

The Provision of a Safe Working Environment for E-Hailing Workers in South Africa: Who Bears This Responsibility?*

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SUMMARY

The introduction of electronic hailing (e-hailing) work in South Africa, with the use of the mobile application (app) as a mode of doing business, has placed Uber drivers under vicious attack by rival taxi operators. There have been various scenes and reports where drivers have been assaulted while performing their duties. It is believed that the cause of the attacks on Uber drivers is competition over passengers. Taxi operators appear not to accept that the Fourth Industrial Revolution has brought some changes to the way work is done and that the transport industry is also affected by these developments. Like all workers operating in South Africa, Uber drivers need to be protected by law. The law entrusts all employers with the duty to provide safe working conditions for their workers. It seems that Uber drivers are an exception to this rule, as the Uber employer has not been seen taking measures to protect its drivers from violence or attacks instituted against them. It must be remembered that labour law in South Africa only protects people who are “employees”. Since the contract of Uber drivers states that they are “independent contractors”, they are seemingly excluded from protection by labour law. It follows that the limited application of labour law to “employees” excludes many categories of worker (including e-hailing workers) from its scope of coverage and protection. The authors argue that the definition of an employee should be broadened to cater to the many categories of worker that have emerged as a result of the Fourth Industrial Revolution. If this happens, the Uber employer will be bound to provide a safe working environment for its drivers.

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KEYWORDS: Uber drivers, an app, taxi operators, competition, violence, safe working environment

1 INTRODUCTION

In South Africa, providing safe and healthy working conditions is a duty imposed on all employers.¹ The employer cannot discharge this obligation alone, as it requires cooperation from workers. The law requires employees or workers to inform the employer about any hazardous conditions or areas in the workplace that could compromise their safety while they work. The duty to provide a safe working environment arises when there is an employment relationship between the parties. There appears to be no general duty on an employer to provide safe working conditions if there is no employment relationship between the employer and the affected people. Determining whether there is an employment relationship is not difficult in a normal or traditional employment relationship. The difficulty arises, however, when e-hailing work is involved, such as with Uber and/or Bolt drivers. E-hailing work has presented South Africa with new and innovative ways of doing business through the use of an application (app). In the transport industry, the introduction of app-based transport business has resulted in clashes between traditional taxi operators and e-hailing drivers. There have been several incidents of attacks on Uber drivers – allegedly by taxi operators. These attacks have resulted in several areas being declared “no-go zones” for Uber drivers.

This article investigates whether e-hailing employers like Uber have a duty to protect their drivers from unsafe working conditions, such as violent attacks from rival taxi drivers.

2 THE NATURE OF E-HAILING WORK AND ITS OPERATION

The modern workplace is characterised by digitisation and the use of technology. The introduction of these new methods of doing work has the potential to replace human capital. Currently, South Africa and other nations worldwide are involved in the Fourth Industrial Revolution (4IR). The 4IR and its use of technology has reduced the number of jobs available in the market, as much of the work that a human being would do is replaced by machines or technology.

A new most popular form of work has hit the workspace in South Africa in the form of “gig work”, which is an umbrella term comprising three distinct types of service: capital platform work, crowd work, and app work.² Each of these types of work performs a particular service in the economy. For

¹ Occupational Health and Safety Act 85 of 1993 (OHSA).

² Duggan, Sherman, Carbery and McDonnell “Algorithmic Management and App-Work in the Gig Economy: A Research Agenda for Employment Relations and HRM” 2020 30 *Human Resource Management Journal* 114 115.

example, crowd work refers to work that ranges in skill-level difficulty and is outsourced to a large pool of online workers. An example of this is freelance workers. App work, on the other hand, which is also known as “on-demand work”, involves an application that connects clients and workers via an online platform to perform tasks in a specific geographical area. This type of work consists of various categories, such as ride-sharing services (like Uber and Bolt) cleaning services (SweepSouth) and running errands (TaskRabbit and Errandworld)). The most popular of these is ride-sharing, which includes Uber and Bolt. This article focuses on ride-sharing, as this form of work has caused controversy in recent years.

With these new methods of doing work, the modern world of work presents a dilemma for workseekers: working in a digitised environment or seeking formal employment where there are not enough standard jobs available. It is clear that the ascendance of 4IR and the new mode of work have brought numerous changes, to such an extent that many workers find it difficult to compete with new methods of doing the same work. One example is found in the transport industry.

Uber transport services offer an alternative to trains, buses, carpooling and minibuses. It is a mode of transport that operates in approximately 84 countries and 674 cities worldwide.³ Uber BV, the parent or holding company, was incorporated in the Netherlands. It owns and operates the Uber app, which allows passengers to hail a ride and for drivers to charge fares and get paid. Uber SA is a subsidiary of Uber BV. Commercial arrangements exist between Uber BV and Uber SA to allow the latter to provide specified services to Uber BV. These include marketing and training, and support services rendered on behalf of the holding company in South Africa. Uber BV describes itself as a company that

“[o]ffers information and a means to obtain transportation services by third-party transportation providers, drivers or vehicle operators (the transportation provider) which may be requested through the use of an application supplied by Uber, downloaded and installed by an individual on his or her mobile device.”⁴

The relationship that Uber drivers have with Uber BV is a distant and anonymised one. Instead, these drivers have a relationship with Uber SA, a subsidiary of Uber BV. Uber BV and Uber SA do not own any vehicles in South Africa. Uber contends that it only connects transportation providers via information technology.⁵ Each driver creates a profile on the Uber BV website, uploads a valid South African driving licence, attends a driver competency test, and undergoes a screening and background check. The drivers then attend an information session at a place designated by Uber SA. During that session, drivers are provided with lessons on how to use the Uber app and how to maintain good ratings from users. The driver’s profile is

³ Van Eck and Nemusimbori “Uber Drivers: Sad to Say but Not Employees of Uber SA” 2018 81(3) *THRHR* 473.

⁴ Van Eck and Nemusimbori 2018 *THRHR* 474.

⁵ Sidak “Is Uber Unconstitutional?” 2016 *Criterion Journal on Innovation (CJI)* 1 182.

then activated. Uber BV provides legal contracts and technology, and deals with the collection and payment of monies received from the riders.

Uber BV's local subsidiary, Uber SA, appoints and controls local drivers, and drivers engage with Uber SA every day and not with Uber BV. The Uber service is controlled through an app where a person seeking transportation (passenger) simply opens the app and requests a ride. The passenger indicates their pick-up point and destination, and the app then processes the information and pairs the passenger with the driver who is closest to the passenger's pick-up point. Drivers can choose when they wish to offer services by logging on and off the app.

3 THE COMMISSION OF VIOLENCE AGAINST E-HAILING DRIVERS

The commission of violence has become a feature in labour relations in South Africa, mostly when workers are on strike. Several cases have come before the courts where violence has been inflicted against other workers or innocent civilians.⁶ The use of violence or force to get the attention of those meant to address grievances appears to be the norm in the Republic. The e-hailing industry (Uber drivers) has also been affected by this conduct. The entry of Uber Technologies into the transport industry has triggered elements of discomfort among traditional taxi operators in South Africa and probably around the world. It has created a competition shift in both the transportation of people and the movement of goods. As a result, Uber has faced hostility from its local competitors, which has prompted interventions from the government. The arrival of Uber and other transport businesses has been met with anger, resistance and violence by existing traditional taxi operators. Uber drivers have experienced the brunt of taxi violence and its effects. The media have reported on Uber cars being set on fire, drivers being violently attacked and passengers facing intimidation in some parts of the country.⁷ In addition, Uber policies have placed their drivers in precarious situations as the system allows them to accept cash from clients, which could expose drivers to violent robberies.

The cause of the violence appears to be competition over clients, as Uber drivers strive to secure their livelihood and their rights as workers and to be recognised as such in the transport industry. The Competition Commission confirmed that "the competition between the metered taxi drivers and e-hailing drivers was largely driven by technological developments which Uber

⁶ As Van Niekerk J put it in *National Union of Food Beverage Wine Spirits & Allied Workers v Universal Product Network (Pty) Ltd: In re Universal Product Network (Pty) Ltd v National Union of Food Beverage Wine Spirits & Allied Workers* (2016) 37 ILJ 476 (LC): "[I]t is regrettable that acts of wanton and gratuitous violence appear inevitably to accompany strike action, whether protected or unprotected ... A week in the urgent court where employers seek interdicts against strike-related misconduct on a daily basis bears testimony to this" (par 37).

⁷ Cilliers "Uber Confirms Driver Attacked and Burnt at Loftus on Saturday " (2017-06-12) *Citizen*.

took advantage of”.⁸ On the other hand, taxi drivers appear to have monopolised the transport industry and do not want to accept competition from other road users with their new and innovative methods of transporting people. Henama and Sifolo refer to these innovative and technology-related businesses as being disruptive in nature.⁹ Ntoyanto argues that this is a fitting description as innovative business models not only disrupt traditional business models, concepts and operations, but they also change the ways in which consumers use or access a product or service.¹⁰ In response, traditional taxi drivers who rely on the old methods of transporting people have resorted to violent attacks against e-hailing drivers, instilling fear in them so that they do not continue with their business. Reported tactics against Uber drivers include physical attacks, petrol bombs and acid throwing, which have resulted in damage to their cars, and the serious injury and death of some drivers. Sometimes the killing of these drivers involves hired hitmen. In some instances, innocent civilians find themselves in the crossfire and lose their lives. For example, in September 2021, there were reports of incidents around the country involving taxi drivers assaulting e-hailing contractors; areas affected included Katlehong, Alberton and Greenacres Shopping Centre in Gqeberha.¹¹ In June 2023, Uber and Bolt drivers were attacked at the Maponya Mall in Soweto, with bystanders reporting that taxi drivers were responsible for the violence. One video showed a man hitting another person who was approaching a vehicle with a blunt weapon.¹² At some point, e-hailing drivers were banned from picking up and dropping off shoppers from any mall in Soweto.¹³

The question of who should protect such workers against these violent attacks remains unanswered. It is argued that questions related to labour and law remain contentious when these two types of workers come into contact with each other. Since these violent incidents take place while Uber drivers are discharging their duties, the question that arises is whether South African labour law protects them from these attacks. It is further argued that since Uber drivers operate in South Africa, South African law should apply and should protect them like all other workers operating in the country.

It must be understood that labour law requires all employers to provide safe and healthy working conditions for their employees, as well as to

⁸ Ntoyanto *Regulation of E-Commerce Transport Business: A Case Study of Uber South Africa* 6th Annual International Conference on Public Administration and Development Alternatives (virtual) (October 2021) 359.

⁹ Henama and Sifolo “Uber: The South Africa Experience” 2017 6(2) *African Journal of Hospitality, Tourism and Leisure* 1–10.

¹⁰ Ntoyanto paper presented at 6th Annual International Conference on Public Administration and Development Alternatives.

¹¹ Chirume “Violence Unleashed Against Gqeberha’s E-Hailing Drivers” Report by GroundUp (9 September 2021) <https://groundup.org.za/article/violence-targeting-e-hailing-drivers-gqeberha-intensifies/> (accessed 2024-07-22).

¹² Illidge “Uber Drivers Allegedly Attacking Their Customers in South Africa” *My Broadband* (6 August 2023) <https://mybroadband.co.za/news/it-services/503332-uber-drivers-allegedly-attacking-their-customers-in-south-africa.html> (accessed 2025-09-19).

¹³ Labuschagne “Uber and Bolt Drivers Banned From Soweto Malls for Three Months” *My Broadband* (8 June 2023) <https://mybroadband.co.za/news/motoring/495413-uber-and-bolt-drivers-banned-from-soweto-malls-for-three-months.html> (accessed 2024-01-23).

conduct their undertaking in a non-hazardous manner for anyone who finds themselves on the premises or workplace of the employer.¹⁴ However, the duty to provide safe and healthy working conditions is not a general duty that is available to every worker and at any workplace. It is available to employees of an employer when discharging their contractual duties, and if there is an employment relationship. For an e-hailing worker to find protection in terms of the labour law in the Republic, they must be categorised as “employees” with an employment relationship existing between them and their employer (Uber SA).

4 DETERMINING THE EXISTENCE OF AN EMPLOYMENT RELATIONSHIP

The existence of an employment relationship is the foundation of many rights in employment or in the workplace. The contract of employment, although not the only factor, usually serves as the determining factor in this regard.¹⁵ For an employment relationship to exist, it must be established that there is an employee who works for an employer and who receives or is entitled to receive remuneration for the services they have rendered. On the other hand, there must be an employer who pays the employee for the services the latter has rendered.¹⁶ However, this does not mean that an employment relationship cannot exist where the other party is not an employee. An employment relationship can exist even if the other party is a worker as defined in the National Minimum Wage Act (NMWA).¹⁷ The question that then arises is whether Uber drivers are employees of Uber employers.

4 1 Determining who is an employee

Determining what constitutes an “employee” is vital, as it is the gate through which employees find protection under labour law in South Africa. Garbers argues that if there is no employment relationship between the parties, the rules of labour law do not apply to that relationship.¹⁸ Du Toit submits that the scope of application of the three main statutes in labour legislation (Labour Relations Act,¹⁹ Basic Conditions of Employment Act²⁰ and Employment Equity Act²¹) is similar and the definitions of the persons bound by them are, for practical purposes, identical.²² The provisions of these pieces of legislation apply to “employees” and “employers” and other bargaining agents such as trade unions and employers’ organisations. In this

¹⁴ Ss 8 and 9 of the OHS Act.

¹⁵ Garbers *The New Essential Labour Law Handbook* (2019) 27.

¹⁶ S 213 of the LRA.

¹⁷ See the definition of “worker” in s 1 of the National Minimum Wage Act 9 of 2018.

¹⁸ Garbers *The New Essential Labour Law Handbook* 27.

¹⁹ 66 of 1995.

²⁰ 75 of 1997.

²¹ 55 of 1998.

²² Du Toit, Godfrey, Cooper, Giles, Cohen, Conradie and Steenkamp “Labour Relations Law: A Comprehensive Guide” 6ed (2015) 87.

regard, a person who is not an employee as defined²³ cannot be protected by these pieces of labour legislation. For example, in terms of provisions from the Labour Relations Act (LRA), only employees, employers and their collective-bargaining representatives enjoy the right to freedom of association and protection against victimisation;²⁴ only employees are protected from unfair dismissals and unfair labour practices;²⁵ employees comprise the constituency for determining whether a trade union is sufficiently representative in a workplace and whether a bargaining council is representative in a sector for certain purposes; only employees enjoy the right to strike;²⁶ and only employees may become members of a workplace forum.²⁷ Enforcement of these rights is through the tailor-made dispute resolution processes created by legislation; and the right to participate in the process of collective bargaining is through membership of trade unions. In terms of the Employment Equity Act (EEA), only “employees” are protected against unfair discrimination.²⁸

It is clear from the provisions of the LRA and the EEA referred to above that only “employees” are able to claim rights in terms of labour legislation in South Africa. The next question is what constitutes an employee. The LRA defines an employee as:

- “(a) 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
- (b) any other person who in any manner assists in carrying on or conducting the business of an employer.”²⁹

The definition of an employee excludes independent contractors from its application. As a result, it is often difficult to distinguish between an employee and an independent contractor as both categories perform work in exchange for remuneration or payment. However, independent contractors are not protected by labour legislation, while an employee is protected by labour law.³⁰ Distinguishing between an independent contractor and an employee appears to rely on the traditional way of defining an employee, with the effect that if the person does not fall within this definition, they will not be protected by labour laws in South Africa. Case law has attempted to help determine whether a person is an employee or an independent contractor through the adoption of three tests: the control, organisation and dominant-impression tests.³¹ It is the combination of these tests or factors

²³ S 213 of the LRA.

²⁴ Ss 4 and 5 of the LRA.

²⁵ S 185 of the LRA.

²⁶ S 64 of the LRA.

²⁷ S 82(h) of the LRA.

²⁸ S 6 of the EEA.

²⁹ S 213 of the LRA.

³⁰ Garbers *The Essential Labour Law Handbook* 63.

³¹ *Smit v Workmen’s Compensation Commissioner* 1979 (1) SA 51 (A); *SABC v Mckenzie* (1999) 20 ILJ 585 (LAC); and Le Roux “Identifying the Contract of Service” 1979 1 *Modern Law Review* 50.

that help determine whether a worker is an employee or an independent contractor.

As indicated above, the LRA does not define an independent contractor, and thus, the distinction with an employee is quite difficult. In layperson's terms, an independent contractor is a person, business or corporation that provides services under a written contract or verbal agreement. Independent contractors do not work regularly for an employer but work when their services are required. An independent contractor is a self-employed individual or entity contracted to perform work for or to provide services to another entity as a non-employee. An entity that uses the services of an independent contractor is not required to provide them with employment benefits, such as health insurance and employer-sponsored retirement provisions that the entity may otherwise provide to its employees. An independent contractor must pay for their own social-security benefits. The rules regulating the employer-employee relationship do not apply when the services of an independent contractor are involved; instead, the rules of the law of agency apply.

Section 200A of the LRA introduces a presumption in favour of persons who work for or render services to any other person, regardless of the form of any contract between them, or the status of "employee", provided that one or more listed factors are present. The effect of this presumption is that if one or more of the listed factors mentioned in the section are present, the person is presumed to be an employee. The presence of any one of these factors is sufficient to trigger the presumption, and the meaning of these factors is explained further in the Code of Good Practice: Who Is an Employee.³²

Following this discussion on employees and independent contractors, the question arises whether Uber drivers operating in South Africa can be regarded as employees. In addressing this question, the starting point is the contract that these workers enter into with their employer, Uber SA. The contract between Uber and its drivers states that they are independent contractors, and thus, in terms of section 213 of the LRA, they are excluded from the definition of an employee and are therefore not protected by labour law.

Despite specific mention in Uber's contract with its drivers that they are independent contractors, debate about their status and protection by labour law in South Africa has been ongoing. Case law has differed from the view that Uber drivers are independent contractors. In *Barbara Ann Berwick v Uber Technologies, Inc., A Delaware Corporation, and Rasier*,³³ the Uber driver sought to claim employee status, entitling her to reimbursement for expenses she had incurred. In its argument, Uber Technologies relied on the contractual terms, which stated explicitly that the driver was an independent contractor. In reaching its decision, the court considered factors such as who the driver was, the driver's investment, expertise required, supervision, opportunity for profit and loss, permanency of the relationship, intention of

³² GG 29445 of 2006-12-01.

³³ No 11-46739 EK 2015.

the relationship, and the period of execution of work. The court observed that the freedoms afforded to drivers are insignificant compared with aspects of Uber's control. Prerequisites for vehicles, termination of contracts for sub-standard ratings and enforcing Uber's marketing strategy were some of the factors the court considered before reaching its decision. The court rejected Uber Technologies's argument that the terms were in line with industry standards. It further held that Uber drivers are not highly skilled and that investment in their vehicles was insufficient to determine that they were in business for themselves. The court therefore found that the title of the contract differed from its substance. Uber's core business of providing transport would not operate in the absence of its drivers. The court disregarded the contract, and the driver was therefore held to be an employee.

In *Rasier LLC v Florida Department of Economic Opportunity*,³⁴ Rasier LLC successfully appealed a ruling that one of its drivers was an employee, entitling him to unemployment insurance after his contract was terminated. Rasier LLC was a wholly owned subsidiary of Uber. Rasier argued that the *Berwick* decision paid insufficient attention to the signed contract and overemphasised Uber's dependence on its drivers. Uber was compared to an art gallery acting as an agent, providing a platform for artists. It was observed that drivers are fundamental to Uber's business model, but just as Airbnb hosts are not employees of Airbnb, drivers are not automatically employees of Uber simply because Uber supplies a platform that connects demand (passengers) and supply (drivers). The ruling favoured Uber's position that it did not control drivers. It was held that Uber's prescriptions are minimal and that drivers have great autonomy in performing their work. Trips are assigned based on distance and are not influenced by expertise, and appraisals are performed by passengers and not by Uber. The court referred to past precedent in respect of traditional taxi drivers over whom greater control was exerted, and yet who were determined to be independent contractors. Citing principles from *Keith v News and Sun Sentinel*,³⁵ the court in *Rasier*³⁶ emphasised the importance of honouring a contract. It found that the explicit nature of the contract established the driver's independent contractor status and that Uber's behaviour did not contradict this. The ruling was subsequently upheld by the Florida District Court of Appeal.³⁷

In *Uber Technology Services (Pty) Ltd v National Union of Public Service & Allied Workers*,³⁸ the CCMA commissioner ruled that the respondents (the drivers) were employees as defined in section 213 of the LRA and that they were accordingly employed by Uber SA. It provided three reasons for this conclusion. First, the drivers render their personal services to Uber as they have to drive in their own name and may not outsource their driving to

³⁴ No 0026283468-02 2015.

³⁵ 667 So 2d 167 (1995).

³⁶ *Darrin E McGillis v Department of Economic Opportunity; and Rasier LLC* No 3D15-2758, 2017 WL, 438423 2017.

³⁷ *Rasier LLC v Florida Department of Economic Opportunity* No 0026283468-02 2025.

³⁸ (2018) 39 ILJ 903 (LC).

someone else. Secondly, their relationship with Uber is indefinite as long as the driver complies with the specified requirements. Thirdly, the drivers are subject to the control of Uber in the sense that they have to comply with its clear performance standards. If the driver does not meet the required standards, they are effectively dismissed or deactivated. The commissioner concluded that the above-mentioned factors indicate that the drivers are in no way independent and, as a result, are economically dependent on Uber SA. On appeal, the Labour Court noted that the definition of an employee in section 213 of the LRA specifically excludes independent contractors. The court held that in order for a person to qualify as an employee, there must be a contract between the person claiming to be an employee and the person alleged to be the employer. The contract must be one of employment. Judge Van Niekerk concluded that, because the drivers conceded that there was no contractual arrangement between them and Uber SA, the commissioner had erred in not upholding Uber SA's jurisdictional challenge. The judge further said that in the event that he was wrong and that there was an employment relationship without a contract, then the court would have to consider three primary criteria: the employer's right to supervision and control (supervision and control test); whether the employee forms an integral part of the organisation (organisation/integration test); and the extent to which the employee was economically dependent on the employer (dominant impression test).

It is argued that further clarity on the subject can be found in foreign law. The use of foreign law in South Africa is permitted in terms of section 39(1)(b)–(c) of the Constitution.³⁹ Foreign law in South Africa was first used in *S v Makwanyane*,⁴⁰ in which the Constitutional Court stated that “we can derive assistance from public international law and foreign case law, but we are in no way bound to follow it”.⁴¹ In *O'Connor v Uber Technology, Inc.*,⁴² the court considered the question of whether Uber drivers should be classified as independent contractors. In arriving at a decision, the court applied the presumption of who is an employee and concluded that Uber drivers were employees until proven otherwise.⁴³ In *Barbara Ann Berwick v Uber Technologies, Inc., A Delaware Corporation, and Rasier*,⁴⁴ the California Labour Commission ruled that an Uber driver was a company employee and not an independent contractor. It distinguished between Uber drivers and pizza deliverers, who are clearly employees despite often using their own vehicles to conduct a separate company business. It confirmed that the Uber driver was, in fact, an employee. In 2017, the New York State Unemployment Insurance Appeal Board, in *AK, JH and JS v Uber Technologies Inc*, ALJ,⁴⁵ held that three Uber drivers were employees and not independent contractors. The Board held that “Uber exercised supervision and control over substantial aspects of their work as drivers” and

³⁹ Constitution of the Republic of South Africa, 1996.

⁴⁰ 1995 (3) SA 391 (CC).

⁴¹ [1995] 6 BCLR 694 (CC).

⁴² (ND Cal 2015) 82 F Supp 3rd 1133 82F.

⁴³ *O'Connor v Uber Technology, Inc supra* 1141–1145.

⁴⁴ *Supra*.

⁴⁵ Case no 016-23858.

that “Uber did not employ an arms’ length approach to the claimants”, which would typically be present in an independent-contractor relationship. Uber drivers had also been labelled as employees in the UK.⁴⁶

The authors consider that the relationship between an employer and an e-hailing worker is new in South Africa, and its operation differs from the traditional employer/employee relationship. Uber’s innovative business model has accordingly posed a challenge to the manner in which judges and CCMA commissioners envision labour relationships. It appears that there has been a lack of clarity in classifying Uber drivers as employees, independent contractors, or something entirely new. It is proposed that lessons from foreign law (as discussed above) may provide some guidance on how to deal with matters of this nature. Foreign case law has held that no matter what the contract says, Uber drivers are employees of their employer. Having found that these drivers are employees, it is suggested that the positive answer to this question will help determine whether Uber, as the employer, has to provide safe and healthy working conditions for its workers, which is a duty of all employers in South Africa.

4 2 Determining the employer in order to promote safe working conditions

With the rise in digitisation and world trade, accompanied by the increasing incursion of multinational companies into the South African economy, the problem of identifying the true employer may become difficult. Digitisation may present the world of work with complex modes of doing business and could obscure the true identity of employers. The significance of identifying the employer is that it will help determine their duties in terms of the law in relation to employees.

Upon its introduction in 1995, the LRA did not include a definition of an employer. However, this changed in 2015 when the Labour Relations Amendment Act⁴⁷ was introduced. Its section 200B(1) provides:

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

Grogan argues that this section seeks to end complex schemes between multi-faceted employers, such as Uber BV and Uber SA, which may circumvent the obligations established by labour legislation.⁴⁸ In *Pearson v Sheerbonnet SA (Pty) Ltd*,⁴⁹ it was held that the determination of an employer may be necessary where a foreign company has business

⁴⁶ *Aslam, Farrar v Uber BV, Uber London Ltd and Uber Britannia Ltd* case no 2202550/2015.

⁴⁷ Act 6 of 2014.

⁴⁸ Grogan *Workplace Law* 5ed (2017) 20.

⁴⁹ (1999) 20 ILJ 1580 (LC).

operations in South Africa and where there is a need to determine its responsibilities to employees in terms of South African law.⁵⁰

Unlike employees, employers may be legal entities, incorporated companies, close corporations, trusts, partnerships or entities resembling partnerships.⁵¹ These entities may also combine to form groups consisting of holding companies and subsidiaries. Grogan argues that in the case of corporate groups, the subsidiary on whose books an employee appears is normally regarded as the employer of that employee.⁵² The term “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 so doing is or has been to directly or indirectly defeat the purposes of this Act or any other employment law.⁵³ Any persons held to be such employers are jointly and severally liable for failure to comply with the obligations of an employer in terms of any employment law.⁵⁴

In South Africa, case law has shed light on the question of what should bind the employer to the employee. In *Discovery Health v CCMA*,⁵⁵ the Labour Court held that irregular migrants may be classified as employees for the purpose of social protection. It further held that even where a contract with workers is invalid, the definition of “employee” does not necessarily presuppose a valid contract of employment, and that such workers fell under section 23(1) of the Constitution’s right to fair labour practice. In *State Information Technology Agency (SITA) (Pty) Ltd v CCMA*,⁵⁶ the LAC held that the focus has shifted from the existence of a formal contract of employment to the presence of an employment relationship. The court reduced the tests to three primary criteria for the employment relationship: an employer’s right to supervision and control; whether an employee forms part of the employer’s organisation; and whether the employee is economically dependent on the employer.⁵⁷

5 THE PROVISION OF SAFE WORKING CONDITIONS FOR E-HAILING WORKERS

Once it is established that Uber drivers should be categorised as employees and that Uber SA is the employer of these drivers, the focus should then shift to measures that must be implemented to protect them from unfavourable working conditions such as attacks by taxi operators. It is argued that challenges concerning the nature and extent of protection afforded to Uber drivers by South African labour legislation remain an issue

⁵⁰ See also *August Lapple (South Africa) v Jarrett* [2003] 12 BLLR 1194 (LC).

⁵¹ See *CAWU v Grinaker Civil Engineering* (2002) 23 ILJ 2248 (LC), where it was held that a “joint venture” between several companies was an employer because it had all the characteristics of a partnership.

⁵² Grogan *Workplace Law* 20.

⁵³ S 200B(1) of the Labour Relations Amendment Act.

⁵⁴ Grogan *Workplace Law* 20.

⁵⁵ [2008] 7 BLLR 633 (LC).

⁵⁶ [2008] 7 BLLR 611 (LAC) par 12.

⁵⁷ Van Eck and Nemusimbori 2018 *THRHR* 482.

of concern. It has been stated above that workers employed by Uber have been on the receiving end of numerous attacks, allegedly by taxi operators. These attacks and other unfavourable working conditions have forced Uber drivers to go on strike, demanding protection from these violent attacks. The question that arises is who should protect Uber drivers from these attacks.

In South Africa, the law places the primary duty to protect employees while they work on the employer. The employer must protect workers from unsafe and unhealthy conditions in the workplace. However, for this to happen, there must be an existing employment relationship between the employer and the affected employees. It has been stated above that Uber drivers are more likely to be categorised as independent contractors, but the actual relationship may be regarded as an employer/employee relationship.⁵⁸ Like all employers, Uber SA, as an employer of these drivers, has a duty to provide them with safe working conditions. In South Africa, the provision of safe and healthy working conditions of work is regulated by the Occupational Health and Safety Act (OHSA). The employer's duty to provide a safe working environment is a cornerstone of the contractual relationship between employer and employee.⁵⁹ The employer would be in breach of this duty if it failed to meet this obligation.⁶⁰ This duty is derived from the Constitution, common law and legislation.⁶¹ The source of all law in South Africa is the Constitution.⁶² The Constitution provides that "everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources".⁶³ It further provides that "everyone has the right to an environment that is not harmful to their health and well-being".⁶⁴

As stated above, the relevant legislation that regulates the provision of safe and healthy working conditions is OHSA. Section 8 provides that all employers must provide and maintain, as far as is reasonably practicable, a safe working environment that is free of risk to the health of their employees. In *City of Johannesburg v Swanepoel*,⁶⁵ it was held that the working environment must be safe and not just the actual place where work is rendered. The question that arises then is what constitutes a working environment. It is argued that a working environment can be described as the surrounding conditions in which an employee carries out operations as described in their contract of employment. This may include physical conditions, such as office temperature, or equipment such as computers. The working environment can also refer to factors such as work processes or procedures.

⁵⁸ *Barbara Ann Berwick v Uber Technologies, Inc, A Delaware Corporation, and Rasier supra.*

⁵⁹ Tenza "The Employer's Duty to Provide Safe and Healthy Working Conditions During a Violent Strike" 2021 LDD 25.

⁶⁰ *Oosthuizen v Homegas* 1992 (3) SA 463 (O).

⁶¹ OHSA.

⁶² S 2 of the Constitution.

⁶³ S 12 of the Constitution.

⁶⁴ S 24 of the Constitution.

⁶⁵ (2016) 37 ILJ 1400 (LC).

It also appears that a work environment has a broader meaning than does a workplace, which is defined as the place where employees work.⁶⁶ It is argued that the phrase “working environment” must be interpreted broadly to include places where Uber drivers work – that is, public roads. Since Uber drivers are workers on public roads, this is a workplace for them. This interpretation is in line with the decision in *City of Johannesburg NO*,⁶⁷ which explained the working environment to mean the surrounding conditions in which an employee carries out operations as described in their contract of employment. Therefore, an employer is expected, in terms of the law, to provide a safe place of work, safe machinery and tools, and computers, as well as to ensure that safe procedures and processes are followed.⁶⁸ How an employer would do this is beyond the scope of this article, but it is assumed that an employer will have to assess each case and then act.

6 THE NEED TO EXTEND THE DEFINITION OF “EMPLOYEE” BECAUSE OF CHANGES IN THE MODE OF DOING WORK

The modes of doing work are changing drastically because of the emergence of the 4IR. The introduction of technology has changed the way people do their work. In the transport industry, the use of an app that is linked to a device to help with the performance of work appears to be the focus and starting point for the performance of e-hailing workers. This has changed the old system of assembling at bus stops, train stations and taxi ranks to wait for transport. People have the choice of taking Uber taxis or waiting for scheduled transport at stations. The advantage of the new mode of transport is that it saves time and is convenient.

A contract of employment has always been the basis for the employment relationship between the employer and employee. However, the importance of employment contracts has declined in recent years as other sources of legal regulation of employment relationships have increased in importance. As an instrument for the creation of rights and duties between employer and employee, the contract of employment has been eclipsed by legislative intervention in the employment relationship and by collective rule-making.⁶⁹ In recent years, work is often not performed by employees working in terms of the (still-regarded-as) standard form of employment – that is, so-called permanent employees who work full-time for an employer until retirement. The amendment to the LRA acknowledged this when it removed the word “employment contract” and replaced it with “employment relationship” in section 186(1)(a).⁷⁰

⁶⁶ S 213 of the LRA.

⁶⁷ *Supra* 1408.

⁶⁸ *Van Deventer v Workmen’s Compensation Commissioner* 1962 (4) SA 28 (T).

⁶⁹ Garbers *The Essential Labour Law Handbook* 27.

⁷⁰ S 186(1)(a) of the LRA now reads: “The employer terminated an employment relationship with or without a reason”.

The introduction of the NMWA also acknowledges the need to change the definition of an “employee” to be more accommodating than it currently is in the LRA. Despite an identical definition of employee in the three main pieces of labour legislation,⁷¹ the NMWA refers to “worker”⁷² and not to employee as a person who is entitled to the rights enumerated in the legislation. This means that the scope of application of the NMWA is much wider than the definition of employee in the LRA. One is tempted to believe that the drafters of the NMWA had the other categories of worker in mind when drafting the legislation. It is argued that these other categories of worker may include those employed in the gig economy, such as Uber drivers. It is further argued that the current definition of employee in the LRA excludes a number of workers, bearing in mind that the world of work is changing rapidly. If the traditional definition of an employee remains unchanged, it will exclude many categories of worker who, with the introduction of new methods of doing work, may not fall within the old definition of “employee”. Accordingly, the provisions of the Constitution, common law and OHSWA on the protection of employees from hazardous workplaces should be interpreted to apply also to Uber drivers.

7 THE ROLE OF THE STATE

The South African transport regulatory authorities did not anticipate or foresee the advent of an online-based transportation platform such as Uber entering the transport industry. The regulatory response to Uber’s entrance into the market has been glacial, and following increased hostility against it, transport regulators are faced with a difficult task that is becoming increasingly difficult to manage. Currently, the e-hailing transport service is not regulated. The non-regulation of e-hailing services is perceived to be one of the causes of conflict between them and taxi operators. It is believed that Uber drivers do not have a limit on which areas they may cover when doing their business, and that this is because of the non-regulation of their services. It is argued that the Uber business must be regulated so that its drivers know what they are allowed to do and not do, including the routes they are authorised to use.

The legislature in South Africa has since responded to the issue of non-regulation of e-hailing services and Uber drivers in particular. It has introduced the National Land Transport Amendment Bill,⁷³ which aims to amend certain provisions of the National Land Transport Act⁷⁴ to include electronic hailing (e-hailing) apps or similar technologies under the definition of metered taxi services. If the Bill is passed, Uber will be subjected to the same licensing and regulatory requirements as normal taxis.⁷⁵

⁷¹ Namely, the BCEA, LRA, and EEA.

⁷² S 1 of the NMWA defines a “worker” 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.

⁷³ Amendment Bill [B7-2016].

⁷⁴ 5 of 2009.

⁷⁵ S 1(d) and s 38(c) of the Amendment Bill.

The duty to provide safe conditions to everyone, including employees, is the duty of the State. The State is bound to do this in its capacity as a protector of the citizenry. The State in South Africa derives its powers from the Constitution.⁷⁶ The Constitution states that everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources, not to be tortured in any way, and not to be treated or punished in a cruel, inhuman and degrading way.⁷⁷ The Constitution further provides in section 24 that everyone has the right to live in an environment that is not harmful to their health or well-being.

In employment relations, it seems that the primary task of providing employees or workers with safe working conditions lies with employers, while the State plays its role as a general protector of everyone within the borders of the country.⁷⁸ The State has a duty to protect the legal interests of everyone, including workers. Through its arms, such as the police, the State has to ensure the protection of everyone, including e-hailing workers. It is important to understand the role the police can play in ensuring that violence and damage to persons and property are prevented, or where it has already taken place, to stop anything further from taking place.

The police have a duty to prevent damage and violence associated with criminal acts such as attacks on Uber drivers. However, in many instances, it has been shown that the police have failed to assist Uber drivers when they are in serious need of assistance. In *Minister of Police v Umbhaha Estates (Pty) Ltd*,⁷⁹ the court found that the police had wrongfully and negligently failed to prevent striking employees from causing damage to Umbhaha Estates. It emphasised that the police must reasonably foresee that violence could erupt and that it was clear that on the few occasions that the police attended at the premises, their presence was a deterrent to violence. The same should apply to Uber drivers when they come into contact with taxi operators, as it is expected that violence will ensue when these people meet.

8 CONCLUSION

The introduction of new methods of doing business, such as Uber with the use of an app, has created tensions between taxi operators and Uber drivers, with taxi operators not accepting competition and the new method of transporting passengers. The transportation of passengers has become contested terrain for Uber and taxi operators, with the former being attacked on the belief that they take away passengers and operate in areas where they are not supposed to operate. Currently, e-hailing drivers are not regulated, and do not have the limits that taxi operators do. Lines should be drawn clearly, indicating what Uber drivers have to do and what they are not supposed to do. This will happen if e-hailing drivers are properly regulated,

⁷⁶ Ss 1 and 40 of the Constitution.

⁷⁷ S 12(1) of the Constitution.

⁷⁸ The Preamble to the Constitution states that "South Africa belongs to all who live in it united in our diversity".

⁷⁹ [2023] ZASCA 85.

in the same way that taxi operators are regulated. In this regard, taxi operators have resorted to violence. There have been several reports of attacks on Uber drivers, allegedly by taxi operators owing to competition for passengers. If not properly looked after, the work and environment in which e-hailing workers operate can pose a danger to both the workers themselves and other people's health and safety.