Revue de droit comparé du travail et de la sécurité sociale

4 | 2018
English Electronic Edition

‘Somewhere Uber the Rainbow: Seeking new ways of regulating new forms of work in South Africa’

Kitty Malherbe

Electronic version

URL: <https://journals.openedition.org/rdctss/1818>
DOI: 10.4000/rdctss.1818
ISSN: 2262-9815

Publisher

Centre de droit comparé du travail et de la sécurité sociale

Printed version

Date of publication: 1 December 2018
Number of pages: 216-219
ISSN: 2117-4350

Electronic reference

Kitty Malherbe, “Somewhere Uber the Rainbow: Seeking new ways of regulating new forms of work in South Africa”, *Revue de droit comparé du travail et de la sécurité sociale* [Online], 4 | 2018, Online since 01 November 2021, connection on 15 November 2021. URL: <http://journals.openedition.org/rdctss/1818> ; DOI: <https://doi.org/10.4000/rdctss.1818>

Revue de droit comparé du travail et de la sécurité sociale est mise à disposition selon les termes de la Licence Creative Commons Attribution - Pas d'Utilisation Commerciale - Pas de Modification 4.0 International.

KITTY MALHERBE

UNIVERSITY OF THE WESTERN CAPE

'Somewhere Uber the Rainbow: Seeking new ways of regulating new forms of work in South Africa'

In his speech on the occasion of the 16th Nelson Mandela Annual Lecture in Johannesburg on Tuesday, 17 July 2018, former US President Barack Obama identified technology and the effect it is going to have on 'giving everybody work that is meaningful' as the biggest challenge that South Africa's President Cyril Ramaphosa will face during his term in office. This observation may indeed be correct, as the South African labour market has been challenged by developments such as globalisation and technological innovation to the same extent as other labour markets across the globe. Add to that existing factors peculiar to the labour markets of developing countries like South Africa, such as the persistently high unemployment rate,¹ and the high incidence of informal and precarious jobs, and the challenge how to give 'everybody' in South Africa work that is 'meaningful' becomes apparent. More importantly, the manner in which work is regulated and the extent to which the law protects workers against exploitation play a significant role in how 'meaningful' the work is. Former President Obama's speech therefore also draws attention to the changing parameters of labour law and what the reach and focus of labour law should be in the light of the changing world of work.

To illustrate the extent to which technological change is radically altering the way in which work is performed, thus calling for corresponding change in labour law institutions such as contracts and the work/employment divide, this article provides an overview of recent Uber litigation in South Africa and makes a few observations on the impact of the cases on South African labour law.

AN OVERVIEW OF THE UBER LITIGATION IN SOUTH AFRICA

In *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & others*,² Van Niekerk J remarked that '[t]he 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 worldwide, and has tested the boundaries of the protection extended to working people by domestic labour legislation.'³

1 According to Statistics South Africa *Quarterly Labour Force Survey: Second Quarter 2018*, the unemployment rate for the second quarter of 2018 was 27.2%.

2 (2018) 39 ILJ 903 (LC).

3 *Uber SA v NUPSAW* par. 2. For a comparative overview of the jurisprudential stance on whether Uber drivers are employees or independent contractors in a number of foreign jurisdictions, see K Mokoena, 'Are Uber Drivers Employees or Independent Contractors: A Comparative Analysis', *ILJ*, 2018, vol. 39, 1453.

Uber drivers⁴ who had been 'deactivated' by cutting them off from the Uber platform and who referred an allegation of unfair dismissal to the Commission for Conciliation, Mediation and Arbitration ('the CCMA') were at the centre of the cases discussed below.

In the first case where Uber drivers sought a remedy for unfair dismissal from the CCMA,⁵ Uber South Africa Technological Services (Pty) Ltd ('Uber SA') claimed that the CCMA did not have jurisdiction over the matter, as the drivers were not employees of Uber BV (the holding company registered in the Netherlands) with whom they have a contract, let alone Uber SA. The commissioner used a 'generous' interpretation of section 213 of the Labour Relations Act 66 of 1995 ('LRA'), and the Constitution and application of the 'Code of Good Practice: Who is an employee?' to rule that the Uber drivers were employees of Uber SA. She came to this conclusion after applying the 'reality of the relationship' test to the relationship between the Uber and the drivers.⁶

Uber SA then applied to the Labour Court for an order reviewing and setting aside the CCMA ruling. Van Niekerk J agreed that there was no employment relationship between the Uber drivers and Uber SA.⁷ However, he made no finding on whether the drivers are employees of Uber BV, or whether they are independent contractors of Uber BV, as it was not the issue before the court.⁸

In a subsequent case,⁹ a driver seeking a remedy for unfair dismissal from the CCMA cited not only Uber SA as the alleged employer, but also Uber BV with whom all Uber partners enter into a contractual arrangement and by whom all drivers are controlled. The CCMA commissioner ruled that the CCMA does not have jurisdiction to hear the matter. The reason, this time, was that Uber BV, the only party with whom the driver alleged to have a contractual relationship, is situated in the Netherlands.¹⁰ A clause in the agreement that drivers enter into with Uber BV stipulates that disputes between drivers and Uber BV are to be settled by arbitration in the Netherlands according to Dutch law.

4 For the distinction between 'partners', 'partner-drivers' and 'drivers' in the Uber business model, see *Uber SA v NUPSAW* (2018) 39 ILJ 903 (LC) par. 22-24.

5 *Uber South Africa Technological Services (Pty) Ltd and NUPSAW and SATAWU obo Morekure & others* Case No WECT 1253716, 7 July 2017.

6 Par. 52.

7 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW & others* (2018) 39 ILJ 903 (LC).

8 Par. 99.

9 *NUPSAW obo Mostert v Uber South Africa Technology Services (Pty) Ltd & others* Case n°WECT18234-18, 31 May 2018.

10 *Mostert v Uber* par. 18.

The implication of the latest ruling is that the applicant and any other Uber driver will have to go to the Netherlands to have their dispute with Uber heard there, presumably instructing Dutch counsel. Is this the end of the road for Uber drivers seeking a remedy for 'deactivation' in South Africa? May be not? The clearest hint that all may not be over comes from Uber itself. As the respondents in *Mostert v Uber* it urged the commissioner to find that the driver was not an employee of Uber (SA or BV), despite the fact that the CCMA does not have jurisdiction. Their stated reason was to 'cover the contingency that another forum may ultimately decide that the [LRA] does apply'.¹¹ They therefore acknowledge that another forum may come to a different conclusion, in which case the matter would be referred back to the CCMA to be argued afresh on the merits. Their concern may not be unfounded, as labour lawyers have already identified various convincing arguments why workers in South Africa should not be required to approach a foreign forum to have their case heard.¹² In addition, the European Court of Justice recently held that Uber is 'a service in the field of transport'.¹³ Therefore, it can be argued that Uber is a passenger transport business and, as such, its business is not merely leasing its app (from Amsterdam) to drivers and riders, but transporting passengers in Cape Town (and elsewhere).

IMPLICATIONS FOR NEW FORMS OF WORK

What would the consequences be should Uber's fears be realised and a forum in a future matter finds that the Labour Court (or the CCMA) has jurisdiction over disputes between Uber and drivers, and the drivers are deemed to be employees? It would likely have a significant impact on labour law, including a knock-on effect on the regulation of organisation of Uber drivers, collective bargaining in the transport industry, protection against unfair labour practices, and access to social security of drivers. Labour law will also have to adapt to an environment where control over workers is exercised via an intermediary or an App and their work performance is evaluated by an algorithm.

South African labour law needs to make this adjustment. Rapid developments in technology and new forms of work may mean that the traditional stratagem of 'extending' the reach of labour law to new categories of workers by statutory amendments will not be effective, as labour law may constantly attempt to catch up to new forms of work for which it was not designed.¹⁴ As Hendrickx states, new forms of work are being created 'which are much less capable of being recognised by more traditional modes or patterns of labour law'.¹⁵ To quote former President Obama's speech again, the new world of work means that 'we're going to have to be more imaginative, and the fact of change is going to require us to do more fundamental reimagining of our social and political arrangements, to protect the economic security and the dignity that comes with a job.'

11 Par. 19.

12 See, for example, D du Toit, "Uber the border and far away" *Weekly Comment* IR Network published by LexisNexis, 11 July 2018.

13 *Asociación Profesional Elite Taxi v Uber Systems Spain SL* Court of Justice of the European Union 20 December 2017 ECLI: EU: C:2017:981, par. 48.

14 D du Toit et al *Labour Relations Law*, LexisNexis, 2015, 69 highlight that amendments to labour legislation can become a protracted process.

15 F Hendrickx «Regulating new ways of working: From the new "wow" to the new "how"», *ELLJ*, 2018, 9 (2), 197.

The Fourth Industrial Revolution ('4IR'), which includes the development of the platform economy, artificial intelligence and robotisation, has created the need for 'creative solutions that allow for the development of technology for the benefit of consumers, while at the same time ensuring that workers' rights are not limited.'¹⁶

It is crucial that South African researchers and social partners participate in the debate on 4IR and its impact on the nature, organisation and regulation of work. However, it is even more important that the research should focus specifically on how 4IR can affect a developing economy such as South Africa within a global setting and how the law can respond.¹⁷

---

16 K Mokoena, "Are Uber Drivers Employees or Independent Contractors: A Comparative Analysis", *ILJ*, 2018, vol.39, 1453 at 1469.

17 Such as the work currently being done by the 'Labour Law in the Fourth Industrial Revolution' niche area of the Department of Mercantile and Labour Law (including the Social Law Project) of the University of the Western Cape. See <http://labourlaw4-0.uwc.ac.za/> for more on the work of this group. The author wishes to acknowledge the contributions of members of this group to this article.