


E-hailing and delivery service workers: employees or independent contractors?

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Abstract

South-African labour legislation provides comprehensive protection to employees in terms of, amongst others, the *Basic Conditions of Employment Act* 75 of 1997 and the *Labour Relations Act* 66 of 1995. Those workers who do not qualify as employees but rather as independent contractors in terms of this legislation are however not protected and can become subject to unfair labour practises.

Currently, in terms of their terms of employment as well as the recent Labour Court matter, Uber drivers in South Africa are deemed independent contractors with relation to Uber BV and thus do not enjoy protection under South-African labour law. The Labour Court in this infamous Uber matter particularly stated that this form of work poses a serious challenge for employment conceptions worldwide. Other e-hailing services such as Bolt's employment status under South African labour law and their terms of employment is yet to be determined. The working conditions and employment status of these Bolt drivers have however become an issue of dispute and consequently strike outbreaks have been prevalent particularly in Cape Town this year. Furthermore, food delivery services in South Africa including Mr Delivery and Uber Eats' employment status are unclear and yet to be determined by the courts for it has not been placed under scrutiny to date. The aforementioned delivery service workers *per se* do not qualify as e-hailing services in terms of the definition - it should be examined whether these persons' nature of employment render them employees of the respective companies or on the other hand independent contractors working for themselves. Further, aside from Uber's position in terms of the recent CCMA (Commission for Conciliation, Mediation and Arbitration) and Labour Court cases, other e-hailing service companies and delivery companies' position of employment status under South African labour law remains uncertain and undetermined.

The determination of a person's legal employment status is not a new phenomenon and the courts, over the years, had to determine the employment status of several individuals and groups. To aid in this determination, a number of tests have been developed - these tests are better known as the common law tests which considers several factors in the relationship between the alleged employee and alleged employer.

Four common law tests exist but the courts seem to be all at one that none of these tests are to be used in isolation. Further, legislation which also try to aid in the determination have been developed and regulations have been issued in this regard.

This research paper will investigate the various common law tests and the legislation available pertaining to the determination of a person's legal employment status in South Africa. The Code of Good Practice: Who is an employee? and the recommendation issued by the International Labour Organisation relating hereto will also be evaluated. The Uber cases in the CCMA and the Labour Court, as mentioned above, will then be discussed and evaluated in depth to demonstrate how the above instruments are implemented by the courts in practice. Further, the terms and conditions that persons agree to, to work under the e-hailing service Bolt and the food delivery service Uber Eats, will be discussed whereafter it will be applied to the various instruments in a bid to determine their true legal employment status.

Keywords: E-hailing, delivery service workers, employees, independent contractors, Uber, Uber Eats, Bolt

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LIST OF ABBREVIATIONS

BCEA	<i>Basic Conditions of Employment Act 75 of 1997</i>
CCMA	Commission for Conciliation, Mediation and Arbitration
EHASA	E-hailing Authority South Africa
ILO	International Labour Organisation
LRA	<i>Labour Relations Act 66 of 1995</i>
PER	Potchefstroom Electronic Law Journal
Uber SA	Uber South Africa

CHAPTER 1: INTRODUCTION

1 Background

As with most things, the ever-evolving technology has also affected the transportation industry and one could argue for better or worse. Nowadays, the introduction of e-hailing or ridesharing has provided a fast and effective manner in which one can be taken from point A to point B. E-hailing, as it is commonly known, is locally defined in section 1(c) of the *National Land Transport Amendment Bill*¹ as a public transport service operated by means of a motor vehicle, which (a) is available for hire by hailing while roaming; (b) may stand for hire at a rank, and (c) is equipped with an electronic e-hailing technology-enabled application. In other words, an application is loaded onto a smartphone through which a person who seeks a driving opportunity requests a ride, the person providing the service accepts the request and drives the passenger to their chosen destination. The e-hailing industry has locally been used for almost ten years after being introduced to the South African market with the launching of Uber South Africa in 2013.² Two years later, their biggest local competitor Bolt was launched,³ and the Chinese company Didi was launched in 2021⁴. However, in April 2022 Didi announced that they will not be continuing their operations in South Africa.⁵

On the other side of the spectrum, most probably due to the Covid-19 pandemic and its encouragement for social distancing, the food delivery service industry has also boomed. This is evident from Uber Eats' (food delivery department of Uber) general manager's statement that their business has grown by a whopping 1860% over the past year.⁶ Currently Uber, Bolt, and Didi operate as e-hailing service providers in

¹ B7D-2016.

² Diki 2022 <https://ewn.co.za/2022/04/19/yonela-diko-uber-and-e-hailing-companies-need-a-new-business-model>.

³ Diki 2022 <https://ewn.co.za/2022/04/19/yonela-diko-uber-and-e-hailing-companies-need-a-new-business-model>.

⁴ Diki 2022 <https://ewn.co.za/2022/04/19/yonela-diko-uber-and-e-hailing-companies-need-a-new-business-model>; Smit and Stopforth 2022 *Law Democracy and Development* 367.

⁵ Businesstech 2022 <https://businesstech.co.za/news/mobile/576148/didi-shuts-down-operations-in-south-africa-report/>.

⁶ Molewa date unknown <https://www.ecommerce.co.za/article.aspx?s=163&a=8223&title=Landscape>.

Southern Africa while the current food delivery service providers in South Africa include MrD (previously Mr Delivery), Uber Eats, OrderIn and Appetite.⁷

Not only does e-hailing provide a simple and effective manner for a person to request a ride but together with food delivery, it also provide work opportunities to individuals who are finding it difficult to get a job in South Africa's struggling economy. The unemployment rate in South Africa was 33.9% during the second quarter of 2022, rendering business opportunities in the 'gig-economy'⁸ ideal for individuals who are unable to find jobs.⁹ It is further projected that the e-hailing business will be expanding by 11.2% or 16.2 billion rands by the year 2025.¹⁰ However, the industry is not well regulated. Having no body regulating the service of e-hailing, a regulatory body called E-hailing Authority South Africa (EHASA) was established in 2020.¹¹ EHASA is an independent government body that was founded with the main purpose of providing protection to e-hailing drivers, riders, members and other stakeholders.¹² However, the introduction of new e-hailing service providers and expansion of existing ones have not been without problems. In March 2022, the first set of strikes started in Cape Town when e-hailing drivers embarked on a strike as a plea to the government to regulate the industry.¹³ They also stated that they are being exploited with high commission fares of up to 25% when working under certain companies.¹⁴ In August 2022, the e-hailing drivers took to the streets of Cape Town again to strike over high commission fares and low fares paid to them.¹⁵ The lack of government interference in the e-hailing

⁷ MoneyToday 2021 <https://moneytoday.co.za/top-food-delivery-services/>.

⁸ The 'gig-economy' is defined as a division of the economy that operates on a flexible basis and involves the exchange of resources and labour through the hiring of independent contractors as opposed to full-time employees; Corporate Finance Institute 2022. <https://corporatefinanceinstitute.com/resources/economics/gig-economy/>.

⁹ Trading Economics 2022 <https://tradingeconomics.com/south-africa/unemployment-rate>.

¹⁰ Mellow 2021 <https://www.bizcommunity.com/Article/196/389/212395.html#>.

¹¹ Ntseku 2020 <https://www.iol.co.za/news/south-africa/western-cape/e-hailing-regulatory-body-launched-in-south-africa-47730713>.

¹² Ntseku 2020 <https://www.iol.co.za/news/south-africa/western-cape/e-hailing-regulatory-body-launched-in-south-africa-47730713>.

¹³ Khumalo 2022 <https://www.news24.com/fin24/companies/no-one-can-work-cape-town-e-hailing-drivers-warn-colleagues-to-switch-off-their-Apps-20220323>.

¹⁴ Khumalo 2022 <https://www.news24.com/fin24/companies/no-one-can-work-cape-town-e-hailing-drivers-warn-colleagues-to-switch-off-their-Apps-20220323>.

¹⁵ Magubane 2022 <https://www.news24.com/fin24/companies/uber-bolt-drivers-start-cape-town-strike-20220817>.

industry has subsequently caused concern for the exploitation and safety of these drivers.

1.2 Problem statement

South African labour legislation provides comprehensive protection to employees¹⁶ in terms of the *Basic Conditions of Employment Act 75 of 1997*, *Labour Relations Act 66 of 1995* and the *National Minimum Wage Act 9 of 2018*.¹⁷ However, those workers who do not qualify as employees but are independent contractors in terms of this legislation are not protected and would only be able to rely on contractual rights in terms of common law when disputes arise.¹⁸ Currently, according to their terms of employment local Uber drivers and a recent Labour Court judgment, drivers are not deemed employees of the Uber SA company and thus do not enjoy protection under South African labour law. The Court in this matter importantly stated that this form of work poses a serious challenge for employment conceptions worldwide as it has been testing the boundaries of protection provided to workers under domestic labour legislation.²⁰ Other e-hailing services such as Bolt's employment status under South African labour law and their terms of employment are yet to be determined. The working conditions and employment status of Bolt drivers have become an issue of dispute and consequently strike outbreaks have been prevalent, particularly in Cape Town.²¹ In March 2022, Bolt drivers embarked on strike action protesting their work conditions and alleged exploitation, consequently halting services.²²

Furthermore, the employment status of food delivery services in South Africa, which include companies such as Mr Delivery and Uber Eats are also unclear and yet to be

¹⁶ The term 'employee' is used and defined in the *Labour Relations Act 66 of 1995* and the *Basic Conditions of Employment Act 75 of 1997*. The definition of an employee as found in the aforementioned acts are discussed in chapter two. The *National Minimum Wage Act 9 of 2018* defines the term 'worker' as any person who works for another person and is entitled to receive remuneration in the form of money or any kind.

¹⁷ Basson *et al The New Essential Labour Law Handbook* 63.

¹⁸ Basson *et al The New Essential Labour Law Handbook* 63.

²⁰ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 2.

²¹ Khumalo 2022 <https://www.news24.com/fin24/companies/no-one-can-work-cape-town-e-hailing-drivers-warn-colleagues-to-switch-off-their-Apps-20220323>.

²² Khumalo 2022 <https://www.news24.com/fin24/companies/no-one-can-work-cape-town-e-hailing-drivers-warn-colleagues-to-switch-off-their-Apps-20220323>.

determined. The aforementioned delivery service workers *per se* do not qualify as e-hailing services in terms of the definition.²³ Therefore, it should be examined whether the food delivery workers' nature of work renders them employees of the respective companies or rather independent contractors rendering services in their own name. Aside from Uber's position in terms of the recent CCMA and Labour Court cases, other e-hailing service companies and delivery companies' position of employment status under South African labour law remains uncertain and undetermined.

1.3 Research question

In light of the above, the main research question to be answered is: what is the true employment status of e-hailing and delivery service workers under South African labour regulations and the common law?

1.4 Aims and objectives

This study aims to provide clarity for the persons providing e-hailing and delivery services regarding their employment status and legal position according to applicable legislation. The e-hailing industry is growing rapidly and the determination of employment status and the accompanying rights and obligations is crucial in this regard. Should it be found that these workers are indeed employees, they should be afforded the whole range of standard rights of employees, and they should be protected by the labour laws against exploitation.

1.5 The proposed structure of the study

Chapter one provides a comprehensive background on the history of e-hailing and delivery services in the South African context. This chapter also provides background regarding the research question and describes the purpose of the study and how it was conducted.

²³ Section 1(c) of the National Land Transport Amendment Bill B7D-2016 defines e-hailing as a public transport service operated by means of a motor vehicle, which (a) is available for hire by hailing while roaming; (b) may stand for hire at a rank, and (c) is equipped with an electronic e-hailing technology-enabled application.

Chapter two discusses the definition of an employee under the *LRA*, the common law tests, the definition of an employee in terms of The Code of Good Practice: Who is an employee? as well as the rebuttable presumption of who an employee is under the *Labour Relations Act*. The International Labour Organisation's position on how a labour relationship should be determined is also discussed.

Chapter three discusses the recent CCMA award and Labour Court judgment relating to Uber drivers' employment status.

Chapter four evaluates the terms of employment and work relationships of other e-hailing service providers and delivery service providers in the South African context and apply these to the common law tests, and the statutory position of who an employee is, as determined in chapter two. For purposes of this study, the e-hailing service, Bolt and food delivery service, Uber Eats' terms are discussed, applied and evaluated.

Chapter five concludes the study. The chapter reflects on the preceding information whereafter the study attempts to provide final answers to the question posed.

1.6 Research methodology

The study was conducted by way of a literature review. The literature included case law relevant to the topic, scholarly articles, textbooks, research papers and reliable internet sources. In using these sources, the general terms of employment of the specific e-hailing drivers and food delivery drivers were stated and examined against the literature and legislation. Upon this, a conclusion into the employment status of these drivers were made.

CHAPTER 2: WHO IS AN EMPLOYEE?

2.1 Introduction

The South African labour law is legislative in nature and affords important rights to employees through various legislation and ordinances such as the *Basic Conditions of Employment Act 75 of 1997* (hereafter the *BCEA*), and the *Employment Equity Act 55 of 1998*, amongst others.²⁴ It is crucial to mention that the rights conferred by these acts are only applicable to those individuals who are regarded as employees. Rights pertaining to minimum wages are conferred to workers by the *National Minimum Wage Act 9 of 2018*²⁵ and the wording employee is not included in this Act. This, in essence, creates a third category of employment in South Africa but only for the purposes of the National Minimum Wage Act. On the other hand, independent contractors are not protected by the provisions of these acts, and should a dispute arise, it has to be resolved on contractual common law basis.²⁶ Consequently, it is critical to distinguish between an employee and an independent contractor. The South African labour legislation does not supply any manner in which an employee can be distinguished from an independent contractor and only provides definitions of an employee. In this regard, over the years the courts had to develop certain tests to draw the distinction – these tests are commonly known as the common law tests. The *Labour Relations Act 66 of 1995* (hereafter referred to as the *LRA*) and the Code of Good Practice: Who is an employee? also aid in this distinction by providing guidelines and definitions of an employee. The *BCEA* alongside the *LRA* creates a rebuttable presumption as to who an employee is. These and the respective common law tests are subsequently discussed below.

²⁴ Basson *et al* *The New Essential Labour Law Handbook* 63.

²⁵ 9 of 2018.

²⁶ Basson *et al* *The New Essential Labour Law Handbook* 63.

2.2 Definition of an employee pursuant to the *Labour Relations Act 66 of 1995*

The *LRA* supplies a definition of who an employee is and this definition, for the most part, is the same in other labour statutes. Section 213²⁷ states that an employee is a person, not including an independent contractor, who works for another person or the State and receives or is eligible to receive remuneration.²⁸ The act further states an employee as a person who assists an employer in conducting business. "Employed" and "employment" are also included in the definition.²⁹ The *LRA* explicitly, through the definitions, exclude independent contractors from the protection of labour legislation and consequently differentiates between different nature of employment. However, it does not define an independent contractor; as a result, other methods to differentiate an employee from an independent contractor had to be developed.³⁰

2.3 The common law tests

As discussed above, many people have approached the courts in the past years over disputes of legal employment status. In an attempt to aid in the distinction between an employee and an independent contractor, the courts developed the so-called common law tests. It is crucial to be able to distinguish between an employee and an independent contractor as independent contractors do not have legislative protection under the South African labour legislation.³¹ The common law tests are subsequently discussed below.

2.3.1 The control test

The control test was first put to use by the court in the matter of *Colonial Mutual Life Assurance Society Ltd v Macdonald*³² in 1931.³³ In this matter, the court found that in the absence of the right to control and supervise an insurance agent, Colonial Mutual

²⁷ Of the *Labour Relations Act 66 of 1995*.

²⁸ Section 213(a) of the *Labour Relations Act 66 of 1995*; Van Niekerk *et al Law@Work* 63.

²⁹ Section 213(b) of the *Labour Relations Act 66 of 1995*; Van Niekerk *et al Law@Work* 63.

³⁰ Van Niekerk *et al Law@Work* 63.

³¹ Basson *et al The New Essential Labour Law Handbook* 72; Van Niekerk *et al Law@Work* 63.

³² 1931 AD 412.

³³ Kasuso *The definition of an employee under labour legislation: An elusive concept* 16.

was not responsible for the negligence of the agent.³⁴ During the application of the control test, the question was asked whether a person exercises control over the alleged employee's daily tasks or they have a right to exercise such control.³⁵ The element of control is deemed to be a cornerstone of the employment contract. However, this principle cannot be applied in isolation because many employees now exercise wide discretion over the performance of their respective daily tasks. This is due to the nature of employment which evolved from the standard format of performing services.³⁶ Where an independent contractor performs the work, an 'employer' does not have the right to prescribe how and the time when the tasks are to be done. However, they have this right where the worker is their employee.³⁷ As stated, the control test applied in isolation may cause confusion, since nowadays labour tends to be more specialised compared to the past, and control cannot be so easily recognised in the same manner anymore. It was also found in the matter of *Nape v INTCS Corporate Solutions (Pty) Ltd*³⁸ that control can be exercised over an independent contractor and not only an employee, rendering the test insufficient to use.³⁹ In the matter of *J & J Nfreeze Trust v Statutory Council for the Squid & Related Fisheries of SA & others*,⁴⁰ the Labour Court with consideration of the *Smit v Workman's Compensation Commissioner*⁴¹ matter, pointed to the control test being too wide for application in this determination.⁴² Molahlehi J stated that although control

³⁴ Kasuso *The definition of an employee under labour legislation: An elusive concept* 16.

³⁵ Basson *et al The New Essential Labour Law Handbook* 72.

³⁶ Basson *et al The New Essential Labour Law Handbook* 72.

³⁷ Basson *et al The New Essential Labour Law Handbook* 72.

³⁸ [2010] 8 BLLR 852 (LC).

³⁹ Basson *et al The New Essential Labour Law Handbook* 72.

⁴⁰ [2011] 11 BLLR 1068 (LC).

⁴¹ 1979 (1) SA (51).

⁴² *J & J Nfreeze Trust v Statutory Council for the Squid & Related Fisheries of SA & others* [2011] 11 BLLR 1068 (LC) para 25.

is an indicator of an employment relationship, it cannot be considered as the sole factor in determining whether a person is an employee or an independent contractor.⁴⁴

2.3.2 The organisation or integration test

The abovementioned control test has received a lot of critiques resulting in the development of the second common law test, the organisation or integration test.⁴⁵ This test was first adopted in local law in the matter of *R v AMCA*,⁴⁶ where it was used as an experiment to test whether it would fill the deficiencies of the control test.⁴⁷ In performing this test, the question was raised as to whether the alleged employee forms part of the organisation in question.⁴⁸ In the matter of *SABC v Mckenzie*,⁴⁹ the Court stated that a person is an employee when they form 'part and parcel of the organisation' whereas, on the other hand, an independent contractor would not form part of the organisation, but is rather an accessory to it.⁵⁰ This considered, pursuant to the organisation test, a person is deemed to be an employee should they form part of an organisation. However, the problem with this common law test is that a person's integration in an organisation as well as the degree of their integration in the organisation is often extremely difficult to determine. Based hereon, in the matter of *Smit v Workmen's Compensation Commissioner*,⁵¹ the Court found this test to be too vague and again not to be used in isolation.⁵² The integration of an employee in an organisation is, however, still important in the determination of legal employment status, among other factors.⁵³

⁴⁴ *J & J Nfreeze Trust v Statutory Council for the Squid & Related Fisheries of SA & others* [2011] 11 BLLR 1068 (LC) para 25.

⁴⁵ Basson *et al The New Essential Labour Law Handbook* 72.

⁴⁶ 1954 (4) SA 208 (A).

⁴⁷ Diedericks 2017 *PER* 5.

⁴⁸ Basson *et al The New Essential Labour Law Handbook* 72.

⁴⁹ (1999) 20 ILJ 585 (LAC) para 8.

⁵⁰ *SABC v Mckenzie* (1999) 20 ILJ 585 (LAC) para 16.

⁵¹ 1979 (1) SA 51(A).

⁵² *R v AMCA* 1954 (4) SA 208 (A).

⁵³ Diedericks 2017 *PER* 6.

2.3.3 The dominant impression test

The third test and the test used most often by the courts in modern days is the multiple or dominant impression test which combines all the relevant elements of the indicative of an employment relationship.⁵⁴ Developed in the case of *Ready Mixed Concrete v Minister of Pensions*,⁵⁵ this test investigates the working relationship of the parties in question as a whole, from which various factors can be taken into consideration:

- (a) the right of supervision over the worker;⁵⁶
- (b) the extend of dependence on the employer for performance of their duties;⁵⁷
- (c) whether the worker is allowed to work for another party – normally an employee would not be allowed to work for another party;⁵⁸
- (d) whether the worker should devote a certain amount of time to their duties;⁵⁹
- (e) whether the person is obliged to perform the duties personally – employees are normally obliged but independent contractors can delegate their duties;⁶⁰
- (f) whether the worker is paid per commission or salary;⁶¹
- (g) whether the worker uses their personal equipment,⁶² and
- (h) whether the person for whom the work is done has the right to discipline the worker - if so, it would indicate a degree of control and indicate an employment relationship.⁶³

⁵⁴ Erasmus date unknown <https://verteenwoordiger.solidariteit.co.za/wp-content/uploads/sites/9/Artikels-Hofsake/Employee%20Status/Employee%20Status.pdf>.

⁵⁵ 1979 (1) SA 51(A).

⁵⁶ Basson *et al The New Essential Labour Law Handbook* 74.

⁵⁷ Basson *et al The New Essential Labour Law Handbook* 74.

⁵⁸ Basson *et al The New Essential Labour Law Handbook* 74.

⁵⁹ Erasmus date unknown <https://verteenwoordiger.solidariteit.co.za/wp-content/uploads/sites/9/Artikels-Hofsake/Employee%20Status/Employee%20Status.pdf>.

⁶⁰ Basson *et al The New Essential Labour Law Handbook* 74.

⁶¹ Erasmus date unknown <https://verteenwoordiger.solidariteit.co.za/wp-content/uploads/sites/9/Artikels-Hofsake/Employee%20Status/Employee%20Status.pdf>.

⁶² Basson *et al The New Essential Labour Law Handbook* 74.

⁶³ Basson *et al The New Essential Labour Law Handbook* 74.

In the *Smit* case, the Court clearly stated that one of the most important factors as listed is the element of control.⁶⁴ However, all the factors are taken into consideration to conclude a dominant impression of the working relationship.⁶⁵ Although the test presents a more comprehensive consideration of a relationship's status before drawing a conclusion, it is nevertheless not immune to criticism.⁶⁶

Courts have over the years found that the test in distinguishing an employee from an independent contractor, is a multi-factorial one and some principles should always be applied during the determination.⁶⁷ These principles include: (1) the 'name' of the relationship should only be deemed a point of departure;⁶⁸ (2) the structure of the relationship in the agreement is important, but the reality of the situation is most crucial;⁶⁹ and (3) all aspects of the relationship have to be considered.⁷⁰ The Court in its judgment in the case of *Kambule v Commission for Conciliation, Mediation and Arbitration and Others*⁷¹ also reiterated the stance that all the factors should be qualitative and not necessarily quantitative.⁷² Thus, the number of factors present should not be considered in isolation, but rather the relationship as a whole and a so-called 'tick-box' approach cannot be followed.⁷³ In *Vermooten v Department of Public Enterprises & Others*,⁷⁴ the dominant impression test was used to determine the legal employment status of the appellant. The Court pointed to the matter of *Sanlam Life Insurance Ltd v Commission for Conciliation, Mediation and Arbitration & Others*⁷⁵

⁶⁴ Kasuso *The definition of an employee under labour legislation: An elusive concept* 19.

⁶⁵ Basson *et al The New Essential Labour Law Handbook* 74.

⁶⁶ Kasuso *The definition of an employee under labour legislation: An elusive concept* 19.

⁶⁷ Basson *et al The New Essential Labour Law Handbook* 79,80.

⁶⁸ *Kambule v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 2234 (LC) para 7.

⁶⁹ *Kambule v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 2234 (LC) para 7.

⁷⁰ *Kambule v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 2234 (LC) para 7.

⁷¹ (2013) 34 ILJ 2234 (LC) para 7.

⁷² *Kambule v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 2234 (LC) para 7.

⁷³ *Kambule v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 2234 (LC) para 7.

⁷⁴ (2017) 38 ILJ 607 (LAC).

⁷⁵ (2009) 30 ILJ 2903 (LAC).

where it was found that the true nature of the relationship between the parties determines whether an employment relationship existed or not.⁷⁶

2.3.4 The economic dependence or economic realities test

The fourth and last common law test is known as the economic dependency or economic realities test.⁷⁷ This test identifies the person who enjoys the most financial benefit from the service that is rendered.⁷⁸ The test was developed in the English case of *Montreal v Montreal Locomotive Works*⁷⁹ where the court established that the question that should be raised in this regard is whether "one is in business on their own?" and "whose business is it?"⁸⁰ In answering these questions, one has to consider whether the person rendering the service is the one who hires employees to work, who the financial risks rest upon and whether equipment is provided to them or not – just to name a few. Therefore, one has to consider whether a person is financially dependent or self-employed. According to Kasuso, the South African courts never adopted this test and economic dependency is only considered as one of the three criteria in the determination of employment status.⁸¹

2.4 The rebuttable presumption in terms of *The Basic Conditions of Employment Act 75 of 1997* and the *Labour Relations Act 66 of 1995*

Apart from the common law tests developed by the courts, a presumption as to who an employee is was introduced into labour legislation in 2002.⁸⁷ The statutory factors found in section 83A of the *BCEA* and section 200A of the *LRA* and other certain factors should be considered in determining whether someone is an employee rather than an independent contractor. These statutory factors combine the tests as developed by the courts and can be deemed a codification thereof, to some extent.⁸⁸ One of these factors must at least be present to create a rebuttable presumption that a person is

⁷⁶ *Sanlam Life Insurance Ltd v Commission for Conciliation, Mediation and Arbitration & Others* (2009) 30 ILJ 2903 (LAC) para 7.

⁷⁷ *Kasuso The definition of an employee under labour legislation: An elusive concept* 17.

⁷⁸ *Kasuso The definition of an employee under labour legislation: An elusive concept* 17.

⁷⁹ [1947] 1 DLR 161.

⁸⁰ *Kasuso The definition of an employee under labour legislation: An elusive concept* 17.

⁸¹ *SITA (Pty) Ltd v CCMA* (2008) 29 ILJ 2234 (LAC) para 11.

⁸⁷ Basson *et al The New Essential Labour Law Handbook* 80.

⁸⁸ Basson *et al The New Essential Labour Law Handbook* 80.

an employee and not an independent contractor.⁸⁹ These factors include: (a) the person's manner of work is subject to control under another person;⁹⁰ (b) the person's hours of work are subject to control under another person;⁹¹ (c) the person forms part of an organisation;⁹² (d) the person has worked for an average of 40 hours per month for a minimum of three months;⁹³ (e) the person depends financially on the other person they render their services to;⁹⁴ (f) the person's equipment is provided to them;⁹⁵ (g) the person only works for one employer.⁹⁶

The abovementioned presumption would only be applicable where the status of a person's employment is questioned and where the person earns below the annual income threshold as determined by the Minister of Labour, which is currently R224 080.48 per annum.⁹⁷ If the person earns above this threshold the common law tests would be applicable, but these factors may be used as a general guideline in the determination.⁹⁸ The determination of the employment status remains subject to the evidence provided but the onus is shifted to the 'employer' to prove that the person was not an employee and rather rendered services as an independent contractor.⁹⁹ Recently, the matter of *Van Kaam & Others v Action Motor Group & Others*¹⁰⁰ reiterated the importance of section 200A of the *LRA* as it covers those who earn below the annual threshold and are more likely to be unduly influenced into signing an agreement they never would have, and the employer can avoid their obligations.¹⁰¹ Therefore,

⁸⁹ Basson *et al* *The New Essential Labour Law Handbook* 80.

⁹⁰ Section 200A(1)(a) of the *Labour Relations Act* 66 of 1995.

⁹¹ Section 200A(1)(b) of the *Labour Relations Act* 66 of 1995.

⁹² Section 200A(1)(c) of the *Labour Relations Act* 66 of 1995.

⁹³ Section 200A(1)(d) of the *Labour Relations Act* 66 of 1995.

⁹⁴ Section 200A(1)(e) of the *Labour Relations Act* 66 of 1995.

⁹⁵ Section 200A(1)(f) of the *Labour Relations Act* 66 of 1995.

⁹⁶ Section 200A(1)(g) of the *Labour Relations Act* 66 of 1995.

⁹⁷ GN 1731 in GG 45880 of 7 February 2022.

⁹⁸ Section 200A(2) of the of the *Labour Relations Act* 66 of 1995.

⁹⁹ Basson *et al* *The New Essential Labour Law Handbook* 81.

¹⁰⁰ (JR1159/18) [2020] ZALCJHB 118.

¹⁰¹ *Van Kaam & Others v Action Motor Group & Others* (JR1159/18) [2020] ZALCJHB 118) para 35.

according to Ramdaw AJ, the interpretation of this presumption is crucial to avoid these situations.¹⁰²

The presumption in terms of section 200A has also recently been used in the matter of *Universal Church in the Kingdom of God v Myeni & Others* [2015] 9 BLLR 918 (LAC). In this matter, it had to be decided whether Mr Myeni, the pastor of the Universal Church of the Kingdom of God (the church), was an employee or independent contractor.¹⁰³ The church argued that the documents that Mr Myeni signed before the commencement of his service clearly state that he is not an employee and that he was doing the pastoral work voluntarily.¹⁰⁴ Mr Myeni argued in turn that his weekly stipend of R1 875.00 was subject to deductions from the Unemployment Insurance Fund (UIF) and Pay-As-you-Earn or income tax deductions which indicated, according to him, an employment relationship.¹⁰⁵ The Labour Appeal Court (LAC) considered section 200A as it was heavily leaned upon by the CCMA and the court *a quo*.¹⁰⁶ In its evaluation, the LAC stated that the correct interpretation of section 200A had to be found. Ndlovu JA stated that, according to him, an employment contract had to exist for the presumption to become applicable.¹⁰⁷ For this reason, although the factors of the section 200A rebuttable presumption were present, Ndlovu JA ruled that Mr Myeni was not an employee of the church and rendered his services on a voluntary basis.¹⁰⁸ The decision of Ndlovu JA to declare the employment contract the point of departure has seen wide criticism as many are of the opinion that, as stated in various legal instruments, the point of departure must not be the agreement and contract concluded between the parties, but the true nature of the relationship between the parties must be examined to determine a person's legal employment status.¹⁰⁹ The criticism of this judgment seems to be, in the researcher's opinion, the correct interpretation as section

¹⁰² *Van Kaam & Others v Action Motor Group & Others* (JR1159/18) [2020] ZALCJHB 118) para 35.

¹⁰³ *Universal Church in the Kingdom of God v Myeni & Others* [2015] 9 BLLR 918 (LAC) para 1.

¹⁰⁴ *Universal Church in the Kingdom of God v Myeni & Others* [2015] 9 BLLR 918 (LAC) para 4.

¹⁰⁵ Ismail 2018 <https://www.derebus.org.za/labour-law-v-the-law-of-contract-and-the-constitution-as-amicus-curiae/>.

¹⁰⁶ *Universal Church in the Kingdom of God v Myeni & Others* [2015] 9 BLLR 918 (LAC) para 41.

¹⁰⁷ *Universal Church in the Kingdom of God v Myeni & Others* [2015] 9 BLLR 918 (LAC) para 41.

¹⁰⁸ *Universal Church in the Kingdom of God v Myeni & Others* [2015] 9 BLLR 918 (LAC) para 41.

¹⁰⁹ Ismail 2018 <https://www.derebus.org.za/labour-law-v-the-law-of-contract-and-the-constitution-as-amicus-curiae/>.

200A which explicitly states that regardless of the form of the contract, when the factors are present, the person is presumed to be an employee.

2.5 The Code of Good Practice: Who is an employee?

The Code of Good Practice: Who is an employee? is a document issued by the National Economic Development and Labour Council (NEDLAC) and its purpose is to aid in the determination of a person's employment status in terms of section 200A(4) and section 203 of the *LRA*.¹¹⁰ Section 203(3) and (4) of the *LRA* determines that the Code should be considered at all times when interpreting the *LRA*, the *BCEA*, the *Employment Equity Act* 55 of 1998 as well as the *Skills Development Act* 97 of 1998.

The Code states that in terms of the *LRA* and the *BCEA*, a rebuttable presumption is created as to who an employee is – these provisions are however only applicable to those individuals who earn less than the annual threshold, as discussed above.¹¹¹ If one of the listed factors is present and applicable, the presumption that the person is an employee is present.¹¹² Should a person allege that they are an employee rather than an independent contractor, they must be able to prove that they work or render services for the alleged employer and that one of the listed seven factors is indeed present in the working relationship between them.¹¹³ Should the contract between the parties state that a person is an independent contract, it should not be merely regarded as proof that they are not an employee – the presumption should be applied and the actual employment relationship must be determined.¹¹⁴

Should at least one of the listed factors be present, employment is not merely assumed. The onus will then fall upon the alleged employer to prove that the person is not an employee and the working relationship between them was of an independent contractor nature. Failure to do so, the person may then be regarded as being an employee of that employer.¹¹⁵

¹¹⁰ The Code of Good Practice: Who is an employee? para 1.

¹¹¹ The Code of Good Practice: Who is an employee? para 12.

¹¹² The Code of Good Practice: Who is an employee? para 13.

¹¹³ The Code of Good Practice: Who is an employee? para 15.

¹¹⁴ The Code of Good Practice: Who is an employee? para 16.

¹¹⁵ The Code of Good Practice: Who is an employee? para 17.

The Code provides seven factors that may lead to the presumption of who an employee is to come into operation, in the hand of the presumptions created by the section 200A of the *LRA* and section 83 of the *BCEA*. These factors are:

(1) "The manner in which the person works is subject to the control or direction of another person":¹¹⁶ This factor entails that the worker is obliged to obey the lawful and reasonable demands of the alleged employer or their personnel. If this obligation exists, this may indicate that the person is an employee but if not, it may indicate that the person is rather an independent contractor.¹¹⁷ In this regard, should an "employer" retain the right to indicate which tools, technology, materials, staff etcetera must be used in performing the task at hand, or if they are entitled to take disciplinary steps against the "employee", it is regarded as a strong indication that an employment relationship exists.¹¹⁸

(2) "The person's hours of work are subject to the control or direction of another person":¹¹⁹ If the hours of work are prescribed in the contract or the contract provides that the 'employer' may establish the working hours, this factor will be present. Should the contract not indicate specific working hours, it does not indicate that it is not a contract of employment.¹²⁰ If the contract determines a minimum of hours that the worker has to work, sufficient control is present. Flexible working hours do not indicate a lack of employment relationship.¹²¹

(3) "In the case of a person who works for an organisation, the person forms part of that organisation":¹²² This factor would indicate to be present should the alleged employee's services form an integral part of the employer's operations or organisation.¹²³ As mentioned, for this factor to be present, a person should be an

¹¹⁶ The Code of Good Practice: Who is an employee? para 18(a); section 200A(1)(a) of the *Labour Relations Act* 66 of 1995; Mofoke 2022 *Obiter* 352.

¹¹⁷ The Code of Good Practice: Who is an employee? para 18(a).

¹¹⁸ The Code of Good Practice: Who is an employee? para 18(a).

¹¹⁹ The Code of Good Practice: Who is an employee? para 18(b); section 200A(1)(b) of the *Labour Relations Act* 66 of 1995; Mofoke 2022 *Obiter* 352.

¹²⁰ The Code of Good Practice: Who is an employee? para 18(b).

¹²¹ The Code of Good Practice: Who is an employee? para 18(b).

¹²² The Code of Good Practice: Who is an employee? para 18(c); section 200A(1)(c) of the *Labour Relations Act* 66 of 1995; Mofoke 2022 *Obiter* 352.

¹²³ The Code of Good Practice: Who is an employee? para 18(c).

integral part of an organisation or their operations, this would not be the case if a person conducts business or performs tasks for an organisation as part of conducting their own business. In the case that a person bears the risk for price hikes, overtime salary payments, poor performance and bad workmanship, it would indicate that they are an independent contractor conducting business in their own name since in contrast an employer would bear the risk.¹²⁴

(4) "The person has worked for that person for an average of 40 hours per month over the last three months":¹²⁵ Regarding this factor, the person must remain in the employment of the alleged employer and should be measured in the three months prior to the case's commencement. Should the working relationship have been terminated before the commencement of the case, the reference should be the three months preceding the termination.¹²⁶

(5) The person is economically dependent on the other person for whom he or she works or renders services":¹²⁷ In this factor, economic dependence is indicated when the alleged employee is dependent on the alleged employer to supply them with work.¹²⁸ The receiving of remuneration is a good indicator that a person is economically dependent of another person and that they do not render services for their own business.¹²⁹ When determining whether a person performs work for themselves or for another person, a good guideline would be to evaluate whether a person bears the risk pertaining to the performance of this work and whether they have the right to contract with other persons to perform the work.¹³⁰ Exclusiveness regarding the working relationship generally indicates that an employee-employer working relationship exists.¹³¹ The Code, in discussing this factor, importantly points out that this aforementioned position is not relevant to employees who work on a part-time

¹²⁴ The Code of Good Practice: Who is an employee? para 18(c).

¹²⁵ The Code of Good Practice: Who is an employee? para 18(d); section 200A(1)(c) of the *Labour Relations Act* 66 of 1995.

¹²⁶ The Code of Good Practice: Who is an employee? para 18(d).

¹²⁷ The Code of Good Practice: Who is an employee? para 18(e); section 200A(1)(e) of the *Labour Relations Act* 66 of 1995.

¹²⁸ The Code of Good Practice: Who is an employee? para 18(e).

¹²⁹ The Code of Good Practice: Who is an employee? para 18(e).

¹³⁰ The Code of Good Practice: Who is an employee? para 18(e).

¹³¹ The Code of Good Practice: Who is an employee? para 18(e).

basis as performing work in their free time does not render them independent contractors.¹³²

(6) "The person is provided with the tools of the trade or work equipment by the person":¹³³ This is not dependent on whether the equipment is free or deducted from earnings or repayment of the cost.¹³⁴ Equipment and electronics are also included in this factor.¹³⁵

(7) "The person only works or renders services for one person":¹³⁶ Should a person render services to another person, this factor will not be applicable.¹³⁷ This stance was reiterated in the matter of *Denel (Pty) Ltd v Gerber*.¹³⁸ The Code emphasises the definition of an employee as found in section 213 of the *LRA* (discussed below in this chapter) and states that the courts' interpretation of the term "employee" before the insertion of the presumption into the *LRA* still remains relevant.¹³⁹ The reason for these interpretations' and judgments' relevance, as prescribed in the code, is due to the presumption only applying to those who earn under the Minister's prescribed threshold¹⁴⁰ and that an employer may introduce evidence in proving that an alleged employee is rather an independent contractor.¹⁴¹

The Code further states that for it to be established whether a person qualifies as an employee or rather as an independent contractor, the dominant impression test is commonly used by the courts.¹⁴² As discussed above, this would entail evaluating the relationship between the alleged employee and the alleged employer as a whole and forming a dominant impression based hereon.¹⁴³ According to the Code, the provision of training by an employer is a strong indication that a person qualifies as an

¹³² The Code of Good Practice: Who is an employee? para 18(e).

¹³³ The Code of Good Practice: Who is an employee? para 18(f); section 200A(1)(f) of the *Labour Relations Act* 66 of 1995.

¹³⁴ The Code of Good Practice: Who is an employee? para 18(f).

¹³⁵ The Code of Good Practice: Who is an employee? para 18(f).

¹³⁶ The Code of Good Practice: Who is an employee? para 18(g); section 200A(1)(g) of the *Labour Relations Act* 66 of 1995.

¹³⁷ The Code of Good Practice: Who is an employee? para 18(g).

¹³⁸ At para 201.

¹³⁹ The Code of Good Practice: Who is an employee? para 22.

¹⁴⁰ The Code of Good Practice: Who is an employee? para 22(a).

¹⁴¹ The Code of Good Practice: Who is an employee? para 22(b).

¹⁴² The Code of Good Practice: Who is an employee? para 27.

¹⁴³ The Code of Good Practice: Who is an employee? para 27.

employee.¹⁴⁴ It is unusual for a person who is self-employed to be provided with training by the employer, but it is not impossible.¹⁴⁵ The fact that an employee does not receive a "normal" wage or remuneration does not merely indicate that they do not qualify as an employee.¹⁴⁶

The Code, as discussed above, is used very often by the courts in determining a person's legal employment status. In the matter of *Universal Church in the Kingdom of God v Myeni & Others*,¹⁴⁷ the Labour Appeal Court (LAC) stated the importance of the Code in the interpretation of the section 200A rebuttable presumption.¹⁴⁸ Here, the LAC stated that the Code reiterates the rebuttable presumption created by the *LRA* and the *BCEA*, and that it should be considered and interpreted hand-in-hand.¹⁴⁹ Although the Code and the presumption state that the contract of employment must not be the point of departure and that the true nature of the relationship must be evaluated, the LAC found that the contract between the parties stated there may not be an employment relationship and, therefore, regardless of the factors present, Mr Myeni was not deemed to be an employee of the church.¹⁵⁰

2.6 The International Labour Organisation: Employment Relations Recommendation, 2006 (No. 198)

The International Labour Organisation (hereafter the ILO) is an organisation devoted to promoting international labour rights and standards.¹⁵¹ The ILO constantly issues recommendations and conventions pertaining to minimum labour rights and legislations that member countries should consult and interpret nationally.¹⁵² In this

¹⁴⁴ The Code of Good Practice: Who is an employee? para 49.

¹⁴⁵ The Code of Good Practice: Who is an employee? para 49.

¹⁴⁶ The Code of Good Practice: Who is an employee? para 47.

¹⁴⁷ [2015] 9 BLLR 918 (LAC).

¹⁴⁸ *Universal Church in the Kingdom of God v Myeni & Others* [2015] 9 BLLR 918 (LAC) para 32.

¹⁴⁹ *Universal Church in the Kingdom of God v Myeni & Others* [2015] 9 BLLR 918 (LAC) para 32.

¹⁵⁰ *Universal Church in the Kingdom of God v Myeni & Others* [2015] 9 BLLR 918 (LAC) para 41.

¹⁵¹ United Nations date unknown [https://www.un.org/youthenvoy/2013/08/ilo-international-labour-organization/#:~:text=The%20International%20Labor%20Organization%20\(ILO,peace%20is%20essential%20to%20prosperity.](https://www.un.org/youthenvoy/2013/08/ilo-international-labour-organization/#:~:text=The%20International%20Labor%20Organization%20(ILO,peace%20is%20essential%20to%20prosperity.)

¹⁵² United Nations date unknown [https://www.un.org/youthenvoy/2013/08/ilo-international-labour-organization/#:~:text=The%20International%20Labor%20Organization%20\(ILO,peace%20is%20essential%20to%20prosperity.](https://www.un.org/youthenvoy/2013/08/ilo-international-labour-organization/#:~:text=The%20International%20Labor%20Organization%20(ILO,peace%20is%20essential%20to%20prosperity.)

regard, the ILO also issues regulations to its member countries pertaining to the protection of workers in an employment relationship.

The ILO's recommendations are of critical importance as they fall within the scope of international law and treaties. Section 232 of the *Constitution of the Republic of South Africa*, 1996 states that when the courts are interpreting national legislation, they must prefer a reasonable interpretation that is consistent with international law rather than an interpretation that would not be consistent with international law.

According to the indicator of status of employment, there are two forms of employment: those who receive salaries and wages (or employees) and those who are self-employed.¹⁵³ However, the reality is that in many instances disguised employment relationships exist. In a disguised employment relationship, the employer treats the employee in a manner which disguises the true nature of the employment relationship with the intention of depriving the employee of legislative protection.¹⁵⁴

Chapter II of the ILO's Employment Relationship Recommendation, 2006 (No. 198) (hereafter the recommendation) states the provisions for the determination of an employment relationship¹⁵⁵. According to the recommendation, when determining the relationship status of a person, one must consider the performance of the work and the remuneration of the person as opposed to merely accepting the provisions agreed upon by the parties.¹⁵⁶ Similar to the above-discussed common law tests, the statutory presumption as to who an employee is, as well as the provisions of the Code of Good Practice: Who is an employee?, the ILO recommends that member states' laws and regulations must determine the employment status of a person.¹⁵⁷ The ILO

¹⁵³ ILO Key Indicator in the Labour Market 1.

¹⁵⁴ ILO date unknown https://www.ilo.org/global/topics/non-standard-employment/WCMS_534833/lang--en/ind.

¹⁵⁵ Other ILO conventions (for example the ILO Centenary Declaration for the Future of Work, 2019) advocate for the rights of workers and don't refer to "employees". The definition of an employee in terms of South African legislation is discussed in chapter two of this study. Further, the definition of worker in terms of the *National Minimum Wage Act* 9 of 2018 is discussed in footnote 16. Some ILO conventions pertain to "workers" which is a much broader term than the current South African labour classification and would therefore not be applicable to employees as meant by the *Labour Relations Act* 66 of 1995 and the *Basic Conditions of Employment Act* 55 of 1997. This considered, it would also not be applicable for the purposes of this study.

¹⁵⁶ Article 9 of ILO Employment Relationship Recommendation, 2006 (No. 198).

¹⁵⁷ Article 13 of ILO Employment Relationship Recommendation, 2006 (No. 198).

recommends that these laws and regulations must consider the control and instructions that are exercised over a person, the integration of the person into the organisation, whether the work performed is solely for the benefit of another person, whether the work is performed within certain hours and at a certain workplace, whether the person is provided with tools and equipment to perform the work and whether it requires the person from being available at certain times.¹⁵⁸ Further, the remuneration of the worker must also be used to determine the person's legal employment status pursuant to this recommendation. Regarding this, one must consider whether the person is paid periodically, whether the person is solely dependent on the income from the other person, whether the person receives other benefits such as leave; travel allowance and which of the parties bears the financial risks in this determination.¹⁵⁹

It is evident that the ILO's recommendation is very similar to the legislation and instruments that are currently being used in South Africa in determining a person's legal employment status. The factor of control, the provision of equipment to perform the job, the economic dependence etcetera draws similarities between the ILO recommendation and the current South African legal stance.

2.7 Conclusion

From the abovementioned legislation and legal principles, it is evident that South African labour law differentiates between an employee from an independent contractor. The differentiation between these two types of work performance is crucial as certain protection and rights under labour legislation are only available to persons deemed to be employees and not to independent contractors. As legislation in the past hasn't provided a particular stance for the determination of these employment statuses, courts have over time developed four common law tests to aid in this determination. The tests, as discussed above, are referred to as the control test, the organisational test, the dominant impression test and the economic dependence test. However, the dominant impression test is the test used most often by the courts, as it

¹⁵⁸ Article 13(a) of ILO Employment Relationship Recommendation, 2006 (No. 198).

¹⁵⁹ Article 13(b) of ILO Employment Relationship Recommendation, 2006 (No. 198).

combines the principles of control, integration and economic dependence and investigates the working relationship between the parties as a whole, rather than certain factors in isolation. Labour legislation has furthermore created a rebuttable presumption as to when a person can be deemed an employee, should it comply with the factors as listed in section 200A of the *LRA* and section 83 of the *BCEA* – one or more factors should be present to satisfy this "statutory test".

The Code of Good Practice: Who is an employee? is a guideline issued by NEDLAC and provides a definition for "employee" as well as certain factors that can be used in the determination of a person's employment status. ILO also issued regulations that serve as guidelines for member countries' legislative systems for the protection of persons in both an employee and an independent contractor working relationship.

Although all these terms seem straightforward and simple, it is important to explore how it is applied and implemented in a court of law. Recently, the legal employment status of Uber drivers in South Africa had to be decided – first by the CCMA and later by the Labour Court. A discussion of these two infamous cases follows in the next chapter.

CHAPTER 3: THE UBER MATTERS IN THE CCMA AND THE LABOUR COURT

3.1 Introduction

The nature of employment of e-hailing drivers is not immune to dispute. Uber drivers approached the Commission for Conciliation, Mediation and Arbitration (CCMA) after being dismissed from service, for them to be declared employees and not independent contractors operating for Uber in South Africa. The matter was considered in the CCMA whereafter the decision was appealed to the Labour Court. The two separate cases are consequently discussed below to demonstrate the application of statutory provisions in the courts. Thereafter, different interpretations of the matters are discussed.

3.2 The CCMA matter

3.2.1 *The facts*

Five of the six respondents in the dispute were drivers or partner drivers for the Uber company.¹⁶⁰ Uber is a registered company in the Netherlands (Uber BV) and conducts business as a subsidiary in the South African market (Uber SA).¹⁶¹ All of the drivers were deactivated from providing services through Uber's application ('app'), each for different reasons.¹⁶² The drivers approached the CCMA on the basis of unfair dismissal. Uber argued that the CCMA does not have jurisdiction in the case as they were not employees of Uber BV or Uber SA with whom they contracted with.¹⁶³ Uber supplies

¹⁶⁰ *Uber South Africa Technological Services (Pty) Ltd Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 9.

¹⁶¹ *Uber South Africa Technological Services (Pty) Ltd Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 9.

¹⁶² *Uber South Africa Technological Services (Pty) Ltd Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 10.

¹⁶³ *Uber South Africa Technological Services (Pty) Ltd Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 10.

an app, and drivers can request a driving opportunity to a chosen destination through this app.¹⁶⁴

Three types of persons can supply these services:

- (1) A partner-only is a person who owns one or more cars but is not a driver themselves, therefore, they have a driver driving their vehicles(s).¹⁶⁵ The partner receives the payment of a fare, Uber deducts a certain amount, and the partner pays a fee to the driver.¹⁶⁶
- (2) A partner-driver is a person who supplies a vehicle and drives the vehicle themselves.¹⁶⁷ The partner-driver is allowed to appoint another driver for the vehicle, but such drivers should be approved by the Uber app.¹⁶⁸
- (3) A driver-only drives a vehicle provided by a partner.¹⁶⁹

All the respondents in the dispute were either partner-drivers or drivers only and were allowed to move between these categories as they pleased.¹⁷⁰ The respondents argued that they were employees of Uber at all times irrespective of whether they own their personal vehicle or drive the vehicle of another person.¹⁷¹ The drivers are contracted

¹⁶⁴ *Uber South Africa Technological Services (Pty) Ltd Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 11.

¹⁶⁵ *Uber South Africa Technological Services (Pty) Ltd Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 11(1).

¹⁶⁶ *Uber South Africa Technological Services (Pty) Ltd Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 11(1).

¹⁶⁷ *Uber South Africa Technological Services (Pty) Ltd Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 11(2).

¹⁶⁸ *Uber South Africa Technological Services (Pty) Ltd Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 11(2).

¹⁶⁹ *Uber South Africa Technological Services (Pty) Ltd Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 11(3).

¹⁷⁰ *Uber South Africa Technological Services (Pty) Ltd Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 12.

¹⁷¹ *Uber South Africa Technological Services (Pty) Ltd Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 12.

with Uber BV (which is registered in the Netherlands), but communicate with Uber SA and Uber Cape Town.¹⁷² The Commissioner stated in the award that it is crucial to determine the "life-cycle" of the Uber-and-driver relationship.¹⁷³ Firstly, the drivers register on the Uber app, the driver and the vehicle that they will drive are approved and the identity of the driver is determined and approved.¹⁷⁴ The driver obtains a Professional Driver Permit (PDP) license and attends training sessions on the use of the app and the standards that are required of a driver. The partner or partner driver accepts these terms and conditions. The agreements are dense, and clearly show that the driver is an independent contractor.¹⁷⁵ This process is known as the driver being "on-boarded."¹⁷⁶

Should the driver meet all the requirements, they are allowed to drive for Uber.¹⁷⁷ They are not obliged to drive a minimum number of hours and they are free to choose when they want to drive – they could simply log on and off the app as they wish.¹⁷⁸ However, they are archived (clients are unable to request a ride from them) when they are not active but once they become active again, they are unarchived.¹⁷⁹ The client requesting a ride is in control, they request a ride to a specific destination as well as the pick-up point. The driver who is within the closest range of the client is informed of the riding

¹⁷² *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 13.

¹⁷³ *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 14.

¹⁷⁴ *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 14.

¹⁷⁵ *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 14.

¹⁷⁶ *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 14.

¹⁷⁷ *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 15.

¹⁷⁸ *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 15.

¹⁷⁹ *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 15.

request on which they may accept or reject the request, if accepted they are informed of the destination.¹⁸⁰ The driver and the client are permitted to cancel the ride request, but the drivers may not cancel more than the average cancelling times of the city they are driving in, otherwise they may face deactivation from Uber.¹⁸¹ Uber, in light of the above facts, argued that the client and the driver contracts directly.¹⁸² Uber argued that the route that is driven to the destination is at the discretion of the driver, but the respondents countered that they are required to drive the route that is determined by Uber on the Global Positioning System (GPS) and are not allowed to deviate from that, or they may face deactivation from Uber.¹⁸³ Uber, through their app, deducts a fee for the ride from the client, their commission is then deducted and the balance is paid to the driver. If a partner provides the vehicle, they are allowed to deduct a fare for that as well.¹⁸⁴ The driver receives weekly remuneration and a statement stating their income, specifically setting out the hours they drove and the fees they earned for these hours.¹⁸⁵

Drivers should maintain a certain standard, in this case, their rating should not be lower than 4.3 out of a 5-point total.¹⁸⁶ Should their rating drop, they are informed of this and training is provided to them to try and increase their rating. If the driver's rating does not change, they will be deactivated from Uber's service and they will have

¹⁸⁰ *Uber South Africa Technological Services (Pty) Ltd Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 17.

¹⁸¹ *Uber South Africa Technological Services (Pty) Ltd Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 17.

¹⁸² *Uber South Africa Technological Services (Pty) Ltd Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 17.

¹⁸³ *Uber South Africa Technological Services (Pty) Ltd Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 18.

¹⁸⁴ *Uber South Africa Technological Services (Pty) Ltd Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 17.

¹⁸⁵ *Uber South Africa Technological Services (Pty) Ltd Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 18.

¹⁸⁶ *Uber South Africa Technological Services (Pty) Ltd Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 19.

to attend "top-up" training¹⁸⁷, which is the only manner they can then be reactivated.¹⁸⁸ Uber has regulations which entail circumstances under which a driver may be deactivated from service. In this regard, Uber deactivates the driver and the partner-only from the app but the partner-only who provides the vehicle to the driver has no control over this action.¹⁸⁹ Uber will inform the driver of their declining ratings and provide suggestions to improve; should they not improve they receive a notification stating their deactivation.¹⁹⁰ A driver is allowed to dispute their deactivation. However, the dispute process is subject to Netherlands laws and the driver should refer the dispute to the International Chamber of Commerce and Mediation and Arbitration.¹⁹¹

3.2.2 The arguments

3.2.2.1 Uber

Uber's main argument throughout was that the respondents were not employees of Uber BV and, therefore, they were also not employees of Uber SA.¹⁹² They maintained that the agreement between the driver and Uber BV clearly states that the driver operates as an independent contractor and Uber SA was not part of the agreement

¹⁸⁷ *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 19.

¹⁸⁸ *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 19.

¹⁸⁹ *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 20.

¹⁹⁰ *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 21.

¹⁹¹ *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 22.

¹⁹² *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 24.

from the start.¹⁹³ From the beginning, the agreement entailed that the drivers would have access to the Uber application for which they will deduct a fee, in turn.¹⁹⁴

Uber argued the following six points:

- (1) The drivers are not obliged to use an Uber registered vehicle and make use of the Uber application;¹⁹⁵
- (2) The drivers are not instructed to drive their vehicles; they are also permitted to choose whether they accept a ride request, and which route they want to drive;¹⁹⁶
- (3) A partner-driver is allowed to employ another driver to drive their vehicle(s);¹⁹⁷
- (4) Drivers are allowed to perform other jobs, even if it is for the direct competition;¹⁹⁸
- (5) The essential tool of the trade, the vehicle, is provided by the partner and not by the company;¹⁹⁹
- (6) Profits and losses are the risks of the partner as an independent contractor and not the driver, they are also allowed to move between partners.²⁰⁰

¹⁹³ *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 26.

¹⁹⁴ *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 26.

¹⁹⁵ *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 25.

¹⁹⁶ *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 25.

¹⁹⁷ *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 25.

¹⁹⁸ *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 25.

¹⁹⁹ *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 25.

²⁰⁰ *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 25.

3.2.2.2 *The respondents*

In turn, the respondents argued that the drivers were not independent contractors but rather employees of Uber.²⁰¹ The respondents further argued their status of employment with consideration that they were controlled by Uber since they were obliged to perform the driving tasks themselves, their conduct was controlled by Uber through the rating system, and the pricing and number of drivers were regulated by Uber. Therefore, business conditions are subject to Uber's regulations.²⁰² The respondents stated that if they were indeed independent contractors, they would have regulated these aspects themselves.²⁰³ The respondents further argued that the ultimate control over the employee drivers was based on the fact that Uber had ultimate control over the termination of the working relationship.²⁰⁴ The respondents also argued that sections 200B and section 198 of the *LRA* provide for joint and several liability in terms of Uber SA and Uber BV.²⁰⁵ Where international companies operate locally, the local subsidiary should be regarded as the employer to provide protection to the local workers.²⁰⁶

3.2.3 *Analysis of the arguments and the evidence*

The Commissioner in her analysis stated that it is clear that the working economy has changed immensely and the lines between who is employed and who is not, are

²⁰¹ *Uber South Africa Technological Services (Pty) Ltd Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 25.

²⁰² *Uber South Africa Technological Services (Pty) Ltd Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 28.

²⁰³ *Uber South Africa Technological Services (Pty) Ltd Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 28.

²⁰⁴ *Uber South Africa Technological Services (Pty) Ltd Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 29.

²⁰⁵ Section 198(2) of the *Labour Relations Act* 66 of 1995 states that where a person provides a temporary employment service for another person (the client), the client is regarded as the employer of the person who provides that service; *Uber South Africa Technological Services (Pty) Ltd Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 32.

²⁰⁶ *Uber South Africa Technological Services (Pty) Ltd Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 32.

increasingly blurred as the working relationships have become anonymous, international and intra-national.²⁰⁷ The drivers argued that society has to decide who they want to protect under their labour laws. In contrast, Uber argued that the legislature has the discretion to determine this and it has already been done through the amendment of the *LRA* and *The Code of Good Practice: Who is an employee?* as issued by NEDLAC.²⁰⁸ The Commissioner stated that it is in her power to determine whether the drivers are employees of Uber and whether they were protected against unfair dismissal under the *LRA*.²⁰⁹ In doing this, the Commissioner decided to interpret the *LRA*, the *Constitution*²¹⁰ and *The Code of Good Practice: Who is an employee?* and applied it to the facts.²¹¹

Once again, the definition of an employee in terms of section 213 of the *LRA* was considered. The definition, as discussed above states an employee to be:

- a) any person, excluding an independent contractor, who works for another person or 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.

Taking the definition into consideration, the Commissioner decided that section 213(b) is broad enough to include Uber drivers as these drivers assist in the business operations of the Uber company.²¹² The Commissioner referred to the common law tests that have been developed by the courts which aim to aid in the distinction between an employee and an independent contractor. In her opinion, these four common law tests namely the organisational test, the dominant impression test, the

²⁰⁷ *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 33.

²⁰⁸ *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 34.

²⁰⁹ *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 35.

²¹⁰ *Of the Republic of South Africa*, 1996.

²¹¹ *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 35.

²¹² *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 37.

control test and the economic dependent test have, however, become unhelpful as certain points of the tests point to employment and other to independent contracting.²¹³ The Commissioner pointed out that none of the abovementioned common law tests is preferred by the courts but it seems that control and supervision are the dominant factors that are mostly considered.²¹⁴ The Code of Good Practice: Who is an employee? on the other hand, seems to endorse the dominant impression test.²¹⁵ In her analysis, the Commissioner mentioned that the aforementioned Code prescribes certain factors that should be considered in determining the employment status of a person. The Commissioner stated that section 200A of the *LRA* embodies the same factors and tests and should one of these factors be present and if the person earns below the annual threshold, they are presumed to be an employee.²¹⁶ However, in their agreement the drivers and the company agreed that the presumption does not apply to the drivers in this regard and the drivers, therefore, have to prove that they are employees of Uber.²¹⁷

Furthermore, the Commissioner mentioned that although the code does not state so explicitly, it introduces a comprehensive new type of test namely the reality of the relationship test.²¹⁸ This test entails that the reality of the working relationship should be considered instead of the contract that was concluded between the parties when determining the employment status of a person.²¹⁹ More specifically, item 52 of the

²¹³ *Uber South Africa Technological Services (Pty) Ltd Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 39.

²¹⁴ *Uber South Africa Technological Services (Pty) Ltd Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 40.

²¹⁵ *Uber South Africa Technological Services (Pty) Ltd Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 40.

²¹⁶ *Uber South Africa Technological Services (Pty) Ltd Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 40.

²¹⁷ *Uber South Africa Technological Services (Pty) Ltd Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 40.

²¹⁸ *Uber South Africa Technological Services (Pty) Ltd Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 41.

²¹⁹ *Uber South Africa Technological Services (Pty) Ltd Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 41.

code states that when determining the employment status, courts, tribunals and officials should consider the dominant impression when all relevant factors are taken into account in examining the realities of the relationship status of the parties.²²⁰

The Commissioner considered the factors of the Code of Good Practice: Who is an employee? when she made her analysis.²²¹ It was pointed out that firstly, the drivers rendered their services personally as they are not allowed to out-source and they can only be "on-boarded" by providing personal information.²²² Secondly, it was mentioned that the relationship between Uber and the driver last for an indefinite period as long as all the requirements are adhered to.²²³ Thirdly, Uber controls the relationship.²²⁴ Although the drivers have the discretion of choosing their own working hours and may accept or decline a request, Uber sets out clear performance standards that the drivers should adhere to at all times.²²⁵ If a driver rejects riding requests too many times, they are deactivated.²²⁶ The Commissioner specifically stated that Uber control the drivers as they have the power to deactivate a person from service after which they will not be able to generate an income. In addition, they are also tracked for reckless driving through technology – if reckless driving is detected the driver may face deactivation.²²⁷

²²⁰ *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 41.

²²¹ *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 42.

²²² *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 43.

²²³ *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 44.

²²⁴ *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 45.

²²⁵ *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 45.

²²⁶ *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 45.

²²⁷ *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 45.

In their arguments, Uber stated that the partners are those who control the drivers and not Uber as an organisation.²²⁸ The Commissioner acknowledged this as the partners are the ones who provide the vehicles and state the conditions under which the vehicle is to be used by drivers.²²⁹ She once again pointed to the control when Uber has to deactivate a driver from service and the strict working standards that Uber sets and has to be adhered to, to prevent deactivation from the Uber app.²³⁰ This was set to point to item 37 of the code which states that any relevant factor entails the control regarding termination of the contract of a sub-contractor.²³¹ The Commissioner rejected Uber's arguments that the driver contracts with a client separately for each trip, she stated that this is not a reflection of the true relationship.²³² The true position in this regard is that the client has no control over who Uber chooses to provide the ride service should they request a ride. In addition, the driver is also not informed of the destination of the client until the request is accepted. They are also not allowed to communicate with the client after the ride has lapsed per the service agreement.²³³ This taken into account, the Commissioner stated that the driver is not at all independent and is economically dependent on Uber for the reasons that Uber controls their ability to drive and generate an income in doing so.²³⁴

²²⁸ *Uber South Africa Technological Services (Pty) Ltd Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 46.

²²⁹ *Uber South Africa Technological Services (Pty) Ltd Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 46.

²³⁰ *Uber South Africa Technological Services (Pty) Ltd Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 46.

²³¹ *Uber South Africa Technological Services (Pty) Ltd Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 46.

²³² *Uber South Africa Technological Services (Pty) Ltd Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 47.

²³³ *Uber South Africa Technological Services (Pty) Ltd Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 47.

²³⁴ *Uber South Africa Technological Services (Pty) Ltd Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 48.

Furthermore, drivers form an essential part of Uber’s business. Although Uber provides the technology, the drivers are those who perform the service.²³⁵ The application used to request a ride simply provides convenience for those who want a ride.²³⁶ Uber SA is the employer of the drivers, and the relationship between the driver and Uber BV is of distant and anonymous nature.²³⁷ The Commissioner rejected Uber’s argument that the real employer of the driver is the partner that provides the vehicle and that the contract of employment is rather between the driver and the client.²³⁸ She further stated that when applying The Code of Good Practice and more specifically the realities of the relationship test, it indicates that the drivers are indeed employees of Uber SA.²³⁹ In this, she recognises her broad interpretation of section 213 of the *LRA* to promote the *Constitution*, social justice and effective dispute resolution.²⁴⁰ The promotion of social justice is found to be the balance between those who have the resources and those who are in weaker positions compared to their opponent.²⁴¹

The Commissioner once again stated that although Uber BV provides the technology for the business of the drivers, Uber SA is the employer for all purposes.²⁴² In finding that the drivers are employees of Uber SA, it promotes their constitutional rights to

²³⁵ *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 49.

²³⁶ *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 49.

²³⁷ *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 50.

²³⁸ *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 51.

²³⁹ *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 52.

²⁴⁰ *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 52.

²⁴¹ *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 56.

²⁴² *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 59.

engage in collective bargaining and participate in strikes.²⁴³ Based on this, the Commissioner ruled that the drivers are employees of Uber SA and that the CCMA, therefore, has jurisdiction to determine the dismissal disputes between the drivers and Uber SA for the purposes of the *LRA*.²⁴⁴

3.3 The matter on review in the Labour Court

Unsatisfied with the ruling of the CCMA Commissioner, Uber took the matter on review to the Labour Court. Very importantly, Van Niekerk J stated that the modern operations of the 'gig-economy' pose serious challenges for the traditional perceptions of employment globally rendering it difficult to some extent to implement domestic labour legislation.²⁴⁵

3.3.1 *Legal issues*

Reiterating and reconsidering the facts of the case as found in the CCMA matter, the Labour Court had to decide on certain legal issues. Pursuant to section 158(1)(g) of the *LRA*, the Labour Court may review any performance under the *LRA* on any permissible ground under the law.²⁴⁶ When reviewing a commissioner's award, reasonableness is not the applicable factor but rather whether the ruling made by the commissioner was correct.²⁴⁷ Van Niekerk J here pointed to the matter of *SA Rugby Players Association & Others v Sa Rugby (Pty) Ltd & Others*²⁴⁸ where it was found that when determining whether dismissal has taken place or not, the jurisdiction of the CCMA to hear the dispute must be determined.²⁴⁹ Should no dismissal have taken place, the CCMA does not have jurisdiction in the matter. Further, as the CCMA is not

²⁴³ *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 61.

²⁴⁴ *Ltd Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others* [2017] 11 BALR 1247 (CCMA) para 62.

²⁴⁵ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 2.

²⁴⁶ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 61.

²⁴⁷ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 61.

²⁴⁸ 2008 29 ILJ 2218 (LAC).

²⁴⁹ At para 39.

a court of law and rather a creature of statute, it does not have the discretion to determine its own jurisdiction. Thus, the Labour Court has to decide whether the CCMA has jurisdiction to decide on a case or not.²⁵⁰

Further, the matter of *Phaka v Commissioner Bracks*²⁵¹ was also considered by the Labour Court during the matter. In this case, the court stated that when there is need to determine whether an arbitrator has jurisdiction to resolve a dispute, it has to be evaluated whether the person has objective jurisdiction in law and fact.²⁵² If it was found that the arbitrator does have jurisdiction over a matter because they reasonably assumed so, it is "wholly untenable in principle".²⁵³ Based on this, the Court stated that in the Uber matter, no dispute arises over the "correctness" threshold – the reasonableness of the Commissioner's decision is not in dispute and, therefore, the decision has no real consequence.²⁵⁴ Based hereon, the court's position was to decide the jurisdictional decision *de novo* based on the records filed in the review proceedings.²⁵⁵

3.3.2 The Labour Court's evaluation

The Court had to decide whether the dismissal dispute was indeed within the jurisdiction of the CCMA to determine. Van Niekerk J stated that the Commissioner was correct in stating that this is all dependent on the nature of the employment status of the drivers and the relationship between the Uber company and the drivers in question.²⁵⁶ The Court once again, as with the Commissioner, considered section 213 of the *LRA* that defines who an employee is.²⁵⁷

²⁵⁰ At para 40.

²⁵¹ [2015] 5 BLLR 514 LAC.

²⁵² *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 62.

²⁵³ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 62.

²⁵⁴ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 63.

²⁵⁵ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 63.

²⁵⁶ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 64.

²⁵⁷ See discussion in chapter two.

Further, the section 200A presumption in terms of the *LRA* was also again considered. The Court stated that this presumption creates an opportunity for workers to be deemed employees and not independent contractors, irrespective of the contractual provisions concluded between the parties.²⁵⁸ The Commissioner was of the opinion that this section did not apply in the Uber case, but this was not in dispute.²⁵⁹ The definition of an employee according to section 213²⁶⁰ exclude independent contractors in both sub-sections.²⁶¹ Sub-section (a) has been decided to apply to individuals who work for other persons under a common law contract of employment.²⁶² This indicates, according to the Court, that a contract of employment must exist between the alleged employee and alleged employer and the contract must be of an employment nature.²⁶³

The matter of *Liberty Life Association of Africa Ltd v Niselow*²⁶⁴ was consulted by Van Niekerk J. Here, the Court stated that section 213(b) of the *LRA* seems to extend the concept of employment more than what is normally understood. Therefore, the judge pointed out that a literal interpretation hereof would be absurd. Later on, the judge stated that their understanding of the concept of 'assisted' is that an individual place themselves at the disposal of a person, yet the person is not necessarily his employer.²⁶⁵ The Code of Good Practise was also consulted for the interpretation of section 213(b)²⁶⁶ and was found that it states that persons who are not employed in terms of an employment contract may, however, be deemed statutory employees.²⁶⁷ The position of the LAC has been that it is necessary to establish whether a contractual relationship between an alleged employer and an alleged employee existed.²⁶⁸ The

²⁵⁸ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 66.

²⁵⁹ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 66.

²⁶⁰ Of the *Labour Relations Act* 66 of 1995.

²⁶¹ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 67.

²⁶² *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) (12 January 2018) para 67.

²⁶³ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 67.

²⁶⁴ (1996) 17 ILJ 673 (LC).

²⁶⁵ At 683 A-B.

²⁶⁶ Of the *Labour Relations Act* 66 of 1995.

²⁶⁷ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 69.

²⁶⁸ *Universal Church of the Kingdom of God v Myeni* [2015] 9 BLLR 918 (LAC) para 49.

drivers admitted that no contract of employment was concluded between them and Uber SA, which was problematic on their side.²⁶⁹ The Commissioner was bound by the rulings of the LAC. Therefore, according to the Labour Court, the Commissioner committed a material error of law for not considering the LAC judgments in her ruling.²⁷⁰

Van Niekerk J further decided to consult three common law tests in determining whether an employment relationship existed, namely the supervision and control test, the organisation or integration test and the dominant impression test.²⁷¹ Relating to the dominant impression test, the Court stated that this test has gained favour and has been used in several rulings of the High Court, Labour Court, Labour Appeal Court and even the Industrial Court.²⁷² The Labour Appeal Court in the matter of *State Information Technology Agency (Pty) Ltd v CCMA & Others*²⁷³ decided on a different approach when it stated that should it be decided whether a person is an employee, one has to evaluate the employer's right to supervision and control over the worker in question, whether the worker forms an integral part of the organisation or company and whether the person is economically dependent on the alleged employer.²⁷⁴ The Court also referred to the 'realities test' which evaluates the substance of a work relationship, rather than the form thereof.²⁷⁵ The reality test was also used in *Denel (Pty) Ltd v Gerber*.²⁷⁶

Van Niekerk J stated that the Commissioner relied on the abovementioned realities test based on its inclusion in the Code of Good Practice.²⁷⁷ He stated that the root of

²⁶⁹ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 72.

²⁷⁰ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 72.

²⁷¹ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 73.

²⁷² *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 74.

²⁷³ (2008) 29 ILJ 2234 (LAC).

²⁷⁴ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 74.

²⁷⁵ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 74.

²⁷⁶ (2005) 26 ILJ 1256 (LAC); *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 74.

²⁷⁷ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 75.

the reality test is that where a contract of employment was concluded on certain terms, the court may enquire into the substance of the arrangement and determine the real relationship between the parties irrespective of the provisions agreed upon.²⁷⁸ But, Van Niekerk J is of opinion that this is not a discrete test and must only be used in the evaluation of a disguised employment relationship.²⁷⁹ Therefore, where parties have concluded and agreed to a relationship in a certain form, it does not stop the court from evaluating the substance of the agreement and determining whether an employment relationship existed regardless of the agreement between the parties.²⁸⁰

The Court furthermore stated that the Commissioner in her finding above relied on the Code of Good Practice very heavily, which was erroneous as this cannot be used as a self-standing source and it points out that the dominant impression test is intact.²⁸¹ It is further stated by the Court that the factors that were considered and which are included in the Code are not definitive, yet include that the worker must perform their task personally, the employer chooses when the employee is used, an employee would be obliged to perform lawful and reasonable instructions of the employer, the contact will be terminated at the death of the employee or once the expiration date has been reached and not when work has been completed.²⁸² Ultimately the court stated that the test used by the Commissioner to reach her conclusion was unclear. Her reference to this test was 'the new comprehensive test', but resembles the dominant impression test.²⁸³ Her broad interpretation of section 213 of the *LRA* resulted in a deviation from binding authority and the correct interpretations were not applied in the matter.²⁸⁴

²⁷⁸ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 75.

²⁷⁹ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 75.

²⁸⁰ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 75.

²⁸¹ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 76.

²⁸² *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 76.

²⁸³ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 77.

²⁸⁴ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 77.

The Court pointed to the fact that it is apparent that all the judgments in the Labour Appeal Court seem to determine whether a person is an employee by way of a multi-factorial approach.²⁸⁵ All the relevant factors regarding the relationship between the alleged employee and alleged employer must thus be investigated to determine the realities thereof.²⁸⁶ The Commissioner was also erroneous in her decision to deal with Uber SA and Uber BV as two separate entities and not include Uber BV in the dispute.²⁸⁷

3.3.3 The Labour Court's findings and ruling

Based on the preceding information, the Labour Court stated that the Commissioner of the CCMA was not correct in her finding that the drivers were employees of Uber SA.²⁸⁸ This decision was made based on the following statements:

The drivers agreed that no contractual relationship in any form existed between them and Uber SA, and no written agreements between the two parties were concluded. It was thus not necessary to evaluate the contractual terms of the drivers and Uber SA.²⁸⁹ Uber BV was also not a party to either of the proceedings.²⁹⁰ This considered, the drivers maintained the position that they were employees of Uber SA and that the relationship between them and Uber SA constitutes an employment relationship pursuant to South African legislation.²⁹¹ In making their argument, the drivers state twelve factors they believed were indicators of the nature of this employment relationship. Firstly, they stated that Uber SA was the entity that recruited, selected and screened the drivers. The on-boarding process was described, competency tests were completed, and training sessions were attended.²⁹² The drivers further contended

²⁸⁵ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 78.

²⁸⁶ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 78.

²⁸⁷ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 80.

²⁸⁸ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 81.

²⁸⁹ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 81.

²⁹⁰ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 82.

²⁹¹ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 82.

²⁹² *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 83.

that a driver would only be allowed to drive and be accepted by Uber SA if they were licensed and authorised through the agreement made with Uber BV. Here, it is important to state that the on-boarding process is not handled by Uber SA but is the responsibility of Uber BV and direct online communication takes place between the prospective driver and Uber BV.²⁹³ The evidence is thus clear that the service performed by the drivers is for Uber BV and not for Uber SA.²⁹⁴

Further, it was the statement of the drivers that their permits were obtained with the help of Uber SA – which was not the case.²⁹⁵ The metered taxi operating licences that the City of Cape Town require are only applicable to vehicle owners and not the drivers.²⁹⁶ Uber SA in turn agreed that they assisted the drivers in the formulation and submission of needed business plans as well as other documentation for securing of the mentioned licenses.²⁹⁷ They further stated that they had no relation to the drivers and, therefore, indicated that no employment relationship existed between the drivers and Uber SA.²⁹⁸ The drivers also took the position that training is provided by Uber SA on the use of the Uber application. The Court here states that Uber SA only provides a high-level overview of how the application is to be used. This is merely Uber SA's support service to the head office of Uber BV and also not an indication of an employment relationship existing between Uber SA and the drivers.²⁹⁹

The drivers further alleged that Uber SA determines the fares that are paid by the clients and the amount of the remuneration that the drivers receive. The reality is that Uber BV determines this by establishing maximum fares that are to be paid by

²⁹³ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 84.

²⁹⁴ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 84.

²⁹⁵ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 85.

²⁹⁶ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 85.

²⁹⁷ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 85.

²⁹⁸ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 85.

²⁹⁹ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 86.

clients.³⁰⁰ This position is the same for drivers' averments relating to price cuts and income guarantees.³⁰¹ Furthermore, the drivers argued that Uber SA pays the partner drivers when in fact Uber BV provides a digital payment facilitation feature that forms part of the platform – the technology that Uber BV provides then calculates the fares and collects them from the drivers. Payments are then made to partner drivers regularly after the fees that are due to Uber BV are deducted.³⁰² Uber operated a local bank account in South Africa – "Uber BV South Africa" where the fees collected from riders are transferred into.³⁰³ The balance from the fare is transferred directly into the nominated bank account of the partner-driver from Uber BV's account and Uber SA is not involved in the process.³⁰⁴

The Court stated that the drivers' arguments that supervision and control were exercised over them through the Uber application by Uber SA and not by Uber BV as a software developer had no factual basis.³⁰⁵ Uber BV submitted a founding affidavit during both proceedings explaining their role. This affidavit clearly states that the rating system, the deactivation of drivers and the deactivation policy was implemented by Uber BV and not by Uber SA, as the drivers alleged.³⁰⁶ By evaluating the documentation submitted to the Court by Uber BV, it was determined that Uber SA did neither retain control over the performance of the drivers nor the deactivation of a driver from providing the service.³⁰⁷ The submitted documentation further proved the drivers' argument that Uber SA provided top-up training for poor performing drivers to be wrong as this is again the policy and implementation of Uber BV. Although Uber SA was entitled to deal with rider complaints submitted against Uber drivers, this

³⁰⁰ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 87.

³⁰¹ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 87.

³⁰² *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 88.

³⁰³ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 89.

³⁰⁴ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 89.

³⁰⁵ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 90.

³⁰⁶ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 90.

³⁰⁷ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 90.

arrangement was abolished in 2016 – which was before the deactivation of the drivers in this matter.³⁰⁸ An incidence response team was established to deal with complaints against South African Uber drivers and their possible deactivations. This team is based in Ireland, but ultimately the decision to deactivate a driver falls within the scope of Uber BV and not of Uber SA.³⁰⁹

The Court stated that the documentation submitted to the Commissioner proved that Uber BV as an entity operates the application that drivers and riders use, and not Uber SA.³¹⁰ Uber BV is also the entity that issues licenses for the use of the application by other parties and they provide the contractual terms that riders and drivers agree to, to get access to one another, and not Uber SA.³¹¹ The remuneration is paid by the partner to the driver and Uber does not pay their fees. In some cases, an employment contract is concluded between a partner-only that provides the vehicle to the driver – rendering the partner the employer of the driver.³¹²

It was also never expected of drivers-only or partner-drivers to use the Uber application or to drive an Uber registered vehicle.³¹³ Uber SA did not instruct the drivers to drive at a particular time, where they must drive and who they were allowed to transport.³¹⁴ The failure of the drivers to refer to Uber SA and Uber BV as separate entities in their founding affidavits was found to be problematic to the Court. The delineation of function between the two entities was ignored by the Commissioner in making her finding, and she was not in the position to do so.³¹⁵ This taken into consideration, Van Niekerk J summarised his findings relating to the CCMA case as

³⁰⁸ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 91.

³⁰⁹ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 91.

³¹⁰ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 91.

³¹¹ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 92.

³¹² *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 92.

³¹³ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 93.

³¹⁴ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 93.

³¹⁵ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 94.

follows: The Commissioner was erroneous in not distinguishing Uber SA and Uber BV as separate legal entities.³¹⁶ No dispute of fact existed before the Commissioner relating to the delineation of the function of Uber SA and Uber BV. The arguments that were made by the drivers all related to Uber BV and not to Uber SA. Therefore, the Commissioner did not and must have considered the separate roles of Uber SA and Uber BV relating to the drivers.³¹⁷ Should she have dealt with these as separate legal entities; she would have found that the arguments of the drivers failed to establish that an employment relationship existed between them and Uber SA.³¹⁸

Based on all the preceding reasons, the Labour Court found that the drivers were not employees of Uber SA and therefore are not allowed to refer a dispute of unfair dismissal against Uber SA to the CCMA.³¹⁹ Their employment relationship with Uber BV was not established as this was not a question before the Commissioner or the Labour Court.³²⁰

3.4 Interpretations of the CCMA award and Labour Court ruling

After the award of the CCMA and the overturning thereof by the Labour Court, different interpretations have been made both by academics, legal practitioners and in judgments.

The legal status of employment of Uber drivers have been challenged over the years in separate countries including France, the United Kingdom (UK) United States of America (USA) and now South Africa.³²¹ All over, Uber drivers were deemed to be

³¹⁶ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 97.

³¹⁷ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 97.

³¹⁸ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 97.

³¹⁹ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 98.

³²⁰ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) para 98.

³²¹ Eiser, Ngcamu and Challenor 2021 <https://www.webberwentzel.com/News/Pages/uber-drivers-in-south-africa-employees-or-independent-contractors.aspx#:~:text=In%20South%20Africa%2C%20Uber%20drivers%20are%20currentl y%20classified%20as%20independent%20contractors.>

independent contractors,³²² pursuant to the terms that are agreed upon, and therefore, are not afforded with the rights and protection of the labour legislation as opposed to the conventional employee.³²³ The current position in South Africa is that Uber drivers are regarded as independent contractors and do not enjoy protection under the South African labour legislation.³²⁴ This position, as discussed above, was determined by the Labour Court as the drivers failed to prove that an employment relationship existed between them and Uber SA, the position as to whether these drivers are employees of Uber BV has not been determined yet.³²⁵ The problem in South African context is that the drivers are generally not the owners of the vehicles and driver-partners provide the vehicles for the Uber service which indicate an employment relationship existing between the drivers and driver partners.³²⁶ A proposal of legislative intervention could potentially provide more protection to South African Uber drivers in the form of the introduction and incorporation of the Fairwork Code of Good Practice regarding the Regulation of Platform Work in South Africa into the *LRA*.³²⁷ Another proposed form of protection for these drivers is that the Minister of Employment and Labour could, pursuant to section 83(1) of the *BCEA* declare these drivers to be

³²² However, a recent landmark case in the UK case have determined that Uber Drivers in the UK can be regarded as employees rather than independent contractors. In this matter the Court found that the contract concluded between the parties is not the starting point to determine the employment status, but that it has to be determined what type of relationship the parties intended to have when concluding the relationship. Further, one has to determine whether the alleged employee deserves legislative protection; *Uber BV and Others v Aslam and Others* [2021] UKSC 5.

³²³ Eiser, Ngcamu and Challenor 2021 <https://www.webberwentzel.com/News/Pages/uber-drivers-in-south-africa-employees-or-independent-contractors.aspx#:~:text=In%20South%20Africa%2C%20Uber%20drivers%20are%20currentl y%20classified%20as%20independent%20contractors;>

³²⁴ Eiser, Ngcamu and Challenor 2021 <https://www.webberwentzel.com/News/Pages/uber-drivers-in-south-africa-employees-or-independent-contractors.aspx#:~:text=In%20South%20Africa%2C%20Uber%20drivers%20are%20currentl y%20classified%20as%20independent%20contractors.>

³²⁵ Eiser, Ngcamu and Challenor 2021 <https://www.webberwentzel.com/News/Pages/uber-drivers-in-south-africa-employees-or-independent-contractors.aspx#:~:text=In%20South%20Africa%2C%20Uber%20drivers%20are%20currentl y%20classified%20as%20independent%20contractors.>

³²⁶ Eiser, Ngcamu and Challenor 2021 <https://www.webberwentzel.com/News/Pages/uber-drivers-in-south-africa-employees-or-independent-contractors.aspx#:~:text=In%20South%20Africa%2C%20Uber%20drivers%20are%20currentl y%20classified%20as%20independent%20contractors.>

³²⁷ Eiser, Ngcamu and Challenor 2021 <https://www.webberwentzel.com/News/Pages/uber-drivers-in-south-africa-employees-or-independent-contractors.aspx#:~:text=In%20South%20Africa%2C%20Uber%20drivers%20are%20currentl y%20classified%20as%20independent%20contractors.>

employees for purposes of the *LRA* and the *BCEA*.³²⁸ The introduction of the aforementioned Code of Good Practice could provide protection to these drivers in terms of minimum wages, protection pursuant to the *Occupational Health and Safety Act* 85 of 1993, agreements based on written contracts, free management and freedom of organisation.³²⁹ Law firms³³⁰ also indicated that they will represent these drivers in a class action against Uber in South Africa and the United Kingdom which could affect the labour rights of Uber drivers and other workers in the same industry.³³¹ The deliberate decision of the Labour Court to not determine the employment relationship between South African Uber drivers and Uber BV at that stage seems to indicate that there is potential that an employment relationship between these parties indeed exists.³³² The Labour Court's ruling and the overturning of the CCMA award was based on a technicality and could have had a different outcome should the drivers have included Uber BV in the matter.³³³

3.5 Conclusion

As discussed in chapter two, there have been a number of instances where the legal employment status of a person had to be determined. A lot of instruments have been developed, including common law tests by the courts, to aid in the determination of a person's legal employment status. The instruments include sections in the *LRA* and the *BCEA* which create a rebuttable presumption as to who an employee is, the Code of Good Practice: Who is an employee?, the common law tests as well the approach of the ILO in their recommendations. Although the provisions of these instruments seem straightforward, it all boils down to the interpretation and application thereof in the

³²⁸ Eiser, Ngcamu and Challenor 2021 <https://www.webberwentzel.com/News/Pages/uber-drivers-in-south-africa-employees-or-independent-contractors.aspx#:~:text=In%20South%20Africa%2C%20Uber%20drivers%20are%20currentl y%20classified%20as%20independent%20contractors.>

³²⁹ Eiser, Ngcamu and Challenor 2021 <https://www.webberwentzel.com/News/Pages/uber-drivers-in-south-africa-employees-or-independent-contractors.aspx#:~:text=In%20South%20Africa%2C%20Uber%20drivers%20are%20currentl y%20classified%20as%20independent%20contractors.>

³³⁰ Including Mbuyisa Moleele Attorneys in South Africa and Leigh Day in the United Kingdom.

³³¹ Eiser, Ngcamu and Challenor 2021 <https://www.webberwentzel.com/News/Pages/uber-drivers-in-south-africa-employees-or-independent-contractors.aspx#:~:text=In%20South%20Africa%2C%20Uber%20drivers%20are%20currentl y%20classified%20as%20independent%20contractors.>

³³² Pagdens 2020 [https://www.pagdens.co.za/legal_employment_status_of_uber_drivers/.](https://www.pagdens.co.za/legal_employment_status_of_uber_drivers/)

³³³ Pagdens 2020 [https://www.pagdens.co.za/legal_employment_status_of_uber_drivers/.](https://www.pagdens.co.za/legal_employment_status_of_uber_drivers/)

courts. It is evident from the matters discussed above, that even the CCMA and the Labour Court do not seem to agree on the application of the provisions.

The CCMA considered the definition of an employee in terms of the *LRA*, the rebuttable presumption of who an employee is according to the *LRA* and the *BCEA*, the Code of Good Practice: Who is an employee? as well as the dominant impression test as, in the Commissioner's opinion, it is endorsed by the Code. The Labour Court also considered the same instruments in its evaluation and finding. Interestingly, neither the CCMA nor the Labour Court considered the recommendation of the ILO.

Importantly, in the overturning of the Commissioner's award, Van Niekerk J criticised the Commissioner's almost sole reliance on the Code and the dominant impression test it endorses. The ruling of the Labour Court reiterates the importance of the common law tests and other instruments not being used in isolation and that all relevant factors and instruments should be considered in determining the employment status of a person. If the Commissioner had done this, she may have come to the same conclusion as the Labour Court relating to the decision that the drivers were not employees of Uber BV. Further, the drivers should have included Uber BV, the head office of Uber, in the proceedings and could have been successful in their bid of being declared employees of Uber. Once again, the Labour Court refused to indicate whether these drivers were employees of Uber BV, which leaves it open for potential future litigation.

The ruling of the Labour Court indicates the importance of using all the instruments in determining a person's legal employment status. In the following chapter, the terms of Bolt and Uber Eats drivers are examined against these instruments in a bid to determine their legal employment status.

CHAPTER 4: TERMS OF EMPLOYMENT OF UBER EATS DELIVERY DRIVERS AND BOLT E-HAILING DRIVERS IN SOUTH AFRICA

4.1 Introduction

As discussed in chapter 1, major e-hailing companies that are currently operating in South Africa include Uber and Bolt. Relating to food delivery services or food couriers, current major operators in South Africa include Uber Eats and MrD (previously MrDelivery). Uber Eats delivery drivers and Uber e-hailing drivers are appointed under the same terms and conditions of employment.³³⁴ This chapter evaluates the terms of employment and work relationship of the e-hailing company, Bolt as well as food courier Uber Eats' delivery drivers. Hereafter, the common law tests and the statutory position of who an employee is, as determined in chapter two, is applied to these employment terms to evaluate the employment status of these workers.

4.2 Employment terms

4.2.1 *Uber Eats delivery drivers*

As mentioned above, Uber Eats delivery drivers are appointed under the same terms and conditions as Uber e-hailing drivers – certain requirements must be adhered to, to be considered for such a position. No drivers are recruited, and a person must apply for a position as a delivery driver. These applications are made as an independent contractor.³³⁵ Consequently, the terms of service that the applicant agrees to is evaluated and applied to the common law tests and the statutory position as to who an employee is.

4.2.1.1 *Terms and conditions for delivery drivers*

The application to become an Uber Eats delivery driver is done online and by applying the applicant agrees to the terms and conditions. To qualify for this position as a delivery person, an individual must have a driver's license, a South African ID or

³³⁴ Uber date unknown <https://www.uber.com/legal/en/document/?name=general-terms-of-use&country=south-africa&lang=en>.

³³⁵ Uber date unknown <https://www.uber.com/legal/en/document/?name=general-terms-of-use&country=south-africa&lang=en>.

passport if the person is a foreigner, a background clearance certificate, a DEKRA vehicle inspection report, a vehicle or motorcycle and the license must be up to date.³³⁶

Relating to the terms of use that the drivers agree to, it states that the contract is concluded between the individual and Uber BV.³³⁷ The terms clearly state that the driver is employed as an independent contractor and in no way an employee of Uber BV or its local affiliates.³³⁸ The license for usage of the Uber application and service is issued on a non-transferable basis and is not transferable to a third party implying that the person applying should render the services themselves.³³⁹ The driver agrees to keep their personal information up-to-date and maintain an active account on the application and that their account may be inaccessible or disabled if these terms are not adhered to.³⁴⁰

The driver is responsible for obtaining data network access for the application and they will be responsible for the fees associated therewith.³⁴¹ Uber recovers the fee from the rider after which they deduct their service fee, and the remainder is paid to the delivery driver.³⁴² The driver is allowed to cancel their service after acceptance but will be liable to pay a cancellation fee.³⁴³ Should an accident occur, the driver is fully liable for the repairs on their vehicle or motorcycle and Uber Eats bears none of the liability.³⁴⁴ Uber Eats exempts itself from any liability that may arise from loss, damage or theft that may occur in the rendering of such delivery services.³⁴⁵ The delivery driver has discretion on the order they want to deliver. If the delivery driver is available for deliveries, they go online on the driver application where delivery requests will be

³³⁶ Uber date unknown <https://www.uber.com/za/en/deliver/>.
³³⁷ Uber date unknown <https://www.uber.com/legal/en/document/?name=general-terms-of-use&country=south-africa&lang=en>.
³³⁸ Uber Terms and Conditions clause 1.
³³⁹ Uber Terms and Conditions clause 2.
³⁴⁰ Uber Terms and Conditions clause 1.
³⁴¹ Uber Terms and Conditions clause 3.
³⁴² Uber Terms and Conditions clause 4.
³⁴³ Uber Terms and Conditions clause 4.
³⁴⁴ Uber Terms and Conditions clause 4.
³⁴⁵ Uber Terms and Conditions clause 5.

available to them – they can then choose whether they want to accept the request or not.³⁴⁶

4.2.2 Bolt e-hailing drivers

As with Uber, Bolt is an e-hailing service which enables riders to request a ride to their chosen destination through an application. Bolt does not recruit drivers, instead, a person must apply to become a driver under Bolt. Bolt claims that these drivers are independent contractors rather than employees. Subsequently, the terms to which a driver agrees when applying are discussed and evaluated.

4.2.2.1 Terms and conditions for drivers

The application process to become a Bolt driver also takes place online. On its website, Bolt states that a driver works on their own schedule and operate as their own boss.³⁴⁷ The requirements to become a driver for Bolt are also set out on the website and include that the individual must have their own vehicle or must provide the details of a partner with a vehicle on the platform, a valid driver's license, a valid professional drivers permit, clean criminal record, the vehicle model must be from the year 2013 or newer and a vehicle inspection certificate will be required from the applicant.³⁴⁸

Relating to the general terms for drivers, a driver may not transfer their Bolt driver account to another person to use. Therefore, they must render the services personally and in their own name under their Bolt account.³⁴⁹ Bolt also states in the general terms that they may provide free training for applicants before accepting them into service.³⁵⁰ A driver is stated to be liable should a law in South Africa be contravened.³⁵¹ A driver may decide when and where they operate, thus operating their own schedule for

³⁴⁶ Uber date unknown <https://www.uber.com/za/en/deliver/basics/making-deliveries/how-to-deliver/>.

³⁴⁷ Bolt date unknown [https://blog.bolt.eu/en-za/how-to-become-a-bolt-driver-in-south-africa/#:~:text=Become%20a%20driver%20in%20just%20a%20few%20days&text=valid%20driver's%20license%20\(more%20info,\(COR%20%E2%80%93%20more%20info%20here\).](https://blog.bolt.eu/en-za/how-to-become-a-bolt-driver-in-south-africa/#:~:text=Become%20a%20driver%20in%20just%20a%20few%20days&text=valid%20driver's%20license%20(more%20info,(COR%20%E2%80%93%20more%20info%20here).)

³⁴⁸ Bolt date unknown [https://blog.bolt.eu/en-za/how-to-become-a-bolt-driver-in-south-africa/#:~:text=Become%20a%20driver%20in%20just%20a%20few%20days&text=valid%20driver's%20license%20\(more%20info,\(COR%20%E2%80%93%20more%20info%20here\).](https://blog.bolt.eu/en-za/how-to-become-a-bolt-driver-in-south-africa/#:~:text=Become%20a%20driver%20in%20just%20a%20few%20days&text=valid%20driver's%20license%20(more%20info,(COR%20%E2%80%93%20more%20info%20here).)

³⁴⁹ Bolt General terms for drivers 2022 clause 1.2.5.

³⁵⁰ Bolt General terms for drivers 2022 clause 2.3.

³⁵¹ Bolt General terms for drivers 2022 clause 4.1.

providing transportation services.³⁵² The equipment or "tools of the trade" that are necessary to provide this service, which in this instance would be the smartphone, the car, etcetera must be provided by the driver and costs incurred for providing this service such as fuel, insurance payments, cell phone data or airtime etcetera is also the responsibility of the driver.³⁵³

The manner in which a driver conducts this service is somewhat under the control of Bolt. Bolt states in general terms that drivers must abide by the ethics of the company which include taking the shortest route to the destination unless requested otherwise by the rider, no unauthorised stops may be made, and no other passengers may be in the vehicle when providing transportation services.³⁵⁴ The fare that is charged by the driver is dependent on the distance, the time it took to get to the destination and the default base fare. A driver may charge less than what is calculated by the system but the Bolt fee will remain the same.³⁵⁵ Should a driver not abide by the aforementioned rules, they may be penalised by way of a deduction on their fee received after the transportation service was completed.³⁵⁶ A 'Bolt fee' is payable by the driver in order to make use of the Bolt service and is dependent on various factors. This fee is payable by the 15th of every month and may incur a 0,04% daily interest-run for unpaid fees.³⁵⁷

Furthermore, similarly to the terms of Uber, a driver must maintain a certain standard by way of minimum average ratings, activity regarding acceptance, declining and non-responding and completion of transportation services.³⁵⁸ Should the rating of the driver not be desirable, Bolt will notify the driver. If the rating does not increase, the driver is automatically suspended either pending an investigation or permanently.³⁵⁹ Importantly, the general terms state that when agreeing to the terms of becoming a Bolt driver, they acknowledge that an employment agreement or relationship is not established and that the drivers operate as independent contractors. Should mandatory laws require that the driver be deemed an employee of Bolt, they waive

³⁵² Bolt General terms for drivers 2022 clause 4.4.

³⁵³ Bolt General terms for drivers 2022 clause 4.5.

³⁵⁴ Bolt General terms for drivers 2022 clause 4.2.

³⁵⁵ Bolt General terms for drivers 2022 clause 4.2.

³⁵⁶ Bolt General terms for drivers 2022 clause 12.5.

³⁵⁷ Bolt General terms for drivers 2022 clause 5.2.

³⁵⁸ Bolt General terms for drivers 2022 clause 8.1.

³⁵⁹ Bolt General terms for drivers 2022 clause 8.3.

the right to claims pertaining to an employment relationship.³⁶⁰ Bolt distances themselves from liability as a result of theft, loss or damage and monetary loss, thus, the driver is fully liable in these instances.³⁶¹ The agreement concluded between the driver and Bolt may be terminated with seven days' notice from the driver or three days' notice from Bolt's side.³⁶² Bolt may terminate the agreement immediately and restrict access to the application if the general terms are breached by the driver.³⁶³

4.3 Application of the common law tests

4.3.1 *Uber eats delivery drivers and Bolt e-hailing drivers*

4.3.1.1 The control test

As established in chapter two, the control test raises the question as to whether a person exercises control over the worker or driver's daily tasks or whether they have the right to exercise such control. Considering the terms that Uber Eats drivers agree to, Uber does not dictate the time and manner that these services should be rendered. Uber also introduced a 12-hour driving limit that entails the driver's account shuts off after 12 hours and is only enabled again after six hours to ensure that the driver rests.³⁶⁴ The delivery driver accepts and rejects delivery requests at their own discretion and time. Should they only maintain an active status on the application; the number of hours that ensures such active status is, however, not certain or stated. Thus, according to the *prima facie* control test, Uber Eats drivers appear not to be employees but rather independent contractors as they are mostly in control of their own working situation and hours - the amount of the control that Uber exercises over these drivers relating to the standards that must be adhered to and the routes that must be taken appears to not be sufficient to indicate an amount of control that indicate an employment relationship. The drivers are subject to the control of Uber as their activities are monitored by the company and the pricing and payment of trips are set out by the company.³⁶⁵ The drivers are allowed to reject driver request, but

³⁶⁰ Bolt General terms for drivers 2022 clause 10.2.

³⁶¹ Bolt General terms for drivers 2022 clause 12.2.

³⁶² Bolt General terms for drivers 2022 clause 13.2.

³⁶³ Bolt General terms for drivers 2022 clause 13.3.

³⁶⁴ Uber 2018 <https://www.uber.com/en-ZA/blog/driving-hours-limit/>.

³⁶⁵ Mokoena 2018 *Industrial Law Journal* 1455.

can be punished for rejecting too often by being suspended of the platform.³⁶⁶ As set out in the general terms that the drivers agree to, they can be suspended if they breach any terms or conditions of the agreement³⁶⁷

Relating to the terms that Bolt drivers agree to, it is stated that the drivers choose whether they accept or reject a ride request. Bolt, thus, does not oblige the driver to drive certain times of the day or that they work certain minimum hours *per se*. On the other hand, they require a driver to remain active on the app (therefore driving a sufficient amount of time to uphold their active status) to avoid disabling of their accounts on the Bolt application. The drivers must also adhere to strict requirements and maintain a minimum standard rating or face disqualification or be required to attend training sessions. Bolt drivers are furthermore obligated to adhere to the terms set by Bolt relating to the number of passengers that may be in the car at a time, the routes they drive etcetera. Although they are not controlled by the manner of working hours etcetera,³⁶⁸ the terms they agree to when applying to become a driver indicate that Bolt in fact exercises control over their daily tasks. This considered, the researcher is of opinion that according to the control test, Bolt drivers qualify as employees of the Bolt company. This test is not used in isolation to determine a person's legal employment status but forms part of the dominant impression tests that are used most often by the courts in this determination.

4.3.1.2 The organisation or integration test

When conducting this test, one has to determine whether the alleged employee forms an integral part of the organisation or company. In this case, Uber Eats delivery drivers indeed form an integral part of the company as their services form the operations aspect of the company – without drivers, Uber Eats would not be able to operate. For this reason and pursuant to the organisation or integration test, the delivery drivers qualify as employees of Uber Eats.

³⁶⁶ Mokoena 2018 *Industrial Law Journal* 1455.

³⁶⁷ Mokoena 2018 *Industrial Law Journal* 1455.

³⁶⁸ Bolt does not prescribe a mandatory break as the Uber company does to encourage resting. The hours worked by the driver is solely up to their discretion.

Bolt's main purpose and business is the providing of transportation services for a person requesting ride opportunities, the drivers in this regard form the main aspect of the business as the application is not useful by itself. This considered logic dictates that the Bolt drivers form an integral and perhaps the most important part of the business. The answer to the organisation or integration test's question is thus that the driver forms an integral and important part of Bolt's business and therefore, pursuant to the test qualifies as an employee. This test is not considered in isolation by the courts when determining the employment status of a person but is used as part of the dominant impression test.

4.3.1.3 The dominant impression test

The dominant impression test is perhaps the most important test when determining an individual's legal employment status, as this is the test used most often by the courts. During this test, one has to consider whether the true working relationship, irrespective of the terms agreed upon between the parties, indicates an employment relationship. As discussed in chapter two, certain factors must be considered in this evaluation.

(a) Right of supervision over the worker:³⁶⁹ No mention is made in the terms regarding the tracking of the delivery drivers. The drivers use their own discretion to choose what deliveries they want to accept and deliver. The only control that Uber Eats exercises, as mentioned during the control test, is that the driver should remain active on the application and that they may not work for longer than 12 hours at once due to safety reasons. Thus, Uber Eats does not control or supervise the delivery drivers. In reality, the position might however be different. According to the ILO's World Employment and Social Outlook of 2021, the algorithm and the access of driver's data could indicate that an increase in control over these drivers are exercised.³⁷⁰ Pertaining to this, the ratings of the drivers, according to them, are strongly dependant on the acceptance and rejection of driving or delivery requests.³⁷¹ Should they reject

³⁶⁹ Basson *et al* *The New Essential Labour Law Handbook* 74.

³⁷⁰ ILO World Employment and Social Outlook of 2021 p 177.

³⁷¹ ILO World Employment and Social Outlook of 2021 p 177.

opportunities and their ratings consequently drop, this could lead to financial penalties, loss of bonuses, loss of requests and deactivation on the account.³⁷²

Bolt does not dictate where and at which times the drivers must be available, but as discussed above, Bolt drivers must drive the shortest route to the chosen destination. In addition, should they make unauthorised stops or not take the shortest route they may be penalised by way of deduction of fees. This indicates that supervision is exercised by Bolt and that the drivers do not have full discretion in the performance of their duties.

(b) The extent of dependence on the other party for the performance of their duties:³⁷³ The delivery drivers are highly dependent on Uber as they provide the application that enables customers to request food delivery.

The drivers are highly dependent on Bolt. Once again, they do not exercise control over the times and hours that the drivers must conduct business, but they provide the application which forms the core of the communication between the driver and the ride requester. Should the application not be available, the drivers are unable to accept ride requests and are left without an opportunity to generate income. Thus, the drivers are highly dependent on the Bolt company.

(c) Whether the worker is allowed to work for another party – normally an employee would not be allowed to work for another party:³⁷⁴ The terms do not indicate that the delivery drivers are only allowed to render services for them. Logic dictates that this means that the drivers are allowed to render services for other companies as well.

The general terms and conditions that a Bolt applicant agrees to do not dictate whether the driver is allowed to work for another company. The omission of such regulation, thus, indicates that the drivers are allowed to work for another company.

(d) Whether the worker should devote a certain amount of time to their duties:³⁷⁵ Uber Eats does not prescribe certain hours that the drivers must deliver – the delivery

³⁷² ILO World Employment and Social Outlook of 2021 p 177.

³⁷³ Basson *et al* *The New Essential Labour Law Handbook* 74.

³⁷⁴ Basson *et al* *The New Essential Labour Law Handbook* 74.

³⁷⁵ Basson *et al* *The New Essential Labour Law Handbook* 74.

drivers can decide when they want to work by accepting or rejecting food delivery requests. However, they must work enough hours to maintain an active status of which the number of hours is uncertain in this regard.

Bolt drivers are not required to work a certain number of hours pursuant to the general terms. The terms, however, state that a driver must maintain their active status on the application which can only be done by actively participating and accepting or rejecting ride requests. Although it does not implicitly state that the drivers must work certain hours, it is implied to remain active on the application. Should a person not be active, Bolt may deactivate their account.

(e) Whether the person is obliged to perform the duties personally – employees are normally required to do so but independent contractors are not:³⁷⁶ The terms and conditions state that an applicant who is accepted may not transfer their Uber account to another person, therefore, a delivery driver has to perform the delivery service themselves.³⁷⁷

The general terms that the drivers agree to clearly state that a person may not transfer their duties or their Bolt account to a third party. Unless a company registers as a juristic person, the driver or natural person agrees that the service and their account will be conducted in their own name – they are thus obligated to perform the duties personally.

(f) Whether the worker is paid per commission or salary:³⁷⁸ The delivery drivers do not earn a salary – they earn payment as they work. The fee that the drivers receive is calculated by the system and consists of a base fare that considers the distance to travel and the time that the delivery will take as well as whether the pick-up or drop-off has multiple points. Further, the driver can earn additionally by way of trip supplements, where higher than normal traffic conditions occurred, boost fees in certain applicable areas and tips from the delivery requestee.³⁷⁹ This points to the

³⁷⁶ Basson *et al The New Essential Labour Law Handbook* 74.

³⁷⁷ This is also the common law duty of the employee; Van Niekerk *et al Law@Work* 93.

³⁷⁸ Basson *et al The New Essential Labour Law Handbook* 74.

³⁷⁹ Uber date unknown <https://help.uber.com/driving-and-delivering/article/how-are-delivery-fares-calculated?nodeId=5aecf430-8e00-4608-ba0a-8bba5b104023>.

driver earning a commission rather than a salary – the more they drive the more their commission will be. Therefore, they are not salary earners and may present themselves as independent contractors rather than employees.

Bolt drivers do not earn a fixed salary but earn as they drive. The general terms of employment determine that the driver's fee will depend on the distance that was travelled, the duration of the travel to the destination and a default fare base. The driver may ask less than what the GPS-based device calculated the fare to be, but the fee payable to Bolt will remain the same. The remuneration that the driver receives is, thus, dependent on the amount of transportation it provides successfully and is not periodically paid a salary but qualifies for commission as a certain portion is payable to the company.

(g) Whether the worker uses their personal equipment:³⁸⁰ The driver provides their own equipment to render this service, which includes the vehicle or motorcycle and the smartphone that is needed to install the application. The application alone is provided by Uber. The costs of acquiring the equipment, maintenance and use of the equipment including data costs and petrol costs are the responsibility of the driver.

Bolt drivers must supply their own equipment. When applying to become a driver, the individual must provide documentation proving that they have their personal vehicle (or the personal information of the person who will provide the vehicle – the person must have an existing account) and that they have a smartphone to upload the application. The driver is also liable for all costs incurred for the operation of the services such as the registration of the vehicle and license, the insurance cost, petrol costs, etcetera. Bolt only provides the application, and the rest of the equipment must be provided by the driver.

(h) Whether the 'employer' has the right to discipline the worker:³⁸¹ Uber Eats, as determined in the terms in the conditions reserve the right to disable a driver from

³⁸⁰ Basson *et al* *The New Essential Labour Law Handbook* 74.

³⁸¹ Basson *et al* *The New Essential Labour Law Handbook* 74.

service if they have acted in contravention of the agreed terms, pending an investigation. Thus, Uber Eats do have a right to discipline the drivers.

As stated by the general terms that the driver agrees to, the agreement may be terminated pending an investigation should the driver not adhere to the terms agreed to. These terms indicate that Bolt has the right to discipline and terminate a driver from service.

When considering the factors discussed above and the application thereof to the realities of the relationship between Bolt and their drivers, the conclusion can be made that pursuant to the dominant impression test and the associated factors of the test, Bolt drivers qualify as employees of the Bolt company rather than independent contractors. It is crucial to indicate the importance of the *Kambule*³⁸² matter in this regard. In this matter, the Labour Court indicated that when considering the factors as discussed above, the test must be conducted through a qualitative rather than a quantitative approach.³⁸³ This considered, viewing the presence of the factors from a qualitative point of view, it is strongly indicative that the drivers are independent contractors.

4.3.1.4 *The economic dependence test*

In conducting this common law test, the question should be raised as to which of the parties gains more from the relationship, financially.

The Uber company takes 25% of the fee paid on every delivery trip – the remainder (75%) is thus earned by the delivery driver plus tips. Although they receive the largest portion of the fee, they also bear sole financial liability and would have no income in the unfortunate event of the application not working. In addition, should accidents, theft or loss occur, they will also be solely liable. The delivery drivers also would not have work and therefore income without the Uber application which provides them with delivery opportunities.

³⁸² *Kambule v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 2234 (LC).

³⁸³ *Kambule v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 2234 (LC) para 7.

In the instance of Bolt and their drivers, Bolt states that they only charge a 20% commission fee per transportation trip,³⁸⁴ the drivers thus earn an income of 80% of the total fee paid by the rider plus tips. This considered, it can be argued that the driver derives the most financial benefit from the work relationship. The test furthermore requires that one must investigate into which party bears the financial risk. In this regard, the Bolt driver bears all financial risk and liability – should the Bolt application suddenly go offline, they will not be able to conduct business and therefore lose income. But, yet again, they are not prohibited from doing other work and generating income in another manner – one could argue that they are not economically dependent on Bolt as they are free to deliver other services or perform other jobs to generate and supplement their income.

4.4 Application to statutory position

4.4.1 Uber Eats delivery drivers

4.4.1.1 The presumption of the LRA³⁸⁵ and BCEA³⁸⁶

For the statutory presumption to be applicable, the person in question must earn below the annual income threshold as determined by the Minister of Labour. This threshold currently weighs in at R224 080.48 per annum or R18 673, 37 per month.³⁸⁷ Since the driver does not earn a fixed salary, their income would be dependent on the hours they choose to work, and this would have the consequence that the applicability of this presumption would have to be evaluated on a case-by-case basis. Uber does not give an exact estimate or average salary of an Uber Eats delivery driver, but it is estimated that they earn an average income of between R1800.00 and R3500.00 per week being R7200.00 to R14 000.00 per month.³⁸⁸ In this instance, this statutory presumption will be applicable as they earn below the annual income threshold.

³⁸⁴ Bolt 2022 <https://bolt.eu/en-za/legal/za/new-terms-for-drivers/>.

³⁸⁵ 66 of 1995.

³⁸⁶ 77 of 1997.

³⁸⁷ GN 1731 in GG 45880 of 7 February 2022.

³⁸⁸ Kiprano 2022 <https://joziwire.co.za/2022/07/how-much-does-an-uber-eats-driver-or-rider-earn-in-south-africa/>; refer to para 4.4.2.1.

Extremely similar to the dominant impression test discussed below, it was found that in considering these factors in the light of the terms agreed to by the Uber Eats drivers, they qualify as independent contractors and not as employees.

4.4.1.2 *The Code of Good Practice: Who is an employee?*

(1) "The manner in which the person works is subject to the control or direction of another person":³⁹⁶ As determined by way of the control test, the Uber Eats company exercises little control over the delivery drivers as they can decide which delivery request to accept and reject. As it is not stated whether they are obligated to take a certain route, one can assume that the drivers have discretion over the route to take. The only control that the company exercises over the drivers is that they are only allowed to work for 12 hours consecutively after which a mandatory six hour break must be taken. They are also obligated to work certain hours to maintain an active status, but the hours needed to maintain active status are not stated. Thus, this factor is not present.

(2) "The person 's hours of work are subject to the control or direction of another person":³⁹⁷ Uber Eats drivers choose their own working hours. The company operates 24 hours a day and the only restriction is that they are only allowed to work 12 hours consecutively whereafter a mandatory 6 hour break must be taken. Thus, this factor is not present.

(3) "In the case of a person who works for an organisation, the person forms part of that organisation":³⁹⁸ The delivery drivers, as determined in the organisation test above, form an integral part of the Uber Eats organisation. Without the drivers, the company would not be able to continue their operations. Therefore, the drivers form the main business thereof. This considered, this factor is thus present.

³⁹⁶ The Code of Good Practice: Who is an employee? para 18(a); section 200A(1)(a) of the *Labour Relations Act* 66 of 1995; Van Niekerk *et al Law@Work* 66.

³⁹⁷ The Code of Good Practice: Who is an employee? para 18(b); section 200A(1)(b) of the *Labour Relations Act* 66 of 1995; Van Niekerk *et al Law@Work* 66.

³⁹⁸ The Code of Good Practice: Who is an employee? para 18(c); section 200A(1)(c) of the *Labour Relations Act* 66 of 1995; Van Niekerk *et al Law@Work* 66.

(4) "The person has worked for that person for an average of 40 hours per month over the last three months":³⁹⁹ This factor would have to be considered on a case-by-case basis and is, therefore, undeterminable at this time.

(5) The person is economically dependent on the other person for whom he or she works or renders services":⁴⁰⁰ The delivery drivers are economically dependent on Uber Eats as they are dependent on the application provided by the company to accept delivery requests and, therefore, would not be able to deliver services without Uber Eats. Should the application not work, they would not be able to receive delivery notification and would therefore not be able to generate income. Thus, this factor is present.

(6) "The person is provided with the tools of the trade or work equipment by the person":⁴⁰¹ The delivery drivers are obligated to provide their personal equipment in order to provide this service, which includes the provision of a vehicle and smartphone and all costs related thereto as well as the maintenance thereof. This factor is not present.

(7) "The person only works or renders services for one person":⁴⁰² The terms and conditions do not require that the delivery driver may only conduct business for Uber Eats and is therefore allowed to conduct business for other companies or even their own company. This factor is thus not present.

From the abovementioned, it is thus clear that the Code of Good Practice: Who is an employee? list certain factors that can be considered when the legal employment status of a person must be determined. These factors should be considered alongside the *BCEA* and the *LRA's* rebuttable presumption and are therefore also dependent on

³⁹⁹ The Code of Good Practice: Who is an employee? para 18(d); section 200A(1)(c) of the *Labour Relations Act* 66 of 1995; Van Niekerk *et al Law@Work* 66.

⁴⁰⁰ The Code of Good Practice: Who is an employee? para 18(e); section 200A(1)(e) of the *Labour Relations Act* 66 of 1995; Van Niekerk *et al Law@Work* 66.

⁴⁰¹ The Code of Good Practice: Who is an employee? para 18(f); section 200A(1)(f) of the *Labour Relations Act* 66 of 1995; Van Niekerk *et al Law@Work* 66.

⁴⁰² The Code of Good Practice: Who is an employee? para 18(g); section 200A(1)(g) of the *Labour Relations Act* 66 of 1995; Van Niekerk *et al Law@Work* 66.

the prescribed annual income threshold. Should the person earn above the threshold, these factors may still be used as a guideline.

In application to the terms and conditions that Uber Eats delivery drivers agree to, it was found that one of these factors is present in the relationship between the company and the delivery drivers and that this could indicate an employee-employer relationship. However, the courts will most likely, as also stated in the Code, use the dominant impression test in determining the nature of this relationship.

4.4.2 Bolt

4.4.2.1 The presumption of the LRA⁴⁰³ and BCEA⁴⁰⁴

As discussed in chapter two, section 200A of the *LRA*⁴⁰⁵ and section 83A of the *BCEA*⁴⁰⁶ creates a rebuttable presumption as to who qualifies as an employee. For an individual who alleges that they are an employee and to rely on this statutory presumption, they must earn below the annual threshold as prescribed by the Minister of Labour. Currently, this threshold stands at R224 080.48 per annum or R18 673, 37 per month.⁴⁰⁷ Bolt alleges that their drivers can earn up to R22 000 per month in Johannesburg and R20 000 in Cape Town or R30 000 and R25 000 respectively if you are a top driver. However, this is the case if the driver works the same hours as an office worker being eight hours a day or 40 hours a week.⁴⁰⁸ The statutory rebuttable presumption will not be applicable as they would earn above the annual income threshold. In this regard, the dominant impression test would have to be used to determine the employment status of a person. It is however important to note that this may also be determinable on a case-by-case basis as some drivers may be earning less than the annual income threshold and the rebuttable presumption may become applicable. Interestingly, the South African Regulatory Board ruled in 2022 that the

⁴⁰³ 66 of 1995.

⁴⁰⁴ 75 of 1997.

⁴⁰⁵ 66 of 1995.

⁴⁰⁶ 75 of 1997.

⁴⁰⁷ GN 1731 in GG 45880 of 7 February 2022.

⁴⁰⁸ Bolt 2021 <https://blog.bolt.eu/en-za/how-much-can-you-earn-as-a-bolt-driver-in-south-africa/#:~:text=If%20you%20work%20the%20same,you'd%20make%20R25%20000>.

Bolt company is not allowed to make such claims as this is misleading and unsubstantiated.⁴¹³ The regulator commented in their ruling that Bolt's advertisement implies that a regular driver could earn up to R30 000 working reasonable hours, although it is hardly achievable and rather an occasional achievement.⁴¹⁴ The Board further stated that the claim that there are no monthly fees are also incorrect as the driver is charged 23% commission fee per ride.⁴¹⁵

4.4.2.2 *The Code of Good Practice: Who is an employee?*

As discussed in chapter two, NEDLAC has issued a Code of Good Practice relating to the determination of a person's legal employment status. This document identified certain factors that must be considered to aid in this determination. These factors applied to the terms of employment of Bolt drivers include:

(1) "The manner in which the person works is subject to the control or direction of another person":⁴¹⁶ As determined above in the application of the control test, Bolt drivers are somewhat under the control of the Bolt company. Although Bolt does not control the driver by allocating customers to them and requiring them to work certain hours, they must maintain an 'active status' on the application to avoid disablement of the application. They are prescribed to take the shortest route and the number of passengers in the vehicle when delivering this service. Therefore, a degree of control is exercised on the daily tasks of the drivers. This factor is thus present.

(2) "The person's hours of work are subject to the control or direction of another person":⁴¹⁷ Once again, the drivers are not prescribed working hours but must maintain active status on the application to avoid disqualification. However, it is unclear how

⁴¹³ Ramalepe 2022 <https://www.businessinsider.co.za/bolt-claims-drivers-can-make-r30000-a-month-2022-11>.

⁴¹⁴ Ramalepe 2022 <https://www.businessinsider.co.za/bolt-claims-drivers-can-make-r30000-a-month-2022-11>.

⁴¹⁵ Ramalepe 2022 <https://www.businessinsider.co.za/bolt-claims-drivers-can-make-r30000-a-month-2022-11>.

⁴¹⁶ The Code of Good Practice: Who is an employee? para 18(a); section 200A(1)(a) of the *Labour Relations Act* 66 of 1995.

⁴¹⁷ The Code of Good Practice: Who is an employee? para 18(b); section 200A(1)(b) of the *Labour Relations Act* 66 of 1995.

many hours of activity is necessary to maintain active status. This factor is thus not present.

(3) "In the case of a person who works for an organisation, the person forms part of that organisation":⁴¹⁸ The drivers form part of the organisation as they are the actual service deliverers. Although Bolt provides the application for the requesting and the acceptance of the ride request, the business will not be able to operate without the drivers. Therefore, the drivers form part of the organisation. This factor is thus present.

(4) "The person has worked for that person for an average of 40 hours per month over the last three months":⁴¹⁹ This factor would have to be determined on a case-by-case basis. To earn the maximum salary, Bolt states that a person must work the same number of hours that an office job would require, being 8 hours a day or 40 hours a week.⁴²⁰ This factor is thus, at this time, undeterminable.

(5) "The person is economically dependent on the other person for whom he or she works or renders services":⁴²¹ Bolt only takes a 20% commission fee on the fee earned per trip – the remaining 80% is thus the income of the driver. In this regard, one has to bear in mind that the driver is economically dependent on Bolt to a degree as they would not be able to render the service without access to the Bolt application. However, once again, they are not prohibited from having another job or providing services for other companies implying that they are, therefore, in charge of supplementing their income if they wish to do so. This indicates that they are not economically dependent on Bolt. This factor is thus not present.

⁴¹⁸ The Code of Good Practice: Who is an employee? para 18(c); section 200A(1)(c) of the *Labour Relations Act* 66 of 1995.

⁴¹⁹ The Code of Good Practice: Who is an employee? para 18(d); section 200A(1)(c) of the *Labour Relations Act* 66 of 1995.

⁴²⁰ Bolt 2021 <https://blog.bolt.eu/en-za/how-much-can-you-earn-as-a-bolt-driver-in-south-africa/#:~:text=If%20you%20work%20the%20same,you'd%20make%20R25%20000>.

⁴²¹ The Code of Good Practice: Who is an employee? para 18(e); section 200A(1)(e) of the *Labour Relations Act* 66 of 1995.

(6) "The person is provided with the tools of the trade or work equipment by the person":⁴²² As determined above with consideration of the general terms that the applicants agree to, the driver must provide all the equipment to be able to render this service. This equipment includes the vehicle and a smartphone to upload the application. The maintenance of the equipment is also the responsibility of the driver. This factor is thus not present.

(7) "The person only works or renders services for one person":⁴²³ The drivers are not obligated to render services for only Bolt under the terms and conditions. Thus, the driver may do several jobs for several persons and still render services as a Bolt driver. This factor is thus not present.

The above factors, according to the Code, should be considered alongside the rebuttable presumption created by the *BCEA* and the *LRA* and the annual income threshold should also be applicable. If the person earns above the threshold, the factors may still be used under the discretion of the court. Once again, the code encourages the use of the dominant impression test in determining an individual's legal employment status.

In conclusion, the Code of Good Practice: Who is an employee? provides a list of factors that must be considered, along with the dominant impression test, to determine the legal status of employment of a person. Should at least one of these factors be present, it could indicate that the employee-employer relationship indeed existed, but it is not absolute. These factors were applied to the general terms for Bolt drivers, and it was found that two of these factors are present and are thus indicative of an employment relationship between Bolt and its drivers. However, should this matter be applied in court, the court would have discretion over the application and the relevance of the factors. The researcher is, however, not convinced that either Uber Eats employees or Bolt drivers will ultimately qualify as employees of the respective companies as it is evident that the drivers have discretion over their daily tasks and when to perform it,

⁴²² The Code of Good Practice: Who is an employee? para 18(f); section 200A(1)(f) of the *Labour Relations Act* 66 of 1995.

⁴²³ The Code of Good Practice: Who is an employee? para 18(g); section 200A(1)(g) of the *Labour Relations Act* 66 of 1995.

with only a degree of management from the company's side. Amongst other factors, should a driver decide to not show up for work, it is at their sole discretion, and they would not be obligated to take leave etcetera as is expected for a conventional employee. The worker is also in control of their hours worked and they can manage their income in that manner. The driver is obligated to provide their own tools to perform the service and the application only is provided by the companies. Thus, reviewing the relationship between the drivers and the respective companies, it would give an overall feeling that the drivers are rather independent contractors than employees.

As mentioned in the first chapter, the introduction of e-hailing services and delivery services in the South African economy has helped many unemployed people to generate an income. However, this has not been unproblematic with calls for the government to intervene for fears of labour exploitation by international companies. As found by the Labour Court and through the application of the general terms on the South African statutory position above, the current stance is that e-hailing and delivery drivers do not qualify as employees but as independent contractors which renders them as unprotected by the South African local labour laws. Globally, the legal employment status of these persons has also been challenged and was found that they are indeed employees of the companies.⁴²⁴ There may be a lesson to learn from this judgment as the growing industry leave a gap for the exploitation of those who are uninformed and desperate to generate an income.

Importantly, after extensive research, no record of articles whether it being internet articles or journal articles were found where the legal employment status of e-hailing or food delivery service drivers in South African context were discussed or evaluated. The Fairwork Code of Good Practice on the Regulation of Platform Work in South Africa discusses the misclassification of employees as independent contractors. Again, the publication refers to the definition of an employee in terms of the *LRA* and the *BCEA*

⁴²⁴ In the United Kingdom, Uber drivers are regarded "workers" meaning they are entitled to receive minimum wages, paid holidays and pensions; Browne 2021
<https://www.cnbc.com/2021/03/18/uber-is-reclassifying-uk-drivers-as-workers-heres-what-happens-next.html#:~:text=Uber%20now%20treats%20all%2070%2C000,were%20workers%2C%20not%20independent%20contractors.>

as well as the rebuttable presumption created by the respective legislation. Importantly, they state that the substance of the relationship is of utmost importance in determining the employment status of an individual.⁴²⁵ Further, no legal precedent on this topic, aside from the Uber matter discussed in the third chapter is available as yet. The current legal stance, aside from this research paper and the legal employment status of Uber drivers, as determined by the Labour Court, is therefore undetermined.

⁴²⁵ The Fairwork Project The Code of Good Practice for the regulation of platform work in South Africa 2020 p5.

Chapter 5: Conclusion

In conclusion, the introduction of technology into the modern world has come with its advantages and disadvantages. Now more than ever, the gig economy has provided many work opportunities that were previously non-existent and could, therefore, aid in the global and national problem of unemployment. In South Africa, the introduction of e-hailing companies and food delivery companies has provided job opportunities for many people, but has come under criticism as these workers are mostly considered to be independent contractors rather than employees of the respective companies, rendering them unprotected under South African Labour legislation. Local companies that operate in this instance include Uber and Bolt on the e-hailing front and MrD and Uber Eats are the biggest providers of food delivery services, which have boomed post-covid pandemic.

The e-hailing and delivery industry, as mentioned above, have caused controversy as the workers, who are appointed as independent contractors, are often very uninformed of their rights and, therefore, exploited. It is debatable whether these drivers are uninformed as a result of lack of knowledge relating to their rights in the labour market or whether misleading advertisement by the various companies lead to false beliefs pertaining to their employment status. For this exact reason, there have been protest outbreaks over South Africa throughout this year, begging for the government to intervene and for these workers to be regarded as employees for legislative protection.⁴²⁶

The determination of a person's legal employment status is not a new phenomenon and courts have been approached in this regard for the past tens of years already. As legislation did not provide assistance at first, courts over the years created four tests – the common law tests that are used in this determination.⁴²⁷ The control tests, the organisation test and the economic dependence test have, however, received much criticism and it seems that the fourth test, the dominant impression test, is most preferred by the courts. In conducting this test, the true relationship between an

⁴²⁶ See chapter 1.

⁴²⁷ See chapter 2 for in depth discussion on these common law tests.

alleged employee and alleged employer must be evaluated. In addition, the terms on which the agreement was concluded are not the sole factor because concealed employment contracts exist, and many employee relationships are concealed as independent contractor relationships to evade the law and the consequences. The *Labour Relations Act 66 of 1995* and *The Basic Conditions of Employment Act 77 of 1997* later introduced a rebuttable presumption as to who an employee is. This presumption included certain factors that must be considered in the determination of a person's legal employment status. However, this is subject to the person earning below the annual prescribed threshold.⁴²⁸ The *LRA* also provides a definition of an employee in section 213.⁴²⁹ Furthermore, NEDLAC has issued the Code of Good Practice: Who is an employee? which also aims to aid in this determination. This document, which has to be read together with the abovementioned presumption, includes factors that must be considered. Should one of these factors be present, it may indicate that an employment relationship is present.

In chapter 3, the infamous Uber cases were discussed. In these two CCMA and Labour Court cases respectively, several Uber drivers were deactivated from the application and, therefore, unable to provide the e-hailing service. They approached the CCMA and the Commissioner. After considering the common law tests, the statutory presumption, the definition of an employee pursuant to the *LRA* as well as the Code of Good Practice, it was found that the employees qualified as employees of Uber and could approach the CCMA on basis of unfair dismissal. However, Uber took the award to the Labour Court for review, and it was ruled that the Commissioner was erroneous in her decision, therefore, rendering the drivers independent contractors and not employees of Uber SA.⁴³⁰ The question as to whether they are employees of Uber BV has not been answered to date.

In chapter one, the research question was posed as to what the true employment status of e-hailing and delivery service workers under South African labour regulations and the common law is. For purposes of this study, the employment status of the e-

⁴²⁸ See para 2.5.

⁴²⁹ See para 2.2.

⁴³⁰ See chapter 3 for full discussion.

hailing company Bolt and the food delivery service company Uber Eats was examined. Chapter four's discussion applied all the above-discussed legal principles and statutory regulations to the terms Bolt and Uber Eats drivers agree to. Upon conclusion, I indicated that I am not convinced that either Uber Eats delivery drivers or Bolt drivers qualify as employees for purposes of the South African labour legislation.

When a court conducts the dominant impression test, the true nature of the relationship between the parties is evaluated. In the researcher's opinion, it is clear from considering the terms that the drivers for both Uber Eats and Bolt operate fairly freely in their working day and that the companies merely require them to maintain active status. The nature of their relationship would, in the researcher's opinion, indicate that they are independent contractors. Relating to the statutory rebuttable presumption, this would have to be evaluated on a case-by-case basis as the annual income threshold is applicable and not all will fall within the threshold's scope. Although Bolt and Uber Eats indicate good salaries for the drivers, logic dictates that the average driver will not earn above the annual income threshold, therefore, the rebuttable presumption will be applicable. By applying the terms of Uber Eats and Bolt drivers, it was found that although the presence of certain factors of the Code of Good Practice and the rebuttable presumption indicate an employment relationship, the courts will most likely rather take a qualitative than a quantitative approach as was the position in the *Kambule* matter. The mere fact that certain factors were present will not convince a court of an employment relationship, but rather the substance and the quality of the factors in the said relationship will decide the employment status of the person. All the factors considered, this study found that for the purposes of the South African labour legislation and statutory position, South African Uber Eats delivery drivers and Bolt e-hailing drivers do not qualify as employees of the respective companies, but they rather operate as independent contractors.

The objective of this study was to provide clarity for the persons providing e-hailing and delivery services into their employment status and legal position pursuant to applicable labour legislation, as well as their rights in terms of fair labour practises in the workplace. The other aim was to provide clarity to the 'employers' regarding their

legal obligations toward their workers. This was done in all the provided information and discussions.

BIBLIOGRAPHY

Literature

Basson *et al* *The New Essential Labour Law Handbook*

Basson AC *et al* *The New Essential Labour Law Handbook* 7th ed (MACE Labour Law Publications CC Centurion 2019)

Diedericks 2005 *PER*

Diedericks L "The Employment Status of Magistrates in South Africa and the Concept of Judicial Independence" 2005 *PER* 1-32

GN 1731 in GG 45880 of 7 February 2022

ILO Centenary Declaration for the Future of Work, 2019

International Labour Organisation Employment Relations Recommendation, 2006 (No. 198)

International Labour Organisation Key Indicator in the Labour Market 3

Kasuso *The definition of an employee under labour legislation: An elusive concept*

Kasuso TG *The definition of an employee under labour legislation: An elusive concept* (LLM-dissertation University of South Africa 2015)

Mofoke 2022 *Obiter*

Mofoke WM "Achieving Decent Work For Digital Platform Workers in South Africa" 2022 *Obiter* 349 - 365

Mokoena 2018 *Industrial Law Journal*

Mokoena K "Are Uber Drivers Employees or Independent Contractors? A Comparative Analysis" 2018 *Industrial Law Journal* 1453-1469

Smit and Stopforth 2022 *Law Democracy and Development*

Smit DM and Stopforth G "An overview of categories of vulnerability among on-demand workers in the gig economy (Part 1)" 2022 *Law Democracy and Development* 364-394

The Code of Good Practice: Who is an employee?

Van Niekerk *et al Law@Work*

Van Niekerk A *et al Law@Work* 5th ed (LexisNexis Sandton 2019)

Case law

Colonial Mutual Life Assurance Society Ltd v Macdonald 1931 AD 412

Denel (Pty) Ltd v Gerber 2005 9 BLLR 849 (LAC)

J & J Nfreeze Trust v Statutory Council for the Squid & Related Fisheries of SA & others [2011] 11 BLLR 1068 (LC)

Kambule v Commission for Conciliation, Mediation and Arbitration and Others (2013) 34 ILJ 2234 (LC)

Liberty Life Association of Africa Ltd v Niselow (1996) 17 ILJ 673 (LC)

Nape v INTCS Corporate Solutions (Pty) Ltd [2010] 8 BLLR 852 (LC)

R v AMCA 1954 (4) SA 208 (A)

Ready Mixed Concrete v Minister of Pensions 1979 (1) SA 51(A)

SABC v Mckenzie (1999) 20 ILJ 585 (LAC)

Smit v Workmen's Compensation Commissioner 1979 (1) SA 51(A)

Uber BV and Others v Aslam and Others [2021] UKSC 5

Uber South Africa Technological Services (Pty) Ltd Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service and Allied Workers and South African Transport and Allied Workers obo Morekure and others [2017] 11 BALR 1247 (CCMA)

Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others (2018) 39 ILJ 903 (LC)

Universal Church in the Kingdom of God v Myeni & Others [2015] 9 BLLR 918 (LAC)

Van Kaam & Others v Action Motor Group & Others (JR1159/18) [2020] ZALCJHB 118)

Vermooten v Department of Public Enterprises & Others (2017) 38 ILJ 607 (LAC)

Legislation

Basic Conditions of Employment Act 75 of 1997

Constitution of the Republic of South Africa, 1996

Employment Equity Act 55 of 1998

Labour Relations Act 66 of 1995

Minimum Wages Act 9 of 2018

National Land Transport Amendment Bill B7D-2016

Skills Development Act 97 of 1998

Internet sources

Bolt 2021 <https://blog.bolt.eu/en-za/how-much-can-you-earn-as-a-bolt-driver-in-south-africa/#:~:text=If%20you%20work%20the%20same,you'd%20make%20R25%2000.>

Bolt 2021 *How much can you earn as a Bolt driver in South Africa*
<https://blog.bolt.eu/en-za/how-much-can-you-earn-as-a-bolt-driver-in-south-africa/#:~:text=If%20you%20work%20the%20same,you'd%20make%20R25%2000.> Accessed 21 September 2022

Bolt 2022 <https://bolt.eu/en-za/legal/za/new-terms-for-drivers/>

Bolt 2022 *General terms for drivers* <https://bolt.eu/en-za/legal/za/new-terms-for-drivers/> accessed 21 September 2022

Bolt date unknown [https://blog.bolt.eu/en-za/how-to-become-a-bolt-driver-in-south-africa/#:~:text=Become%20a%20driver%20in%20just%20a%20few%20days&text=valid%20driver's%20license%20\(more%20info,\(COR%20%E2%80%93%20more%20info%20here\)](https://blog.bolt.eu/en-za/how-to-become-a-bolt-driver-in-south-africa/#:~:text=Become%20a%20driver%20in%20just%20a%20few%20days&text=valid%20driver's%20license%20(more%20info,(COR%20%E2%80%93%20more%20info%20here))

Bolt date unknown *Become a driver in just a few days* [https://blog.bolt.eu/en-za/how-to-become-a-bolt-driver-in-south-africa/#:~:text=Become%20a%20driver%20in%20just%20a%20few%20days&text=valid%20driver's%20license%20\(more%20info,\(COR%20%E2%80%93%20more%20info%20here\)](https://blog.bolt.eu/en-za/how-to-become-a-bolt-driver-in-south-africa/#:~:text=Become%20a%20driver%20in%20just%20a%20few%20days&text=valid%20driver's%20license%20(more%20info,(COR%20%E2%80%93%20more%20info%20here)) accessed 19 September 2022

Bolt date unknown <https://bolt.eu/en-za/legal/za/new-terms-for-drivers/>

Bolt date unknown *This is how much you can earn as a Bolt driver in Johannesburg* <https://bolt.eu/en-za/legal/za/new-terms-for-drivers/> accessed 21 September 2022

Browne 2021 <https://www.cnbc.com/2021/03/18/uber-is-reclassifying-uk-drivers-as-workers-heres-what-happens-next.html#:~:text=Uber%20now%20treats%20all%2070%2C000,were%20workers%2C%20not%20independent%20contractors>

Browne R 2021 *Uber employment rights setback is a 'gut punch' to its prospects in the UK*

Businesstech 2022 <https://businesstech.co.za/news/mobile/576148/didi-shuts-down-operations-in-south-africa-report/>

Businesstech 2022 *Didi shuts down operations in South Africa – report* <https://businesstech.co.za/news/mobile/576148/didi-shuts-down-operations-in-south-africa-report/> accessed 12 September 2022

Corporate Finance Institute 2022 <https://corporatefinanceinstitute.com/resources/economics/gig-economy/>

Corporate Finance Institute 2022 *Gig Economy: An economy that operates flexibly*
<https://corporatefinanceinstitute.com/resources/economics/gig-economy/> accessed
10 November 2022

Diko 2022 <https://ewn.co.za/2022/04/19/yonela-diko-uber-and-e-hailing-companies-need-a-new-business-model>

Diko Y 2022 *Yonela Diko: Uber and e-hailing companies need a new business model*
<https://ewn.co.za/2022/04/19/yonela-diko-uber-and-e-hailing-companies-need-a-new-business-model> accessed 11 September 2022

Eiser, Ngcamu and Challenor 2021

<https://www.webberwentzel.com/News/Pages/uber-drivers-in-south-africa-employees-or-independent-contractors.aspx#:~:text=In%20South%20Africa%2C%20Uber%20drivers%20are%20currently%20classified%20as%20independent%20contractors.>

Eiser K, Ngcaumu S and Challenor K 2021 *Uber Drivers in South Africa: employees or independent contractors?* <https://www.webberwentzel.com/News/Pages/uber-drivers-in-south-africa-employees-or-independent-contractors.aspx#:~:text=In%20South%20Africa%2C%20Uber%20drivers%20are%20currently%20classified%20as%20independent%20contractors.> Accessed 11 November 2022

Erasmus date unknown <https://verteenwoordiger.solidariteit.co.za/wp-content/uploads/sites/9/Artikels-Hofsake/Employee%20Status/Employee%20Status.pdf>

Erasmus N date unknown *Employee status*

<https://verteenwoordiger.solidariteit.co.za/wp-content/uploads/sites/9/Artikels-Hofsake/Employee%20Status/Employee%20Status.pdf> accessed 26 September 2022

ILO date unknown https://www.ilo.org/global/topics/non-standard-employment/WCMS_534833/lang--en/ind

ILO date unknown *Disguised employment / Dependent self-employment*
[https://www.ilo.org/global/topics/non-standard-employment/WCMS_534833/lang--en/ind](https://www.ilo.org/global/topics/non-standard-employment/WCMS_534833/lang-en/ind) accessed 14 November 2022

Ismail 2018 <https://www.derebus.org.za/labour-law-v-the-law-of-contract-and-the-constitution-as-amicus-curiae/>

Ismail R 2018 *Labour law v the law of contract and the Constitution as amicus curiae?* <https://www.derebus.org.za/labour-law-v-the-law-of-contract-and-the-constitution-as-amicus-curiae/> accessed 15 November 2022

Khumalo 2022 <https://www.news24.com/fin24/companies/no-one-can-work-cape-town-e-hailing-drivers-warn-colleagues-to-switch-off-their-Apps-20220323>

Khumalo S 2022 *'No one can work': Cape Town e-hailing drivers warn colleagues to switch off their apps* <https://www.news24.com/fin24/companies/no-one-can-work-cape-town-e-hailing-drivers-warn-colleagues-to-switch-off-their-Apps-20220323> accessed 17 August 2022

Kiprano 2022 <https://joziwire.co.za/2022/07/how-much-does-an-uber-eats-driver-or-rider-earn-in-south-africa/>

Kiprano J 2022 *How Much Doen an Uber Eats Driver or Rider Earn in South Africa?* <https://joziwire.co.za/2022/07/how-much-does-an-uber-eats-driver-or-rider-earn-in-south-africa/> accessed 15 November 2022

Mellow 2021 <https://www.bizcommunity.com/Article/196/389/212395.html#>

Mellow J 2021 *Growth ahead for e-hailing services*
<https://www.bizcommunity.com/Article/196/389/212395.html#> accessed 5 September 2022

Molewa date unknown

<https://www.ecommerce.co.za/article.aspx?s=163&a=8223&title=LandscapeMolewa>

Molewa N date unknown *The growth of online food delivery*

<https://www.ecommerce.co.za/article.aspx?s=163&a=8223&title=Landscape> accessed 5 September 2022

MoneyToday 2021 <https://moneytoday.co.za/top-food-delivery-services/>
MoneyToday 2021 *Top 15 food delivery services in South Africa*
<https://moneytoday.co.za/top-food-delivery-services/> accessed 6 September 2022

Ntseku 2020 <https://www.iol.co.za/news/south-africa/western-cape/e-hailing-regulatory-body-launched-in-south-africa-47730713>

Ntseku M 2020 *E-hailing regulatory body launched in South Africa*
<https://www.iol.co.za/news/south-africa/western-cape/e-hailing-regulatory-body-launched-in-south-africa-47730713> accessed 6 September 2022

Pagdens 2020
https://www.pagdens.co.za/legal_employment_status_of_uber_drivers/
Pagdens 2020 *What is the legal employment status of your Uber driver?*
https://www.pagdens.co.za/legal_employment_status_of_uber_drivers/ accessed 14 November 2022

Trading Economics 2022 <https://tradingeconomics.com/south-africa/unemployment-rate>

Trading Economics 2022 *South African Unemployment Rate*
<https://tradingeconomics.com/south-africa/unemployment-rate> accessed on 13 September 2022

Uber 2018 <https://www.uber.com/en-ZA/blog/driving-hours-limit/>

Uber 2018 *Introducing a new feature: Driving hours limit*
<https://www.uber.com/enZA/blog/driving-hours-limit/> accessed 22 September 2022

Uber date unknown <https://www.uber.com/za/en/deliver/>

Uber date unknown *Deliver with Uber Eats* <https://www.uber.com/za/en/deliver/>
accessed 22 September 2022

Uber date unknown <https://www.uber.com/za/en/deliver/basics/making-deliveries/how-to-deliver/>

Uber date unknown *Delivering using the Uber Eats app*

<https://www.uber.com/za/en/deliver/basics/making-deliveries/how-to-deliver/>
accessed 15 November 2022

Uber date unknown <https://www.uber.com/legal/en/document/?name=general-terms-of-use&country=south-africa&lang=en>

Uber date unknown *Terms and conditions*

<https://www.uber.com/legal/en/document/?name=general-terms-of-use&country=south-africa&lang=en> accessed 22 September 2022

Uber date unknown <https://help.uber.com/driving-and-delivering/article/how-are-delivery-fares-calculated?nodeId=5aecf430-8e00-4608-ba0a-8bba5b104023>

Uber date unknown *How are delivery fees calculated?* <https://help.uber.com/driving-and-delivering/article/how-are-delivery-fares-calculated?nodeId=5aecf430-8e00-4608-ba0a-8bba5b104023> accessed 22 September 2022