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THE EMPLOYMENT STATUS OF UBER DRIVERS: COMPARING APPROACHES BY COURTS IN THE UNITED KINGDOM AND SOUTH AFRICA¹

SUMMARY

South African labour law draws a distinction between employees, who dedicate their full-time endeavours to the service of a particular employer, and independent contractors, who perform specific projects for a customer. Employees enjoy a wide range of statutory rights such as the right to not be unfairly dismissed, but such protection does not extend to independent contractors. In the advent of the digital era, many people have turned to online platforms to secure their incomes. For example, some have turned to the Uber platform to drive customers seeking transport by means of the Uber application. Such drivers are, in terms of our law, not regarded as employees of Uber, but as independent contractors and are thereby precluded from the statutory protection which extends to employees. This position is demonstrated by an analysis of *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others (C449/17) [2018] ZALCCT 6*. This case is further compared to a similar decision in the United Kingdom, *Uber BV and Others v Aslam and Others [2021] UKSC 5*, where protection was afforded to the Uber drivers. Suggestions are made for legal reform, in order to align the prevailing position in South Africa with the approach in the United Kingdom, thereby extending legal protection as employees to uber drivers.

Keywords: Independent contractors; employees; digital platforms; Uber



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1 This case note analyses the case of *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others (C449/17) [2018] ZALCCT.6* in SA and compares it to that of *Uber BV and Others v Aslam and Others [2021] UKSC 5* in the UK. Certain aspects from the case note supplement my Master's thesis, Chayya "Towards the creation of a fair ride-hailing industry: Should South African labour law regulate the Uber relationship?" <http://hdl.handle.net/11427/29756> (accessed 12 February 2023).

1. INTRODUCTION

Traditionally, employment relationships are regarded as permanent, meaning of a full-time nature and, in principle, continue until termination of employment or the reaching of an employee's retirement age.² In recent decades, the advent of digital platforms has brought about an online space for exchange between producers of products, services, and information,³ which resulted in an increasing amount of people conducting their work via digital platforms. Work conducted via digital platforms, often referred to as non-standard work, has called for the redefinition of standard terms of employment.⁴ In particular, people who contract as drivers on the Uber platform are identified as independent contractors in terms of their contract of work.⁵ Independent contractors differ from traditional employees in that they are contracted to produce a specific service and are remunerated for that service. No reciprocal duties exist beyond the rendering of a payment for the service for which the independent contractor is engaged. Furthermore, independent contractors are not subject to the control of an organisation and thus conduct their work according to their own accord.⁶ *The Labour Relations Act*⁷ expressly excludes independent contractors from its definition of an employee. This means that independent contractors are excluded from the rights to which employees are entitled in terms of the *Labour Relations Act*,⁸ among others, the right to claim for unfair dismissals, unfair labour practices, rights associated with collective bargaining, and to be a member of a trade union. In addition, they are not entitled to basic rights as stipulated in terms of the *Basic Conditions of Employment Act*,⁹ which regulates pertinent rights such as working hours, rest periods, safety and security issues, and leave which includes sick leave and maternity leave. Other legislation in South Africa (SA), which deals with the protection of employees and specifically excludes independent contractors, are the *Unemployment Insurance Act*¹⁰ and the *Occupational Health and Safety Act*.¹¹

In essence, this contradicts the International Labour Organization's (ILO) 'core' mandate of decent work. In 2008, the ILO held a Tripartite Meeting of

2 Mokofe 2022:11.

3 Hakoune "How digital platforms are changing the way we work", <https://monday.com/blog/project-management/digital-platforms/> (accessed on 12 February 2023).

4 Chayya "Towards the creation a fair ride-hailing industry: Should SA labour law regulate the Uber relationship?", <http://hdl.handle.net/11427/29756> (accessed on 12 February 2023).

5 Uber defines its drivers as independent contractors.

6 Arnold "Are you an employee or an independent contractor", <https://www.lexisnexis.co.za/lexis-digest/legal/are-you-an-employee-or-an-independent-contractor> (last accessed on 20 February 2023).

7 *Labour Relations Act* 66/1995:sec. 213.

8 *Labour Relations Act* 66/1995.

9 *Basic Conditions of Employment Act* 75/1977.

10 *Unemployment Insurance Act* 63/2001.

11 *Occupational Health and Safety Act* 85/1993.

Experts, whereby a framework of decent work indicators was adopted. The ILO defines decent work as:¹²

opportunities for work that is productive and delivers a fair income, security in the workplace and social protection for all, better prospects for personal development and social integration, freedom for people to express their concerns, organise and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men.

Internationally, Uber drivers have begun approaching the courts, in order to determine the actuality of their contracts.¹³ The focus of this contribution will be a comparison between a case decided in the United Kingdom (UK) in 2021¹⁴ and a 2018 judgement in SA.¹⁵ Despite similarities regarding the facts of the two cases, the respective decisions of the courts differ significantly. A brief background of the structure of the Uber platform will be relayed, followed by a summary of the SA court's decision compared to that of the UK court's decision.

2. BRIEF BACKGROUND TO THE UBER PLATFORM

Uber is a company incorporated and Uber's holding company Uber BV is based in The Netherlands.¹⁶ Its business is conducted through a range of subsidiaries throughout the world.¹⁷ Uber operates an application that can be downloaded via a smartphone.¹⁸ Once downloaded, the user is able to request transportation services and is paired via the application with an available driver.¹⁹ The Uber platform consists of three categories of drivers. First, partner-drivers who own one or more vehicles that are registered under

12 ILO "Tripartite Meeting of Experts on the Measurement of Decent Work", https://www.ilo.org/global/meetings-and-events/WCMS_098029/lang--en/index.htm (last accessed on 20 February 2023).

13 The current case of *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others* (C449/17) [2018] ZALCCT.6 in SA will be discussed as well as the case of *Uber BV and Others v Aslam and Others* [2021] UKSC 5. in the UK. Other examples of cases observed internationally are: *Uber BV, Uber London Ltd, Uber Britannia Ltd v Aslam & Others* UKEAT/0056/17/DA; *Asociación Profesional Élite Taxi v Uber Systems Spain SL*, JUDGMENT OF THE COURT (Grand Chamber), (2017); *Independent Workers' Union of Great Britain v RooFoods Limited T/A Deliveroo* TUR1/985(2016); *O'Conner et al v Uber Technologies, Inc., et al* (California District Court) Case no. C-13-3826 EMC.

14 *Uber BV and Others v Aslam and Others* [2021] UKSC 5.

15 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others* (C449/17) [2018] ZALCCT.6.

16 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others* (C449/17) [2018] ZALCCT:par. 1

17 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others* (C449/17) [2018] ZALCCT:par. 1.

18 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others* (C449/17) [2018] ZALCCT:par. 1.

19 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others* (C449/17) [2018] ZALCCT:par. 26.

his/her profile under Uber BV and are also registered as drivers authorised to make use of the application.²⁰ Secondly, drivers only who do not own vehicles but who drive on the Uber BV profile of one of Uber BV's partners in agreement with the partner.²¹ Thirdly, partners only who own one or more vehicles registered with Uber BV via the Uber application but who do not drive vehicles and only contract with the drivers only category.²²

In the practical use of the application, the drivers are notified of a trip request from a user, and have 10 seconds to accept the trip. If the trip is not accepted, another driver is alerted and has the opportunity to complete the trip.²³ Drivers have to attend to the local Uber entity to present documents, attend an interview, and watch a video presentation before they are eligible to drive under the Uber banner.²⁴ Drivers also bear the costs of driving their vehicles,²⁵ which are required to be in a proper condition.²⁶ They are assessed by ratings from passengers²⁷ and cautioned if they frequently cancel trips.²⁸ In the event that their ratings by customers drop too low, they are removed from the platform and their accounts are deactivated.²⁹ The local subsidiary handles complaints about drivers.³⁰

In SA, people who conduct work via digital platforms such as the Uber platform, are generally recognised as independent contractors, as opposed to employees in terms of their contracts.³¹ This places them in a vulnerable position as they are precluded to claim the same rights and benefits as people recognised as employees.³² By contrast, in the UK, a third category of workers as “dependent contractors” are recognised as “workers” for purposes of limited employment benefits.³³ The rights afforded to the “worker” category in the UK thereby include the right to the national minimum wage, protection from

20 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others* (C449/17) [2018] ZALCCT:par. 22.

21 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others* (C449/17) [2018] ZALCCT:par. 23.

22 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others* (C449/17) [2018] ZALCCT:par. 24.

23 *Uber BV and Others v Aslam and Others* [2021] UKSC 5:par. 19.

24 *Uber BV and Others v Aslam and Others* [2021] UKSC 5:par. 19.

25 *Uber BV and Others v Aslam and Others* [2021] UKSC 5:par. 19.

26 *Uber BV and Others v Aslam and Others* [2021] UKSC 5:par. 19.

27 *Uber BV and Others v Aslam and Others* [2021] UKSC 5:par. 19.

28 *Uber BV and Others v Aslam and Others* [2021] UKSC 5:par. 19.

29 *Uber BV and Others v Aslam and Others* [2021] UKSC 5:par. 19.

30 *Uber BV and Others v Aslam and Others* [2021] UKSC 5:par. 19.

31 Chayya “Towards the creation a fair ride-hailing industry: Should South African labour law regulate the Uber relationship?”, <http://hdl.handle.net/11427/29756> (accessed on 12 February 2023).

32 Chayya “Towards the creation a fair ride-hailing industry: Should South African labour law regulate the Uber relationship?”, <http://hdl.handle.net/11427/29756> (accessed on 12 February 2023), such as the right to claim for an unfair dismissal.

33 Chayya “Towards the creation a fair ride-hailing industry: Should South African labour law regulate the Uber relationship?”, <http://hdl.handle.net/11427/29756> (accessed on 12 February 2023).

unlawful deductions from wages, protection from excessive working hours, rights to health and safety at work, certain collective rights, and equal pay.³⁴

Due to the difficulties faced by online platform workers, the ILO suggested that the following measures could be taken:³⁵

granting employment status; granting rights to collective bargaining; adequate social security benefits; dispute resolution mechanism; fair termination process; fair payments and working time standards; non-discrimination; occupational health and safety; transparency and accountability in algorithms and ratings; access to local jurisdictions; data protection; portability of worker data and ratings; enabling environment for sustainable enterprises.³⁶

3. *UBER SOUTH AFRICA TECHNOLOGY SERVICES PTY (LTD) V NUPSAW & OTHERS*

3.1 A critical analysis of the court's decision

In 2017, a group of Uber drivers approached the Commission for Conciliation, Mediation and Arbitration (CCMA), as they were deactivated by Uber BV and, therefore, claimed to have been unfairly dismissed.³⁷ Uber South Africa (Uber SA) was the applicant in the arbitration proceedings and argued that the CCMA lacked jurisdiction to hear the matter.³⁸ Uber SA contended that the drivers were not employees of Uber Netherlands (Uber BV) and, by implication, neither could they be employees of Uber SA.³⁹ Uber SA further stated that, regardless, it does not have the required level of supervision and control over drivers that would qualify them as Uber employees. Specific reference was made to the facts that a partner driver is allowed to appoint another driver and that Uber drivers are⁴⁰ required to supply their own vehicles and carry all related expenses.⁴¹

34 *Employment Rights Act 1996*. GOV.UK, <https://rebrand.ly/rllwyp5> (accessed on 12 February 2023). See also Chayya "Towards the creation a fair ride-hailing industry: Should South African labour law regulate the Uber relationship?", <http://hdl.handle.net/11427/29756> (accessed on 12 February 2023).

35 Rani 2021:11.

36 Rani 2021:11.

37 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others* (C449/17) [2018] ZALCCT:par. 3.

38 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others* (C449/17) [2018] ZALCCT:par. 20.

39 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others* (C449/17) [2018] ZALCCT:par. 20.

40 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others* (C449/17) [2018] ZALCCT:par. 54.

41 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others* (C449/17) [2018] ZALCCT:par. 54.

The drivers maintained that Uber exercises sufficient control over them by the use of ratings.⁴² The drivers ultimately claimed that they and the partner drivers are employees when they drive in terms of the Uber application, irrespective of whether they own the vehicle or are driving another vehicle in some other manner secured.⁴³

To determine whether an employment relationship prevailed, the CCMA made reference to various tests formulated in case law such as the control test, the organisational test, the economic dependence test, and the dominant impression test. These tests entail observing the overall working relationships between the parties, in order to determine the employment status.⁴⁴ Sec. 200A of the *Labour Relations Act*⁴⁵ further embodies these tests,⁴⁶ by creating a presumption on employment status. This sec. provides:

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 any one or more of the following factors are present:

- (a) the manner in which the person works is subject to the control or direction of another person;
- (b) the person's hours of work are subject to the control or direction of another person;
- (c) in the case of a person who works for an organisation, the person forms part of that organisation;
- (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;
- (e) the person is economically dependent on the other person for whom he or she works or renders services;
- (f) the person is provided with tools of trade or work equipment by the other person, or
- (g) the person only works for or renders services to one person.

42 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others* (C449/17) [2018] ZALCCT:par. 38.

43 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others* (C449/17) [2018] ZALCCT:par. 51.

44 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others* (C449/17) [2018] ZALCCT:par. 57.

45 *Labour Relations Act* 66/1995.

46 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others* (C449/17) [2018] ZALCCT:par. 57.

The CCMA found that drivers are indeed subject to the control of Uber and that there are clear standards and performance requirements.⁴⁷ The commissioner further stated that Uber also has the power to deactivate and/or suspend access to the application.⁴⁸ The CCMA rejected Uber SA's argument that the partner is the driver's employer, as the partner has no control over the deactivation of the drivers or any other controls that are implemented by Uber. The CCMA concluded that the drivers are an essential element to Uber⁴⁹ and that sec. 213 of the *Labour Relations Act*⁵⁰ is wide enough to include Uber drivers in the definition of an employee.⁵¹

Uber SA subsequently took the arbitration award on review to the Labour Court (LC).⁵² It was stated that, in a review application, the court must determine whether the commissioner's decision is correct.⁵³ The LC made reference to sec. 145 of the *Labour Relations Act*.⁵⁴ Sec. 145 of the *Labour Relations Act*⁵⁵ states that a party to a dispute, who alleges a defect in an arbitration proceeding, may apply to the LC to set aside such order.

The LC further made reference to the case of *SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others*,⁵⁶ whereby it was stated that, according to the facts, what needed to be determined was whether or not a dismissal had taken place and such an issue speaks to the jurisdiction of the CCMA.⁵⁷ It was stated that, if no unfair dismissal had taken place, then the CCMA simply does not have jurisdiction to entertain the matter.⁵⁸ An unfair dismissal can only take place if an employee relationship is proven and then only may jurisdiction be established. It was also stated that the CCMA is a

47 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others* (C449/17) [2018] ZALCCT:par. 58.

48 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others* (C449/17) [2018] ZALCCT:par. 58.

49 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others* (C449/17) [2018] ZALCCT:par. 51.

50 *Labour Relations Act* 66/1995.

51 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others* (C449/17) [2018] ZALCCT:par. 60. Sec. 213 of the *Labour Relations Act* 66/1995 defines an employee as:

any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive any remuneration and ... any other person who in any manner assists in carrying on or conducting the business of an employer, and "employed and "employment" have meanings corresponding to that of "employee".

52 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others* (C449/17) [2018] ZALCCT.

53 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others* (C449/17) [2018] ZALCCT:par. 61.

54 *Labour Relations Act* 66/1995.

55 *Labour Relations Act* 66/1995.

56 *SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others* (2008) 29 ILJ 2218 (LAC).

57 *SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others* (2008) 29 ILJ 2218 (LAC):paras. 38-39.

58 *SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others* (2008) 29 ILJ 2218 (LAC):paras. 38-39.

“creature of statute” and as such cannot decide on its own as to whether it possesses jurisdiction or not.⁵⁹ It must be decided in law and fact whether the commissioner has jurisdiction.⁶⁰

The LC, therefore, turned its focus to whether or not the CCMA had jurisdiction to hear the matter.⁶¹ The court made reference to the case of *Universal Church of the Kingdom of God v Myeni (Myeni)*.⁶² Of importance, it was stated that:

Thus the onus was on him to prove that he was indeed an employee of the Church as envisaged in the LRA. Unless he established that there was an employment relationship between him and the Church, the CCMA, being a creature of statute, would not have the requisite jurisdiction to arbitrate his dispute.⁶³

In *Myeni*, it was held that Mr Myeni could not rely on the provisions of sec. 200A of the *Labour Relations Act*,⁶⁴ as there was no employment contract nor any working arrangement between the parties.⁶⁵ Although the court acknowledged that it is bound by the decision of *Myeni* and that the commissioner should also be bound by such, the court did consider the various tests used to determine whether one is an employee or not – this being the control test, the organisation test and the dominant impression test.⁶⁶ These tests entail determining the amount of control and supervision the employer exercises over the worker; whether the employee forms an integral part of the organisation, and the economic dependence of the worker on the employer.⁶⁷ This entails a reality test where regard is given to the “substance of the relationship” as opposed to the “form”.⁶⁸ This test, in essence, determines whether the contractual terms are in line with the actual working relationship, in order to eradicate “disguised employment relationships”.⁶⁹ The LC further stated that the reality cannot be evaluated

59 *SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others* (2008) 29 ILJ 2218 (LAC):par. 40.

60 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others* (C449/17) [2018] ZALCCT:par. 62.

61 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others* (C449/17) [2018] ZALCCT:par. 61.

62 *Universal Church of the Kingdom of God v Myeni* [2015] 9 BLLR 918 (LAC):par. 26.

63 *Universal Church of the Kingdom of God v Myeni* [2015] 9 BLLR 918 (LAC):par. 26.

64 *Labour Relations Act* 66/1995.

65 *Universal Church of the Kingdom of God v Myeni* [2015] 9 BLLR 918 (LAC):par. 36.

66 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others* (C449/17) [2018] ZALCCT:par. 73.

67 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others* (C449/17) [2018] ZALCCT:par. 74.

68 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others* (C449/17) [2018] ZALCCT:par. 74.

69 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others* (C449/17) [2018] ZALCCT:par. 75.

on its own.⁷⁰ The LC stated that the commissioner placed much emphasis on this test alone and was still bound to the statutory provisions of sec. 213 of the *Labour Relations Act*.⁷¹

The court held that the commissioner erred in not giving credence to the fact that there was no contractual relationship between the parties.⁷² The court held that Uber BV implemented the rating system and the deactivation policy, and not Uber SA.⁷³ The court further noted that the remuneration of a driver is derived from the partner and that there were written contracts between vehicle-owning partners and drivers.⁷⁴ The LC ultimately concluded that the commissioner conflated Uber BV with Uber SA and that no contractual relationship existed between Uber SA and the drivers.⁷⁵ Ultimately, the court concluded that the CCMA lacked jurisdiction in the dispute.⁷⁶ Significantly, the LC left open the question as to whether or not Uber drivers were employees of Uber BV,⁷⁷ as the latter was not joined as a party to the proceedings.

4. *UBER BV AND OTHERS V ASLAM IN THE UK (ASLAM)*

In the UK, there are three categories of workers, namely an employer, an independent contractor, and a worker.⁷⁸ In this case, the court was called upon to determine whether Uber drivers were indeed “workers”, in order to be entitled to certain rights as stipulated in the *Employment Rights Act*.⁷⁹ As workers, these drivers would be entitled to pertinent rights such as the regulation of working times and the national minimum wage.⁸⁰

This is a Supreme Court of appeal case in the UK.⁸¹ This case follows the decision granted by the Employment Tribunal (ET) sitting at London in 2015.⁸² The claimants to the case at the ET were the drivers and the respondents were

70 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others* (C449/17) [2018] ZALCCT:par. 76.

71 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others* (C449/17) [2018] ZALCCT:par. 77.

72 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others* (C449/17) [2018] ZALCCT:paras. 90-91.

73 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others* (C449/17) [2018] ZALCCT:paras. 90-91.

74 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others* (C449/17) [2018] ZALCCT:par. 92.

75 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others* (C449/17) [2018] ZALCCT:paras. 96-100.

76 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others* (C449/17) [2018] ZALCCT:paras. 96-100.

77 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others* (C449/17) [2018] ZALCCT: paras. 96-100.

78 *Employment Rights Act* 1996. Sec. 230 deals specifically with the definition of ‘employee’ and ‘worker’.

79 *Employment Rights Act* 1996.

80 *Uber BV and Others v Aslam and Others* [2021] UKSC 5.

81 *Uber BV and Others v Aslam and Others* [2021] UKSC 5.

82 *Aslam and others v Uber BV and others* Case 2202551/2015.

Uber BV as well as Uber London, the local subsidiary.⁸³The ET concluded that the written agreement between Uber and the drivers was a misrepresentation of the true nature of the working relationship, at least the case for as long as the drivers are logged onto the application.⁸⁴ The ET held that the local subsidiary is the employer of the drivers.⁸⁵ This matter was then taken on appeal to the Employment Appeal Tribunal (EAT), which upheld the decision of the ET that the drivers were in the employment of Uber London.⁸⁶

The matter was subsequently brought on appeal to the Supreme Court of Appeal.⁸⁷

Uber argued that regard must be given to the contract and that, in terms of the contract, Uber BV only provides technological services and acts as a payment-collection agent.⁸⁸ Uber claimed that the ET failed to give effect to the terms of the written agreement.⁸⁹

The Supreme Court of Appeal considered the legislative terminology of a “contract of employment” as well as the term ‘employee’ as legislatively defined by the *Employments Rights Act*.⁹⁰

It was acknowledged that there was no written agreement between Uber London and the drivers and, due to this, the court found that the relationship must be inferred from the parties’ conduct considering its relevant, factual, and legal context.⁹¹

The court recognised that regard must be given to the true agreement between the parties’ conduct.⁹² Uber argued that the written agreement represented the true nature of conduct between the parties.⁹³ The court acknowledged that the drivers had a certain degree of freedom; they were free to decide when and where they wanted to work.⁹⁴

83 *Aslam and others v Uber BV and others* Case 2202551/2015.

84 *Aslam and others v Uber BV and others* Case 2202551/2015:par. 83.

85 *Aslam and others v Uber BV and others* Case 2202551/2015:par. 83.

86 *Uber BV, Uber London Ltd, Uber Britannia Ltd v Aslam & Others* UKEAT/0056/17/DA.

87 *Uber BV and Others v Aslam and Others* [2021] UKSC 5.

88 *Uber BV and Others v Aslam and Others* [2021] UKSC 5:par. 43.

89 *Uber BV and Others v Aslam and Others* [2021] UKSC 5:par. 44. In terms of the written agreement, the drivers are required to sign a partner registration form, the agreement is termed an agreement between Uber BV and a so-called ‘independent company’ which provides transportation services; it thereafter contains an undertaking by the ‘customer’ to further enter into contracts with drivers in the form of an accompanying driver addendum.

90 *Employments Rights Act* 1996.

91 *Uber BV and Others v Aslam and Others* [2021] UKSC 5:par. 45.

92 The court made reference to the case of *Autoclenz Ltd v Belcher* [2011] UKSC 41, where 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”.

93 *Uber BV and Others v Aslam and Others* [2021] UKSC 5:par. 66.

94 *Uber BV and Others v Aslam and Others* [2021] UKSC:par. 90.

The Supreme Court considered the following aspects of control made by the ET, which resulted in the ET recognising the drivers as workers of Uber London:

1. Uber sets the fees and not the driver.
2. Uber sets its own services fee.
3. Uber decides on any refunds made to the passengers.
4. Drivers have no control over the terms set by Uber.
5. Uber further controls the drivers by monitoring their ratings and has the final say on whether the cars may be used or not.
6. Uber restricts communications between the passenger and the drivers.⁹⁵

Hence, in considering the above aspects that indicate a great degree of control and based on the reality of the working relationship between the drivers and Uber London, the Supreme Court of Appeal agreed with the ET and concluded that the drivers are indeed under the “control” of the company when they log onto the Uber application.⁹⁶The Supreme Court of Appeal, therefore, concluded that the drivers were entitled to the rights granted by the ET.⁹⁷

5. AN OVERVIEW OF THE POSITION IN SA AS COMPARED TO THE POSITION IN THE UK

In SA, our courts have determined whether a person is an employee or an independent contractor, by examining the “true nature” of the working relationship as opposed to focusing solely on written agreements.⁹⁸ As noted earlier, the courts have correspondingly applied and considered the same factors as stated in terms of sec. 200A of the *Labour Relations Act*.⁹⁹

The case of *Aslam* seems to have made a considerable impact in determining the true nature of employment contracts in the UK,¹⁰⁰ where certain rights such as the right to claim for an unfair dismissal are limited to those individuals who work under employment contracts.¹⁰¹ The UK judiciary system makes use of the control test, the integration test, and the economic reality tests.¹⁰² Factors such as control are considered; whether the employer pays wages to the worker and accepts the risks of profit or loss; whether the worker has been integrated into the organisation; whether the employer has

95 *Uber BV and Others v Aslam and Others* [2021] UKSC 5:paras. 94-100.

96 *Uber BV and Others v Aslam and Others* [2021] UKSC 5:par. 134.

97 *Uber BV, Uber London Ltd, Uber Britannia Ltd v Aslam & Others* UKEAT/0056/17/DA:par. 139.

98 Arnold “Are you an employee or an independent contractor”, <https://www.lexisnexis.co.za/lexis-digest/legal/are-you-an-employee-or-an-independent-contractor> (last accessed on 20 February 2023).

99 *Labour Relations Act* 66/1995.

100 Peiris 2021.

101 Peiris 2021.

102 Peiris 2021.

supplied the capital, raw materials, tools and equipment; whether the worker is required to perform the work personally or is allowed to use a substitute; whether the institution accepts risks and health and safety responsibility.¹⁰³

In terms of SA labour law, workers are classified as either employees or independent contractors. However, to the converse, it is observed that, in the UK, the third category of workers (dependent contractors) seem to be on the borderline between employees and independent contractors, whereby they are granted limited rights.

In both cases, the local entity of Uber was a party to the proceedings. The court in *Aslam* looked beyond the contractual relationship and adopted similar tests such as those already recognised in terms of SA labour laws, being the degree of control exercised by the local Uber entity over the drivers. In the case of *Uber SA v NUPSAW & Others*,¹⁰⁴ the LC bound itself to the fact that the starting point of determining the nature of the true working relationship should be in considering the contract itself. In the case of *Myeni*, the court stated that sec. 200A of the *Labour Relations Act*¹⁰⁵ cannot be considered, unless there was a “legally enforceable” agreement between the parties.¹⁰⁶ The court went on to state that, since there was no contractual agreement, sec. 200A of the *Labour Relations Act* could not be considered.¹⁰⁷

As observed by the LC in *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others*,¹⁰⁸ in *Myeni*, the starting point in determining employment status is ultimately the contract. However, section 200A of the *Labour Relations Act*¹⁰⁹ provides for the courts to look beyond the contractual terms and this results in some means of protection to vulnerable workers. Had there been a contractual agreement between Uber SA and the drivers, perhaps the court could have taken into account the following with regard to the reality of the relationship between Uber SA and the drivers:

- The manner in which the drivers work is subject to certain conditions mentioned in their contracts such as being in a possession of a driving permit; having a safety screening certificate, and having a driving evaluation certificate.¹¹⁰

103 Peiris 2021.

104 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others* (C449/17) [2018] ZALCCT.

105 *Labour Relations Act* 66/1995.

106 *Universal Church of the Kingdom of God v Myeni* [2015] 9 BLLR 918 (LAC):par. 40.

107 *Universal Church of the Kingdom of God v Myeni* [2015] 9 BLLR 918 (LAC):par. 41. See also the discussion in Chayya “Towards the creation a fair ride-hailing industry: Should South African labour law regulate the Uber relationship?”, <http://hdl.handle.net/11427/29756> (accessed on 12 February 2023), such as the right to claim for an unfair dismissal.

108 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others* (C449/17) [2018] ZALCCT.

109 *Labour Relations Act* 66/1995.

110 Uber “The basics”, <https://www.uber.com/za/en/drive/requirements/> (last accessed on 28 April 2023).

- The vehicles which the drivers use must also adhere to certain requirements.¹¹¹
- Promotions are offered to drivers if a driver reaches a certain number of trips and drivers get paid more during busy periods.¹¹² If workers reject rides too often, they are deactivated; this further points to a degree of control regarding the hours of work.
- Drivers are indeed a crucial part of Uber as, without drivers, Uber will cease to exist.
- Due to the deactivation policy of Uber, many drivers feel the need to clock in a certain amount of hours and may not even have time for a full employment at other institutions.

Another case dealing with Uber was subsequently noted in SA, where one of the drivers approached the CCMA and also cited Uber BV as a party.¹¹³ However, the CCMA stated that it did not have jurisdiction to hear the matter.¹¹⁴ The commissioner stated that there is a clause in the agreement to the effect that disputes must be resolved in the form of arbitration in The Netherlands.¹¹⁵ Although regard must be given to contractual terms, such contracts must also be subject to “constitutional scrutiny”.¹¹⁶ In the case of *Barkhuizen v Napier*,¹¹⁷ the Constitutional Court highlighted the fact that contractual terms would be null and void if such terms are against public policy and that regard must be given to the “relative situation of the contracting parties” and “the inequality of bargaining power”.¹¹⁸ What the commissioner suggested in this case is not only impractical for the drivers, but such a clause would be against public policy as it indeed causes these drivers to be in an unfair position. It is highly unlikely that any driver would resort to arbitration in The Netherlands, even though there may be a gross violation of rights.

It can be argued that, in the UK, a different scenario was noted, due to the fact that, in order to drive in the UK, Uber would need to obtain a licence to provide transportation services,¹¹⁹ and because of this requirement, licenses were issued to Uber London and subsequently drivers must contract with Uber London.¹²⁰ However, in SA, there is no need for this as drivers can obtain licenses individually.¹²¹ *The National Land and Transportations Amendment Bill*,¹²² however, seems to suggest a change to the current situation regarding

111 Uber “The basics”, <https://www.uber.com/za/en/drive/requirements/> (last accessed on 28 April 2023).

112 Uber “The basics”, <https://www.uber.com/za/en/drive/requirements/> (last accessed on 28 April 2023).

113 Malherbe *et al.* 2019.

114 Malherbe *et al.* 2019: 185

115 Malherbe *et al.* 2019:185.

116 Malherbe *et al.* 2019: 186.

117 *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC).

118 *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC):par. 59.

119 Malherbe *et al.* 2019:187.

120 Malherbe *et al.* 2019:187.

121 Malherbe *et al.* 2019.

122 *The National Land and Transportations Amendment Bill* (B7-2016).

licenses as there is a definition for e-hailing services. There are also certain requirements to which e-hailing businesses must adhere.¹²³ For instance, the *National Land and Transportations Amendment Bill*¹²⁴ states that business may not allow the driver to use the application if the driver does not have a valid operating license and that the business must disconnect access to the platform until a valid operating license is obtained.

Government has faced challenges concerning regulation of e-hailing services. A possible challenge with regard to regulation is that work conducted via digital platforms is changing and updating on a constant basis.¹²⁵ A study by The City of Cape Town revealed that there were more Uber drivers on the roads compared to the number of licenses issued by the city; hence, this emphasises the predicament that is currently faced SA.¹²⁶

The enactment of these amendments could result in better protection to drivers, as observed with the position in the UK, and could contribute towards a fair ride hailing industry. In the instance that employment status is granted to Uber drivers, perhaps there will be further regulation in the e-ride hailing industry. Rights such as collective bargaining, protection against unfair dismissals and unfair labour practices, as well as social security benefits would be granted to these workers.¹²⁷

6. CONCLUSION

Given SA's Constitutional background and taking into cognisance sec. 23 of the *Constitution of the Republic of South Africa* 1996, which states that everyone has the right to fair labour practices, the courts have a duty to ensure that persons can access their fundamental constitutional rights. Following the decision of the case of *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others*,¹²⁸ one can observe the vulnerable positions that face Uber drivers. SA courts have already developed tests to ensure that a purposive and factual approach is applied. These tests are similar to the tests observed in the UK. Uber SA already plays a significant role with regard to the activation and deactivation of the drivers and this is consistent with the dominant impression test. However, due to the fact that there was no contractual agreement between Uber SA and the drivers, a similar decision to the case of *Aslam* could not be reached. Further regulation is required to ensure that SA's legislative framework is kept abreast with developments in the changing world of work.

123 Insertion of sec. 66A in *The National Land Transport Act* 5/2009.

124 *National Land and Transportations Amendment Bill* (B 7-2016).

125 Ntoyanto 2021.

126 Ntoyanto 2021:357.

127 Ntoyanto 2021:187.

128 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & Others* (C449/17) [2018] ZALCCT.

SA has one of the highest unemployment rates.¹²⁹ Traditional work can make way for other forms of work.¹³⁰ However, regulation is essential and crucial. When it comes to legislation, regard must be given to what the very aim of legislation is meant to advance. It has been stated that “labour law regulation has lost the harmonisation with the goal that they are supposed to advance”.¹³¹ Our current labour legislation is more focused on traditional employment relationships.¹³² There needs to be a move away from this focus to accommodate the changing world of work and to ensure that working conditions in the new world of work have some form of regulation.

Digitalisation can be a means to improve working and living conditions, it is not an “apocalyptic evil but something that needs to be shaped”.¹³³ It must be noted that human beings do not become slaves to technology.¹³⁴

Due to technological advances and the disadvantages which workers face as a result of companies taking advantages of certain “loopholes” such as confining persons to contractual terms of being “independent contractors”, it is indeed necessary for governments to ensure that legislation is enacted to regulate platform work.

129 Smit & Stepforth “An overview of categories of vulnerability among on-demand workers in the gig economy”, <https://law.uwc.ac.za/all-publications/idd-items/an-overview-of-categories-of-vulnerability-among-on-demand-workers-in-the-gig-economy-part-1-pp-364-394> (last accessed on 23 February 2023).

130 Smit & Stepforth “An overview of categories of vulnerability among on-demand workers in the gig economy”, <https://law.uwc.ac.za/all-publications/idd-items/an-overview-of-categories-of-vulnerability-among-on-demand-workers-in-the-gig-economy-part-1-pp-364-394> (last accessed on 23 February 2023).

131 Botha & Fourie 2019:180.

132 Botha & Fourie 2019:180.

133 Mokofe 2022:12.

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