

**A LEGAL ANALYSIS OF THE CLASSIFICATION OF ON-DEMAND WORKERS IN
SOUTH AFRICA**

By

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I desire that this study will meaningfully contribute to this unique field of labour law, especially within South Africa. This is needed to assist in ultimately bringing about legal certainty and to afford on-demand workers the much-needed protection as members of society seeking to generate an income and ultimately be able to make a decent living.

DISCLAIMER

This study was done up until 1 November 2023. This study does not address any changes in legislation and judgments after this date.

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LIST OF ABBREVIATIONS

AU	–	African Union
BCEA	–	Basic Conditions of Employment Act 75 of 1997
CCMA	–	Commission for Conciliation, Mediation and Arbitration
CC	–	Constitutional Court
EEA	–	Employment Equity Act 55 of 1998
ERA	–	Employment Rights Act, 1996
ERR	–	Employment Relationship Recommendation
EWCA Civ	–	England and Wales Court of Appeal (Civil Division)
EU	–	European Union
FWC	–	Fair Work Commission
GWP	–	Good Work Plan
ILJ	–	International Law Journal
ILO	–	International Labour Organization
LAC	–	Labour Appeal Court
LC	–	Labour Court
LRA	–	Labour Relations Act 66 of 1995
NMWA	–	National Minimum Wage Act 9 of 2018
NUPSAW	–	National Union of Public Service and Allied Workers
OHSA	–	Occupational Health and Safety Act 85 of 1993
SCA	–	Supreme Court of Appeal

- SDA** - Skills Development Act 97 of 1998
- UK** – United Kingdom
- WEF** – World Economic Forum
- WTR** - Working Times Regulations

SUMMARY

“Non-standard forms of employment” have become a contemporary feature of labour markets worldwide.¹, however, this form of employment has resulted in a classification conundrum, with the result that many platforms seek to avoid the obligations pertaining to a traditional employment relationship by classifying workers as independent contractors rather than employees.² It is specifically the mentioned classification difficulties that make these workers vulnerable to *inter alia* poor remuneration, reduced bargaining power and rights, poor working conditions, social security deficiencies, unregulated working hours, and poor occupational health and safety practices.

Therefore, this study will explore legislative responses to regulating on-demand work and matters associated with the correct classification of on-demand workers within a South African context. This is done with reference to the UK courts' position in regulating and/or classifying on-demand workers. Therefore, the research aims to contribute to the current and ongoing debate regarding on-demand work to ensure that on-demand workers are properly classified. It is also intended to ensure legal certainty and adequate legal protection of persons operating as on-demand workers in South Africa.

Key terminology: On-demand workers, gig economy, platform work, traditional labour classification, labour protection, worker exploitation, United Kingdom, Code of Good Practice, tailored classification, classification conundrum, vulnerable on-demand workers, poor remuneration, reduced bargaining power and rights, poor working conditions, social

¹ ILO 2016:xxi.

² Fairwork 2020(a):5.

security deficiencies, unregulated working hours, collaborative economy, sharing economy, on-demand economy, crowd employment.

CHAPTER 1: INTRODUCTION AND GENERAL ORIENTATION

1.1 INTRODUCTION AND BACKGROUND

The concept of 'on-demand work' is characterised by short-term and freelance work rather than work of a permanent nature.³ The novel nature of this type of work is directly associated with the fact that the lines between home life and work life are increasingly blurred, resulting in the need for more flexible work models.⁴ The terms 'gig economy', 'collaborative economy', 'sharing economy', 'on-demand economy' and 'crowd employment' are all synonymous with on-demand work, where a 'digital platform' forms the basis of connecting workers and clients.⁵ This work category starkly contrasts with the 'standard employment relationship', characterised by a continuous and often full-time employment relationship between an employer and an employee.⁶ These workers are currently excluded from the scope of labour rights in South Africa due to platforms classifying them as independent contractors, which is the primary reason for the existing structural vulnerabilities associated with this atypical employment type.⁷

According to the Global Commission on the Future of Work, platform work has the potential to expand due to the demand for greater flexibility and a better work-life balance.⁸ Whilst this may bring about increased job opportunities as well as new income generation opportunities, in a country which is marred by high unemployment rates, it may at the same time bring about non-compliance with labour legislation, discriminatory

³ Fairwork 2020(a):5.

⁴ Manpower Group "#GigResponsibly: The rise of NextGenWork" <https://www.manpowergroup.co.uk/the-word-on-work/gig-responsibly/> (accessed on 12 November 2023):7.

⁵ ILO 2021(a):4.

⁶ ILO 2016:1-2.

⁷ Fairwork 2020(a):5.

⁸ ILO 2021(a):3.

labour practices as well as difficulties associated with the correct classification of such workers.⁹ For this reason, there is an urgent need to develop a regulatory framework based on the standards of decent work, with the primary aim of ensuring proper regulation and protection of platform workers.¹⁰

1.2 LEGAL PROBLEM

The legal problem associated with the matter under research is primarily found in the fact that on-demand workers in South Africa do not currently enjoy the protection afforded to 'employees' under the country's labour laws. This expose on-demand workers to the previously mentioned exploitative labour practices and acts of unfair labour practice by platforms, who argue that their relationship with workers is pure of a business nature, where the platform merely acts as a supplier of a specific application or digital source to connect workers and clients and that there is, therefore, no employment relationship with the platform worker.¹¹

At face value and based on the definitions of an "employee" and the "gig economy", respectively, persons who function within the gig economy as platform workers are excluded from the definition of an employee as defined in the *LRA*¹² and *BCEA*¹³. Based on the definitions in question, these workers appear to be independent contractors¹⁴ rather than employees.¹⁵ This position has also since been confirmed by both the

⁹ ILO 2021(a):3.

¹⁰ Fairwork 2020(a):12.

¹¹ Fairwork 2020(a):5.

¹² The *Labour Relations Act* 66/1995.

¹³ The *Basic Conditions of Employment Act* 75/1997.

¹⁴ *locatio conductio operis*.

¹⁵ *locatio conductio operarum*.

Commission for Conciliation, Mediation and Arbitration¹⁶ (hereafter the “CCMA”) and the Labour Court in South Africa.¹⁷

The issue of whether Uber drivers are employees or independent contractors was explored by the Labour Court in the above matter, following an award by the CCMA that they are indeed employees under South African law. The Labour Court, in this matter, held that the referring parties failed to discharge the onus to establish that they were employees of Uber SA, which subsequently settled that they were not employees of Uber SA.

However, the judgment mentioned above contrasts with that in *Uber BV v Aslam*.¹⁸ The UK Supreme Court, in this matter, held that Uber drivers should be regarded as ‘workers’ under UK labour law. This argument was based on the fact that workers represent a hybrid between an employee and an independent contractor. Whilst this judgment does not afford the employees in question all rights afforded to employees; it marks significant progress as it entitles them to more statutory rights than those afforded to independent contractors. This judgment may set the basis for a third category of ‘worker’, which may resolve the current classification conundrum regarding on-demand workers. However, this study will focus on establishing a code of practice to regulate platform work in South Africa.

¹⁶ *Uber South Africa Technological Services (Pty) Ltd/ v National Union of Public Service and Allied Workers and South African Transport and Allied Workers Union obo Morekure and others* [2017] 11 BALR 1247 (CCMA).

¹⁷ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (C449/17) 2018 39 ILJ 903 (LC).

¹⁸ [2018] EWCA Civ 2748.

1.3 RESEARCH QUESTIONS

The main research question of this study is concerned with how South Africa can extend labour protection to on-demand workers by applying the statutory classification of labour approaches as provided by law. The second research question explores the modern gig economy and the different types of platform work within a South African context. The third research question focuses on the characteristics of on-demand work and how workers are left vulnerable. The fourth research question focuses on how the statutory framework affords protection to on-demand workers in South Africa. The final research question focuses on the lessons South Africa can learn from the United Kingdom's (UK) position regarding extending labour protection to on-demand workers.

This dissertation attempts to answer the research questions mentioned above, which will be responded to throughout the dissertation. This is specifically done to classify on-demand workers in South Africa correctly, give meaning to the term "on-demand worker", and provide legal certainty concerning the regulation and protection associated with this worker category.

1.4 MOTIVATION FOR THE STUDY

The current conundrum associated with on-demand workers is specifically concerned with distinguishing whether these workers are to be categorised as employees or independent contractors. This has resulted in a lack of protection under the various labour legislations to protect employee rights in South Africa.

The aim of this study is against the background mentioned above; therefore, firstly, to research and provide a critical analysis of matters associated with the classification of on-demand workers within the context of the statutory classification of labour to resolve the current impasse associated with this classification conundrum. The study further explores the challenges on-demand workers face in South Africa due to the classification problem.

The study will also explore other “tailored classification” forms, such as a code of practice to regulate on-demand work in South Africa. It is envisaged that a set of distinct rules in the form of a ‘code of practice’ for this sector would be equally binding and include remedies and enforcement mechanisms to fill the gaps that the courts and existing enforcement mechanisms cannot reach.¹⁹

To achieve the intended aims of the study, it will also explore the modern-day gig economy and the types of platform work, the characteristics of on-demand work, how workers are left vulnerable, and the extent to which the existing statutory framework protects the mentioned worker category. This will also be explored with reference to the position within the jurisdiction of the United Kingdom (UK).

The study is undertaken with the primary intention of making a meaningful contribution towards this field of labour law to avoid exploitation of on-demand workers by ensuring their correct classification, in line with the relevant legislative responses available in South Africa or to suggest new legislative mechanisms that will ensure the much need protection of this worker category.

1.5 RESEARCH METHODS

This study conducts desktop research on the issues under scrutiny. A doctrinal study will be followed, comprising a literature review and a critical analysis of relevant literature. The study does not employ the comparative analysis method of research and will merely explore the position of on-demand workers within the jurisdiction of the United Kingdom. This will, however, be restricted to the position of the UK courts to regulate and/or classify

¹⁹ Du Toit 2018:2099.

on-demand workers and will, therefore, not constitute a full comparison of the position of the UK legal system in its entirety.

Primary sources to be considered as part of the study *inter alia* include the relevant provisions of the *Labour Relations Act* (hereafter the “LRA”), the *Basic Conditions of Employment Act* (hereafter the “BCEA”), the *Employment Equity Act*²⁰ (hereafter the “EEA”), the *National Minimum Wage Act*²¹ (hereafter the “NMWA”) as well as legislation applicable to the United Kingdom jurisdiction. These include, *inter alia*, the *Employment Rights Act*²² (hereafter the “ERA”) and the Working Times Regulations²³ (hereafter the “WTR”).

Relevant case law, such as *inter alia* the *Discovery* case,²⁴ the *Kylie* case,²⁵ and the *Uber v NUPSAW*²⁶ matter, will also be considered as primary sources of law. Other primary sources of international law to be considered as part of the study, *inter alia* include the case of *Uber BV v Aslam*²⁷ to determine the position in a foreign jurisdiction as a basis for a suitable approach to eradicate the current conundrum in South Africa.

Secondary sources that will be considered in this study include the commentaries of academic writers such as Du Toit,²⁸ Fairwork,²⁹ Grogan,³⁰ Heeks,³¹ Smit and Stopforth,³²

²⁰ Act 55/1998.

²¹ Act 9/2018.

²² 1996.

²³ 1998.

²⁴ *Discovery Health v CCMA and Others* [2008] 7 BLLR 633 (LC).

²⁵ *Kylie v Commission for Conciliation, Mediation and Arbitration & Others* [2010] 31 ILJ 1600 (LAC).

²⁶ *Uber South Africa Technology Services (Pty) Ltd v (NUPSAW) and Others*.

²⁷ [2018] EWCA Civ 2748.

²⁸ Du Toit 2019.

²⁹ Fairwork 2020(a).

³⁰ Grogan 2020:4.

³¹ Heeks 2017.

³² Smit & Stopforth 2022:364-394.

and Viviers and Smit.³³ In addition, relevant online newspaper articles, as outlined in the bibliography, will also be considered as far as it applies to the topic under research.

The study will also consider international instruments from the International Labour Organisation (hereafter the “ILO”) as far as such are relevant and applicable to the topic under research.

1.6 CHAPTER OUTLINE

This research proposal consists of a total of five (5) chapters, which are made up as follows:

Chapter 1: Introduction and general orientation

This chapter serves as an introductory chapter to this study. It focuses on the classification of on-demand work in South Africa and aims to provide a background to the gig economy and related matters. It sets the scene for the ensuing chapters through a brief discussion of the legal problem, the relevant research questions, the motivation for the study, and the research methods used. It also provides a chapter outline to ensure a logical flow of the relevant discussions associated with the research.

Chapter 2: Conceptualising the GIG Economy, Platform Work and the concept of On-Demand Work within the South African context

This chapter explains what the concepts of the gig economy, platform work, and on-demand work entail. It also analyses on-demand work within the South African context. The mentioned concept, which forms the major part of this research, will be explored in

³³ Viviers & Smit 2017.

detail to achieve the study's aims. This is specifically aimed at providing the reader with a detailed understanding of the concepts under discussion and a basis for the ensuing discussions on the matter under scrutiny. The chapter will also explore the different types of platform work.

Chapter 3: The Legal Framework Relating to On-Demand Work within the South African context

This chapter focuses on the legal framework relating to on-demand work with reference to the South African context. This analysis aims to ultimately classify on-demand work and, therefore, to bring about legal certainty or to illustrate the absence of much-needed legal certainty. The analysis will assume a top-down approach by exploring international perspectives on constitutional provisions, followed by an analysis of other relevant legislation and applicable case law on the topic. This will also set the basis for further analysis of the right to fair labour practices before exploring other legislative instruments relating to on-demand work in South Africa.

Chapter 4: UK Perspectives on Classifying On-Demand Work

This chapter constitutes a comparative analysis of on-demand work with reference to the position in foreign jurisdictions. It specifically seeks to compare the position in the UK with the South African position. The comparative nature of the study will only be restricted to the position of the UK courts in classifying on-demand workers. It will, therefore, not constitute a full comparison of the position of the UK legal system in its entirety. This is done to explore a foreign perspective for classifying on-demand work with the primary aim of drawing best practices that can be used to assist the classification conundrum associated with on-demand workers in South Africa.

Chapter 5: Conclusion and Recommendations

This chapter seeks to conclude the preceding chapters of this research. It is also an attempt to provide relevant and appropriate recommendations regarding the classification of on-demand workers in South Africa. All this is done to address the current classification conundrum associated with the worker category.

CHAPTER 2: CONCEPTUALISING THE GIG ECONOMY, PLATFORM WORK AND THE CONCEPT OF ON-DEMAND WORK WITHIN THE SOUTH AFRICAN CONTEXT

2.1 INTRODUCTION AND BACKGROUND

This Chapter aims to conceptualise concepts associated with the ‘gig economy’, ‘platform work’ and ‘on-demand work’ within South Africa. It, therefore, provides a theoretical basis for demystifying the said concepts. It also attempts to provide comprehensive responses to the first and the second sub-questions associated with the study. It subsequently seeks to explore issues associated with the modern gig economy and the different types of platform work. It also attempts to analyse the characteristics and vulnerabilities associated with on-demand work within a South African context. It is, therefore, specifically aimed at deconstructing the mentioned concepts to provide the reader with a detailed understanding of the concepts under discussion and, therefore, provide a basis for the ensuing discussions on the matter under scrutiny.

The ‘gig economy’ concept may be viewed as new, but it has been around for a long time.³⁴ Jazz musicians originally used the term to refer to performances. However, it has taken on a new meaning in modern days. It now refers to a form of non-standard employment outside the confines of the traditional employer-employee relationship.³⁵ This “non-standard form” of employment, which is characterised by short-term, on-demand and temporary work assignments, has become a contemporary feature of labour markets worldwide.³⁶ In addition to the high unemployment rate and the increased need for job opportunities, the COVID-19 pandemic also fast-tracked the fourth industrial

³⁴ Pinsof 2016:342.

³⁵ Gigworker.com “The history and future of the gig economy”, <https://gigworker.com/gig-economy-timeline/> (accessed 26 September 2023).

³⁶ ILO 2016:xxi.

revolution (4IR), which has resulted in immense growth in new forms of work operating within the digital space.³⁷

Employment associated with the gig economy has unfortunately resulted in a classification conundrum, with the result that many platforms seek to avoid the obligations pertaining to a traditional employment relationship by classifying workers as independent contractors rather than employees.³⁸ It is rather unfortunate that the mentioned classification difficulties expose these vulnerable workers to unjust and unfair practices, including low pay, wage theft, unreasonable working hours, discrimination, precarity and unsafe working conditions.³⁹ Therefore, the classification difficulties create a *quasi-subordinate* relationship or state of *para-subordination*, which offers further opportunities for the misclassification of employees without paying any significant worker protective dividends.⁴⁰

The problem of high unemployment with specific reference to the South African context is, however, not solved by jobs with high levels of exploitation as such undermines workers' constitutional rights to dignity, to fair labour practices, to form or join a trade union, to engage in collective bargaining and to strike.⁴¹ It would, therefore, seem at face value that this new form of 'work' is not without its fair share of challenges and requires further regulation to eliminate the mentioned challenges. Whilst South Africa and the rest of the world need more jobs, it would also be incorrect to accept the exploitative labour practices associated with the gig economy in the name of increased work opportunities. Therefore, the current state of affairs within the gig economy is globally in urgent need of regulation, which this study *inter alia* seeks to explore further in Chapter 3.

³⁷ Smit & Stopforth 2022:367.

³⁸ Fairwork 2020(a):5.

³⁹ Du Toit 2020:1494.

⁴⁰ ILO 2019:12-13.

⁴¹ Fairwork 2020(a):5.

2.2. DESCRIBING THE CONCEPT OF THE ‘GIG ECONOMY’

The world of work in the digital era has seen significant transformation due to the increased use of online platforms. This new form of work is of a socially distanced nature.⁴² Particularly, this transformation gave rise to the ‘gig economy’ and resulted in technologies providing an extremely scalable workforce.⁴³ The mentioned online platforms play a major role in addressing the high unemployment rate of more than 20% for the last two decades in South Africa,⁴⁴ as they serve as a means to provide an alternative to traditional employment opportunities, which opportunities are of a limited nature and therefore not in all instances readily accessible and available to all.

Unfortunately, This phenomenon has resulted in certain precarity and a lack of ‘decent work’ opportunities in the digital platform economy.⁴⁵ The different forms of work associated with the gig economy, which are synonymous, include on-demand work,⁴⁶ crowd work,⁴⁷ app work,⁴⁸ and capital platform work.⁴⁹ It all essentially refers to “an employment form that utilises an online platform to enable organisations or individuals to access an indefinite an unknown group of other organisations or individuals to solve specific problems or to provide specific services or products in exchange for payment”.⁵⁰

The said digital platforms allow users to connect with peers to rent under-utilized assets⁵¹ or services and, therefore, connect workers with consumers of work.⁵² The definition mentioned above clearly indicates that work associated with the gig economy is outside

⁴² Smit & Stopforth 2022:364.

⁴³ De Stefano 2016:4.

⁴⁴ Smit & Stopforth 2022:375.

⁴⁵ Fairwork 2021(a):4.

⁴⁶ Smit & Stopforth 2022:367.

⁴⁷ Smit & Stopforth 2022:367.

⁴⁸ Smit & Stopforth 2022:367.

⁴⁹ Smit & Stopforth 2022:367.

⁵⁰ ILO 2021(a):3.

⁵¹ Schwartz & Einarson 2018:222.

⁵² ILO 2018:1.

traditional employment.⁵³ The concept of the gig economy will now, and within the context of the descriptions mentioned above, be further analysed below with reference to a comprehensive definition of the said concept and an analysis of the different types of ‘gig work’.

2.2.1 The modern-day gig economy defined

The World Economic Forum defines the gig economy as “involving the exchange of labour for money between individuals or companies via digital platforms that actively facilitate matching between providers and customers, on a short-term and payment-by-task basis.”⁵⁴ Thus, based on this definition, it is evident that the gig economy and gig work generally consist of income-earning activities outside of standard, long-term employer-employee relationships.⁵⁵ It is also further evident from the definition provided that the gig economy relies on digital management systems, including algorithmic management, to operate successfully.⁵⁶ However, it is necessary to explore alternative definitions of the gig economy to gain a more detailed understanding of the concept.

To this end, the gig economy refers to the freelance and side-hustle work workforce.⁵⁷ It is also known as ‘dependent self-employment, where work is performed under a civil or commercial contract, although workers depend on clients for income or instruction on work to be performed.’⁵⁸ All the definitions provided are indicative of the atypical nature of work associated with the gig economy, which, as mentioned, falls outside of the traditional

⁵³ Smit & Stopforth 2022:367.

⁵⁴ WEF “What is the gig economy and what's the deal for gig workers?”, <https://www.weforum.org/agenda/2021/05/what-gig-economy-workers/> (accessed on 5 June 2023).

⁵⁵ Gig Economy Data Hub “What is a gig worker?”, <https://www.gigeconomydata.org/basics/what-gig-worker> (accessed 26 September 2023).

⁵⁶ Du Toit & Howson 2022:714.

⁵⁷ Mckinsey & Company “What is the gig economy?”, <https://www.mckinsey.com/featured-insights/mckinsey-explainers/what-is-the-gig-economy> (accessed on 6 October 2023).

⁵⁸ ILO 2016:9.

employer-employee relationship as governed by established labour law frameworks on a global scale.

Work on the mentioned platforms cannot necessarily be regarded as “decent”, primarily caused by the afore-mentioned classification conundrum and the fact that workers are viewed and treated as independent contractors and, therefore, deprived of the rights afforded to employees by the relevant labour-related legislative frameworks.⁵⁹ This position has also since been confirmed by the Labour Court in South Africa, which will be further explored in Chapter 3 of this study.⁶⁰ The Fairwork Code of Good Practice⁶¹ classifies workers’ rights associated with “decent work” under five headings: fair pay, fair conditions, fair contracts, fair management and fair association. However, these elements are not present in the working relationship associated with gig work, rendering it devoid of the required elements associated with “decent work” and again highlighting the much talked about classification conundrum.

The definitions provided above in an attempt to define the ‘gig economy’ are considered sufficient for this study, which is aimed at analysing the classification of on-demand workers in South Africa and related matters as highlighted in this research.

2.2.2 Describing the concept of ‘platform work’

Platform work essentially refers to work where a digital platform acts as an intermediary and enables organisations or individuals to access an indefinite an unknown group of other organisations or individuals to solve specific problems or to provide specific services

⁵⁹ Smit & Stopforth 2022:365.

⁶⁰ See *Uber South Africa Technology Services (Pty) Ltd v NUPSAW and Others*, where court did not specifically decide on the classification of on-demand workers and in the absence of such, they remain classified as independent contractors.

⁶¹ Fairwork 2020(a):6.

or products in exchange for payment”.⁶² This entails the individualisation of workers by classifying them as separate businesses.⁶³ However, the fact remains that ‘work’ is dependent on the platform and is also performed under the platform's control, which resembles the elements of an employment relationship.⁶⁴ However, this fact has not yet eliminated the classification of these workers as independent contractors, thereby excluding them from the scope of employment and the associated protection under relevant labour legislation.⁶⁵ Platform work, gig economy and on-demand work/economy are all synonymous and interrelated concepts.

The classification of occupations associated with platform work includes the performance of professional tasks, clerical and data entry, creative and multimedia-related functions, sales and marketing support, software development and technology, and writing and translation services.⁶⁶ Examples of specific tasks or activities resorting under the aforementioned occupational classes associated with platform work may include the delivery of services such as financial planning, transcription, voice acting, photography, advertising, virtual reality-related services, creative writing, moving services, taxi services, exam training, baby sitting, etc.⁶⁷

It can, therefore, be deduced from the explanations above that platform work refers to work where a digital platform forms the *nexus* between the platform, the client and the “workers”. It is this complicated and atypical working relationship that is the primary cause for the misclassification of workers as independent contractors, and that once again brings to the fore the issue of ‘control’ over these workers through technology.⁶⁸ In the

⁶² ILO 2021(a):3.

⁶³ Du Toit & Howson 2022:713.

⁶⁴ Fairwork 2020(a):12.

⁶⁵ Fairwork 2020(a):12.

⁶⁶ Florisson & Mandl 2018:53-54.

⁶⁷ Florisson & Mandl 2018:53-54.

⁶⁸ ILO 2021(a):34.

Uber matter,⁶⁹ the CCMA⁷⁰ Commissioner pointed out that: “even though there is no direct or physical supervision, control is exercised through technology, to the point that even the movement of the cell phone can be detected, indicating reckless driving”. This statement implies an employment relationship, as confirmed in the mentioned award by the CCMA.

The primary aim of this study is thus to unravel the mentioned classification conundrum concerning platform workers, especially viewed in the light of the subsequent Labour Court ruling,⁷¹ which found that these workers are, in fact, independent contractors. What is, however, evident is that platform work covers both ‘crowd work’ and ‘on-demand work’ as forms of work operating within the gig economy, although this specific study will be confined to ‘on-demand work’ as a form of platform work.

There is a common cause that platform work is a growing source of livelihood both in South Africa and internationally.⁷² It is submitted that this type of work should not be discouraged for reasons based on the current lack of labour protection and the risks associated with workers engaged in the platform economy. The focus should rather be on balancing job creation and devising an appropriate regulatory framework to ensure ‘decent work’ for such workers.⁷³ This is particularly so as the absence of clear standards of ‘decent work’ for platform workers is not only in conflict with the *Constitution* but also undermines some of South Africa’s international labour law obligations.⁷⁴

⁶⁹ *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others*.

⁷⁰ Commission for Conciliation and Arbitration.

⁷¹ *Uber South Africa Technological Services (Pty) v NUPSAW and Others*.

⁷² Fairwork 2020(a):5.

⁷³ Smit & Stopforth 2022:369.

⁷⁴ Fairwork 2020(a):5.

The continuous classification of these workers as independent contractors is the major obstacle that must be overcome to ensure adequate protection of platform workers. A fine balance must, therefore, be struck between implementing measures that will negatively impact this growing source of income in a country plagued by poverty and unemployment and the implementation of a regulatory framework based on the standards of decent work to eradicate the current exploitative working conditions of these workers.⁷⁵ It is, however, significant to further explore the concept of platform work by providing a detailed and concise definition, intending to clarify the said concept and related matters further, as outlined below.

It should be noted that some authors use the terms ‘platform work’, ‘gig work’ and in certain instances ‘on-demand work’ interchangeably. The term ‘gig work’ will, however, be used as an umbrella term to refer to the mentioned concepts and will also encompass both ‘crowd work’ and ‘on-demand’ work. The next section will attempt to distinguish between the different types of gig work.

2.2.3 Different types of gig work

The different types of gig work operating within the gig-economy primarily include “crowd work” and “work-on-demand via apps”.⁷⁶ The latter stated form of gig work, which forms the basis of this specific study, is commonly known as ‘on-demand work’, also the term that will primarily be used throughout this study. Both types of gig work are associated with the demand and supply of working activities, which are matched online or *via* mobile apps.⁷⁷

⁷⁵ Fairwork 2020(a):12.

⁷⁶ De Stefano 2016:iii.

⁷⁷ De Stefano 2016:iii.

According to De Stefano,⁷⁸ ‘crowd work’, as a distinct form of gig work, refers to working activities that imply completing a series of tasks through online platforms that link an indefinite number of organisations, businesses and individuals through the internet.⁷⁹ The nature of such work varies from ‘microtasks’, which are of a menial and monotonous nature and which still require some form of judgment beyond the understanding of artificial intelligence, to more significant and meaningful tasks.⁸⁰ Online platforms associated with crowd work *inter alia* include platforms such as, ‘AppJobber’,⁸¹ which finds people to perform location-based micro jobs, ‘Clickworker’,⁸² which places tasks to purchasers/contractors in the texts & translations, categorization and tagging and the web investigation sectors and ‘Workhub’,⁸³ which finds people digital tasks that can be handled *via* Smartphone, Tablet or PC with internet access. Crowd work is mainly executed online and principally allows the platform, clients and workers to operate anywhere in the world.⁸⁴ ‘Crowd work’ will not be further analysed as part of this specific study, as it does not constitute a focal area of the study in question.

‘On-demand work’, on the other hand, *inter alia* involves traditional working activities such as ride-hailing services, cleaning services, clerical work, etc., assigned through mobile applications.⁸⁵ Online platforms associated with on-demand work *inter alia* include platforms such as Uber,⁸⁶ which is a ride-hailing service that matches consumers looking

⁷⁸ De Stefano 2016:1.

⁷⁹ De Stefano 2016:2.

⁸⁰ De Stefano 2016:2.

⁸¹ Crowd worker.Com “Who are the typical crowd workers?”, <http://www.crowd worker.com/who-are-the-typical-crowd workers/> (accessed on 26 September 2023).

⁸² Crowd worker.Com “Who are the typical crowd workers?”, <http://www.crowd worker.com/who-are-the-typical-crowd workers/> (accessed on 26 September 2023).

⁸³ Crowd worker.Com “Who are the typical crowd workers?”, <http://www.crowd worker.com/who-are-the-typical-crowd workers/> (accessed on 26 September 2023).

⁸⁴ De Stefano 2016:3.

⁸⁵ De Stefano 2016:3.

⁸⁶ Wikipedia Contributors “Uber”, <https://en.wikipedia.org/wiki/Uber> (accessed on 26 September 2023).

for rides or food delivery with people selling such services; SweepSouth,⁸⁷ which provides domestic, office and speciality cleaning services; and TaskRabbit,⁸⁸ which provides handyman, moving and delivery services. On-demand work is therefore focussed on matching the online supply and demand of activities executed locally. The distinct difference between ‘crowd work’ and ‘on-demand work’ is that the latter occurs on a more local level than the former-mentioned type of gig work.⁸⁹ Both these forms of gig work, especially on-demand work as a focal area of this study, constitute precarious work⁹⁰ and deprive workers associated with such work of the protection of labour laws due to them being classified as independent contractors or informal workers.

The concept of on-demand work will be further explored and analysed as a key concept associated with this study, providing a basis for the rest of the study.

2.3 CONCEPTUALISING ON-DEMAND WORK

A conceptualisation of on-demand work is vital in a study concerned with the legal classification of on-demand workers in South Africa. The said concept will, against this background, be delineated by making introductory remarks, providing an overview of the on-demand sector in South Africa, defining the concept of on-demand work and finally exploring the challenges associated with on-demand work.

⁸⁷ SweepSouth “SweepSouth”, <https://sweepsouth.com/cleaning-services/> (accessed on 26 September 2023).

⁸⁸ Taskrabbit “Taskrabbit”, <https://www.taskrabbit.com/> (accessed on 26 September 2023).

⁸⁹ De Stefano 2016:3.

⁹⁰ Smit & Stopforth 2022:369.

2.3.1 Introductory Remarks

On-demand work is characterised by short-term and freelance work and, therefore, does not refer to work of a permanent nature.⁹¹ De Stefano⁹² describes on-demand work as the ‘personal outsourcing’ of activities to individuals rather than to ‘complex businesses’. This succinct description of on-demand work clearly expresses its independent contractor nature, which falls outside of the traditional employer-employee relationship and exposes affected workers to exploitative labour practices by platforms. It is specifically due to this feature that these workers are referred to as the ‘just-in-time workforce’ and are compensated on a ‘pay-as-you-go’ basis.⁹³ This is indicative and confirmation of the nature of on-demand work, which is characterised by a series of continuous short tasks⁹⁴ or short work assignments.

According to Darcy du Toit,⁹⁵ it is the proliferation of digitalisation, automation, robotics and artificial intelligence as features of the fourth industrial revolution that is accelerating the process of creating space for new forms of ‘irregular work’ such as that associated with on-demand work. It is evident from this description of on-demand work that it constitutes a form of platform work that depends on digital labour platforms to function.⁹⁶

Against this background, this study will endeavour to analyse further and dissect the concept of on-demand work. To achieve this purpose, the concept will be discussed with reference to an overview of on-demand work, a detailed definition, and an outline of the specific challenges associated with on-demand work.

⁹¹ Fairwork 2020(a):5.

⁹² De Stefano 2016:4.

⁹³ De Stefano 2016:4.

⁹⁴ Fairwork 2020(a):38.

⁹⁵ Du Toit 2019:1.

⁹⁶ Fairwork 2020(a):12.

2.3.2 An overview of the on-demand sector in South Africa

South Africa's unemployment rate was 32.6% in the second quarter of 2023, bringing the number of unemployed persons to 7.933 million.⁹⁷ This high unemployment rate serves as fertile ground for the emergence of atypical forms of employment, such as on-demand work. However, the exploitative conditions associated with such work are, on the contrary, detrimental to society.⁹⁸ The most common on-demand platforms in South Africa include 'Mr Delivery', 'SweepSouth', 'One Cart', 'Bolt', 'Uber', 'Uber Eats', 'HonestCare', 'Nunanny', 'OrderIn' and 'ClockWork'.⁹⁹ The number of platforms already in existence in the country and the rapidly growing nature of such platforms serve as evidence of the growing nature of on-demand work as a catalyst for disrupting a wide range of sectors and the traditional employer-employee relationship.¹⁰⁰ Thus, on-demand work in South Africa cuts across various sectors, including food delivery, cleaning, ride-hailing, home-based care, child care, and on-demand staffing services.¹⁰¹ However, a distinct and common feature associated with the mentioned platforms and workers remains the purposeful misclassification of workers as independent contractors or self-employed workers despite a subordinate employment relationship.¹⁰²

The courts have, however, played a clear role in relation to the framework and conditions that settle employment status, distinguishing between employees and independent contractors.¹⁰³ To this end, in the matter of *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others*,¹⁰⁴ the issue of whether Uber drivers are employees or independent contractors was explored,

⁹⁷ Trading Economics "South Africa unemployment rate", <https://tradingeconomics.com/south-africa/unemployment-rate> (accessed on 2 October 2023).

⁹⁸ Fairwork 2020(a):5.

⁹⁹ Clockwork "On-demand staffing apps in South Africa", <https://clockworkapp.co.za/on-demand-staffing-apps-south-africa> (accessed on 02 October 2023).

¹⁰⁰ Smit & Stopforth 2022:368.

¹⁰¹ Smit & Stopforth 2022:365.

¹⁰² ILO 2016:9.

¹⁰³ ILO 2021(a):3.

¹⁰⁴ *Uber South Africa Technology Services (Pty) Ltd v NUPSAW and Others*.

following an award by the CCMA¹⁰⁵ that they are indeed employees under South African law. The Labour Court, however, subsequently ruled that these workers were not employees. However, the judgment mentioned above contrasts with that in the matter of *Uber BV v Aslam*. The UK Supreme Court, in this matter, held that Uber drivers should be regarded as ‘workers’ under UK labour law. This UK ruling is not of assistance to the position in South Africa as far as this matter is concerned, which implies that alternative regulatory frameworks must be explored to mitigate this predicament.

It is also evident that on-demand workers in South Africa may, regarding the ‘presumption as to who is an employee’ as contained in section 200A of the *LRA* as well as in terms of the provisions of section 213 of the same legislative instrument, find difficulty in being classified as ‘employees’ due to their exclusion from the said definitions.

The cases mentioned above and the relevant legislation associated with ‘employees’ will be further analysed in Chapter 3 of this study, which deals with the legal framework relating to on-demand work in South Africa. The next focal are of this specific chapter will be with reference to the specific challenges associated with on-demand work.

2.3.3 Defining on-demand work

It would be impossible to properly define the phenomenon of ‘on-demand work’ without referring to the ‘on-demand economy’ as the relevant economy within which this type of work takes place. To this end, it is evident that there are various terms, such as the ‘gig economy’, ‘collaborative economy’, ‘sharing economy’ and the ‘Uber economy’, that are used to describe the on-demand economy and, therefore, also on-demand related work.¹⁰⁶

¹⁰⁵ Commission for Conciliation, Mediation and Arbitration.

¹⁰⁶ ILO 2021(a):4.

The mentioned and different references to essentially the same concept may well be an indication that there is currently no definitive description of on-demand work. This is said with due regard that employment classification is an old legal conundrum and that this ‘old legal problem’ is now attracting new attention as brought about by the on-demand economy.¹⁰⁷ The above comment is also made with due consideration of the historic and archaic nature of the concept under discussion, *albeit* in a different form and associated with a different era, as alluded to earlier in this study.¹⁰⁸

De Stefano¹⁰⁹ notes that whilst on-demand work can provide a good match of job opportunities and allow flexible working schedules, it can, at the same time, pave the way to a severe commodification of work. The latter assertion in relation to *flexibility* and *choice* is evidence of the fact that on-demand work, whilst riddled with challenges and risks, also holds certain benefits.¹¹⁰ The risks associated with a lack of worker protections¹¹¹ may well be a key factor responsible for the stated vulnerabilities associated with workers involved in this type of work. De Stefano further states that on-demand work is work that is hidden under catchphrases such as ‘gigs’, ‘tasks’, ‘favours’, ‘services’ and ‘rides’.¹¹² Global examples include operators such as Uber, Lyft, Sidecar, Handy and Care.com.¹¹³ The afore-mentioned catchphrases are indicative of the temporary and short-term nature of such work assignments, which in the mentioned instances resemble that of an independent contractor.

¹⁰⁷ Pinsof 2016:343.

¹⁰⁸ Gigworker.com “The history and future of the gig economy”, <https://gigworker.com/gig-economy-timeline/> (accessed 26 September 2023).

¹⁰⁹ De Stefano 2016:iii.

¹¹⁰ Smit & Stopforth 2022:378.

¹¹¹ Smit & Stopforth 2022:378.

¹¹² De Stefano 2016:5.

¹¹³ Smith & Leberstein 2015.

A further feature of on-demand work as a form of platform work is that it is both *task-based* as well as *location-based*.¹¹⁴ Its task-based nature lies in the fact that it is associated with activities such as cleaning, running errands, home-repairs and driving¹¹⁵ and is therefore associated with the performance of physical tasks, whilst its location-based nature¹¹⁶ is found in the fact that it allocates work to individuals in a specific geographical area. The latter feature of on-demand work is indicative of the fact that matching takes place on a local level, which is in contrast with crowd work, which is more online-based and allows for clients and workers to connect and operate on a global scale.¹¹⁷

It is now, in response to the second research question, which seeks to explore the characteristics of on-demand work and how workers are left vulnerable, necessary to explore the characteristics and the types of on-demand work with reference to the South African context.

2.3.4 Challenges associated with on-demand work

It is evident from the preceding discussions and the findings of this specific study so far that on-demand work is not without its fair share of challenges. The mentioned challenges usher in certain legal considerations that must be borne in mind. This statement is with reference to the fact that on-demand workers are currently classified as independent contractors in the absence of a court judgment providing otherwise. The absence of any case law in this regard, therefore, creates a *lacuna* which is directly associated with the current uncertainty in regard to the status of on-demand workers in South Africa. Challenges, therefore, appear to be both of classification as well as a design nature and

¹¹⁴ ILO 2021(a):3.

¹¹⁵ De Stefano 2016:3.

¹¹⁶ ILO 2021(a):3.

¹¹⁷ De Stefano 2016:3.

complex.¹¹⁸ The predictions of the Global Commission on the Future of Work associated with on-demand and platform work, in as far as it is said to promote flexibility and to provide a better work-life balance,¹¹⁹ may therefore be hampered in this regard. Further detail on this matter will, however, be comprehensively discussed in Chapter 3.

2.4 CONCLUSION

Chapter 2 of this study attempted to conceptualise concepts associated with the gig economy, platform work and on-demand work within a South African context, with the primary purpose of setting the scene for the ensuing chapters. This was necessary to explore the legal classification of on-demand workers as the primary theme of this study.

The research conducted to date has confirmed the precarious, unstable and insecure nature of on-demand work¹²⁰ as well as the plethora of challenges associated with this atypical work type and subsequent work-relationships. It has also been established that on-demand workers are being deprived of the protection afforded by the labour laws of the country, which is primarily due to such workers falling outside of the ambit of the traditional employer-employee relationship, which leaves these workers exposed to the mentioned vulnerabilities and risks.¹²¹ It is particularly the classification and design-related challenges¹²² that constitute fertile ground for all the ensuing challenges that have left on-demand workers vulnerable and exploited.

The concept of on-demand work and the extent of its prevalence and applicability to South Africa, which is exacerbated by the skills shortages across all occupations in the

¹¹⁸ Smit & Stopforth 2022:365.

¹¹⁹ ILO 2021(a):3.

¹²⁰ Smit & Stopforth 2022:374-375.

¹²¹ Smit & Stopforth 2022:368.

¹²² Smit & Stopforth 2022:365.

country¹²³ have also been confirmed in this chapter. This serves as an indication that South Africa is not immune to the mentioned challenges and risks and is, therefore, also directly affected by the dire need for regulation in this regard. The positive contributions that the gig economy can make to unemployment within the country also became evident during this chapter. However, it is submitted that such must occur within the context of an established regulatory framework.¹²⁴ Chapter 3 will consequently examine the legal framework relating to on-demand work, with specific reference to the South African context and with a view to achieve legal certainty as well as to be able to ultimately recommend an appropriate regulatory framework as a means of contributing to this field of labour law.

¹²³ Smit & Stopforth 2022:365.

¹²⁴ Smit & Stopforth 2022:370.

CHAPTER 3: THE LEGAL FRAMEWORK RELATING TO ON-DEMAND WORK WITHIN THE SOUTH AFRICAN CONTEXT

3.1 INTRODUCTION AND BACKGROUND

This Chapter focuses on the legal framework pertaining to on-demand gig work with specific reference to the South African context. It is specifically aimed at ultimately classifying on-demand work and bringing about legal certainty or illustrating the absence of much-needed legal certainty in this regard. The Chapter also seeks to respond to one of the sub-questions associated with this research in relation to the extent to which the existing statutory framework affords protection to on-demand workers. All this is done with the ultimate aim of determining if labour protection can indeed be extended to on-demand gig workers through the application of the statutory classification of labour approaches provided by law and making the necessary recommendations on an applicable approach where such is not possible.

The analysis in this regard will assume a top-down approach by first exploring the relevant international obligations and perspectives, followed by a constitutional perspective, with a specific focus on the right to fair labour practices. This will be followed by an exposition of the common law roots with respect to the classification of labour, as well as a discussion on the relevant judicial tests affecting the issue under discussion. The chapter will finally analyse South African labour legislation to properly define the term 'employee' before applicable case law pertaining to on-demand gig work in South Africa will be analysed.

3.2 AN INTERNATIONAL PERSPECTIVE ON ‘ON-DEMAND GIG WORK’

Whilst the focus of Chapter 3 is with reference to the legal framework regulating on-demand work in South Africa, it is imperative first to explore this concept from an international perspective and, therefore, to emphasise the importance and the impact of international law, international organisations, and international perspectives on on-demand gig work, as well as its relevance to the South African legal framework. This will subsequently also set the basis for the comparative analysis with respect to on-demand work, with reference to the position in foreign jurisdictions, which will be discussed in Chapter 4 of this study.

International organisations have become key actors in international society over the past two centuries, which has resulted in such organisations being considered subjects of international law in their own right.¹²⁵ The ensuing discussions will focus on the ILO as the most relevant international organisation associated with this study. However, it is acknowledged that there are also other relevant international organisations, such as the EU,¹²⁶ the UN¹²⁷ and the AU,¹²⁸ which will, for purposes of this specific study, not be further discussed.

The ILO acknowledges that digital labour platforms are now part of our everyday lives and that digital transformation also extends to the world of work.¹²⁹ It further acknowledges that a clearer understanding of the operation of digital platforms, as well as a more effective and consistent approach, is essential before it will be able to provide ‘decent’ work opportunities.¹³⁰ Whilst the report also acknowledges that there have been

¹²⁵ Strydom 2016:47.

¹²⁶ European Union.

¹²⁷ United Nations.

¹²⁸ African Union.

¹²⁹ ILO 2021(b):Preface.

¹³⁰ ILO 2021(b):Preface.

some land marks developments in this regard, it also states that it may take several more years before the contours of labour and social protection for such workers will be realised.¹³¹ Other international instruments associated with the ILO and which are deemed relevant to a study associated with on-demand gig work will now be discussed.

Any discussion on the ILO for purposes of this specific study would be incomplete without reference to the Declaration of Philadelphia, 1944 and the Declaration on Fundamental Principles and Rights at Work, 1998. The ILO describes the Declaration of Philadelphia as a 'visionary document that contributed to shaping the global order after the Second World War and which sets out the guiding principles for national economic and social policies within that order'.¹³² The most relevant fundamental principle contained in the mentioned Declaration and associated with this study, as reaffirmed by the Conference, is that labour is not a commodity,¹³³ which implies that labour cannot be sold. The Declaration of Philadelphia still represents valid guidelines for economic and social policy for any of the ILO's member states in the changing world of work,¹³⁴ and the on-demand sector is no exception.

The Declaration on Fundamental Principles and Rights at Work, according to the ILO, is 'an expression of commitment by governments, employers' and workers' organizations to uphold basic human values - values that are vital to our social and economic lives.'¹³⁵ These *inter alia* include freedom of association and the right to collective bargaining, the elimination of all forms of forced labour or compulsory labour, the elimination of discrimination with respect to employment and occupation, as well as a safe and healthy

¹³¹ ILO 2021(b):211.

¹³² ILO "Declaration of Philadelphia", <https://www.ilo.org/legacy/english/inwork/cb-policy-guide/declarationofPhiladelphia1944.pdf> (accessed on 1 November 2023).

¹³³ ILO "Declaration of Philadelphia", <https://www.ilo.org/legacy/english/inwork/cb-policy-guide/declarationofPhiladelphia1944.pdf> (accessed on 1 November 2023).

¹³⁴ Stopforth 2023:118.

¹³⁵ ILO "Declaration on Fundamental Principles and Rights at Work", <https://www.ilo.org/declaration/lang--en/index.htm> (accessed on 1 November 2023).

working environment.¹³⁶ The Declaration on Fundamental Principles and Rights at Work remains a decisive step towards universal respect of the ILO's core standards.¹³⁷

The preamble of the Employment Relationship Recommendation also explicitly recognises the 'difficulties of establishing whether or not an employment relationship exists in situations where the respective rights and obligations of the parties concerned are not clear, where there has been an attempt to disguise the employment relationship, or where inadequacies or limitations exist in the legal framework, or its interpretation or application.'¹³⁸ It, therefore, aims to ensure that all workers, regardless of employment status, should work in conditions of decency and dignity.¹³⁹ This speaks true to workers associated with the on-demand sector and is also highly useful to the study in question, which is directly associated with providing a legal analysis of the classification of on-demand workers and, therefore, also an attempt to determine whether or not an employment relationship exists.

The ILO Centenary Declaration for the Future of Work, which was adopted in 2019, recalls and reaffirms the aims, purposes, principles and mandate set out in the ILO Constitution and the Declaration of Philadelphia, 1944.¹⁴⁰ A noteworthy inclusion in this Declaration is the recognition by the ILO that it marks its centenary at a time of 'transformative change in the world of work, driven by technological innovations, demographic shifts, environmental and climate change, and globalization, as well as at a time of persistent

¹³⁶ ILO "Declaration on Fundamental Principles and Rights at Work", <https://www.ilo.org/declaration/lang--en/index.htm> (accessed on 1 November 2023).

¹³⁷ Stopforth 2023:111.

¹³⁸ See the preamble of the Employment Relationship Recommendation, 2006 (No. 198). It in addition also recognises that laws and regulations, and their interpretation, should be compatible with the objectives of decent work and that the protection of workers is at the heart of the mandate of the ILO, and in accordance with the principles set out in the Declaration on Fundamental Principles and Rights at Work, 1998 and the Decent Work Agenda.

¹³⁹ ILO 2020:84.

¹⁴⁰ See the ILO Centenary Declaration for the Future of Work, 2019.

inequalities, which have profound impacts on the nature and future of work, and on the place and dignity of people in it.’ This international instrument, therefore, gives recognition to the new world of work, which will also include the on-demand gig economy and the precarious forms of work associated with the said sector, which is largely a result of technological innovations.

Whilst ILO standards assume various forms, conventions and recommendations, which the ILC adopts¹⁴¹ as the highest policy-making body of the ILO, constitute the most important forms.¹⁴² Conventions, except for the mentioned fundamental conventions, are, however, not automatically binding and only become binding once ratified by a member state, whilst recommendations are not capable of being ratified and, therefore, not binding.¹⁴³ Once ratified, a convention gives rise to an obligation to implement the terms thereof in national legislation.¹⁴⁴ In addition to the instruments mentioned above, the ILO also issues non-binding ‘codes of practice’ that may be utilised in the development of legislation, collective agreements, as well as workplace policies and rules.¹⁴⁵ It is at this stage noteworthy to mention that most ILO standards refer to ‘workers’ rather than ‘employees’ and may, therefore, also be applicable to on-demand gig workers.¹⁴⁶

Examples of the most relevant ILO instruments¹⁴⁷ associated with ‘non-standard employment’, such as on-demand gig work, applicable to the South African context *inter alia* include the Freedom of Association and Protection of the Right to Organise Convention,¹⁴⁸ the Equal Remuneration Convention,¹⁴⁹ the Discrimination (Employment

¹⁴¹ International Labour Conference.

¹⁴² Van Niekerk *et al.* 2019:25.

¹⁴³ Van Niekerk *et al.* 2019:25.

¹⁴⁴ Van Niekerk *et al.* 2019:27.

¹⁴⁵ Van Niekerk *et al.* 2019:26.

¹⁴⁶ ILO 2019:17.

¹⁴⁷ See Table 2: Stopforth 2023:143.

¹⁴⁸ 1948 (No. 87).

¹⁴⁹ 1951 (No. 100).

and Occupation) Convention,¹⁵⁰ the Forced Labour Convention,¹⁵¹ the Abolition of Forced Labour Convention,¹⁵² the Minimum Age Convention¹⁵³ as well as the Worst Forms of Child Labour Convention.¹⁵⁴ Since South Africa has ratified all the mentioned ILO instruments, it has a binding effect on the country and must, therefore, find expression in South African labour laws. It can, therefore, safely be concluded that the mentioned international instruments remain an important source of South Africa's international law obligations.

This research has revealed that the ILO, in the form of the Employment Relationship Recommendation (ERR),¹⁵⁵ provides for matters associated with the determination of the existence of an employment relationship.¹⁵⁶ The mentioned recommendation requires that members should, within the framework of national policy, consider the possibility of *inter alia* providing for a legal presumption that an employment relationship exists where one or more relevant indicators are present.¹⁵⁷ The presumption applies regardless of the form of contract and, therefore, gives effect to ILO Recommendation 198.¹⁵⁸ The presumption as to who is an employee in terms of S200A of the *LRA* will be further discussed in paragraph 3.6.1 of this study.

It is evident from the above that while the ILO has no specific conclusive solution to the classification conundrum associated with on-demand gig workers, considerable progress has been made through the various ILO instruments as well as the numerous researches

¹⁵⁰ 1958 (No. 111).

¹⁵¹ 1930 (No. 29).

¹⁵² 1957 (No. 105).

¹⁵³ 1972 (No. 138).

¹⁵⁴ 1999 (No. 182).

¹⁵⁵ 2006 (No. 198).

¹⁵⁶ See paragraph 3.2 of this study for a comprehensive discussion on the ILO Employment Relationship Recommendation 2006 (No.198).

¹⁵⁷ See 11(b) of the Employment Relationship Recommendation, 2006 (No. 198).

¹⁵⁸ Van Niekerk *et al.* 2019:66.

conducted by the ILO to find a solution to the said problem. In addition to South Africa's obligation to comply with ILO standards and prescripts, as a member state of the ILO, it is also imperative to, from a general perspective, explore its obligation to consider international law. The *Constitution of South Africa*,¹⁵⁹ to this end, expressly provides for the recognition of international law¹⁶⁰ and, therefore, the recognition of international legal standards in regard to on-demand gig work.

The importance of international law to the South African legal system has therefore been established. 'The following constitutional provisions serve true in this regard; 'the interpretation of the Bill of Rights must take into consideration international law',¹⁶¹ 'when interpreting any legislation, every court must prefer any reasonable interpretation of legislation consistent with international law over any alternative interpretation that is inconsistent with international law',¹⁶² 'customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'.¹⁶³ The *Constitution* therefore expressly recognises international law as a foundation of democracy.¹⁶⁴

The South African courts have, over the years and in addition to the above provisions, also emphasised the importance of international law. This is *inter alia* evident in *Ferreira v Levin NO*,¹⁶⁵ where the court turned to international jurisprudence for guidance on the meaning of 'liberty' and 'security of person' as well as in the matters of *Minister of Health*

¹⁵⁹ *Constitution of the Republic of South Africa*, 1996. Hereafter referred to as the Constitution of South Africa, or the Constitution.

¹⁶⁰ *Constitution of the Republic of South Africa*:sec. 39(1)(b), 233.

¹⁶¹ *Constitution of the Republic of South Africa*:sec. 39(1)(b).

¹⁶² *Constitution of the Republic of South Africa*:sec. 233.

¹⁶³ *Constitution of the Republic of South Africa*:sec. 232.

¹⁶⁴ Van Niekerk *et al.* 2019:23.

¹⁶⁵ *Ferreira v Levin NO*, 1996 (1) SA 984 (CC):1035-1036, 1085.

v Treatment Action Campaign (No 2),¹⁶⁶ and *Mazibuko v City of Johannesburg*,¹⁶⁷ where the Court examined the concept of a ‘minimum core obligation.’

The importance and the impact of international law on the South African legal system has now been confirmed. It can, therefore, safely be concluded that the Constitution explicitly recognises international instruments that give effect to international standards as points of reference for the interpretation of labour and other legislation.¹⁶⁸ Labour law is not immune to this phenomenon and is, therefore, also, in a similar manner, subject to international law. This is evident in both the *LRA*¹⁶⁹ and the *BCEA*,¹⁷⁰ which prescribe that its purpose is to *inter alia* give effect to obligations incurred by the Republic as a member state of the ILO. A meaningful study of labour law is therefore not possible without at least a rudimentary understanding of the institutions that shape international labour law standards, the basic content of those standards and the relationship between them and domestic labour legislation.¹⁷¹

This study will now consider the ‘South African Constitutional perspective,’ with specific reference to the right to fair labour practices and within the context of ‘on-demand work’ gig work.

3.3 A SOUTH AFRICAN CONSTITUTIONAL PERSPECTIVE

The advent of the *Constitution of the Republic of South Africa Amendment Act, 2 of 1994*, which included a Bill of Rights, drastically impacted all branches of law in South Africa,

¹⁶⁶ *Minister of Health v Treatment Action Campaign (No 2)*, 2002 (5) SA 721 (CC).

¹⁶⁷ *Mazibuko v City of Johannesburg*, 2010 (4) SA 1 (CC).

¹⁶⁸ Van Niekerk *et al.* 2019:23.

¹⁶⁹ Section 1(b).

¹⁷⁰ Section 2(b).

¹⁷¹ Van Niekerk *et al.* 2019:23.

as it provided a mechanism for citizens to challenge legislation and actions by the state which infringe on such fundamental rights.¹⁷²

The importance of international law¹⁷³ and the enabling provisions as contained in the *Constitution* have been established in the preceding section of this study. It is for this reason that it has now become necessary to explore the applicable constitutional provisions, with specific reference to the right to fair labour practices, before a further review of the statutory framework pertaining to on-demand work can be undertaken. It is specifically aimed at establishing the *nexus* between constitutional rights and the concept of 'labour' within the South African context. Section 23 of the *Constitution* will, therefore, and in view of the above, form the basis of the ensuing discussions.

The fundamental right to fair labour practices is, to this end, entrenched in Section 23(1).¹⁷⁴ This enabling provision stipulates that 'Everyone has the right to fair labour practices'. The emphasis as far as this specific legal provision is concerned is with reference to the word 'everyone', which at face value appears to extend beyond the scope of the traditional employment relationship. The South African courts have interpreted the meaning of the word 'everyone' as contained in section 23. Constitutional supremacy would mean little if the provisions of the *Constitution* were not justiciable.¹⁷⁵ In *NEHAWU v University of Cape Town & others*,¹⁷⁶ Ngcobo J held:

Where the rights in the section are guaranteed to workers or employers or trade unions or employers' organisations, as the case may be, the Constitution says so explicitly. If the rights in section 3(1) were to be guaranteed to workers only, the Constitution should have said so. The basic

¹⁷² Grogan 2020:4.

¹⁷³ *Constitution of the Republic of South Africa*:sec. 39(1)(b), 232, 233.

¹⁷⁴ *Constitution of the Republic of South Africa*.

¹⁷⁵ Currie & De Waal 2016:9.

¹⁷⁶ (2003) 24 ILJ 95 (CC).

flaw in the applicant's submission is that it assumes that all employers are juristic persons. That is not so. In addition, section 23(1) must apply either to all employers or none. It should make no difference whether they are natural or juristic persons.¹⁷⁷

The Constitutional Court again, in the matter of *Pretorius v Transnet Pension Fund*,¹⁷⁸ observed that there was a compelling basis not to restrict section 23 to those engaged in formal employment – more and more people found themselves in a ‘twilight zone’ of employment as supposed independent contractors. Mtembu AJ reaffirmed this position in *Labuschagne v Minister of State Security Agency and Another*.¹⁷⁹

In view of above, there is a common cause that the courts have interpreted the word ‘everyone’ and that such interpretation seems to extend beyond the scope of the traditional employment relationship. The predicament, however, lies in the question as to whether or not on-demand gig workers, in view of section 23, qualify to be classified as ‘employees’ and, therefore, whether such workers are entitled to enjoy the protection of the labour laws of the country. Ngcobo J, in assessing the fairness component of the right under discussion in the *NEHAWU*¹⁸⁰ case, held that care must be taken to accommodate, where possible, the interests between employers and workers so as to arrive at the balance required by the concept of fair labour practices.¹⁸¹ Whilst it is not in dispute that the right to fair labour practices applies to both employers and workers, it is still not clear how, when construing the *LRA*, the courts should give effect to the balance to be struck.¹⁸²

At this stage, it is my considered view that section 23(1) and the mentioned case law do not provide any guarantee of much-needed labour protection to on-demand workers,

¹⁷⁷ *NEHAWU v University of Cape Town & others*;par. 39.

¹⁷⁸ [2018] 7 BLLR 633 (CC);par. 48.

¹⁷⁹ (44033/19) [2023] ZAGPPHC 622 (17 July 2023);par. 22.

¹⁸⁰ (2003) 24 ILJ 95 (CC).

¹⁸¹ Van Niekerk *et al.* 2019:45.

¹⁸² Van Niekerk *et al.* 2019:45.

which continues to leave such workers vulnerable and exploited to acts of unfair labour practice by unscrupulous operators.¹⁸³ A comprehensive discussion of the South African legislative framework and employee classification is provided later in this chapter. This is done with a view to further exploring and obtaining certainty on whether or not on-demand gig workers, for classification purposes, fall within the purview of ‘employees’ or whether their current classification as independent contractors remains.

It is, however, vital to first provide a brief overview of the common law classification of labour, which will be done in the next section of this chapter. This is done to bring context to the discussions associated with the legal framework regulating the classification of labour in South Africa, which will serve as a basis for the legislative intervention.

3.4 COMMON LAW CLASSIFICATION OF LABOUR

Whilst this research has a strong focus on legislative interventions affecting employee classification, the importance of the common law position associated with the employment relationship cannot be overemphasised. A brief overview of the common law classification of labour is thus provided against the background that common law continues to regulate the employment relationship to the extent that legislation is inapplicable.¹⁸⁴ The roots of labour law are therefore found in common law as per the below exposition.

The common law contract of employment, with specific reference to the South African context, originated from the *locatio conductio*¹⁸⁵ of Roman law.¹⁸⁶ Roman law identifies

¹⁸³ On-demand gig workers are still classified as independent contractors. This classification conundrum requires a constitutional challenge or alternatively legislative intervention.

¹⁸⁴ Grogan 2020:3.

¹⁸⁵ Contract of letting and hiring.

¹⁸⁶ Grogan 2020:3.

three different types of contracts of letting and hiring, namely,¹⁸⁷ *locatio conductio rei*,¹⁸⁸ *location conductio operis*,¹⁸⁹ and the *locatio conductio operarum*.¹⁹⁰ The contract of employment, as it is known today, developed from *locatio conductio operarum*, which in Roman law applied only to menial workers.¹⁹¹

The shortcomings associated with the common law on matters pertaining to, e.g. the inequality in bargaining power between parties, the absence of a right to demand better working conditions, exploitation of labour, etc., subsequently resulted in an increased need to regulate the employment relationship by means of statutory intervention.¹⁹² The *Masters and Servants Ordinance* of 1841,¹⁹³ which was later replaced by the *Master and Servants Act* of 1856, constituted some of the first statutory intrusions associated with employment law. Various other labour law statutes were subsequently passed during the period 1911 to 1918 with the primary aim of regulating matters pertaining to employee conditions of service.¹⁹⁴ Labour legislation such as the *LRA* and the *BCEA* in its current forms are, therefore, products of this statutory evolution.

The mentioned statutory intrusion into the common law relating to the employment relationship, which will be explored later in this study, was inspired by the realisation that the law had lagged behind conditions in modern commerce and industry and also by the recognition of fundamental rights,¹⁹⁵ which required expression in labour legislation.

¹⁸⁷ Grogan 2020:3.

¹⁸⁸ The letting and hiring of a specific thing for money.

¹⁸⁹ The Independent contractor.

¹⁹⁰ The contract of service.

¹⁹¹ Grogan 2020:3.

¹⁹² Grogan 2014:3.

¹⁹³ *Masters & Servants Act* 15/1856.

¹⁹⁴ Van Jaarsveld & Van Eck 2005:205.

¹⁹⁵ Grogan 2020:3-4.

In the matter of *SA Broadcasting Corporation v McKenzie*,¹⁹⁶ the Labour Appeal Court identified clear distinguishing characteristics with respect to an employment relationship versus an independent contractor. Myburg JP, to this end, provides that the 'object of the contract of service is the rendering of personal services by the employee to the employer. The services are the object of the contract. The object of the contract of work is the performance of a certain specified work for the production of a certain specified result.'¹⁹⁷

The South African courts have also been placing much reliance on a number of judicial tests in an attempt to distinguish between the requirements of a *locatio conductio operarum* and, therefore, the Roman law contract of employment and the *locatio conductio operis*, which refers to the Roman law independent contractor contract. An overview of the relevant judicial tests will be provided in the next section of this chapter, with a view to further expand on the common law classification of labour.

3.5 JUDICIAL TESTS AFFECTING THE CLASSIFICATION OF LABOUR

It is in the interest of this study to turn to and dissect the common law judicial tests affecting the classification of labour in South Africa. This is necessary to ultimately be able to determine the classification of on-demand workers as either employees or independent contractors. The courts, to this end, have developed several common law tests for distinguishing between the requirements for a *locatio conductio operarum*¹⁹⁸ and a *locatio conductio operis*.¹⁹⁹

The *locatio conductio operarum* or the ordinary contract of employment is defined as a reciprocal contract in terms of which an employee places his services at the disposal of

¹⁹⁶ *SA Broadcasting Corporation v McKenzie* (1999) 20 ILJ 585 (LAC):par. 9.

¹⁹⁷ *SA Broadcasting Corporation v McKenzie*:par. 9(1).

¹⁹⁸ This refers to the Roman law contract of service.

¹⁹⁹ This refers to the Roman law contract for work.

another person or organisation at a determined or determinable remuneration in such a way that the employer is clothed with authority over the employee and exercises supervision regarding the rendering of the employee's services.²⁰⁰ *Locatio conductio operis*, in contrast, is concluded between an employer and an independent contractor and is, therefore, a reciprocal contract between parties in terms of which the independent contractor undertakes to build, manufacture, repair or alter a corporeal thing within a certain period and where the employer undertakes to pay the contractor a certain reward.²⁰¹ It is, however, not always easy to distinguish the correct relationship as outlined above, which prompted courts to establish the common law judicial test to classify the relationship between parties.²⁰²

The mere existence of judicial tests to determine the status of contracts and subsequent relationships flowing from such serve as an indication of the historical and, therefore, long-standing nature of classification difficulties associated with determining the nature of contractual relationships. The most prominent common law tests to determine the actual working relationship between the parties are the 'supervision-and-control test', the 'organisation or integration test' and the 'economic-dependency test'.²⁰³ The 'control test', which is a distinct feature of the ordinary contract of employment, has been used to distinguish between the contract of employment and other contracts.²⁰⁴ Control in the context of this test refers to the employer's authority to issue instructions to the employee, which does not have to be absolute.²⁰⁵ The 'organisation or integration test' considers the extent to which a person is part of the organisation and, therefore, not just an accessory to the business in an attempt to establish whether a person is an employee or an

²⁰⁰ Du Plessis & Fouché 2019:9.

²⁰¹ Du Plessis & Fouché 2019:9-10.

²⁰² Du Plessis & Fouché 2019:10.

²⁰³ Van Niekerk *et al.* 2019:64.

²⁰⁴ Du Plessis & Fouché 2019:10.

²⁰⁵ Du Plessis & Fouché 2019:10.

independent contractor.²⁰⁶ The ‘economic test’ seeks to determine whether, as a matter of economic reality, the worker is reliant on the hiring party to earn a living (employee) or is self-reliant and independent (contractor).²⁰⁷ All the mentioned tests proved to be inadequate to distinguish conclusively between employees and independent contractors.

It is, however, the ‘dominant impression test’ that prevailed and that ultimately found favour with the courts.²⁰⁸ This test has been widely used by South African courts, such as in the matter of *Denel (Pty) Ltd v Gerber*,²⁰⁹ where Zondo J, based on the dominant impression test, held the applicant was an independent contractor rather than an employee.²¹⁰ In *SABC v Mc Kenzie*, the court provided distinguishing characteristics and, therefore, provided crucial guidance to distinguish between employment relationships and independent contracts. AJ Molahlehi, in the matter of *Linda Erasmus Properties Enterprise (Pty) Ltd v Lucky Mhlongo & Others*,²¹¹ also emphasised that ‘the dominant impression test has since *Ongevallekommissaris v Onderlinge Verskeringsgenoodskap AVBOB*²¹² and *Medical Association of SA & others v Minister of Health & others*,²¹³ gained more support from the courts and the various dispute resolution bodies’.²¹⁴

The court, in applying the dominant impression test, would take into account factors such as:

the right to supervision, the extent to which the worker depends on the employer, whether the employee is allowed to work for another, whether worker is required to devote a specific time to his

²⁰⁶ Nacubo Business Officer “Employee or independent contractor”, <https://www.tru.ca/finance/pro-manual/contract-index/contract-emp.html> (accessed on 18 October 2023).

²⁰⁷ Lebowitz “What is the economic realities test?”, <https://whoismyemployee.com/2017/01/10/what-is-the-economic-realities-test/> (accessed on 18 October 2023).

²⁰⁸ Du Plessis & Fouché 2019:11.

²⁰⁹ (2005) 26 ILJ 1256 (LAC).

²¹⁰ *Denel (Pty) Ltd v Gerber*:par. 39.

²¹¹ (2007) 28 ILJ 1100 (LC).

²¹² 1976 (4) SA 446(A).

²¹³ (1997) 18 ILJ 528.

²¹⁴ *Medical Association of SA & others v Minister of Health & others*:par. 12.

work, whether the worker is obliged to perform his duties personally, whether the worker is paid according to a fixed rate or a commission, whether the worker provides his or her own tools and whether the employer has the right to discipline the worker to obtain the dominant impression.²¹⁵

This test is, therefore, seen as the standard common law test of employment used by our courts to determine whether a person is an employee or an independent contractor.²¹⁶ In view of the above, the statutory classification of labour will be the focus of the part that follows.

3.6 SOUTH AFRICAN LEGISLATIVE FRAMEWORK AND EMPLOYEE CLASSIFICATION

Although the port of entry into the employment relationship remains the common law contract of employment, the conduct of the parties is regulated largely by statute law and the rules created in terms of such statutes.²¹⁷ Common law principles are, therefore, still applicable, although greatly augmented by legislation, especially where labour legislation is silent on a particular issue.²¹⁸ It, therefore, provides the basis for the modern-day contract of employment.²¹⁹

A discussion on the South African legislative framework guiding employee classification and related matters must be undertaken within the context of the constitutional framework guiding such.²²⁰ According to Van Niekerk *et al.*, section 23 of the *Constitution* establishes a set of broadly expressed labour rights that accrue to a variety of parties, including but

²¹⁵ Basson *et al.* 2009:27.

²¹⁶ Basson *et al.* 2009:27.

²¹⁷ Du Plessis & Fouché 2019:3.

²¹⁸ Du Plessis & Fouché 2019:9.

²¹⁹ Du Plessis & Fouché 2019:7.

²²⁰ See Chapter 3, heading 3.3 for a detailed discussion on the South African Constitutional perspective.

not limited to employers, workers and their respective representative organisations.²²¹ The mentioned constitutional provision, therefore, serves as an enabling provision for all other labour legislation. The next section will focus on the definition of 'employee' as contained in some of the relevant pieces of labour legislation in order to determine its relevance to on-demand gig workers or otherwise as the primary focus of this study.

The *LRA* defines an 'employee' as:

- (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
- (b) any other person who in any manner assists in carrying on or conducting the business of an employer, and "employed" and "employment" have meanings corresponding to that of "employee."²²²

The definition mentioned above is also contained in the *BCEA*,²²³ *EEA*²²⁴ and the *SDA*.²²⁵ A common feature of the definition of 'employee' in all the mentioned pieces of legislation is the express exclusion of independent contractors. In *Phaka and Others v Bracks and Others*,²²⁶ the LAC confirmed that in an instance where employees engaged in an owner-driver scheme, their relationship with the company did not amount to a relationship of employment. The *LRA*²²⁷ and the *BCEA*²²⁸ further contain a rebuttable presumption of employment, which applies only to persons earning below the earning threshold as determined from time to time and which is aimed at assisting with determining who is an 'employee'.²²⁹ All the mentioned definitions are rather restrictive and, in the main, expressly exclude on-demand gig workers from the protections and rights as

²²¹ Van Niekerk *et al.* 2019:39.

²²² Section 213 of the *LRA*.

²²³ Section 1.

²²⁴ Section 1.

²²⁵ *Skills Development Act 97/1998*:sec. 1.

²²⁶ [2015] 5 BLLR 514 (LAC);par. 34.

²²⁷ See sec. 200A of the *LRA*.

²²⁸ See sec. 83A of the *BCEA*.

²²⁹ See the discussion in para. 3.6.1 where the presumption (*LRA* s 200 A) as to who is an employee is examined.

encapsulated in the mentioned pieces of legislation due to their classification as independent contractors.

The rights accorded to ‘employees’ in the mentioned statutes are comprehensive, as is evident from the purposes of the mentioned legislation. The *LRA*, for instance, has the object of advancing economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act,²³⁰ which *inter alia* include the rights to collective bargaining in the workplace,²³¹ the formulation of industrial policy²³² and the right to the effective resolution of disputes.²³³ The *BCEA* also has as its purpose the advancement of economic development and social justice by fulfilling the primary objects of this Act,²³⁴ which include giving effect to and regulating the right to fair labour practices conferred by section 23(1),²³⁵ the establishment and enforcement of basic conditions of employment,²³⁶ the regulation of variations to basic conditions of employment²³⁷ and to give effect to the obligations incurred by the Republic as a member state of the ILO.²³⁸ The *EEA* sets out to achieve equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination²³⁹ and implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups in order to ensure their equitable representation in all occupational categories and levels in the workforce.²⁴⁰ The

²³⁰ See sec. 1 of the *LRA*.

²³¹ See sec. 1(c)(i) of the *LRA*.

²³² See sec. 1(c)(ii) of the *LRA*.

²³³ See sec. 1(d)(iv) of the *LRA*.

²³⁴ See sec. 2 of the *BCEA*.

²³⁵ See sec. 2(a) of the *BCEA*.

²³⁶ See sec. 2(a)(i) of the *BCEA*.

²³⁷ See sec. 2(a)(ii) of the *BCEA*.

²³⁸ See sec. 2(b) of the *BCEA*.

²³⁹ See sec. 2(a) of the *EEA*.

²⁴⁰ See sec. 2(a) of the *EEA*.

SDA inter alia aims to develop the skills of the South African workforce²⁴¹ and to increase the levels of investment in education and training in the labour market.²⁴²

The advent of the *NMWA*, *however*, seems to have ushered in a glimpse of hope for on-demand gig workers in South Africa, *albeit* this may be confined to their possible entitlement to the payment of a ‘minimum wage.’ This assertion is made against the background of the definition of a ‘worker’ as contained in the *NMWA*, which defines a ‘worker’ as any person who works for another and who receives, or is entitled to receive, any payment for that work, whether in money or kind.²⁴³ This definition, at face value, seems to include on-demand gig workers. It is, however, my opinion that even if the *NMWA* were to be made applicable to on-demand gig workers, it would still not entitle them to the labour protections as contained in other labour legislations.

The challenge in this regard is, however, primarily found in the fact that the matter remains untested in a court of law and, therefore, remains unchallenged. A solution to the plight of on-demand gig workers could well be to amend the definition of ‘employee’ in all labour legislations to accord with that of the *NMWA*, which provides a broad definition of the concept and refers to ‘workers’ rather than employees. The suggested amendment will, however, have to be very specific in its application to on-demand gig workers as it would, in the absence of judicial precedent in this regard, still be without value. These suggested amendments, along with a code of practice as a means to regulate on-demand gig work in South Africa, may, however, be a more viable solution to the current classification conundrum associated with these workers.

²⁴¹ See sec. 2(1)(a) of the *SDA*.

²⁴² See sec. 2(1)(b) of the *SDA*.

²⁴³ See sec. 1 of the *NMWA*.

3.6.1 Presumption as to who is an employee in terms of section 200A of the *LRA*

A discussion and study on matters pertaining to the legal framework regulating on-demand work in South Africa would be incomplete without determining the true meaning of the term 'employee'. This is necessary to ultimately be able to determine whether on-demand gig workers are employees or independent contractors.

South Africa, as a member state, heeded the call of the ILO by making provision for this legal presumption in national legislation, as is evident in section 200A²⁴⁴ of the *LRA*, which contains a rebuttable presumption²⁴⁵ as to who is an employee. Section 83A²⁴⁶ of the *BCEA* contains an identical rebuttable presumption aimed at determining who falls within the purview of being classified as an 'employee'. The two mentioned pieces of legislation provide as follows:²⁴⁷

Until the contrary is proved, a person who works for or renders services to any other person is presumed, regardless of the form of the contract, to be an employee if any one or more of the following factors are present:

- (a) the manner in which the person works is subject to the control or direction of another person;
- (b) the person's hours of work are subject to the control or direction of another person;
- (c) in the case of a person who works for an organisation, the person forms part of that organisation;

²⁴⁴ Sections (1)-(4).

²⁴⁵ Du Plessis & Fouché 2019:12.

²⁴⁶ Sections (1)-(3).

²⁴⁷ *LRA*:sec. 200A.

- (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;
- (e) the person is economically dependent on the other person for whom he or she works or renders services;
- (f) the person is provided with tools of trade or work equipment by the other person or
- (g) the person only works for or renders services to one person.

It is interesting to note that the above-mentioned legislative provision contains clear elements of the common law judicial tests for the classification of labour as discussed in this study. It, therefore, combines the control test, the organisation test, and the economic test and, therefore, accords with the dominant impression test as preferred by the courts.

The effect of the legislative provision in question is that a person who earns less than the *BCEA* threshold (as determined by the Minister of Labour from time to time, currently R241 110.59 as of 1 March 2023) is presumed to be an employee if any of the above indicators is present.²⁴⁸ The effect of section 83A is that if an employer fails to prove that a person is an independent contractor, that person is deemed to be an employee. This provision, therefore, prevents employers from circumventing the law and depriving persons who are, in fact, employees of the legislative rights and protection accorded to employees.²⁴⁹ It is, however, important to note that the presumption does not alter the statutory definition of 'employee' and that the presence of one or more of the seven factors mentioned above does not mean that the person is, in fact, an employee.²⁵⁰ Ndlovu JA, in *Universal Church of the Kingdom of God v Myeni and Others*,²⁵¹ opines that a proper

²⁴⁸ Du Plessis & Fouché 2019:12-13.

²⁴⁹ Du Plessis & Fouché 2019:13.

²⁵⁰ Van Niekerk *et al.* 2019:66.

²⁵¹ (2015) 36 ILJ 2832 (LAC):par. 40.

construction of section 200A of the *LRA* requires that there must be a legally enforceable agreement or some contractual working in place between the parties for section 200A to apply. It, therefore, follows that reliance on section 200A alone will not stand the test of time in determining who is an employee.

It is submitted that the difficulty in classifying on-demand workers as employees constitutes the primary reason for leaving such workers vulnerable to exploitation by unscrupulous employers. The issue of vulnerable employees has been dealt with in the *Kylie* case.²⁵² The LAC,²⁵³ in this case, found that the term ‘everyone’ in section 23(1) of the *Constitution* should be interpreted in its widest possible fashion and, therefore, included prostitutes under the definition of employees.²⁵⁴ Similarly, in the *Discovery* case,²⁵⁵ the LC²⁵⁶ also held that the word ‘everyone’ in section 23(1) of the *Constitution* included a foreign national who worked without a valid work permit which qualified him as an employee.²⁵⁷ The mentioned case laws serve as evidence of the stance that the South African courts have taken in respect of ‘vulnerable’ workers and the subsequent protection being afforded to employees in this regard.

The predicament, however, remains that on-demand gig workers are currently classified as independent contractors and are therefore not able to benefit from the legal provision under discussion as well as from other protections contained in the South African labour law framework afforded to ‘employees’. The difficulties associated with granting this worker category ‘employee’ status are, therefore, ongoing.

²⁵² *Kylie v Commission for Conciliation, Mediation and Arbitration & Others.*

²⁵³ Labour Appeal Court.

²⁵⁴ Viviers & Smit 2014:63.

²⁵⁵ *Discovery Health v CCMA and Others.*

²⁵⁶ Labour Court.

²⁵⁷ Viviers & Smit 2014:65.

3.7 SOUTH AFRICAN CASE LAW IN RESPECT OF ON-DEMAND GIG WORK

It is vital to explore the views of the South African courts with respect to the classification of on-demand gig workers in a pursuit to research the topic under discussion comprehensively. This is especially so as judicial precedent constitutes one of the primary sources of law and is therefore deserving of consideration in a study of this nature. This research has, however, found that there is limited case law available in South Africa on the classification of on-demand gig workers, which unfortunately does not bode well for affected workers in their plight for ‘decent work’.

The following section will highlight selective parts of the two Uber decisions, which currently constitute the only case law in this regard.²⁵⁸ The two cases referred to are the *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others*²⁵⁹ (hereafter referred to as the CCMA case) and the *Uber SA Technology Services (Pty) Ltd v National Union of Public Service & Allied Workers* (hereafter referred to as the LC case).²⁶⁰

The CCMA, in this 2017 matter that served before it, had to decide whether Uber drivers are employees of *Uber Technologies South Africa (Pty) Ltd* (“Uber SA”) for purposes of the *LRA* as defined in section 213.²⁶¹ This followed after the drivers in question referred an unfair dismissal dispute to the CCMA after their ‘deactivation’ by Uber.²⁶² Uber argued that drivers are not employees of Uber BV and, therefore, not employees of Uber SA,

²⁵⁸ The Uber decisions will also form the basis for the comparative analysis with foreign jurisdictions in chapter 4 of this study.

²⁵⁹ *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others*.

²⁶⁰ *Uber South Africa Technology Services (Pty) Ltd v NUPSAW and Others*.

²⁶¹ *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others*:8.

²⁶² *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others*:10.

which is ancillary to Uber BV.²⁶³ Uber further argued that drivers are not employees a result of the following reasons: There is no legal obligation on the part of drivers to drive any Uber-registered vehicle or to use the Uber App,²⁶⁴ and there is no right to instruct a driver to drive his vehicle and drivers, therefore, have a choice in this regard,²⁶⁵ a partner-driver may employ another driver to drive,²⁶⁶ drivers are free to work whenever they like, on anything else,²⁶⁷ the partner-driver is required to supply a vehicle and all associated expenses;²⁶⁸ the risk of profit or loss is borne by the driver-partner as an independent contractor;²⁶⁹ and that a driver is free to move from one partner to another.²⁷⁰ Uber, as a result of the above, objected to the CCMA's jurisdiction in the said unfair dismissal cases, claiming that drivers were not employees of Uber BV and, therefore, not drivers of Uber SA as a subsidiary of Uber BV.²⁷¹

The drivers, as respondents in this CCMA matter, argued that they are employees of Uber SA due to the following reasons: Riders do not contract independent drivers, but Uber and Uber issue receipts for services rendered,²⁷² drivers are required to perform their

²⁶³ *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others*:24.

²⁶⁴ *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others*:25.

²⁶⁵ *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others*:25.

²⁶⁶ *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others*:25.

²⁶⁷ *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others*:25.

²⁶⁸ *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others*:25.

²⁶⁹ *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others*:25.

²⁷⁰ *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others*:25.

²⁷¹ *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others*:10.

²⁷² *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others*:27.

tasks personally,²⁷³ Uber controls their conduct, and how they do work through rating systems,²⁷⁴ Uber controls the actual conditions under which business is done,²⁷⁵ Uber's power to terminate the working relationship attracts the protection of the *LRA*,²⁷⁶ Uber controls driver performance and also have incentive schemes available to drivers,²⁷⁷ drivers may not allow another to drive on their account and driving must be personally performed,²⁷⁸ and that the local subsidiary of an international company must be regarded as the employer to avoid severe disadvantage to South Africans working for foreign companies.²⁷⁹

The CCMA, however, rejected the jurisdictional challenge brought by Uber²⁸⁰ and used the Code of Good Practice: Who is an Employee? to justify its conclusion that the drivers are indeed employees of Uber SA for the purpose of *Labour Relations Act* 66 of 1995 as amended. The CCMA Commissioner,²⁸¹ in this regard, remarked that drivers render personal services,²⁸² that the relationship is indefinite,²⁸³ that drivers are subject to the control of Uber,²⁸⁴ that drivers are economically dependent on the ability to drive for

²⁷³ *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others*:28.

²⁷⁴ *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others*:28.

²⁷⁵ *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others*:28.

²⁷⁶ *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others*:29.

²⁷⁷ *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others*:30.

²⁷⁸ *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others*:31.

²⁷⁹ *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others*:32.

²⁸⁰ *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others*:62.

²⁸¹ Senior Commissioner Winnie Everett.

²⁸² *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others*:43.

²⁸³ *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others*:44.

²⁸⁴ *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others*:45.

Uber²⁸⁵ and that Uber drivers form an essential part of Uber's service.²⁸⁶ The CCMA ruling associated with this matter was subsequently taken on review to the LC by Uber.

The matter before the LC²⁸⁷ constituted an application²⁸⁸ to review and set aside the afore-mentioned CCMA ruling, which confirmed that the drivers in question were indeed employees as defined in s 213 of the *LRA* and, therefore, employees of Uber SA.²⁸⁹ The LC, therefore, had to deal with the CCMA ruling to the extent that it had the effect of confirming that the CCMA has jurisdiction to arbitrate claims of unfair dismissal referred by the drivers after they were 'deactivated' or denied access to the Uber App.²⁹⁰

It is for purposes of this research not necessary to also dissect the LC judgement associated with this matter. The crux of this matter lies in the fact that the LC overturned the CCMA's ruling, which confirmed that the Uber drivers in question were indeed employees. The reason for this decision was premised on the basis that there was no contractual relationship between the employee and the putative employer, nor was there an employment relationship with Uber SA.²⁹¹

Van Niekerk J interestingly notes that the nature of the engagement of drivers who use the Uber App (and indeed the many others who provide services in what has been described as the 'gig economy') poses a challenge to traditional conceptions of employment world-wide, and has tested the boundaries of the protection extended to

²⁸⁵ *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others*:48.

²⁸⁶ *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others*:49.

²⁸⁷ *Uber South Africa Technology Services (Pty) Ltd v NUPSAW and Others*.

²⁸⁸ The CCMA and the Commissioner did not oppose this application. See par. 4 of LC Judgment.

²⁸⁹ *Uber South Africa Technology Services (Pty) Ltd v NUPSAW and Others*:3.

²⁹⁰ *Uber South Africa Technology Services (Pty) Ltd v NUPSAW and Others*:3.

²⁹¹ Stopforth 2023:301.

working people by domestic labour legislation.²⁹² This observation by the learned Judge succinctly summarises the classification conundrum currently facing on-demand gig workers in South Africa.

Van Niekerk J, in conclusion, emphasised that his judgment does no more than conclude that, on the facts, the drivers were not employees of Uber SA and that they, therefore, have no right to refer an unfair dismissal dispute to the CCMA against Uber SA.²⁹³ The question as to whether the referring parties were employees of Uber BV was left open by the LC as it argued that this matter was not a matter before the CCMA and, consequently, not a matter before the LC.²⁹⁴

What is evident from the latter judgement is that on-demand gig workers in South Africa continue to be classified as independent contractors and still do not meet the requirements to be regarded as employees and, therefore, continue to be deprived of the protection of the law. The law needs to keep pace with social and other developments to be relevant, socially and otherwise, and this objective can be achieved through legislation or judicial means or by a combination of both.²⁹⁵ Consideration of a code of practice or amending the definition of ‘employee’²⁹⁶ in all labour-related legislation as a means to regulate on-demand gig work may also be an option to resolve the current predicament, which will be explored in the next section of this study.

²⁹² *Uber South Africa Technology Services (Pty) Ltd v NUPSAW and Others*:2.

²⁹³ *Uber South Africa Technology Services (Pty) Ltd v NUPSAW and Others* 98.

²⁹⁴ *Uber South Africa Technology Services (Pty) Ltd v NUPSAW and Others*:98.

²⁹⁵ ILO “Ramifications of the UK Supreme Court judgement in Uber B V v. Aslam and Others”, https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---act_emp/documents/newsitem/wcms_814852.pdf (accessed on 1 November 2023).

²⁹⁶ To refer to workers rather than employees as found in the *NMWA*.

3.8 PROPOSALS FOR EXTENDING THE LABOUR AND SOCIAL PROTECTIONS TO ON-DEMAND WORKERS

This section of this study constitutes an analysis of different proposals suggesting how labour and social protections can be extended to on-demand workers, as contained in the various pieces of literature available on the subject.

Whilst acknowledging that cooperatives are currently mainly confined to the ‘physical sector’ rather than the ‘digital sector’, Darcy du Toit argues that ‘cooperatives’²⁹⁷ could clear a path towards efficient and convenient use of technology for consumers that simultaneously incorporate fair labour standards.²⁹⁸ He further argues that the collective nature of this approach under decent working conditions will result in greater commitment and input from workers. Not being subject to the demands of shareholders, this sector is driven by sustainability rather than productivity, which allows for innovation.²⁹⁹ It is therefore argued that social justice can be pursued more readily on a cooperative basis, resulting in the extension of labour and social protection to on-demand gig workers.

The Fairwork Code of Good Practice on the Regulation of Platform Work,³⁰⁰ on the other hand, comprehensively attempts to interpret and apply South African law to protect the rights of platform workers in accordance with Constitutional principles.³⁰¹ Each principle will, however, due to limitations associated with this study, only be briefly referred to. This Code is founded on five principles of decent work, namely, fair pay, fair conditions, fair contracts, fair management and fair association.³⁰² The Code is, therefore, an attempt to

²⁹⁷ A cooperative is defined as an “autonomous association of persons united voluntarily to meet their common economic and social needs and aspirations through a jointly owned and democratically controlled enterprise organised and operated on co-operative principles. *Cooperatives Act 14/2005*:sec. 1.

²⁹⁸ Du Toit 2019(a):8.

²⁹⁹ Du Toit 2019(a):8.

³⁰⁰ Fairwork 2020(a):1-80.

³⁰¹ Fairwork 2020(a):5.

³⁰² Fairwork 2020(a):6.

provide these workers with greater legal protection than the existing legal framework by applying existing labour laws to gig economy workers in the country.³⁰³

The principle of fair pay requires that all workers must at least earn the same or similar amounts and links this principle to the *NMWA*, which already provides for ‘workers’ instead of only ‘employees’.³⁰⁴ The Code, however, proposes a sectoral determination as it views the *NMWA* as inadequate to cater for the work-related expenses of platform workers and thus proposes a living-wage after expenses to be paid.³⁰⁵ The fair conditions principle is linked to the *OHSA*³⁰⁶ and, therefore, is associated with the health and safety and general protection of workers.³⁰⁷ The code requires a broad interpretation of certain terms contained in the *OHSA* to include platform workers as well as the application of basic principles of delictual liability for platforms where the *OHSA* does not find application.³⁰⁸ The code further requires that risks associated with work processes, as well as proactive measures to protect workers, at least be contained in written policies.³⁰⁹ The principle of fair contracts is equated to the provisions of the *BCEA* in as far as these workers are to be regarded as employees as well as to that of the *CPA*³¹⁰ in as far as the relationships in question constitute a business transaction, as often argued by platforms.³¹¹ The code links the fair management principle to the *LRA*. It, therefore, requires due process in relation to decisions which are detrimental to the workers and to resolving disputes in general.³¹² It also, in relation to non-discrimination and related

³⁰³ University of Oxford “Fairwork Foundation announces Code of Good Practice to protect gig workers in South Africa”, <https://www.oii.ox.ac.uk/news-events/news/fairwork-foundation-announces-code-of-good-practice-to-protect-gig-workers-in-south-africa/> (accessed on 1 November 2023).

³⁰⁴ Fairwork 2020(a):6.

³⁰⁵ Fairwork 2020(a):6-7.

³⁰⁶ *Occupational Health and Safety Act 85/1993*.

³⁰⁷ Fairwork 2020(a):7.

³⁰⁸ Fairwork 2020(a):7.

³⁰⁹ Fairwork 2020(a):7.

³¹⁰ *Consumer Protection Act 68/2008*.

³¹¹ Fairwork 2020(a):7.

³¹² Fairwork 2020(a):7.

matters, associates this principle with the provisions of both the *EEA*³¹³ and *PEPUDA*³¹⁴ as a means to protect platform workers against unfair discrimination. The final principle of fair representation is linked to the relevant provisions of the *Constitution* dealing with the right to freedom of association (s.18), to assemble peacefully, demonstrate and picket (s.17), to form and join a trade union, participate in its activities and programmes and to strike (s.23).³¹⁵ It provides that any right that cannot be exercised under the *LRA* must be asserted directly under the mentioned Constitutional provisions. It is, however, argued that this is a utopian view of managing platform work and that work has become increasingly flexible and, in certain cases, more peculiar, which requires urgent adaptation of our existing labour law framework to bring about a state of decent work for all.³¹⁶

Smit and Stopforth argue that the definition of ‘employment’ as contained in our labour laws no longer seems to correspond with the reality of the modern-day working relationship.³¹⁷ This, it is argued, should be the starting point, as the mentioned definition is regarded as a primary way of acquiring employee rights and benefits.³¹⁸ It is against this background, and whilst acknowledging that this matter has yet to be tested in court, that the legal solution is argued to be the *NMWA*’s definition of a ‘worker’ as a basis for extending minimum wage rights to on-demand workers.³¹⁹ Smit and Stopforth opine that as an interim regulation, the definition of a “worker” as defined by the *NMWA* must be expanded. It is further argued and opined that many of the applicable conventions could be extended to on-demand workers, considering the extent to which they extend to “workers” and not “employees”.³²⁰ This broader approach, as suggested and which

³¹³ Employment Equity Act.

³¹⁴ *Promotion of Equality and Prevention of Unfair Discrimination Act 4/2000.*

³¹⁵ Fairwork 2020(a):10.

³¹⁶ Stopforth 2023:342.

³¹⁷ Smit & Stopforth 2022:374.

³¹⁸ Smit & Stopforth 2022:374.

³¹⁹ Smit & Stopforth 2023:175-176.

³²⁰ Smit & Stopforth 2023:175

detracts from the current binary approach, therefore resembles a unique tailor-made solution that will be suitable to the South African context. With the aforesaid in mind, the next section provides an analysis of possible solutions to extending labour protections to on-demand workers as gleaned from various South African scholarly publications.

Mokofe succinctly argues that decent work for platform workers will remain an illusion if these workers are not treated as employees and if the government continues to use its power to improve the conditions of these workers.³²¹ He also questions the narrow definition of ‘employee’, which limits the protection afforded to platform workers.³²² It is further his contention that these workers have been largely incorrectly classified as independent contractors instead of employees.³²³ He strongly advocates that the definition of ‘worker’ be expanded through the introduction of new forms to regulate this matter.³²⁴ He finally opines that more refined categories for self-employed workers are needed in order to identify platform workers and that the measurement of the size and nature of the platform workforce will offer greater insight into the need for labour regulation.

Van Eck and Nemusimbori are of the view that Van Niekerk J, in the matter of Uber SA (LC), should have reflected on international developments and should have considered the definition of “employer” in terms of section 200B of the *Labour Relations Act* 66 of 1995.³²⁵ They argue strongly that this judgment, which confirmed that Uber drivers were not employees due to the fact that there is no contractual agreement between the parties, resulted in a missed opportunity to resolve the current classification impasse in South Africa.³²⁶ They also opine that a broader constitutional approach should have been

³²¹ Mokofe 2022:177.

³²² Mokofe 2022:161.

³²³ Mokofe 2022:161.

³²⁴ Mokofe 2022:175.

³²⁵ Van Eck & Nemusimbori 2018:483.

³²⁶ Van Eck & Nemusimbori 2018:483.

adopted rather than a narrow contract-based outlook.³²⁷ The South African courts have been generous in this regard, as is *inter alia* evident in *SA National Defence Union v Minister of Defence* 1999 ILJ 2265 (CC) (“*SA National Defence Union*”), where the court held that uniformed soldiers are “akin” to employees and that they have the right to establish trade unions.

The proposals mentioned above for extending labour and social protections to on-demand workers are both of a binding³²⁸ as well as a non-binding nature.³²⁹ Whilst the mentioned proposals are yet to be tested, and whilst there is currently no conclusive outcome that fits the classification dilemma, the unique approaches, as discussed, do at least provide a solid foundation for resolving the current classification predicament. It is against this backdrop that the UK's position on classifying on-demand gig work, with specific reference to court judgments, will be explored.

3.9 CONCLUSION

At face value and based on the definitions of an “employee” and the “gig economy”, respectively, it is now evident that workers who operate within the gig economy are excluded from the definition of an ‘employee’ as defined in the *LRA* and *BCEA*. These workers, based on the definitions, are classified as independent contractors³³⁰ rather than employees.³³¹ This position has also since been confirmed by the Labour Court,³³² which does not assist in the plight of these unprotected and exploited workers. The mentioned digital platforms are further responsible for individualising workers by characterising them

³²⁷ Van Eck & Nemusimbori 2018:483.

³²⁸ Binding proposals are with reference to proposals that are of a legislative nature.

³²⁹ Non-binding proposals are with reference to proposals that must still be agreed upon or be adopted, e.g. cooperatives & the mentioned Code of Good Practice.

³³⁰ *locatio conductio operis*.

³³¹ *locatio conductio operarum*.

³³² See, *Uber South Africa Technology Services (Pty) Ltd v NUPSAW and Others*, where court did not specifically decide on the classification of on-demand workers and in the absence of such, they remain classified as independent contractors.

as individual businesses and, therefore, not as employees,³³³ which provides the basis for the exploitative practices associated with the mentioned workers.³³⁴

The fact that these workers are not entitled to employee-related benefits and other social entitlements,³³⁵ such as paid leave and social security benefits, as well as the fact that they determine their working hours³³⁶ and have to provide their tools of trade such as computers, vehicles, etc. further serve as indicators and solidifies the view that on-demand workers are independent contractors.³³⁷ The unfortunate avoidance by platforms to be classified as employers is further responsible for complicating this matter.³³⁸

On-demand workers are, as a result of the position mentioned above, not enjoying the protection of the labour laws of the country, which subsequently leaves such workers vulnerable to exploitation by unscrupulous operators.³³⁹ The challenges associated with on-demand work in South Africa range from classification-related problems to other secondary problems associated with poor remuneration, reduced bargaining power and rights, poor working conditions, social security deficiencies, unregulated working hours and a general lack of occupational health and safety compliance.³⁴⁰ The mentioned challenges, therefore, resemble those applicable to the rest of the globe as far as on-demand workers are concerned.

The main challenge in this instance lies in the fact that on-demand workers are not entitled to the labour protection mentioned above, which is only applicable to 'traditional

³³³ Du Toit & Howson 2022:713.

³³⁴ Fairwork 2020(a):10.

³³⁵ De Stefano 2016:6.

³³⁶ De Stefano 2016:5.

³³⁷ Smit & Stopforth 2022:368.

³³⁸ Smit & Stopforth 2022:368.

³³⁹ Smit & Stopforth 2022:368.

³⁴⁰ Heeks 2017:13-14.

employees', as a result of their classification as independent contractors. This should serve as an indication that there is a desperate need to invoke some form of *sui generis* regulatory response to remedy this predicament. Regulatory uncertainty is, however, not a new phenomenon, as the need for the adoption of new laws as necessitated by emerging economic forces has always been there.³⁴¹ The rate at which the on-demand economy is growing has, however, proven to be a regulatory challenge.³⁴²

I am therefore of the considered view that a code of practice, as well as the amendment of the definition of 'employee'³⁴³ in all labour-related legislation, as a means to regulate on-demand gig work in South Africa, would serve as a mechanism to bring about decent work to affected workers. The fact that matters affecting on-demand gig workers remain untested and therefore remain unchallenged in our courts continues to be a challenge, leaving on-demand gig workers destitute and keeping them waiting to be afforded an opportunity for 'decent work'.

Chapter 4 constitutes a comparative analysis with respect to on-demand work with specific reference to the position in the UK. The comparative analysis will be restricted to the position of the UK courts in classifying on-demand workers. The primary aim is to determine best practices that can be used to assist the classification conundrum associated with on-demand workers in South Africa and also to ascertain if there may be other means in addition to the above-suggested means to regulate on-demand gig work in South Africa ultimately.

³⁴¹ Schwartz & Einarson 2018:223.

³⁴² Schwartz & Einarson 2018:223.

³⁴³ To refer to workers rather than employees as found in the *NMWA*.

CHAPTER 4: UK PERSPECTIVES ON CLASSIFYING ON-DEMAND WORK

4.1 INTRODUCTION AND BACKGROUND

Chapter 3 analysed the legal framework relating to on-demand gig work with specific reference to the South African context. More importantly, Chapter 3 also analysed South African case law in respect of on-demand gig work, which will enable a comparison with the position of the UK courts. This, therefore, serves as a good starting point to perform a comparative analysis with respect to on-demand work with specific reference to the position in the UK.

The analysis, as indicated above, will be restricted to the position of the UK courts in classifying on-demand workers and will, therefore, not constitute a full comparison of the position of the UK legal system in its entirety. The chapter also serves as a response to one of the sub-questions, which focuses on the lessons that South Africa can learn from the United Kingdom's (UK) position with regard to extending labour protection to on-demand workers. All this is done in order to ultimately be able to draw on best practices from the UK and to be able to make valuable recommendations to mitigate the precarious position that on-demand gig workers in South Africa are faced with in their constant quest for 'decent work'. It, therefore, also aims to determine if there is a possible *nexus* between the suggested code of practice as a regulatory framework for on-demand workers in South Africa and the UK's position in this regard.

The comparison mentioned above is especially necessary within the context of the limited jurisprudence available in South Africa on the subject under research and based on the

fact that the only LC case³⁴⁴ also confirmed the independent contract nature of on-demand gig workers in South Africa. The mentioned case, therefore, does not assist the plight of these workers, and a comparison with the UK position, where the classification of on-demand workers and the extension of labour protection has already been dealt with, will be of great value to South Africa. This chapter, therefore, aims to establish if the UK's approach could serve as a solution to resolving the current conundrum of correctly classifying on-demand workers in South Africa. The focus will primarily be on the legal position as pronounced by the UK courts as determined in *Uber BV v Aslam*.³⁴⁵

4.2 PERSPECTIVES ON THE GROWTH OF ON-DEMAND WORK IN THE UK

The rapid rise of the gig economy in the UK is ascribed to Uber's launch in 2012, with 30,000 Londoners having installed the Uber app on their phones by 2016.³⁴⁶ It is evident from this statement that the gig economy started long before the advent of *Uber v Aslam*³⁴⁷ and that the protections currently being afforded to these workers, which mainly emanate from this groundbreaking case, were not in existence at the time. The UK industrial strategy,³⁴⁸ from as far back as 2016, also prioritised the development of artificial intelligence and data infrastructure,³⁴⁹ which provided fertile ground for the platform economy to develop and effectively function.

It is estimated that the number of workers in the UK who rely on platforms for at least part of their income has doubled between 2016 and 2021.³⁵⁰ The mentioned increase amounts to approximately 4.4 million workers and an increase from 5.8% to 14.7% of the

³⁴⁴ *Uber South Africa Technology Services (Pty) Ltd v NUPSAW and Others*.

³⁴⁵ [2018] EWCA Civ 2748.

³⁴⁶ See the Fairwork UK Ratings Report 2021(b):4.

³⁴⁷ *Uber BV v Aslam* [2021] UKSC 5.

³⁴⁸ The UK's Industrial Strategy is a partnership with businesses, local government and educational institutions in the UK and overseas to ensure the UK remains one of the best places in the world to innovate, do business, to invest and create jobs.

³⁴⁹ See the Fairwork UK Ratings Report 2021(b):8.

³⁵⁰ See the Fairwork UK Ratings Report 2021(b):6.

working-age population in the UK.³⁵¹ It is, however, important to realise that different platforms are affected by different conditions and circumstances and that a one-size-fits-all approach is therefore not possible. This is evident from the fact that food and grocery delivery platforms continued and even expanded their operations during the COVID-19 pandemic. In contrast, care work and beauty platforms had to halt their operations entirely due to lockdown restrictions.³⁵² This study is, however, not concerned with the variables affecting the operations of the different platforms, and this matter will, therefore, not be further explored.

The landmark ruling of the Supreme Court³⁵³ in *Uber v Aslam*,³⁵⁴ as handed down in February 2021, brought about major changes to the gig economy in the UK. The court, in this matter, declared that Uber drivers were not self-employed but rather Limb (b) workers who are entitled to certain employment rights from which they were previously excluded.³⁵⁵ This effectively established a third category of worker, which partly eradicates the restrictions associated with the binary system associated with worker classification. A detailed exposition of this case and matters associated thereto will be provided in 4.4 of this chapter.

Despite the mentioned and newly acquired employment rights, the precarities associated with the on-demand gig economy in the UK have, however, not been totally erased, as workers continue to experience challenges in this regard. One of the challenges raised by these workers is that of not being able to accurately determine how much they would get for a job. In the case of food delivery and ride-hailing platforms, even if they knew the

³⁵¹ See the Fairwork UK Ratings Report 2021(b):6.

³⁵² See the Fairwork UK Ratings Report 2021(b):14.

³⁵³ This is the final court of appeal in the UK for civil cases, and for criminal cases from England, Wales and Northern Ireland. The Supreme Court hears cases of the greatest public or constitutional importance affecting the whole population.

³⁵⁴ *Uber BV v Aslam* [2021] UKSC 5.

³⁵⁵ See the Fairwork UK Ratings Report 2022:17.

distance and time needed.³⁵⁶ Algorithmic opacities associated with pay, job distribution and performance monitoring are also raised as concerns by these workers.³⁵⁷ Other precarities associated with the gig economy, which seem to be continuing unabated, include discrimination by proxy caused by customer review systems as a result of the use of Artificial Intelligence (AI),³⁵⁸ the issuing of automated warnings to workers as part of automated performance management systems³⁵⁹ as well as the fact that the degradation in wages requires workers to take more risks to increase their income, which in turn poses a risk to their health and safety.³⁶⁰

It is evident from the above discussions that a lot of work has gone into improving the employment conditions and rights of on-demand gig workers in the UK. The fact that these workers are entitled to the right to receive the national minimum wage for each hour of work, rights to holiday pay, and rights to rest periods in respect of their working time marks considerable progress towards the realisation of their employment rights.³⁶¹ It is, however, also evident that there are still numerous challenges facing workers within the UK gig economy and that the need to continuously improve their employment conditions is ongoing.

4.3 OVERVIEW OF THE LEGAL FRAMEWORK GOVERNING ON-DEMAND GIG WORK IN THE UK

Whilst this study does not constitute a comparative study in respect of the two legal systems in question, it is, however, imperative to briefly explore the legal framework governing on-demand gig work in the UK to be able to meaningfully compare the position

³⁵⁶ See the Fairwork UK Ratings Report 2023:8.

³⁵⁷ See the Fairwork UK Ratings Report 2023:8.

³⁵⁸ See the Fairwork UK Ratings Report 2023:8.

³⁵⁹ See the Fairwork UK Ratings Report 2023:8.

³⁶⁰ See the Fairwork UK Ratings Report 2023:8.

³⁶¹ See *Uber BV v Aslam* [2021] UKSC 5.

as pronounced by the UK courts to that of the South African courts. This section will, therefore, provide a brief overview of the UK's constitutional model as well as its national labour law framework. This will, however, be confined to the extent that it is applicable to the classification of on-demand workers in the UK and will, therefore, be done within the parameters of this specific study. The ensuing discussions will also, where possible, make brief comparisons with similar South African labour legislation, which is done with a view to contextualising especially the objectives of the mentioned pieces of legislation. A top-down approach will, therefore, in a similar manner as followed in Chapter 3, be assumed to provide an overview of the mentioned legal framework.

4.3.1 The Westminster constitutional model

According to De Vos *et al.*,³⁶² constitutions are living documents that judges have to interpret and apply in an ever-changing political, economic and social environment. This statement emphasises the need to take a closer look at the UK's constitution, which is viewed as vital in a discussion involving a comparison of court judgments in respect of worker classification.

The UK, to this end, uses the Westminster constitutional model, which has its origins in Britain.³⁶³ A distinct feature associated with this specific constitutional model is that Parliament is of central importance, as it exercises sovereign or supreme law-making powers.³⁶⁴ The model is, therefore, characterised by parliamentary supremacy³⁶⁵ rather than constitutional supremacy, as in the case of the South African constitutional model. Parliament, therefore, has the power to make any law on any subject.³⁶⁶ This feature constitutes the main difference between the two models for purposes of the current

³⁶² De Vos *et al.* 2014:4.
³⁶³ De Vos *et al.* 2014:42.
³⁶⁴ De Vos *et al.* 2014:42.
³⁶⁵ De Vos *et al.* 2014:42.
³⁶⁶ De Vos *et al.* 2014:42.

comparative study. Despite the above, the Westminster constitutional model demands that the judiciary be independent,³⁶⁷ which resembles the South African position. Mechanisms included in the constitutional model under discussion to guarantee the mentioned independence include security of tenure for judges,³⁶⁸ judges may only be removed from office for contravention of law or misconduct³⁶⁹ and a guarantee associated with the salaries of judges.³⁷⁰ The next section contains a brief discussion on selected labour laws associated with on-demand gig workers, with specific reference to the UK. The mentioned discussion will, for purposes of this study, be confined to the *Employment Rights Act (ERA)*,³⁷¹ the *National Minimum Wage Act (NMWA)*³⁷² and the Working Times Regulations (WTR).³⁷³ Any reference to case law will be reserved for section 4.4 of this study, which is dedicated to this purpose.

4.3.2 The Employment Rights Act

The *ERA* broadly sets out the rights of employees in situations such as dismissal, unfair dismissal, parental leave, and redundancy.³⁷⁴ It further provides for matters associated with an employee's right to an itemised pay statement,³⁷⁵ the right not to suffer unauthorised deductions,³⁷⁶ the contractual requirements relating to Sunday work,³⁷⁷ as well as an employee's right to be represented.³⁷⁸ It is important to note that the *ERA* distinguishes between 'employees' and 'workers'. The applicability of this Act to on-

³⁶⁷ De Vos *et al.* 2014:44.

³⁶⁸ De Vos *et al.* 2014:44.

³⁶⁹ De Vos *et al.* 2014:44.

³⁷⁰ De Vos *et al.* 2014:44.

³⁷¹ 1996.

³⁷² 1998.

³⁷³ 1998.

³⁷⁴ NET LAWMAN "Employment Rights Act, 1996", <https://www.netlawman.co.uk/ia/era-1996> (accessed on 25 October 2023).

³⁷⁵ See section 8 of the *Employment Rights Act*, 1996.

³⁷⁶ See section 13 of the *Employment Rights Act*.

³⁷⁷ See section 37 of the *Employment Rights Act*.

³⁷⁸ See section 47 of the *Employment Rights Act*.

demand gig workers requires further investigation. To this end, the *ERA* in section. 230(3)(b) defines a worker as:

“(3) In this Act “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker’s contract shall be construed accordingly.”³⁷⁹

The *ERA*, therefore, aims to widen the eligibility for selected employment rights, drew on the discrimination law conception of contracts to do work personally, but also added the caveat that the other party should not be a client or customer of any profession or business undertaking carried on by the person doing the work.³⁸⁰ Fredman and Du Toit refer to this category of worker ‘as a “limb (b) worker”. The definition mentioned above of a ‘worker’ as contained in the mentioned *ERA* provision seems to be deliberately wider than that of an ‘employee’ as contained in the same Act. The rights and entitlements between workers and employees are, however, different in that whilst an employee is entitled to all statutory rights, a worker is *inter alia* unable to claim for unfair dismissal or a statutory redundancy payment.³⁸¹ This accords with the term ‘limb’ worker, as previously discussed. From a comparative point of view, it is evident that this legislative instrument contains elements found in both the *LRA* and the *BCEA*.

³⁷⁹ *Employment Rights Act*:sec. 230(3)(b).

³⁸⁰ Fredman & Du Toit 2019:263.

³⁸¹ All Answers LTD “Arguments for employment distinctions within law” <https://www.lawteacher.net/free-law-essays/employment-law/arguments-for-employment-distinctions-within-law-1005.php?vref=1> (accessed on 25 October 2023).

4.3.3 The National Minimum Wage Act

The *NMWA* has as its primary objective the creation of a statutory minimum hourly wage rate for employees and workers.³⁸² The Act *inter alia* provides for the determination of an hourly rate of remuneration,³⁸³ the exclusion of, and modification for, certain classes of persons,³⁸⁴ referral of matters to the Low Pay Commission,³⁸⁵ the duty of employers to keep records,³⁸⁶ Worker's right of access to records³⁸⁷ and related matters. The term 'worker', which seems to be the term mostly used throughout the Act, may also be argued to include on-demand gig workers. The Act, to this end, expressly provides that a person qualifies for the national minimum wage if he is an individual who is a 'worker'³⁸⁸ and who is working or ordinarily works in the UK under his contract.³⁸⁹ South Africa has a similar piece of legislation in the form of the *National Minimum Wage Act*, 9 of 2018, which has similar purposes associated with improving the wages of lowest paid workers, protecting workers from unreasonably low wages, preserving the value of the national minimum wage; promoting collective bargaining; supporting economic policy, and; reducing wage inequality.³⁹⁰ This, as previously mentioned, is the only labour law-related legislative instrument in South Africa, which, based on its definition, may be interpreted to possibly also include on-demand gig workers.

³⁸² Templeton "A guide to the National Minimum Wage and National Living Wage in 2022", <https://www.thegazette.co.uk/all-notices/content/104063> (accessed on 25 October 2023).

³⁸³ See sec. 2 of the *National Minimum Wage Act*, 1998.

³⁸⁴ See sec. 3 of the *National Minimum Wage Act*.

³⁸⁵ See secs. 5-8 of the *National Minimum Wage Act*.

³⁸⁶ See sec. 9 of the *National Minimum Wage Act*.

³⁸⁷ See sec. 10 of the *National Minimum Wage Act*.

³⁸⁸ *National Minimum Wage Act* 1998:sec. 2(a).

³⁸⁹ *National Minimum Wage Act* 1998:sec. 2(b).

³⁹⁰ CCMA "National Minimum Wage Act 9 of 2018", <https://www.ccma.org.za/wp-content/uploads/2023/03/National-Minimum-wage-Info-Sheet-2023-01.pdf> (accessed on 25 October 2023).

4.3.4 The Working Times Regulation Act

The WTR provides basic minimum rights to work a reasonable number of hours and have reasonable rest breaks and holidays.³⁹¹ This legislative instrument *inter alia* provides for a maximum weekly working time,³⁹² length of night work,³⁹³ daily rest,³⁹⁴ compensation related to entitlement to leave,³⁹⁵ dates on which leave is taken,³⁹⁶ and unfair dismissal.³⁹⁷ The WTR defines the term ‘worker’ in an identical manner to the *ERA* and, therefore, similarly, makes provision for on-demand workers to benefit from the protections afforded by this Act. Section 36(2) of the WTR, which is entitled ‘Agency workers not otherwise “workers”, is particularly interesting, as it, at face value, appears also to be relevant to on-demand workers. The provisions of the WTR can, in the main, be equated to that contained in the *BCEA*. However, as explained earlier in this study, it also contains certain provisions such as ‘unfair dismissals’, which can be equated to the *LRA* and provided for in the *ERA*.

4.3.5 The UK Good Work Plan

In addition to the UK’s Constitution and labour laws, it is of great value to also make reference to and briefly discuss the UK’s Good Work Plan (GWP).³⁹⁸ The GWP came about as a result of an independent review known as the Taylor Review of Modern Working Practices in July 2017.³⁹⁹ The Report consists of 53 recommendations as put

³⁹¹ Lexisnexis “Working time and flexible working – overview”, https://www.lexisnexis.com/uk/lexispsl/employment/document/393758/55T3-KWP1-F18B-R1JP-00000-00/Working_time_and_flexible_working_overview (accessed on 25 October 2023).

³⁹² See sec. 4 of the Working Time Regulations, 1998.

³⁹³ See sec. 6 of the Working Time Regulations, 1998.

³⁹⁴ See sec. 10 of the Working Time Regulations, 1998.

³⁹⁵ See sec. 14 of the Working Time Regulations, 1998.

³⁹⁶ See sec. 15 of the Working Time Regulations, 1998.

³⁹⁷ See sec. 32 of the Working Time Regulations, 1998.

³⁹⁸ This policy document was published by the UK Government in December 2018.

³⁹⁹ Citation “Everything you need to know about the good work plan”, <https://www.citation.co.uk/good-work-plan/> (accessed on 03 November 2023).

forward in the mentioned Taylor Review.⁴⁰⁰ A scrutiny of this plan has revealed that it contains numerous provisions aimed at improving the working conditions and employment status of platform workers.⁴⁰¹ The plan to this end constitutes a commitment by the UK Government to certain policy and legislative changes, which are directed at ensuring that workers can access fair and decent work, that both employers and workers better understand their employment relationships, and that the enforcement system is fair and purposeful.⁴⁰²

The UK Government's responses to the mentioned recommendations contained in the GWP, particularly in relation to platform workers *inter alia* include; bringing forward legislation to clarify employment status and reflecting modern working practices,⁴⁰³ the introduction of a right to request a more predictable and stable contract for all workers,⁴⁰⁴ developing ideas on how the prominence of WorkerTech could be increased,⁴⁰⁵ publication of a paper setting out government's approach to increasing pension participation and savings persistency among the self-employed,⁴⁰⁶ and encouraging gig platforms to enable individuals to be able to carry their verified approval ratings with them when they move from the platform and to share them with third parties,⁴⁰⁷ These policy provisions are confirmation of the UK Government's commitment to transforming the world of work, in order to accommodate all forms of work and to move away from the binary approach towards labour classification, which seems to be the primary cause for the current classification conundrum in South Africa.

400 Citation "Everything you need to know about the good work plan", <https://www.citation.co.uk/good-work-plan/> (accessed on 03 November 2023).

401 GOV.UK 2018.

402 GOV.UK 2018.

403 See response to recommendation 1 as contained in the GWP.

404 See response to recommendation 13 as contained in the GWP.

405 See response to recommendation 28 as contained in the GWP.

406 See response to recommendation 30 as contained in the GWP.

407 See response to recommendation 37 as contained in the GWP.

A critical finding made from the above analysis of the mentioned pieces of legislation is that for on-demand gig workers to enjoy the much-needed labour and social protection, it is necessary for them first to be classified as ‘workers’.⁴⁰⁸ This indeed appears to be the case in the UK, and on-demand workers there seem to enjoy the protection afforded by such legislation, *albeit* to a limited extent. The next section, which provides an outline of UK case law regarding the classification of on-demand gig work, will also attempt to expatiate further the extent of the mentioned protection afforded to these workers in the UK and the lessons South Africa can draw from such.

4.4 UK CASE LAW IN RESPECT OF THE CLASSIFICATION OF ON-DEMAND GIG WORK

This section of the study provides a comprehensive comparative perspective in regard to the classification of on-demand gig workers in the UK as a foreign jurisdiction. This is done with specific reference to the position of the UK courts in classifying on-demand workers. The UK is deemed to be the most relevant foreign jurisdiction for this study due to the fact that the common law relating to labour matters in South Africa is rooted partially in English law.⁴⁰⁹ This specific issue is important to be researched with a view to ultimately developing the South African labour law associated with the classification of on-demand gig workers.⁴¹⁰ It is also an attempt to respond to the main research question of this study, which is concerned with how South Africa can extend labour protection to on-demand workers through the application of the statutory classification of labour approaches as provided by law.

The below facts and discussions associated with UK case law on the classification of on-demand gig work are provided with the due understanding that under UK law,

⁴⁰⁸ *Uber BV v Aslam* [2021] UKSC 5:par. 1

⁴⁰⁹ *K v Minister of Safety and Security* (CCT52/04) [2005] ZACC 8.

⁴¹⁰ *Wyeth SA (Pty) Ltd v Manqele and Others* (JA 50/03) [2005] ZALAC 1:par. 31.

employment status, to a huge extent, depends on the agreed-upon terms as contained in a specific contract.⁴¹¹ It is evident from this statement that it remains possible for parties to negotiate express terms that are indicative of self-employment rather than employment.⁴¹² The focus of this specific study is, however, on situations where self-employment was not expressly negotiated and agreed upon by the parties concerned and, therefore, with specific reference to on-demand gig work as a form of precarious work.⁴¹³ The UK has a series of judicial decisions which confirm that gig workers are indeed workers with employment rights and also that platforms draft contracts in a manner that excludes gig workers from the scope of such rights by characterising them as self-employed.⁴¹⁴ To illustrate this assertion, a brief reference will be made to a relevant case before a comprehensive analysis of the *Uber v Aslam*⁴¹⁵ matter will be provided.

The Supreme Court in *Pimlico Plumbers v Smith*,⁴¹⁶ to this end, found that a gig worker who had been characterised as self-employed in his employment contract was, in fact, a so-called ‘Limb’ (b) worker,⁴¹⁷ or dependent contractor, with rights to holiday pay and equal treatment.⁴¹⁸ The focus of this study will, however, be on the most well-known case in this regard, with specific reference to the *Uber v Aslam*⁴¹⁹ matter.⁴²⁰ All discussions associated with the case will, for purposes of this study, be confined to the Supreme Court judgment, as the said court confirmed the judgments of all previous tribunals where the matter was heard. A brief background of the matter will be provided in an attempt to properly contextualise further discussions in respect of the mentioned case.

411 Dukes 2020:219.

412 Dukes 2020:219.

413 This statement serves as an indication that self-employment is not negatively viewed by everyone.

414 Dukes 2020:218.

415 *Uber BV v Aslam* [2021] UKSC 5.

416 *Pimlico Plumbers v Smith* [2018] 4 All ER 641.

417 See Section 4.3.2 of this study for discussion on the term ‘limb worker’.

418 Dukes 2020:218.

419 *Uber BV v Aslam* [2021] UKSC 5.

420 Hereafter referred to as the “Aslam”

4.4.1 Uber v Aslam background and judgment

The *Aslam* matter, which commenced in 2016 and spanned over five years, was initially brought by a group of Uber drivers under the leadership of Yaseen Aslam and James Farrar.⁴²¹ The specific claims brought against the platform pertained to a failure on the part of the platform to pay the National Minimum Wage and to grant paid annual leave.⁴²² The London Central Employment Tribunal (ET)⁴²³ found in their favour by finding that they were workers rather than independent contractors.⁴²⁴ Uber, not satisfied with the decision of the ET, subsequently took the matter on appeal. Their grounds of appeal were, however, rejected by HHJ Eady in the Employment Appeal Tribunal (EAT), which was satisfied that the ET did not err and that there was indeed a ‘worker’ contract between Uber and the drivers in question.⁴²⁵ Uber, once again not satisfied with the judgment of the EAT, referred the matter to the Supreme Court as the final appeal authority. The Supreme Court ultimately upheld the decision of previous tribunals that the claimant drivers were ‘workers’ who worked for Uber London under ‘worker’s contracts’, within the meaning of the statutory definition of a ‘worker’⁴²⁶ as will be further explored in the next section of this chapter. It is, however, vital to first summarise the judgment of the Supreme Court in *Aslam* before exploring the concept of ‘worker’ as confirmed in *Aslam* and as statutorily provided for in 230(3)(b) of the *ERA* and before discussing the labour protections that UK on-demand gig workers are entitled to and looking into the extent to which such is observed by UK employers.

The UK Supreme Court in *Aslam* ruled that Uber drivers are ‘workers’ and, therefore, entitled to a range of employment rights.⁴²⁷ There were three main questions to be

⁴²¹ Prassl 2022:956.

⁴²² Prassl 2022:956-957.

⁴²³ The ‘London Central Employment Tribunal’ is an independent tribunal which makes decisions in legal disputes around employment law.

⁴²⁴ Prassl 2022:957.

⁴²⁵ Prassl 2022:958.

⁴²⁶ Prassl 2022:961.

⁴²⁷ *Uber BV v Aslam* [2021] UKSC 5:par. 2.

answered in this case, namely, whether Uber drivers are ‘workers’, if Uber drivers are workers, how should their working time be determined and who they are employed by.⁴²⁸ This ground breaking case serves as an important step towards the realisation of adequate protection of ‘workers’ in the gig economy,⁴²⁹ as will be illustrated in the ensuing discussions. The court, in this case, confirmed that the Uber claimant drivers are ‘workers’ for the *ERA*, the *WTR*, as well as the *NMWA*, which will be further discussed in 4.4.3 of this study.⁴³⁰ This third category of worker in the UK, which is known as a so-called “limb (b)” worker, is recognised and provided for in sec. 230(3)(b) of the *ERA*.⁴³¹ Leggat L states that ‘Limb (b) of the statutory definition of a “worker’s contract” has three elements, namely, a contract whereby an individual undertakes to perform work or services for the other party, an undertaking to do the work or perform the services personally and a requirement that the other party to the contract is not a client or customer of any profession or business undertaking carried on by the individual.’⁴³² The concept of ‘worker’ within the meaning of section 230 (3)(b) of the *ERA* and on which the *Aslam* decision is founded will now be further investigated.

4.4.2 The concept of ‘worker’ as defined in sec. 230(3)(b) of the ERA, as confirmed in Uber v Aslam

The term ‘worker’ is defined as follows in sec. 230(3)(b) of the *ERA*:⁴³³

⁴²⁸ Fredman & Du Toit 2019:262.

⁴²⁹ Prassl 2022:965.

⁴³⁰ Adams 2021:221.

⁴³¹ Adams 2021:221.

⁴³² *Uber BV v Aslam* [2021] UKSC 5:par. 41.

⁴³³ Also see 4.3.2 of this study where the *Employment Rights Act*, 1996 has been discussed as part of the discussion providing an overview of the legal framework governing on-demand gig work in the UK.

“(3) In this Act “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker’s contract shall be construed accordingly.”⁴³⁴

The definition of a ‘worker’ set out in section 230(3) of the *ERA* goes beyond those engaged in a traditional contract of employment to include individuals who undertake to personally perform any work or services for another party to the contract.⁴³⁵ The essential question to be answered in each case, as held in *Jivraj v Hashwani*,⁴³⁶ is whether the person concerned performs services for and under the direction of another person in return for which he or she receives remuneration or, on the other hand, he or she is an independent provider of services who is not in a relationship of subordination with the person who receives the services.⁴³⁷ Leggatt L, however, states that while “subordination may sometimes be an aid to distinguishing workers from other self-employed people, it is not a freestanding and universal characteristic of being a worker.”⁴³⁸ It is further evident from the definition provided that there is an exclusion for circumstances where the other party to the contract can be considered a client or customer of any profession or business carried out by the individual.⁴³⁹

⁴³⁴ *Employment Rights Act*:sec. 230(3)(b).

⁴³⁵ This is expressly stated in 230(3)(b) and is also clearly distinguished from the provisions of 230(3)(a).

⁴³⁶ *Hashwani v Jivraj* [2011] UKSC 40.

⁴³⁷ See *Hashwani v Jivraj*:par. 34.

⁴³⁸ *Uber BV v Aslam* [2021] UKSC 5:par. 74. Also see *Clyde & Co LLP v Bates van Winkelhof* [2014] UKSC 32:par. 39.

⁴³⁹ See *Employment Rights Act*:sec. 230(3)(b).

The fact that all ‘employees’ are considered to be ‘workers’ does not imply that all ‘workers’ are ‘employees’, as stated by Elias LJ in *Stringfellow Restaurants Ltd v Quashie*.⁴⁴⁰ A thorough understanding of this specific distinction is considered vital for this study. An individual who does not fall within this definition will usually be regarded as genuinely self-employed.⁴⁴¹ The mentioned statutory provision,⁴⁴² in this instance, therefore, brings about legal certainty as far as the categorisation of on-demand gig workers in the UK is concerned, as will further become evident in the ensuing discussion associated with the *Aslam* matter.

One of the three main issues that were to be determined in *Aslam*, as previously mentioned, was whether the Uber drivers were ‘workers’.⁴⁴³ It is within the meaning of the statutory provision set out in section 230(3) of the *ERA* that Leggatt L stated that the claimant drivers were “workers” who worked for Uber London under “worker’s contracts”. In arriving at the above decision, reliance was placed on the “statutory approach”⁴⁴⁴ followed in *Hashwani Ltd v Belcher*⁴⁴⁵ to determine that these on-demand workers were ‘workers’ in terms of sec. 230(3)(b) of the *ERA*. He further states that employment law distinguishes between three types of people: those employed under a contract of employment, those self-employed people who are in business on their account and undertake work for their clients or customers, and an intermediate class of workers who are self-employed but who provide their services as part of a profession or business undertaking carried on by someone else.⁴⁴⁶ The statutory definition of a “worker” therefore

⁴⁴⁰ See *Stringfellow Restaurants Ltd v Quashie* [2012] EWCA Civ 1735;par. 5.

⁴⁴¹ *Uber BV v Aslam* [2021] UKSC 5.par. 38.

⁴⁴² See *Employment Rights Act*:sec. 230(3).

⁴⁴³ Also see 4.4.1 of Chapter 4 of this dissertation which deals with the background and judgment in the *Uber v Aslam* matter.

⁴⁴⁴ Adams 2021:222-223.

⁴⁴⁵ *Autoclenz Ltd v Belcher* [2011] UKSC 41.

⁴⁴⁶ *Uber BV v Aslam* [2021] UKSC 5;par. 38.

includes in limb (b) a further category of individuals who are not employees, as confirmed in *Aslam*.⁴⁴⁷

It has, therefore, been established that on-demand gig workers in the UK fall within the definition of a ‘worker’ provided for in section 230(3) of the *ERA*. Mokofe, against this background, opines that ‘the South African Labour Court should have adopted a broader approach and that it could have explored ways of piercing the legal complexities associated with triangular relationships created by online platforms and placed less emphasis on the existence of a contract of employment by recognising an employment relationship.’⁴⁴⁸ The next section of this study will focus on the limited protection that was extended to these workers in terms of the *ERA*, *WTR*, and the *NMWA* as a result of the *Aslam* judgment.⁴⁴⁹

4.4.3 *Uber v Aslam* and the ensuing labour protections being accorded to UK on-demand gig workers

In order to determine the extent to which South Africa can learn from this jurisdiction’s approach in classifying on-demand gig workers, it is necessary to analyse the specific labour law protections accorded to these workers in the UK. A discussion of this nature is important as on-demand gig workers are entitled to a number of specific Employment Law rights by virtue of their status. These rights include the right to receive the national minimum wage for each hour of work, rights to holiday pay and rights to rest periods in respect of their working time.⁴⁵⁰ Leggat L summarises the statutory rights claimed by ‘workers’ in this matter as ‘rights under the *National Minimum Wage Act*, 1998 and associated regulations to be paid at least the national minimum wage for work done; rights

⁴⁴⁷ *Uber BV v Aslam* [2021] UKSC 5:par. 71.

⁴⁴⁸ Mokofe 2022:173.

⁴⁴⁹ *Uber BV v Aslam* [2021] UKSC 5.

⁴⁵⁰ *Uber BV v Aslam* [2021] UKSC 5:par. 1, 3, 34.

under the Working Time Regulations 1998 which include the right to receive paid annual leave; and in the case of two claimants, one of whom is Mr Aslam, a right under the *Employment Rights Act* 1996 not to suffer detrimental treatment on the grounds of having made a protected disclosure (“whistleblowing”).⁴⁵¹

It has already been established that on-demand gig workers are falling within the ambit of ‘workers’ in terms of section 230(3)(b) of the *ERA* and that they consequently stand to benefit from all provisions and protections accorded to ‘workers’ flowing from all other labour law-related legislative instruments in this regard.⁴⁵² Emphasis will subsequently, for purposes of this section of the study, be on the labour protections associated with the *NMWA* and its Regulations, as well as the *WTR* as a result of the *Aslam* judgement.

The *NMWA*⁴⁵³ was promulgated to provide ‘workers’ within the meaning of this act, individuals working under a contract in the UK and those individuals who are not of school-going age anymore, with a right to the national minimum wage in the UK.⁴⁵⁴ The National Minimum Wage Regulations, 2015 determine what is deemed to be working time for the right to be paid the national minimum wage.⁴⁵⁵ Uber, in this matter, contended that, at most, drivers’ working time began when the passenger entered the car and ended when the trip was concluded.⁴⁵⁶ Leggat L, in explaining the entitlement of on-demand workers to a minimum wage, states that ‘Laws such as the *NMWA* were manifestly enacted to protect those whom Parliament considers to be in need of protection and not just those whom their employer designates as qualifying for it.’⁴⁵⁷

⁴⁵¹ *Uber BV v Aslam* [2021] UKSC 5:par. 34.

⁴⁵² Also see sections 4.4, 4.4.1 and 4.4.2 of chapter 4 of this dissertation for discussions on the term ‘worker’ as per sec. 230(3) of the *ERA*.

⁴⁵³ *National Minimum Wage Act*.

⁴⁵⁴ *National Minimum Wage Act*:sec. 1(2).

⁴⁵⁵ *Uber BV v Aslam* [2021] UKSC 5:par. 138.

⁴⁵⁶ Fredman & Du Toit 2019:272.

⁴⁵⁷ *Uber BV v Aslam* [2021] UKSC 5:par. 76.

One of the secondary questions associated with this case pertained to ‘what periods of times were the claimants working?’⁴⁵⁸ Uber contended that ‘the employment tribunal should have found that the claimants (on the assumption that they were “workers” at all) were only working under workers’ contracts during periods when they were actually driving passengers to their destinations.’⁴⁵⁹ Alternatively, Uber contend that the tribunal should have found that a claimant was only working under such a contract from the moment (and not until) he accepted a trip request.⁴⁶⁰ The court, in response to this question, held that for the purposes of calculating entitlements under the WTR and *NMWA*, drivers are deemed to be working not only when actively engaged on a trip but also when they are in their cars with the app switched on, waiting to be offered a job by the app.⁴⁶¹ The court further stated that there is no difficulty in principle in a finding that the time when a driver is “on call” falls within this definition of “working time” as defined in regulation 2(1) of the WTR.⁴⁶²

It has now been established that the claimant drivers for ride-hailing firm Uber are workers for the *ERA*, the WTR, and the *NMWA* and its Regulations. Whilst the mentioned protections and entitlements do not include the full scope of protections afforded to ‘employees’, it goes a long way towards ensuring ‘decent work’ for these vulnerable workers. It is, however, submitted that more attention needs to be provided to other much-needed labour protections such as guaranteed minimum pay, protection against harassment and unfair discrimination, freedom from discrimination, and the protection of collective rights⁴⁶³ in order to improve the conditions of these vulnerable workers further. Further research needs to, however, be performed to determine what these additional rights will entail within the context of on-demand gig workers in South Africa. The extent

⁴⁵⁸ *Uber BV v Aslam* [2021] UKSC 5:par. 121.

⁴⁵⁹ *Uber BV v Aslam* [2021] UKSC 5:par. 123.

⁴⁶⁰ *Uber BV v Aslam* [2021] UKSC 5:par. 123.

⁴⁶¹ Adams 2021:221.

⁴⁶² *Uber BV v Aslam* [2021] UKSC 5:par. 132-133.

⁴⁶³ Fredman & Du Toit 2019:277.

to which the entitlements and protections associated with this study as accorded to these workers are being implemented and observed by ‘employers’ in the UK remains to be seen and will therefore be further explored in the next section of this study.

4.4.4 Status on the modern-day implementation of the principles of *Uber v Aslam* in the UK

This section seeks to assess the extent to which ‘employers’ or ‘providers of work’ or ‘platforms’ in the UK are implementing and, therefore, observing the outcomes of the *Aslam* judgment issued on 19 February 2021. The said assessment will be with specific reference to the extent to which on-demand gig workers in the UK are provided with the right to receive the national minimum wage for each hour of work, rights to holiday pay and rights to rest periods in respect of their working time as accorded by the *NMWA*, the *ERA* and the *WTR*.

Whilst the *Aslam* landmark ruling is widely viewed as a progressive step towards achieving decent work for on-demand workers, there seems to be a fair amount of resistance to this judgment. The Insurance Journal reported on 23 November 2021 that Uber has already challenged a small part of the landmark ruling in relation to a judge’s comments, which suggests that Uber should enter into a direct contract with passengers when providing car journeys.⁴⁶⁴ Uber is seeking a ruling that isn’t the case, which it argues is in line with the London transport regulator’s guidance.⁴⁶⁵

⁴⁶⁴ Milligan “Uber UK accused of undermining court ruling on worker rights”, <https://www.insurancejournal.com/news/international/2021/11/23/643315.htm> (accessed on 5 November 2023).

⁴⁶⁵ Milligan “Uber UK accused of undermining court ruling on worker rights”, <https://www.insurancejournal.com/news/international/2021/11/23/643315.htm> (accessed on 5 November 2023).

There is also evidence that on-demand gig workers are experiencing growing forms of dissatisfaction associated with their working conditions and related matters.⁴⁶⁶ The International Labour Organisation reported that there is a general increase in the volume of worker protests on digital platforms.⁴⁶⁷ It is reported that the number of protests varied considerably across different platforms, while Uber and Deliveroo have far more protests than other platforms.⁴⁶⁸ It is said that the UK accounts for 13% of platform labour unrest across the world.⁴⁶⁹ This is a significant percentage for a country where the extension of labour protection to on-demand gig workers has already been dealt with. A study led by the University of Bristol has revealed that a huge percentage of gig economy workers in the UK are earning less than the minimum wage, with 52% of respondents having reported that they are earning less than the minimum wage.⁴⁷⁰ This is an indication of the low levels of compliance with the directives of *Aslam* and the fact that there is still a high prevalence of exploitation associated with this precarious work type in the UK.

4.5 A COMPARATIVE PERSPECTIVE ON THE POSITION OF THE UK COURTS VS SOUTH AFRICAN COURTS TO CLASSIFYING ON-DEMAND WORK

The respective positions of the UK courts, as well as that of the South African courts, to classify on-demand work have now been determined.⁴⁷¹ This section of the study, therefore, serves as a summary intended to highlight the different perspectives on the matter under research, with specific reference to court judgments. It is, therefore, not intended to be a repetition of previous discussions as already provided in the preceding chapters of this study.

⁴⁶⁶ See the ILO 2022 policy paper on the global analysis of worker protest in digital labour platforms.

⁴⁶⁷ ILO 2022:16.

⁴⁶⁸ ILO 2022:18.

⁴⁶⁹ Stuart 2023:289.

⁴⁷⁰ Kelly "Half of UK gig economy workers earn below minimum wages, study reveals", <https://www.theguardian.com/global-development/2023/may/11/half-of-uk-gig-economy-workers-earn-below-minimum-wage-study-reveals> (accessed on 5 November 2023).

⁴⁷¹ See Chapter 3 and Chapter 4 of this dissertation.

The identification of on-demand gig workers as employees or independent contractors for purposes of labour legislation has been a thorny issue worldwide, and courts in various jurisdictions have rejected the contention by Uber that they are not the employer of Uber drivers.⁴⁷² It has been established that in 2018, the LC in South Africa also had to determine whether Uber drivers are employees or to be regarded as independent contractors.⁴⁷³ Despite the CCMA⁴⁷⁴ having awarded the drivers in question with employee status, the LC, in a surprising turn of events, failed to come to the rescue of the drivers and held that they are, for all intents and purposes, independent contractors.⁴⁷⁵ This unfortunate state of affairs continues to leave on-demand gig workers in South Africa vulnerable to exploitation and other forms of abuse, as highlighted in this study.⁴⁷⁶

The study has further revealed that in contrast with South Africa, the position in the UK with respect to on-demand gig workers has, however, been more favourable than that as pronounced by the South African courts. The UK courts had to contend with similar disputes also brought by Uber drivers in respect of the same matter.⁴⁷⁷ This is evident from the matter of *Uber v Aslam*,⁴⁷⁸ where the Supreme Court aided Uber drivers by finding that they are workers and, therefore, entitled to certain employment rights.⁴⁷⁹

A key finding of this study is, therefore, that the position in the UK, as far as on-demand gig workers are concerned, is more favourable than that in South Africa and that on-demand gig workers in the UK, therefore, enjoy greater legal protection and recognition as 'workers'. Whilst the afforded protection is deemed to be of a limited nature and only

⁴⁷² Nemusimbori 2017:43.

⁴⁷³ Newaj 2022:1 Also see section 3.7 of Chapter 3 of this dissertation.

⁴⁷⁴ *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others*.

⁴⁷⁵ Newaj 2022:1.

⁴⁷⁶ See Chapter 2 of this dissertation. Also see section 4.4.1 of Chapter 4 of this dissertation.

⁴⁷⁷ Newaj 2022:1.

⁴⁷⁸ *Uber BV v Aslam* [2021] UKSC 5.

⁴⁷⁹ Also see section 4.4.3 of Chapter 4 of this dissertation.

with reference to the right to receive the national minimum wage for each hour of work, rights to holiday pay and rights to rest periods in respect of their working time, it is also viewed as a progressive step towards ensuring decent work for these workers.⁴⁸⁰ South African courts are yet to afford the same protection to on-demand gig workers.

The fundamental issue with specific reference to the South African position, as revealed by the mentioned case law, lies in the fact that the definition of 'employee' excludes independent contractors and, therefore, distinguishes between employment and self-employment.⁴⁸¹ It is, however, submitted that this dividing line between the two concepts is not always clear due to the phenomenon of 'disguised employment'.⁴⁸² The rebuttable presumption as to whether one is an employee, as contained in the *LRA*, also does not assist in the plight of these workers. In the *Myeni*⁴⁸³ matter, it was concluded that the words 'regardless of the form of the contract' contained in section 200A meant that the presumption only applied if there was an employment contract or some form of contractual arrangement in place. This being rarely the case for on-demand gig workers does not bode well for the precarious situation that these workers are finding themselves in.⁴⁸⁴

The analysis and comparison of the case law in question have, therefore, revealed that there is still a lot of work to be done by the South African courts to improve the conditions of on-demand gig workers in the country. What is required is a more generous approach to the application of employment rights, with due consideration of new and emerging

⁴⁸⁰ *Uber BV v Aslam* [2021] UKSC 5:par. 1, 3, 34. Also see section 4.4.3 of Chapter 4 of this dissertation.

⁴⁸¹ Newaj 2022:5.

⁴⁸² Newaj 2022:5.

⁴⁸³ *Universal Church of the Kingdom of God v Myeni and Others*.

⁴⁸⁴ Newaj 2022:5.

forms of work and, therefore, a purposive application of the law by the South African courts.⁴⁸⁵

4.6 CONCLUSION

This chapter constituted a comparative analysis with respect to on-demand work with reference to the position in foreign jurisdictions, specifically looking at the position in the UK. The focus was restricted to the position of the UK courts in classifying on-demand work. More importantly, its primary aim was to draw on best practices that can be used to assist the classification conundrum associated with on-demand workers in South Africa. It has, however, been noted that whilst the position in the UK compares favourably to that of South Africa, the UK is not without its fair share of problems as far as the on-demand economy is concerned.⁴⁸⁶ It is, however, submitted that emulation of the UK position or parts thereof will greatly contribute towards the achievement of decent work with reference to the South African on-demand economy.

It has been established through this research that the current labour market, which is associated with globalization and new technological innovation, creates a growing number of persons who cannot meaningfully be called employees and have no protection within the labour legislation of the country.⁴⁸⁷ These workers can, at the same time, not meaningfully be called independent contractors because they are also not independent in the real sense.⁴⁸⁸ The limitations prescribed by the *LRA*'s definition of an employee and other labour laws lack protection at the level of both individual and collective labour rights and, therefore, result in unfair deactivation, discrimination by both clients and the platform and poor collective bargaining power.⁴⁸⁹ This situation causes a predicament for

⁴⁸⁵ Newaj 2022:28.

⁴⁸⁶ Also see section 4.4.4 of Chapter 4 of this dissertation.

⁴⁸⁷ Nemusimbori 2017:42.

⁴⁸⁸ Nemusimbori 2017:29.

⁴⁸⁹ Smit & Stopforth 2023:175

the affected workers and requires urgent regulation to mitigate the adverse effects associated with the aforementioned. What becomes important, though, is to suggest and find successful ways to extend labour protection to on-demand workers through the application of the statutory classification of labour approaches in South Africa.

It has to this end been established that the *ERA* in the UK, and specifically section 230(3), contains a clear definition of a ‘worker’ which makes provision for both persons employed under an employment contract⁴⁹⁰ as well as persons employed under any other contract⁴⁹¹ and therefore resolving the classification conundrum currently being experienced in South Africa. This legislative instrument effectively establishes a third category of workers, which eradicates the binary approach to the classification of labour as the main cause of the classification conundrum in South Africa. The amendment of the current definition of an ‘employee’ as contained in South African labour legislation, *viz.* the *LRA*, *BCEA*, *EEA* and the *SDA*, to that of a ‘worker’ is therefore suggested to reflect a similar provision to that as contained in the *ERA*. The proposal to amend the mentioned legislation would, however, not entirely be a new feature as the definition of ‘worker’ already appears in the *NMWA*⁴⁹² and is already presented in a manner suggested in line with the *ERA*. It is therefore argued that the provisions of the *NMWA* are already applicable to on-demand gig workers in South Africa and that these workers are therefore entitled to the minimum wage as provided for in the Act and determined from time to time. This matter, however, remains untested, and the views of the South African courts in this regard are yet to be seen. The suggested amendment of the mentioned definition is made with reference to providing on-demand gig workers in South Africa with the right to receive

⁴⁹⁰ See sec. 230(3)(a) of the *Employment Rights Act*.

⁴⁹¹ See sec. 230(3)(b) of the *Employment Rights Act*.

⁴⁹² Section 1 of this Act defines a ‘Worker’ to mean ‘any person who works for another and who receives, or is entitled to receive, any payment for that work whether in money or in kind.’ This progressive definition sets the basis for the amendment of all other labour legislation in South Africa.

the national minimum wage for each hour of work, rights to holiday pay and rights to rest periods in respect of their working time as is applicable to UK workers.

It is further proposed that in addition to the amendment of the labour laws, as suggested above, a universal *code of practice* be implemented for on-demand gig workers in South Africa with the primary purpose of codifying other employment-related rights for this category of worker. This proposal accords with the opinion of Smit and Stopforth, which suggests that many of the applicable ILO conventions could be extended to on-demand workers if one considers the extent to which they extend to “workers” and not “employees”.⁴⁹³ The suggested *code of practice* is proposed to be made applicable to all sectors within the South African on-demand economy as separate codes would create difficulty in implementation. It may result in inconsistent protection being afforded to different sectors. This, according to Smit and Stopforth, is advanced to be a broader approach as compared to the binary approach to the classification of employment in the South African context.⁴⁹⁴

It is therefore submitted that the two approaches, as suggested above, would aid the process of extending labour and social protection to on-demand workers through the application of the statutory classification of labour approaches in South Africa. It would also give effect to their constitutional right to fair labour practices, as discussed in this study.⁴⁹⁵ In view of this, the next chapter will provide conclusions drawn from each chapter and recommendations relating to the legal classification of on-demand workers in South Africa.

⁴⁹³ Smit & Stopforth 2023:175.

⁴⁹⁴ Smit & Stopforth 2023:175.

⁴⁹⁵ Also see section 3.3 of Chapter 3 of this dissertation.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 INTRODUCTION AND BACKGROUND

This chapter serves to conclude this study, which is aimed at providing a legal analysis of the classification of on-demand workers in South Africa. It will accordingly set out the limitations of the study, followed by conclusions which seek to respond to the legal problem and research questions associated with the study. It will additionally make the necessary recommendations, which are directed at ultimately providing an exposition of how on-demand workers should ideally be legally classified within the South African context.⁴⁹⁶ The chapter will finally conclude with potential research topics pertaining to on-demand workers and the on-demand economy in general. The mentioned potential research topics are provided with reference to both the South African and international contexts.⁴⁹⁷

5.2 LIMITATIONS OF THE STUDY

The fact that this study constitutes a mini-dissertation resulted in numerous limitations in relation to providing a comprehensive legal analysis of the classification of on-demand workers in South Africa, as is evident from Chapter 1 of the study. The limitations herein can be summarised as follows: First, Chapter 2 had to be confined to a conceptualisation of the concepts of the gig economy, platform work and on-demand work, with specific reference to the South African context only. The reason for this specific limitation is that a discussion involving other jurisdictions, as far as this matter is concerned, would have

⁴⁹⁶ Also see of Chapter 5 of this dissertation.

⁴⁹⁷ Also see section 5.5 of Chapter 5 of this dissertation.

involved significant and protracted discussions and, thereby, resulted in the scope of the research being extensively exceeded.⁴⁹⁸ Secondly, the discussions associated with the legal framework relating to on-demand work in South Africa, as provided in Chapter 3, for similar reasons had to be provided to only a limited extent. An exposition of other jurisdictions in this regard would have been of no value as the intention of Chapter 3 is specifically aimed at providing an exposition of the South African legal framework as the basis for making comparisons in the ensuing chapters of the study.⁴⁹⁹ Thirdly, the comparative perspective with a foreign jurisdiction, as provided in Chapter 4 of this study, had to be restricted to a comparison with the UK position. Due to length limitations associated with the study, even this had to be only confined to the position of the UK courts to regulating and/or classifying on-demand workers and is therefore not a full comparison of the position of the UK legal system in its entirety.⁵⁰⁰

The research also provides informal recommendations in respect of the legal classification of on-demand workers with a view to indicate the way forward with respect to the topic under research. The informal nature of the mentioned recommendations also constitutes a limitation associated with this study.⁵⁰¹

In view of the mentioned limitations, the following section will provide conclusions, which serve as responses to the main as well as the sub-research questions of the study. All this is done to ultimately address the main legal problem associated with the study.

⁴⁹⁸ Also see Chapter 2 of this dissertation.

⁴⁹⁹ Also see Chapter 3 of this dissertation.

⁵⁰⁰ Also see Chapter 4 of this dissertation.

⁵⁰¹ Also see Chapter 5 of this dissertation.

5.3 CONCLUSIONS

Chapter 1 of this study serves as a comprehensive introduction and background for the study. The legal problem, as outlined in Chapter 1, lies in the fact that on-demand workers in South Africa do not currently enjoy the protection afforded to employees in terms of the labour laws of the country.⁵⁰² This exposes these workers to exploitative labour practices and acts of unfair labour practice on the part of platforms. Platforms often argue that their relationship with workers is pure of a business nature, where the platform merely acts as a supplier of a specific application or digital source to connect workers and clients and that there is, therefore, no employment relationship with the platform worker.⁵⁰³

In order to successfully respond to the main legal problem, this study was linked to several research questions.⁵⁰⁴ The main research question is concerned with how South Africa can extend labour protection to on-demand workers through the application of the statutory classification approaches of labour in South Africa.⁵⁰⁵ However, this main research question was not responded to in isolation. This study also considered an exploration of the modern-day gig economy as well as drawing a distinction between the different types of platform work within the South African context, which serves as the first sub-research question.⁵⁰⁶ The second sub-research question associated with this study focuses on the characteristics of on-demand work and how workers are left vulnerable.⁵⁰⁷ The third sub-research question focuses on the extent to which statutory frameworks afford protection to on-demand workers in South Africa.⁵⁰⁸ The final sub-research question focuses on the lessons that South Africa can draw from the UK's position.⁵⁰⁹ In

⁵⁰² Also see section 1.2 of Chapter 1 of this dissertation.

⁵⁰³ Fairwork 2020(a):5.

⁵⁰⁴ See section 1.3 of Chapter 1 of this dissertation.

⁵⁰⁵ See section 1.3 of Chapter 1 of this dissertation.

⁵⁰⁶ See section 1.3 of Chapter 1 of this dissertation.

⁵⁰⁷ See section 1.3 of Chapter 1 of this dissertation.

⁵⁰⁸ See section 1.3 of Chapter 1 of this dissertation.

⁵⁰⁹ See section 1.3 of Chapter 1 of this dissertation.

the ensuing paragraphs, the answers to the main question, as well as the mentioned sub-research questions, will be briefly stated.

Chapter 2 of this study set out to explore the modern-day gig economy, platform work and on-demand work within the South African context by conceptualising the mentioned concepts in response to the first sub-research question associated with the study.⁵¹⁰ This chapter commenced with a description as well as a definition of the ‘gig economy’ and found that this economy is associated with work that falls outside of the domain of traditional employment.⁵¹¹ It was further established that employment within the gig economy is dependent on online platforms that enable organisations or individuals to access an indefinite and unknown group of other organisations or individuals to solve specific problems or to provide specific services or products in exchange for payment.⁵¹² It also became evident that gig work cannot yet be classified as ‘decent work’, which is primarily a result of the conundrum associated with the classification of these workers as independent contractors, which subsequently does not entitle them to employment rights.⁵¹³

In this chapter, the concept of ‘platform work’ was also explored.⁵¹⁴ The study found that platform work refers to work where a digital platform forms the *nexus* between the platform, the client and the “workers”.⁵¹⁵ The concepts of platform work, gig economy and on-demand work were found to be synonymous and interrelated concepts.⁵¹⁶ The research focussed on the two different forms of platform work, namely, ‘crowd work’ and ‘on-demand work’. Whilst the focus of this study was not on ‘crowd work’, it was found to

⁵¹⁰ See Chapter 2 of this dissertation.

⁵¹¹ See section 2.2 of Chapter 2 of this dissertation.

⁵¹² See section 2.2 of Chapter 2 of this dissertation.

⁵¹³ See section 2.2.1 of Chapter 2 of this dissertation.

⁵¹⁴ See section 2.2.2 of Chapter 2 of this dissertation.

⁵¹⁵ See section 2.2.2 of Chapter 2 of this dissertation.

⁵¹⁶ See section 2.2.2 of Chapter 2 of this dissertation.

be a form of platform work that is mainly executed online and which allows platforms, clients and workers to operate from anywhere in the world digitally.⁵¹⁷

The remainder of Chapter 2 focussed on conceptualising the concept of ‘on-demand’ work as the basis of this specific study.⁵¹⁸ It was found that on-demand work, in contrast with crowd work, is focused on matching the online supply and demand of activities that are executed locally rather than online.⁵¹⁹ This novel work type was, to this end, therefore found to be task-based as well as location-based.⁵²⁰ It was further established that this form of platform work is characterised by work which is of a freelance and short-term nature, whose characteristics are contributory to the exploitative practices associated with this precarious form of work.⁵²¹ The prevalence of on-demand work in South Africa, which cuts across various sectors, including food delivery-, cleaning-, ride-hailing-, home-based care-, child care- and on-demand staffing services, has also been confirmed in this chapter of the study.⁵²² This chapter emphasised the precarious, vulnerable, unstable and insecure nature of on-demand work as well as the fact that these workers are being deprived of the protection afforded by the labour laws of the country.⁵²³ The chapter confirmed that the aforementioned adverse working conditions are also applicable to the on-demand economy in South Africa, which requires to be remedied.⁵²⁴

In order to determine the vulnerability of on-demand workers, it links to the previous sub-research question. This was addressed in two respective chapters, namely Chapter 2 and Chapter 3 of the study and also serves as a response to the second sub-research question associated with this study. It was found that the Labour Court in South Africa

⁵¹⁷ See section 2.2.3 of Chapter 2 of this dissertation.

⁵¹⁸ See sections 2.2.3, 2.3 and 2.3.3 of Chapter 2 of this dissertation.

⁵¹⁹ See section 2.2.3 of Chapter 2 of this dissertation.

⁵²⁰ See section 2.2.3 of Chapter 2 of this dissertation.

⁵²¹ See section 2.2.3 of Chapter 2 of this dissertation.

⁵²² See section 1.1 of Chapter 1 and section 2.2.1 of Chapter 2 of this dissertation.

⁵²³ See section 2.2.1 of Chapter 2 of this dissertation.

⁵²⁴ See section 2.4 of Chapter 2 of this dissertation.

has confirmed that on-demand workers are classified as independent and that they are consequently not entitled to employment rights.⁵²⁵

It was further found that the right to fair labour practices, as entrenched in section 23 of the *Constitution* at face value, appears to extend beyond the scope of the traditional employment relationship.⁵²⁶ This study, however, argues that the current misclassification of on-demand workers as independent contractors rather than employees or workers is responsible for the exclusion of these workers from the protection of the mentioned fundamental right.⁵²⁷ It is further argued that the restrictive nature of the definition of an “employee” as contained in the numerous labour legislations in South Africa, specifically in as far as it expressly excludes “independent contractors”, solidifies the mentioned exclusion from the protections afforded to employees in South Africa.⁵²⁸

It also argues that the rebuttable presumption as to who is an “employee”, as contained in Section 200A of the *LRA* as well as in Section 83A of the *BCEA*, does not come to the rescue of on-demand workers due to their classification as independent contractors.⁵²⁹ The unfortunate conclusion associated with the position mentioned above is that violations of the mentioned fundamental right, as well as the exclusion of on-demand workers from the protection of labour laws in South Africa, will continue unabated, leaving these workers vulnerable and susceptible to continued exploitation.⁵³⁰ This predicament, unfortunately, does not bode well for novel employment relationships which have taken the world of work by storm.⁵³¹

⁵²⁵ See section 2.3.2 of Chapter 2 of this dissertation.

⁵²⁶ See sections 3.3 and 3.6 of Chapter 3 of this dissertation.

⁵²⁷ See section 3.3 of Chapter 3 of this dissertation.

⁵²⁸ See section 3.6 of Chapter 3 of this dissertation.

⁵²⁹ See section 3.6.1 of Chapter 3 of this dissertation.

⁵³⁰ See section 3.6 of Chapter 3 of this dissertation.

⁵³¹ See section 3.9 of Chapter 3 of this dissertation.

Chapter 3 focuses on providing an exploration of the statutory framework relating to on-demand work within the South African context and also serves as a response to the third sub-research question associated with this study.⁵³² This was done with the specific intention to establish the extent to which statutory frameworks afford protection to on-demand workers in South Africa.⁵³³ Notwithstanding the previous submissions made as part of this study, the study also argues that it is still not certain if the traditional forms of employment will fit the description of on-demand work.⁵³⁴ It is also not certain if the current definition of an ‘employee’ will be extended to afford protection to on-demand workers in South Africa.⁵³⁵ Whilst there may be an idea as to how the presumption pertaining to who is an “employee” can be applied, there is no certainty in this regard yet, and this matter is therefore left open from an interpretational point of view.⁵³⁶ What became evident from the research is that the traditional model of employment is no longer suitable for novel forms of work.⁵³⁷ This requires a rethinking of the way in which the traditional model of employment can be made to fit on-demand work.⁵³⁸

The study briefly explored the Uber case in South Africa and also provided an overview of the applicable statutory framework associated with on-demand workers within the South African context.⁵³⁹ It was found that the Labour Court in *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers* ruled that there was no contractual relationship between the Uber employee and the putative employer, nor was there an employment relationship conferred on Uber SA.⁵⁴⁰ The

532 See section 1.3 of Chapter 1 of this dissertation.

533 See section 1.3 of Chapter 1 of this dissertation.

534 See section 3.7 of Chapter 3 of this dissertation.

535 See section 3.7 of Chapter 3 of this dissertation.

536 See section 3.6.1 of Chapter 3 of this dissertation.

537 See section 3.9 of Chapter 3 of this dissertation.

538 See section 3.9 of Chapter 3 of this dissertation.

539 See sections 3.6 and 3.7 of Chapter 3 of this dissertation.

540 See section 3.7 of Chapter 3 of this dissertation.

question as to whether or not Uber drivers are deemed to be employees or independent contractors of Uber BV was left open since it was not the legal question to be decided on.⁵⁴¹ As a result, South African jurisprudence is undecided on whether or not Uber drivers should be afforded labour protection as employees of Uber.⁵⁴² The mentioned exploration of the statutory framework applicable to this worker category also made it abundantly clear that these workers do not fall within the ambit and protection of national legislation.⁵⁴³ The research has thus revealed that there is still a grey area as far as the classification of on-demand workers is concerned.⁵⁴⁴

Within the context of the above, Chapter 4 focused on providing a comparative analysis with respect to on-demand work, with reference to the position in foreign jurisdictions, and specifically set out to compare the position of the UK courts with the South African position.⁵⁴⁵ This was done with the primary intention of determining how labour and social protection can be extended to South African on-demand workers by drawing best practices from the UK position and also serves as a response to the fourth sub-research question of this study.⁵⁴⁶ It was found that there are indeed developments in the UK with respect to the classification of on-demand workers and that the UK has already extended protection to on-demand workers, as confirmed in *Uber v Aslam*.⁵⁴⁷

The study also confirmed that there are other ‘piecemeal’ cases in the UK where the mentioned protection was extended to this worker category, viz. *Pimlico Plumbers v*

⁵⁴¹ See section 3.7 of Chapter 3 of this dissertation.

⁵⁴² See section 3.7 of Chapter 3 of this dissertation.

⁵⁴³ See section 3.6 of Chapter 3 of this dissertation.

⁵⁴⁴ See section 3.7 of Chapter 3 of this dissertation.

⁵⁴⁵ See Chapter 4 of this dissertation.

⁵⁴⁶ See section 1.3 of Chapter 1 of this dissertation.

⁵⁴⁷ See sections 4.2, 4.4 and 4.4.1 of Chapter 4 of this dissertation.

Smith.⁵⁴⁸ The mentioned protection is with reference to a third category of workers, as provided for in section 230 of the *ERA*.⁵⁴⁹

This category of workers is also found in South Africa but is restricted to national minimum wages as provided for in the *NMWA*.⁵⁵⁰ This may serve as a good starting point for the extension of the classification of the term 'employee' to on-demand workers, which may serve as a solution to the classification conundrum experienced in this regard.⁵⁵¹ There is, however, no case law on the matter to date, and the future of this matter, therefore, remains to be seen.⁵⁵² In the event that the definition of 'worker' as contained in the *NMWA* is extended to on-demand workers, it may have an impact on the provisions of the *BCEA* due to the interconnectedness of the two pieces of legislation. As far as the extension of a third category of worker in South Africa is concerned, it is evident that a firm possibility exists due to the fact that a working definition in this regard, as contained in the *NMWA*, is already in existence.⁵⁵³ For purposes of all other statutory labour protections in South Africa, the binary approach is still used, which implies a distinction between employees and independent contractors.⁵⁵⁴ It is also submitted that even in the event of a court decision on the matter under research, there is still no guarantee that it will bring about a major reform as far as the gig economy is concerned. As in the case of numerous international cases, such a judgment may only be applicable to the parties to which the specific matter relates. Such a case would, therefore, not necessarily have the desired impact on the gig economy in its entirety.

⁵⁴⁸ See section 4.4 of Chapter 4 of this dissertation.

⁵⁴⁹ See section 4.4.2 of Chapter 4 of this dissertation.

⁵⁵⁰ See sections 3.6 and 3.8 of Chapter 3 and sections 4.3.3 and 4.4.3 of Chapter 4 of this dissertation.

⁵⁵¹ See sections 3.6 and 3.8 of Chapter 3 and sections 4.3.3 and 4.4.3 of Chapter 4 of this dissertation.

⁵⁵² See sections 3.6 and 3.8 of Chapter 3 and sections 4.3.3 and 4.4.3 of Chapter 4 of this dissertation.

⁵⁵³ See sections 3.6 and 3.8 of Chapter 3 and sections 4.3.3 and 4.4.3 of Chapter 4 of this dissertation.

⁵⁵⁴ See section 3.8 of Chapter 3 and sections 4.2 and 4.6 of Chapter 4 of this dissertation.

Broad legal protection for on-demand workers in South Africa through the extension of the existing legal framework will, therefore, require legal reform. This approach is, however, time-consuming, and the results will, therefore, not be imminent, prolonging the current classification conundrum associated with this precarious work type.

5.4 RECOMMENDATIONS

The first recommendation is concerned with the establishment of ‘cooperatives’, which is argued could assist with the efficient and convenient use of technology for consumers and which would simultaneously incorporate fair labour standards. It is further submitted that the collective nature of this approach, under decent working conditions, will result in greater commitment and input from workers. Not being subject to the demands of shareholders will promote greater sustainability rather than productivity, which in turn allows for innovation.⁵⁵⁵ This approach is founded on the sense of ownership that it creates and steers away from the view that workers are being exploited by ‘employers’ or platforms.

The second recommendation pertains to the implementation of the Fairwork Code of Good Practice on the Regulation of Platform Work as a mechanism to attend to the classification conundrum associated with on-demand workers in South Africa. Whilst it is argued that this is a utopian view of managing platform work, it is submitted that the said code is an attempt to provide on-demand workers with greater legal protection than the existing legal framework by applying existing labour laws to gig economy workers in the country.⁵⁵⁶ If all else fails, the implementation of a dedicated code to regulating on-demand work would at least constitute a chance to improve the current dire situation associated with the on-demand economy.

⁵⁵⁵ See Section 3.8 of Chapter 3 of this dissertation for a discussion on this.

⁵⁵⁶ See Section 3.8 of Chapter 3 of this dissertation for a discussion on this.

The third recommendation relates to the amendment of the definition of ‘employment’ as contained in South African labour legislation to accord with that of a “worker” as defined by the *NMWA*. This recommendation would merely entail an extension of the already existing working definition of a ‘worker’ and should be able to be implemented with minimal effort. It is viewed as a solution to the classification conundrum as the ‘definition’ of an employee is currently regarded as the primary way of acquiring employee rights and benefits.⁵⁵⁷ It constitutes an opportunity to eradicate the current binary approach and allow for a third category of workers, as discussed in this study.⁵⁵⁸ This recommendation also accords with the UK approach to recognising a third category of workers, and South Africa stands to benefit from emulating a similar approach.

The fourth recommendation is that more refined categories for self-employed workers are needed to identify on-demand workers and to circumvent the current narrow definition of an ‘employee’. This recommendation is, therefore, in accordance with the previous recommendation that suggests a shift from the current binary approach associated with worker classification. The ultimate aim of this recommendation is to have on-demand workers enjoying similar protections to that afforded to ‘employees’ without necessarily classifying them as ‘workers’ or ‘employees’. The recognition and subsequent protection of these workers through the strengthening of labour regulations and institutions should, therefore, be the key consideration.⁵⁵⁹

The fifth recommendation focuses on the definition of an ‘employer’ as contained in section 200B of the *LRA* rather than on that of an ‘employee’ as contained in the mentioned labour legislation as a means to solve the current classification conundrum

⁵⁵⁷ See Section 3.8 of Chapter 3 of this dissertation for a discussion on this.

⁵⁵⁸ See Section 1.2 of Chapter 1 and Section 4.4.1 and 4.6 of Chapter 4 of this dissertation.

⁵⁵⁹ See Section 3.8 of Chapter 3 of this dissertation for a discussion on this.

associated with on-demand workers. The recommendation specifically relates to situations where there appears to be more than one employer and where the said provision can be invoked to enforce the joint and several liability of the 'employers' involved, as in the case of *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers*.⁵⁶⁰ Most of the focus up to now has been on the definition of 'employee' in attempting to resolve the classification conundrum, and a shift in focus may well offer a solution and fresh perspective in this regard.

The final recommendation to ensure the extension of labour and social protection to on-demand workers is to adopt a broader constitutional approach rather than a narrow contract-based one. The South African courts have been willing to extend labour protection to workers in the event of a grey area and where difficulty exists in making a distinction between the two categories of workers associated with the current binary approach to worker classification.⁵⁶¹ This recommendation would give effect to the constitutional right of on-demand workers to fair labour practices.

5.5 POTENTIAL FUTURE RESEARCH TOPICS

In conducting this research, numerous topics were found to be research-worthy but could unfortunately not be addressed due to limitations associated with this study. These include: First, an investigation into effective and non-discriminatory performance management tools for on-demand gig workers in South Africa. Research of this nature is deemed necessary in order to be adequately prepared for an eventuality where the much-needed protections would ultimately be extended to on-demand workers. Effective management of any process requires the ability to measure same effectively, and the on-demand economy is no exception. Secondly, an investigation into the primary reasons why UK platforms are not observing the rights of on-demand gig workers is considered

⁵⁶⁰ See Section 3.8 of Chapter 3 of this dissertation for a discussion on this.

⁵⁶¹ See Section 3.8 of Chapter 3 of this dissertation for a discussion on this.

valuable. Research associated with this matter would be interesting in light of the fact that legal and social protection has already been extended to on-demand workers in the UK. Understanding the reasons for the current non-compliance by platforms in the UK would also assist South Africa in regulating similar occurrences in future, should the country arrive at such a juncture. Thirdly, an assessment of the level of digital skills of Uber drivers in South Africa is also considered to be research-worthy. This is informed by the fact that some degree of digital skills is required to effectively and meaningfully participate in the platform economy. It would, therefore, be interesting to understand the effect that the level of digital proficiency has on the ability to effectively operate and participate in the platform economy. Finally, an assessment of the most prevalent reasons for worker protests by on-demand gig workers in the UK is also considered to be a worthy research topic. Research has revealed that worker protests seem to be on the rise in the UK. It is important to understand the reasons for this, which may serve as a basis for South Africa to ensure proper regulation of the on-demand economy and to avoid similar incidents in future.

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