conducting the business of the employer. Based on the role played by Uber SA, which is essentially to recruit and facilitate the appointment of Uber drivers in SA, an argument can be made that the Uber drivers assist in carrying out Uber BV's business and Uber SA's business. Since platform workers are engaged in work arrangements that make it challenging to identify the actual employer,[99] the LC could have done more to provide drivers with a remedy. At the very least, the LC could have delved into the possibility of co-employment between the two entities, which is a recognised concept in South African labour law.[100]

Notwithstanding the absence of a general definition for 'employer', the LRA in section 200B (1) states that an 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.' It has been suggested that this definition of 'employer' can be used in respect of categories of workers such as Uber drivers.[101] It is noted that the LAC in *Masoga v Pick n Pay Retailers*[102] found that the provision does not provide a general test for determining whether a particular person or entity is the true employer of a particular employee. Rather it defines 'employer' for a very specific purpose, which is merely to extend the liability of an existing employer. In other words, they are regarded as employers for the purposes of liability and cannot be utilised generally to declare persons or entities to be employers of others.[103] Notwithstanding, the legal principles set out in *Masoga*, it notably did not deal with platform workers. It has been plausibly argued that section 200B was applied narrowly and that there is scope for it to be used in the unique environment of the platform economy to ensure that substance prevails over form.[104]

As seen from the CCMA decision in *NUPSAW,* holding Uber BV to be the employer does not assist. The CCMA very easily ruled out its jurisdiction to deal with Uber BV by applying the locality of undertaking test endorsed in *Monare v SA Tourism & Others* (*Monare*).[105] It must be mentioned that the circumstances in *Monare* were distinguishable. A key difference is that Uber drivers do not work or render services in the Netherlands. Contrarily, Monare signed an employment contract for the position of Finance and Administration Manager; he moved to and worked in London, where the

98 *Footwear Trading CC v Mdlalose* (2005) 26 ILJ 443 (LAC) para 24.
99 Du Toit (n 12) 38.
100 *Footwear Trading CC v Mdlalose* paras 32 and 39.
101 Du Toit (n 12) 38. See also Van Eck and Nemusimbori (n 9) 481.
102 *Masoga and Another v Pick n Pay Retailers (Pty) Ltd and Others* (2019) 40 ILJ 2707 (LAC).
103 ibid paras 46–47.
104 Du Toit (n 12) 38–39. See also Van Eck and Nemusimbori (n 9) 481. However, Govindjee (n 15) 61 rejected the application of section 200B.
105 *Monare* (n 91).

position was based and was subsequently disciplined and dismissed by the London entity.[106] Notwithstanding this, he was still given a remedy in SA, as the LAC disagreed with the LC's finding that the CCMA did not have jurisdiction. It found that the nub of the matter was whether the London undertaking was separate and divorced from its undertaking in SA. As there was a sufficient nexus between the London and South African entities, the CCMA had jurisdiction to consider the unfair dismissal dispute.[107] However, here the London entity was the subsidiary. While the facts and circumstances of the case differ, it is notable that the law was applied in a manner that came to the aid of someone in a somewhat senior position. However, it could not be applied in a way that came to the aid of Uber drivers.

It is noteworthy that the Supreme Court of Canada[108] found it 'unconscionable' that disputes with Uber be referred to the Netherlands for resolution. It explained that unconscionability must be assessed, based on two criteria. These are whether there is an unequal bargaining power such that the weaker party 'cannot adequately protect their interests in the contracting process.' And whether the contract 'unduly advantages the stronger party or unduly disadvantages the more vulnerable [party].'[109] It is contended that the relationship between the drivers and Uber meets these two criteria and that the obligation placed on them to have their dispute dealt with in the Netherlands is similarly reprehensible.

It has been said that the statutory definition of 'employee' can be developed by affording an expansive interpretation 'without doing any violence to the existing language of the definition.'[110] A wide-ranging approach to the definition of 'employee' can also arguably be used to identify the employer, which is called for in the changing world, that creates complex contractual arrangements.[111] Applying these arrangements to deny Uber drivers statutory protection is at odds with the purpose of labour legislation and the fundamental values on which the constitutional right to fair labour practices is premised. Affording Uber drivers recourse would comply with the need to apply the law in a manner that is alive to the complexities brought about in the new technological age and the obligation imposed on decision-makers to give effect to constitutional imperatives.

106 ibid para 2.
107 ibid para 36.
108 *Uber Technologies Inc. v. Heller* 2020 SCC 16.
109 Thornicroft (n 15) 364.
110 Benjamin (n 28) 804.
111 Lisa Rodgers, 'The Uberization of Work Case Developments in the UK' [Online] (2019) 4 Revue de Droit Comparé du Travail et de la Sécurité Sociale 176 and 180–181 <http://journals.openedition.org/rdctss/1416> accessed 5 November 2022.

The Position in the United Kingdom

The Legislative Framework

Employment rights are regulated by the Employment Rights Act of 1996. Section 230 provides definitions for both 'employee' and 'worker,' as certain rights are extended only to employees while others are extended to workers.[112]

An 'employee' is defined as an individual who has entered into or works under a contract of employment, which is described as a contract of service or apprenticeship, whether express or implied and (if it is express) whether oral or in writing.[113] A worker is defined as 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 personally undertakes to do or perform any work or services for another party to the contract whose status under the contract is not that of a client or customer of any profession or business undertaking carried on by the individual.[114] An 'employer', in relation to an employee or a worker, means the person by whom the employee or worker is or was employed.[115]

Equivalent definitions for 'employee,' 'worker' and 'employer' are contained in section 54 of the National Minimum Wage Act 1998. In line with the above, UK employment law distinguishes between three categories of persons, which is 'employee,' 'worker' and 'self-employed' person.[116]

Judgment of the Supreme Court

Uber, which comprises Uber BV, Uber London Ltd and Uber Britannia Ltd, appealed against a decision reached by the Employment Tribunal that Uber drivers constituted workers of Uber (specifically Uber London). This entitled them to employment rights, notably the national minimum wage and paid annual leave.[117] The decision of the Employment Tribunal was confirmed by the Employment Appeal Tribunal and the majority of the Court of Appeal, which led the matter to the SC.[118] The appeal was based on the contention that the drivers were independent contractors, which was clearly borne out by the terms of the contract.[119]

112 For example, s 13 which regulates deductions by an employer, applies to workers, while s 92 which requires an employer to provide reasons for a dismissal, applies only to employees.
113 Employment Rights Act 1996 s 230(1) and (2).
114 ibid s 230(3).
115 ibid s 230(4).
116 Rodgers (n 110) 175.
117 *Uber BV v Aslam* (n 5) paras 1, 3 and 34.
118 ibid para 2.
119 ibid para 1.

The SC explained the 'onboarding' process and concluded that it was conducted by Uber London.[120] It engaged with the service agreement, which highlighted that the drivers and not Uber BV provided a transportation service resulting in a direct legal relationship between the driver and the user, to which neither Uber BV nor any of its affiliates were a party. Notably, it recorded that the driver appointed Uber BV as the payment collection agent who accepted the fare on behalf of the driver, resulting in the payment made by the user to Uber BV being considered as payment made directly by the user to the driver. However, the agreement gave Uber BV the right to change the fare calculation at any time at its discretion 'based upon local market factors.'[121]

In addition to the service agreement, there were also 'rider terms' which passengers had to accept before using the Uber application. These terms constituted an agreement between the rider, Uber BV and the local Uber company operating in the relevant part of the UK (in this case Uber London). The agreement identified Uber London as the entity that accepted private hire vehicle bookings as the disclosed agent of the driver, thereby characterising Uber London as an intermediary between the rider and the driver and not a transportation service.[122]

The role of Uber London, as described in the rider terms, sought to give effect to the Private Hire Vehicles (London) Act 1998 (PHVA). In terms of this Act, a private hire vehicle would only be authorised to carry passengers if in possession of a private hire vehicle operator's license for London.[123] This allowed acceptance of private hire bookings, which was reasonably understood to encompass acceptance of a contractual obligation to carry out the booking and the provision of a vehicle for that purpose.[124] Therefore, the SC concluded that Uber London could not merely have acted as an agent for the drivers. This would have been in contravention of the PHVA, as it was Uber London and not the drivers that possessed the required license. The SC found that the only contractual arrangement that was compatible with the licensing regime was one where Uber London, as the licensed operator, accepted private hire bookings as a principal and contracted with the Uber drivers to fulfil its obligation to the passenger.[125]

A further finding was that the rider terms were an agreement between the rider, Uber BV, and the relevant local Uber company. The driver was not a party to the agreement,

120 ibid para 23. It is important to point out that a distinguishing difference from Uber SA and Uber London is that the latter handled passenger complaints, including complaints about a driver, and decided whether to make any refund to the passenger. When Uber London considered it necessary to make a refund without there being proper grounds to attribute fault to the driver, Uber London bore the cost of the refund.

121 ibid paras 22–26.

122 ibid paras 27–29.

123 ibid paras 30–31.

124 ibid paras 30–31 and 47.

125 ibid para 47.

and under the basic principles of contract and agency law, nothing conferred authority on Uber London to act as an agent for any driver.[126]

Notwithstanding the above findings, which ostensibly characterised Uber London as the employer, the SC decided against considering the appeal on that basis alone. It explained that it was important to address Uber's argument that the decision to award worker status had to be approached by interpreting the terms of any applicable written agreements as a starting point.[127] The SC considered but rejected this argument of Uber. It outlined that working relationships require statutory regulation and that it would be inconsistent with the purpose of the legislation to use the contract as the entry point. The unequal bargaining power between employers and employees was highlighted. So were its consequences, which led to situations where the employer was often able to dictate the terms of the contract, leaving the individual performing the work with very little ability to influence the terms.[128] The court emphasised that statutory intervention would be undermined if the employer were left to determine by way of a contract whether the person performing the work was a worker. It explained that the purpose of enacting the National Minimum Wage Act was to protect those who Parliament considered needed protection, not just those that employers designated as workers. The SC found it noteworthy that there was no possibility for the drivers to have negotiated different terms.[129]

The SC took heed of the legal principles set out in the *Autoclenz* case.[130] There it was stated that 'the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part.'[131] Relying on this principle, the SC found that to utilise the characterisation of the relationship between Uber, drivers and passengers as stated in the service agreement as the starting point would result in Uber being afforded the power to determine for itself whether or not the legislation designed to protect workers, would apply to its drivers.[132]

126 ibid paras 49–56.
127 ibid para 57.
128 ibid paras 76–77.
129 ibid.
130 ibid paras 58–64.
131 ibid para 84. See also Sandra Fredman and Darcy Du Toit, 'One Small Step Towards Decent Work: Uber v Aslam in the Court of Appeal' 2019 48(2) Industrial Law Journal (UK) 261, where reference is made to the pronouncements of the Supreme Court decision in *Autoclenz*, that 'the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part' as cited by the Court of Appeal in *Uber v Aslam*. With reference to these statements the authors surmised that the majority in the Court of Appeal took seriously the imbalance of bargaining power between the contracting parties leading them to look beyond the contractual documents to the reality of the relationship. They found that the majority position was strong and correct.
132 *Uber BV v Aslam* (n 5) para 76.

The SC proceeded to consider the statutory definition of 'worker' and the factors that pointed towards a person being a worker. These were subordination to another person, dependence upon another person, and the degree of control exercised by the other person.[133] The court cited five aspects highlighted by the Employment Tribunal, illustrating that Uber defined and controlled the relationship.

Firstly, the remuneration paid to the drivers was fixed by Uber, which also fixed the amount of its own 'service fee,' which it deducted from the fares paid to drivers. Second, the contractual terms on which drivers performed their services were dictated by Uber. Third, Uber exercised control over the drivers. Even though they had the freedom to choose when and where (within the area covered by their PHV license) to work, once a driver logged onto the Uber application, a driver's choice about whether to accept requests for rides was constrained, as Uber monitored the acceptance and cancellation rates. Fourth, Uber exercised a significant degree of control over the way in which drivers delivered their services. They prescribed the types of cars that could be used, and the technology, which was integral to the service, was wholly owned and controlled by Uber. The rating system also controlled drivers. The failure of a driver to maintain a specified average rating resulted in warnings and, ultimately, in the termination of the driver's relationship with Uber. The ratings were used by Uber purely as an internal tool for managing performance and as a basis for making termination decisions. Fifth and lastly, Uber restricted communication between passengers and drivers to the minimum necessary to perform the particular trip and took active steps to prevent drivers from establishing any relationship with a passenger beyond the individual ride. Drivers were specifically prohibited by Uber from exchanging contact details with a passenger or contacting a passenger after the trip. [134]

Considering the nature of the relationship, the SC concluded that the decision of the Employment Tribunal was justified.[135]

Analysis of the UK Judgment

The UK's statutory definition of 'worker' envisages the existence of a contract. Despite the drivers being classified as independent contractors in the service agreement, they were afforded worker status. The Employment Tribunal referred to the contract 'as a pure fiction which bears no relation to the real dealings and relationships between the parties'[136] and found Uber to be running a transportation business.[137] These findings give effect to the reality of the relationship.

133 ibid para 87.
134 ibid paras 93–101.
135 ibid paras 92–93.
136 *Uber v Aslam* [2017] IRLR 4, para 91. See also Ewan McGaughey, 'Uber, the Taylor Review, Mutuality, and the Duty Not to Misrepresent Employment Status' (2019) 48(2) Industrial Law Journal (UK) 193.
137 *Uber v Aslam* (n 135) paras 89 and 92.

Significantly, Uber London was found to be the employer despite Uber BV being cited as a respondent. This denotes the Employment Tribunal's rejection of the argument that if drivers were found to be workers, employer status should be attributed to Uber BV and not Uber London.[138] The SC had no difficulty in upholding this decision.

However, there is a striking difference in the arrangements between Uber London and Uber SA. The SC found that in terms of the PHVA, Uber London served as the principal of the drivers. The same cannot be said of Uber SA, as there is no requirement in SA for Uber SA to hold an operator's license. Therefore, Uber London was not only involved in the onboarding process but, importantly served as the principal of the drivers, which is a material distinction from the South African position. Notwithstanding this, the SC chose not to dispose of the appeal on this basis. It rather opted to evaluate whether the drivers were indeed independent contractors as recorded in the agreement by establishing whether the reality of the relationship characterised them as such. Essential to this enquiry was the extent to which Uber exercised control over the drivers. In its discussion of the factors that signified control, markedly, the SC did not attribute these factors to Uber BV; rather, it used the term Uber.[139]

Nevertheless, there is no doubt that the five aspects discussed above are the rules imposed by Uber BV, which is controlled by the Uber application that is owned and enforced by the company. For example, Uber London does not set the fares, determine the commission payable to Uber BV, or set the contractual terms. However, despite the role played by Uber BV, the SC had no reservations in attributing employer status to Uber London. In fact, in discussing the five elements of control, no mention was made of the distinct role of each entity. Yet, in SA, everything turned on which Uber entity the elements of control could be attributed to.

The UK case is distinguishable from the SA case in that the former delved into whether Uber drivers should be granted *worker status*, while the latter contended with whether they should be granted *employee status*. However, this does not alter the importance of the decision. In the UK, both employee and worker status are linked to the existence of a contract. Therefore, it is arguably more difficult to prove worker status in the UK than it is to prove employee status in SA. Furthermore, the factors that were engaged with to determine worker status, such as subordination, dependence and control, are the same elements that need to be engaged with to determine employee status in SA.

Notwithstanding the UK statutory framework being considered difficult to use in the gig economy in proving worker or employee status, uber drivers received a successful outcome.[140] The SC was willing to look beyond the terms of the contract and to come

138 ibid para 84. See also Fredman (n 130) 271.

139 *Uber BV v Aslam* (n 5) paras 94–101.

140 Rodgers (n 110) 176 and 180–181 explains that there is inconsistency in the case law in determining worker status. This is based on problems in the definition of 'worker', which is regarded as superficial and phrased in negative terms. This arises due to the tendency to blur the boundaries between

to the aid of Uber drivers, which has been applauded.[141] Disappointingly, the same approach was not embraced in SA despite the constitutional imperatives that underpin South African labour law, coupled with the generous provisions contained in the LRA. The South African legal framework allows for a broader approach in determining whether Uber drivers are employees, similar to that followed in the UK. What is needed is the resolve of the judiciary to apply the law purposively.

The Position in New Zealand

The Legislative Framework

The Employment Relations Act (ERA)[142] regulates the rights of employees. Section 6 contains a detailed definition of 'employee.' It states that an employee means any person of any age employed by an employer to do any work for hire or reward under a contract of service. Included in the definition are homeworkers or persons intending to work. Excluded from the definition are volunteers who do not expect to be rewarded for work and who receive no reward for work performed.[143]

In deciding whether another person employs a person under a contract of service, the court or the Authority must determine the real nature of the relationship between them. In doing this, the court or the Authority must consider all relevant matters, including any matters that indicate the intention of the persons; and must not treat as a determining matter any statements by the parties that describe the nature of their relationship.[144] An employer is defined as a person employing any employee or employees.[145]

Judgment of the Employment Court

As a point of departure, it must be acknowledged that *E TU INC v Rasier*[146] was the second case dealt with in NZ. In the first case of *Arachchige v Rasier New Zealand,*[147] Holden J found that the plaintiff Uber driver was not an employee. The evaluation was premised on the intention of the parties, which was garnered from the service agreement. The court explained that the service agreement did not operate as an employment contract and that it was consistent with Uber's contention that it provided a technology business.[148] Notwithstanding this finding, the judge went on to explain that Uber was a passenger transport business in the broader sense and that without the drivers, there was

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employee and worker status and the 'extremely complex factual patterns and contractual arrangements' brought about in the gig economy, which is intentionally constructed to deny a person worker or employee status.

141 Fredman (n 130) 273.

142 The Employment Relations Act 24 of 2000.

143 ibid s 6(1).

144 ibid s 6(2).

145 ibid s 5.

146 [2022] NZEmpC 192 EMPC 230/202.

147 *Arachchige v Rasier New Zealand Ltd* [2020] NZEmpC 230.

148 ibid paras 41–45.

no business as they were integral to the way in which Uber's business operated.[149] However, it was said that the business was structured in a manner that separated the services that Uber provided to passengers and drivers from how the drivers undertook the work. In this regard, Uber had very little control over how the driver carried out his part of the undertaking.[150]

It further recognised the presence of aspects that pointed to employment but found that this was overtaken by the intent of the parties as documented in the agreement (the plaintiff would operate his own business in the manner and at the times that he wished).[151]

It is observed that the legislation was not properly applied in this matter. Section 6 requires the court to determine the real nature of the relationship by considering all relevant factors. It should not treat as determinative the way the parties describe their relationship. However, the court relied primarily on the service agreement defining the driver as an independent contractor. To support this classification of the driver, it diminished the factors that pointed towards an employment relationship with insubstantial reasoning. It is probably for this reason that Chief Judge Inglis, in the succeeding case of *E TU INC v Rasier,* did not follow nor refer to the evaluation of Holden J.

Inglis CJ in *E TU INC v Rasier* explored whether section 6 of the Employment Relations Act (ERA) catered for categories of work such as Uber drivers.[152] It was emphasised that section 6 must be viewed with due regard to its purpose, which was to offer protection to vulnerable workers based on the inherent inequality of bargaining power between employers and employees.[153] Therefore, a court was required to approach the definition of 'employee' in a broad, purposive manner.[154]

The court referred to the two prerequisites that had to be complied with to be classified as an employee, ie engagement to work for hire or reward, and engagement under a contract of service.[155] In line with the definition of 'employee,' a determination of whether a person was employed by another under a contract of service required clarity on the real nature of the relationship. Therefore, the court summed up the question: 'in a nutshell, the question to be asked and answered is whether s 6, construed purposively, was intended to apply to the relationship at issue when viewed realistically.'[156]

149 ibid para 53.
150 ibid para 54.
151 ibid para 56.
152 *Rasier* (n 145) para 6.
153 ibid paras 8 and 9.
154 ibid para 11.
155 ibid para 12.
156 ibid para 17.

The court commenced by engaging with Uber's argument that Uber drivers were operating their own businesses and, as such, a contractual relationship existed between the driver and the passenger/customer. According to Uber, they were not a party to the contractual relationship but merely served as an intermediary that sought to minimise the 'hassles' that the contracting parties would otherwise face.[157] This argument failed to convince the court. While it acknowledged that the drivers were not operating under a traditional employment model, it was not persuaded that Uber served merely as a facilitator, as the evidence illustrated that it exercised a high level of control and subordination over the drivers.[158]

A significant indicator of control was the fact that Uber dictated the contractual terms under which the drivers performed their services. A driver could not drive unless the terms and conditions set by Uber were accepted.[159] A number of other factors led the court to find that, in reality Uber exercised significant control over the drivers.[160] These were the rendering of personal services by the drivers; the power held and exercised by Uber to decide on the cost of each trip and to charge the customer; Uber's standards of behaviour which drivers were obliged to comply with, failing which they could be disciplined and deactivated; and the fact that drivers were unaware of the destination until the passenger was picked up.[161] While acknowledging that the drivers were not expressly directed to work by Uber, the court found that they were subjected to very effective direction and control through the rating system, the disciplinary system, and deactivation, among others.[162] Furthermore, Uber's direct involvement in fare-setting and review stood in contrast to its claim that there was a direct contractual relationship between the driver and the customer.[163]

It was unequivocally found that the drivers were not operating their own businesses. They had no opportunity to grow a business, and the only way for them to make more money was to work longer hours.[164] Therefore, Uber was the only party running a business, and the drivers worked for Uber's business, not their own.[165]

The court took cognisance of the flexibility and choice that Uber drivers had. Notably, none of the drivers were required to log onto the app at any particular time and could work for as long or as little as they liked. Significantly, there was no obligation to accept work.[166] However, the court rejected Uber's contention that this pointed away from an employment relationship. The court held that flexible working arrangements were

157 ibid para 31.
158 ibid para 32.
159 ibid para 33.
160 ibid para 43.
161 ibid paras 33–42.
162 ibid para 44.
163 ibid para 37.
164 ibid para 47.
165 ibid para 50–52.
166 ibid para 53.

commonplace among employees in NZ.[167] Significantly, it held that an Uber driver's decision to accept or decline work was not entirely optional, as drivers who did not accept rides were subjected to the negative consequences imposed by Uber of discipline and deactivation.[168]

The court further recognised that each driver provided their own vehicle and paid their own running costs. However, the court was not persuaded that these factors warranted an imputation that they were business owners and not employees.[169] Furthermore, the fact that the drivers signed up and worked for an extended, indeterminate time led to the conclusion that they were economically dependent on Uber.[170]

An important fact is that the plaintiffs were not solely engaged as Uber drivers; they were engaged in other types of work, some of them with other employers.[171] Despite this, the court found that they were integrated into the Uber business during the times that they were driving. During these times, they were dependent on Uber, and Uber was dependent on them.[172]

Apart from the practical realities presented in the relationship between Uber and the drivers, as discussed above, consideration was given to the contract that was in place. Consideration was notably given to the contract's classification of the relationship as one of independent contracting. However, it was clear to the court that the label attached to the relationship in the contract did not accurately describe the relationship.[173] The court was mindful of the fact that the contract was prepared by Uber without any input or negotiation and was presented to the drivers on a take-it-or-leave-it basis, which illustrated the imbalance in bargaining power between the parties.[174] Uber BV and the local affiliate, Rasier New Zealand, were cited as defendants. In deciding who the employer was, the court explained that both entities controlled different aspects of the Uber service. Therefore, it found that they were joint employers.[175] This was despite the fact that Uber argued that in NZ, joint employment was only utilised in limited circumstances, one being to 'resolve the mischief of a company seeking to evade its employment obligations', which was allegedly not the case here.[176]

The court considered the definition of 'employer' in the ERA and held that while an 'employer' is defined as singular rather than plural, there was nothing that prohibited a finding of joint or multiple employers. The following remarks by the court are

167 ibid para 54.
168 ibid paras 41 and 59.
169 ibid paras 67–69.
170 ibid paras 70–71.
171 ibid para 72.
172 ibid paras 67–73.
173 ibid para 79.
174 ibid paras 76 and 78.
175 ibid para 83 and 90.
176 ibid para 85.

significant: 'although an employer is entitled to establish complex corporate structures and relationships, the law should be vigilant to ensure that permissible complexity in corporate structures does not work as an injustice in the realm of employment law.'[177] Therefore, it explained that a finding of joint employment was permissible in broader circumstances, such as in instances where there was more than one entity with a sufficient connection that exercises common control over an employee, which it found was applicable in this case.[178] However, it did not exclude the possibility of a finding of joint employment on the limited circumstances raised by Uber. [179]

Analysis of the NZ Judgment

Important legal principles were set out by the court. It was explained that the legislation must be interpreted to protect vulnerable employees based on the inherent inequality of the parties. With this in mind, it was found that despite the service agreement categorising the drivers as independent contractors, this did not accurately describe the relationship.

Considering the reality of the relationship, it was found that Uber undoubtedly exercised a substantial degree of control over the drivers. This led the court to conclude that Uber could not be classified as a technology company, which aligns with the decision of the SC in the UK. This finding detracts from the argument raised by Uber that the drivers were independent contractors. The court's explanation that 'if Uber sold its App to drivers, rather than receiving a percentage of fares set at its own discretion, the argument that it is simply a technology company providing a platform for drivers to connect with people looking for a ride (rather than a transportation company) might be stronger,'[180] accords with the way Du Toit classified a genuine independent contractor in the platform economy.[181] Having regard to both the contract, as well as the practical realities of the relationship, the court found that the Uber drivers were not operating their own businesses and were not independent contractors. In conducting this assessment, no distinction was made between Uber BV and the local affiliate. The court rather holistically engaged with the manner in which the drivers and the Uber business operated.

Regarding the employer, the court made important pronouncements about its role in guarding against complex corporate structures being used to evade workplace justice, which is a fact that must be borne in mind by South African decision-makers. NZ has a

177 ibid para 87.

178 ibid para 88 and 90. This was by virtue of the fact that 'Uber BV retains significant control, including in respect of information and compliance with various requirements. It operates the App, the rating and promotion systems. Rasier New Zealand can suspend a driver for harm caused to Uber BV, is named as a party (along with Uber BV) to the service fee addendum and may (along with Uber BV) alter the contractual arrangements at will.'

179 ibid para 90.

180 ibid para 73.

181 Du Toit (n 4) 1504.

definition for 'employer', which states that it is the person employing an employee or employees. Even though the definition does not provide much assistance, the court was willing to interpret this limited description broadly to ascribe joint employment to Uber BV and the NZ affiliate. This was despite joint employment being an uncommon occurrence in NZ.

It is recognised that the role played by the respective local affiliates in NZ and SA may not be the same. Notwithstanding this, there is leeway in SA to hold Uber BV and Uber SA responsible. This is based on the broad definition of 'employee,' from which the identity of the employer can be established, as well as section 200B of the LRA. If these sections are applied in a purposive manner with the objective in mind that foreign entities should not be allowed to evade justice, especially when it comes to workers who are on a substantially unequal footing, therefore, Uber drivers in SA should not be left without a remedy. The decisions of the UK and NZ are clear about the fact that Uber is a transportation business, and based on the degree of control exercised over Uber drivers, the drivers are not independent contractors. This equally applies to the South African situation.

Conclusion

The approach adopted by the LC and the CCMA (*NUPSAW*) in SA did not further the purpose of the Constitution, which prescribes that its spirit, purport, and object must be promoted when interpreting legislation. This required a purposive interpretation of the LRA, which was not advanced through these decisions. Instead, the LC placed too much emphasis on the distinction between Uber BV and Uber SA, despite the reality that Uber has characteristically fragmented itself into different entities.[182] Secondly, the CCMA denied Uber drivers' domestic recourse against Uber BV. These two decisions left Uber drivers with no remedy, although the manner in which they operate does not fall comfortably within the confines of work done by an independent contractor. Applying these operational arrangements to deny Uber drivers statutory protection is at odds with the purpose of labour legislation and the fundamental values on which the constitutional right to fair labour practices is premised.

It has now been unequivocally found in both the UK and NZ that Uber does not operate as a technology company. Accordingly, it has been concluded that Uber drivers are not independent contractors. These findings are equally applicable in SA, as Uber substantially operates in the same manner in all three of the jurisdictions, although the affiliates' roles are different. It is interesting to note that these foreign jurisdictions were able to arrive at progressive decisions without having a codified Constitution that provides for labour rights, as is the case in SA.

The Employment Court in NZ, in interpreting its labour legislation, made important pronouncements. The question that it sought to ask and answer in engaging with the

182 Fredman (n 130) 262, 270.

definition of employee as contained in the ERA was whether the definition *purposively* construed was intended to apply to the relationship between Uber and its drivers when viewed realistically. Factors that steered it to a conclusion that there was an employment relationship, was the fact that they were not operating their own businesses, they had no opportunity to grow a business, and the only way for them to make more money was to work longer hours. Furthermore, a driver's decision to accept or decline work was not entirely optional, as drivers who did not accept rides were subjected to the negative consequences imposed by Uber of discipline and deactivation. These drivers worked for an extended, indeterminate time, which led to the conclusion that they were economically dependent on Uber. Therefore, it was clear to the court that the label attached to the relationship in the contract did not accurately describe that relationship. The court was mindful of the fact that the contract was prepared by Uber without any input or negotiation and was presented to the drivers on a take-it-or-leave-it basis, which illustrated the imbalance in bargaining power between the parties. It was this imbalance that likewise influenced the SC decision in the UK.

Significantly NZ, in determining who the employer was, made important pronouncements about its role in guarding against complex corporate structures being used to evade workplace justice, which is a fact that must be borne in mind by South African decision-makers.

Based on SA's own legislative framework, coupled with the jurisprudence developing in foreign jurisdictions, there is room for the South African courts to foster a more generous approach to the application of employment rights for those involved in the platform economy, considering the changing world of work. What is needed is the resolve of the judiciary to apply the law purposively.

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