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“UBER DRIVERS: WHO IS (OR IS NOT) THE EMPLOYER - THE MOTHER COMPANY OR THE SUBSIDIARY?”

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A. INTRODUCTION

“Croud sourcing”, “Gig Economy”, “Sharing economy” or “On-demand work” is on the increase

Uber, Taskrabbit, MechanicalTurk, Amazon Service, Air B&B, are but some examples

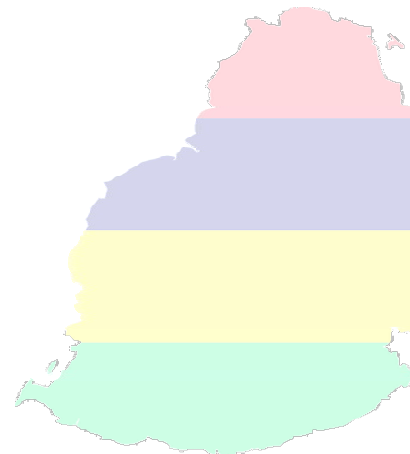
Reason for concern: Disruptive technologies have the potential of eroding workers’ protection

Policy makers have reacted differently:

- Some countries ban Uber;
- Others leave it to the courts to decide;
- Some regulators have started working on the issue

Some commentators say:

- We need a new test;
- The current tests should be adapted – use the “functional” approach;
- The test should concern who is the “employer”.



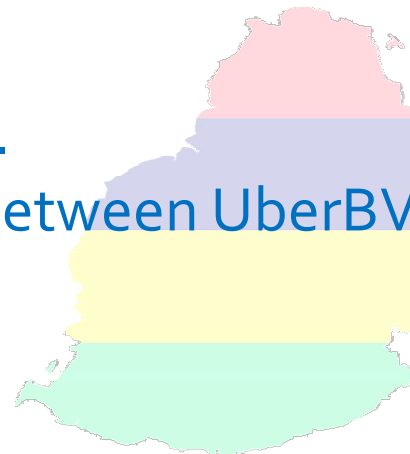
B. HOW DOES UBER WORK?

Uber says:

- We act as digital agent, connecting clients with independent contractors.
- We do not render transportation services.
- Costly taxi industry regulations don't apply.
- Uber BV, the mother, is registered in Amsterdam, and
- a national subsidiary assists with admin.
- Uber does not own a vehicle, but implements strict quality control.
- Uber receives a percentage of each ride.

Uber drivers:

- We either own a vehicle, or drive for an Uber vehicle owner.
- Most often, the Uber driver does not know the difference between UberBV and the local entity.



C. UBER IN SA

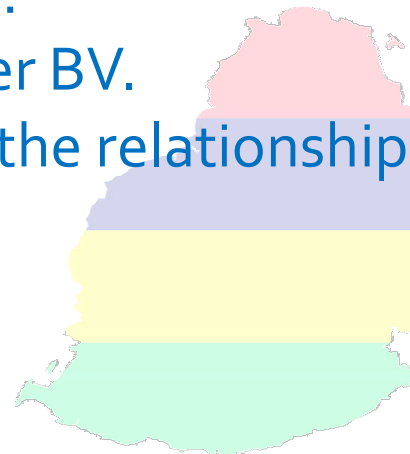
There are roughly 2 000 000 Uber drivers in the world and 4 000 in SA.

A number of assault cases have been reported in and around Gauteng stations.

SA policy makers have not discussed changes to the LRA or Code of Good Practice relating to gig workers.

A dispute has been lodged with the CCMA:

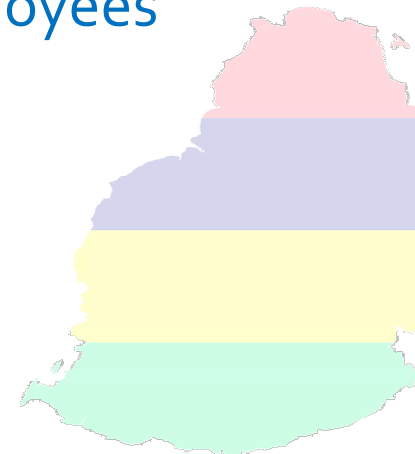
- Three Uber drivers' apps "deactivated". Is this a "dismissal"?
- Uber SA argued that all Uber drivers only contract with Uber BV.
- Despite not being joined, the CCMA applied the "reality of the relationship"
- Held the three were drivers of Uber SA.



C. UBER IN SA

UWC Social Policy Unit, assisting Uber drivers, requested an Oxford Research Project, under supervision of Prof Sandra Fredman, to compile a comparative report covering 15 countries, states and regions. Some of the findings were:

- No clear answers yet.
- UK Empl Tribunal, Swiss Social Sec - the national subsidiary the employer.
- UK, France, Quebecq, Netherlands, Belgium – hiding behind multiple employers rejected
- EU – Advocate General of ECJ favours Uber drivers as Employees
- Belgium – Labour Prosecutor argues they are employees.
- UK – *Aslam* on appeal, held treat Uber as a group.

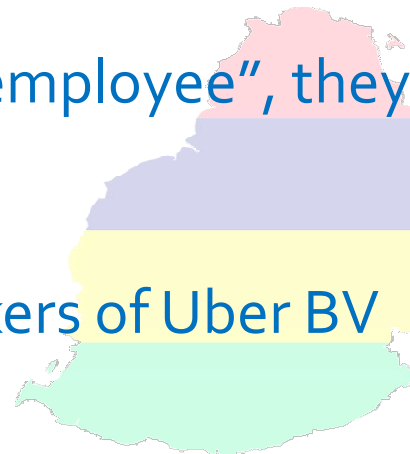


C. UBER IN SA

In *Uber SA* the Labour Court overturned the CCMA decision on review:

1. *Universal Church of the Kingdom of God v Myeni* [2015] (LAC) held must be contract before an employment relationship could exist;
2. The LC criticised the CCMA for not distinguishing between Uber BV and Uber SA;
3. When applying the traditional tests regarding who is an “employee”, they would not have succeeded against Uber SA.

The LC left the question unanswered whether they were workers of Uber BV



D. CRITIQUE ON *UBER SA*

Firstly,

S 39(1)(b)–(c) of the Constitution states that when:

“interpreting the Bill of Rights, a court, tribunal or forum . . . must consider international law . . . and may consider foreign law”.

In *K v Minister of Safety and Security* the CC cautioned that it is important not “to equate legal institutions which are not, in truth, comparable” (para 34).

However, “[i]t would seem unduly parochial to consider that no guidance, whether positive or negative, could be drawn from other legal systems’ grappling with issues similar to those with which we are confronted” (para 35).

D. CRITIQUE ON *UBER SA*

Secondly,

Realising that there are complex employer models, a definition of “employer” was introduced into the LRA in January 2015.

S 200B(1) of the LRA provides:

“ ‘employer’ includes one or more persons who carry on associated or related activity or business ... if the intent or effect of their doing so is to ... defeat the purposes of this act.”

10 years ago, in *Footwear Trading CC v Mdlalose* the LAC had already concluded “that Fila and Footwear were separate legal personalities but the effect of their actions was such that they were in effect joint or co-employers”

D. CRITIQUE ON *UBER SA*

Thirdly,

Since the Constitution, 1996 there have been key extensions of the notion of employee

1999: The CC in *SA National Defence Union v Minister of Defence* held that uniformed soldiers are “akin” to employees.

2003: a rebuttable presumption was introduced into the LRA and the BCEA.

2008: the LC in *Discovery Health v CCMA* (LC) held that irregular migrants may be classified as employees for the purpose of social protection.

2008: the LAC in *State Information Technology Agency (SITA) (Pty) Ltd v CCMA* held that the focus has shifted from the existence of a formal contract to the presence of an employment relationship.

2010: the LAC in *“Kylie” v CCMA* held that despite the fact that Kylie was a sex worker with no valid contract of employment, she was entitled to unfair dismissal protection under the LRA.



E. CONCLUSION

I embrace innovative technological advances and new types of work.

However, what society do we want to see?

Tech entrepreneurs should not be allowed to circumvent their social responsibilities by hiding behind smart apps.

Allow and encourage technological advances, but regulate practices to prevent exploitation of gig workers.

