

CODE OF GOOD PRACTICE FOR THE REGULATION OF PLATFORM WORK IN SOUTH AFRICA

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The **Fairwork** Project

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EXECUTIVE SUMMARY



Introduction

1. The proposed Explanatory Memorandum and Code of Good Practice (henceforth ‘the Code’) aim to demonstrate how South African law can be interpreted and applied in order to give better protection to the rights of platform workers in accordance with Constitutional principles. Based on two years of in-depth research on the promotion of decent work for platform workers in South Africa, and parallel research in India and other countries, it provides an evidence-based contribution to an issue that has become pressing, particularly in the light of the Covid-19 epidemic. The Code draws on legal sources, at national and international level, to provide guidelines to platforms and workers as well as legal decision-makers for protecting the rights of platform workers within the existing legal framework and also highlights areas where legal reform will be needed in order to address the problems more effectively.
2. Platform-mediated work is a growing source of livelihood for many in South Africa and internationally. However, because platforms typically classify workers as ‘independent contractors’, they are excluded from the scope of labour rights under South African law. Instead, both the risks and the costs of providing labour are transferred to the worker. This has a corrosive effect on working standards, not just of platform workers but of workers in competing enterprises whose terms and conditions are likely to be undermined.
3. The problem of high unemployment in South Africa is not solved by jobs with high levels of exploitation. Such jobs undermine workers’ constitutional rights to dignity, to fair labour practices, and to form or join a trade union, engage in collective bargaining and strike. Exploitative terms and conditions of work are also detrimental to society, making it impossible for workers to support their families and fostering conflicts.
4. The absence of clear standards of decent work for platform workers is both in conflict with South Africa’s constitution and undermines some of South Africa’s international commitments in relation to the International Labour Organization (ILO), the United Nations Sustainable Development Goals and the International Covenant on Economic, Social and Cultural Rights.

Misclassification of workers as independent contractors

5. Many platforms seek to avoid the obligations pertaining to an employment relationship by using service agreements which stipulate that workers are independent contractors. This raises serious challenges in determining whether this classification reflects the actual relationship of the parties. The Labour Relations Act (LRA) 66 of 1995 was amended in 2002 to include a presumption that a person (henceforth X) is an employee, regardless of the form of the contract, if any one or more of seven factors are present (s.200A). These include whether the manner in which X works or their hours of work are subject to the direction or control of another person; whether X is part of the organization they work for; whether X has worked for that other person for an average of at least 40 hours a month over the previous three months; whether X is economically dependent on the person for whom X works or renders services; whether X is provided with work equipment by the other person; or whether X only works or renders services for one person. (See also Basic Conditions of Employment Act (BCEA) 75 of 1997, s83A; Code of Good Practice: Who is an Employee, 2006). It is then up to the putative employer to rebut the presumption. Courts have held that to determine whether the burden has been discharged, the substance of the relationship is of primary importance.

6. The presumptions in s200A of the LRA need to be adapted to the specific features of platform working. For example:
 - 6.1. The control factor manifests through such mechanisms as algorithms, which determine how, when and where work is provided, in a manner which appears technical but is in fact highly controlling. Control also manifests through the ability of platforms to terminate the relationship unilaterally and without due process.
 - 6.2. To determine the duration of the relationship for the purposes of the 40 hours monthly average requires an appreciation that the relationship consists of more than a single task (e.g. a single taxi ride or delivery), but of the sum of many such tasks processed through the same app over the relevant period.
 - 6.3. Platforms often deny that they are employers. Section 200A refers to the 'person' for whom X renders services This should be interpreted broadly to reflect the reality of the relationship, and particularly the power of the platform in relation to the worker and the work he or she does.

Principles of Decent Work

7. This Code elaborates on workers' rights to decent work under five headings: fair pay, fair conditions, fair contracts, fair management and fair association. These categories were developed through wide consultation both in SA and in other countries and in Geneva, with workers' and employers' representatives (including platforms) and policymakers and regulators. They have been tested over two cycles of surveys, by which selected platforms' working practices were scrutinised. The rights should apply irrespective of the employment status of the worker (whether employee or independent contractor),

Principle One: Fair Pay

8. The first principle is that, regardless of their status, all workers should earn at least at the same amount as the local minimum wage. The National Minimum Wage Act (NMWA) specifies that it is applicable to all workers, with very specific exceptions (s.3(1)), and defines a worker as 'any person who works for another and who receives, or is entitled to receive, any payment for that work whether in money or in kind' (s.1). Since it uses the term 'worker', rather than 'employee', the NMWA should be regarded as covering platform workers.
9. Given the work-related expenses borne by many platform workers, such as vehicle maintenance in the case of drivers, the national minimum wage (NMW) would be inadequate even to cover those expenses. Within the existing legal framework, fair pay would require a sectoral determination to provide a formula for determining earnings inclusive of expenses which, being higher than the NMW, would be binding.
10. When the business model of the platform makes it necessary for workers to be on call (e.g. ride-hail and delivery platforms), the formula for determining pay in the sectoral determination should take waiting time into account for the purposes of calculating working hours.

11. For the purpose of such a sectoral determination, consideration should be given to requiring platforms to pay a living wage after expenses, rather than the NMW, to platform workers.
 - 11.1. The NMW in South Africa is generally acknowledged not to be a living wage. Living wage is based on the concept that work should provide adequate income to cover the decent living costs of a family or an individual, and is consistent with South Africa's binding international obligations under the ILO and ICESCR (Article 11(1)), which requires States Parties to recognize the right of everyone to an adequate standard of living for themselves and their families.
 - 11.2. While the NMW is based on the presumed sustainability for all employers, platforms represent a relatively well-resourced segment of work-providers which should not be subject to the lowest common denominator.
 - 11.3. This may also be relevant in the context of disputes over unfair labour practices relating to 'benefits' or remuneration (see paragraph 17 below) as well as the framing of sectoral determinations relevant to platform work.

Principle 2: Fair Conditions

12. The definitions of 'employer', 'employee', 'machinery', 'work' and 'workplace' in the Occupational Health and Safety Act (OHSA), as well as the duties of employers to employees and persons other than employees,¹ should be interpreted broadly to include platform workers, where possible, on the principles set out above. Where OHSA does not find application, platforms should be regarded as responsible under basic principles of delictual liability to take reasonable steps to avoid reasonably foreseeable risks to workers. This should entail, at the very least, having written policies for protecting workers from foundational risks arising from the processes of work, and taking proactive measures to protect and promote the health and safety of workers. For online work (such as cloudwork), this should include processes to protect workers against exposure to psychologically harmful material and adequate and ethical data privacy and security measures. For workers performing physical tasks (such as ride-hail, delivery and domestic workers), this should include policies and processes to minimise risks, such as accidents and injuries, harmful materials, abuse and violence. It should not be an excuse that these risks are due to third parties (such as the ultimate user) where such risks are reasonably foreseeable.

Principle Three: Fair Contracts

13. The terms and conditions governing platform work are not always clear and accessible to workers. To the extent that platform workers are employees, the duty of the employer to provide written particulars of employment in terms of s 29 of the BCEA will apply. However, regardless of their

¹ Section 1(1), 8 and 9, OHSA.

classification, workers should be able to understand, agree to, and access the conditions of their work at all times, and should have legal recourse if the platform breaches those conditions.

14. Principles for promoting fairness in this regard can be derived both from the common law of contract and from statutes such as the Consumer Protection Act (CPA) 68 of 2008.
15. Under the law of contract, a contract or a clause may be declared void if its terms are against public policy as encapsulated in the Bill of Rights, despite the contract having been entered into freely and voluntarily. Given the special vulnerability of platform workers, public policy in this context should be interpreted as including that:
 - 15.1. The party contracting with the worker must be identified in the contract, and the contract must be subject to the law of the place in which the worker works.
 - 15.2. The terms and conditions (corresponding, where relevant, to those required by s 29 of the BCEA) should be communicated in clear and comprehensible language that workers could be expected to understand.
 - 15.3. The terms and conditions should be accessible to workers at all times.
 - 15.4. Every worker should be notified of proposed changes in a reasonable timeframe before changes come into effect, subject to the process outlined in paragraph 19 below; and changes should not reverse existing accrued benefits and reasonable expectations on which workers have relied.
 - 15.5. The contract should not include clauses which exclude liability for negligence by the platform nor unreasonably exempt the platform from liability for working conditions.
 - 15.6. The contract should not include clauses which prevent workers from effectively seeking redress for grievances which arise from the working relationship.
16. Many platforms insist that their relationship with workers constitutes a business transaction, where the platform merely supplies an app or other digital resource as a service for connecting workers and customers. Where this is found to be the case, s 1 of the CPA defines a 'consumer' in respect of any goods or services inter alia as 'a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business'. In terms of this definition, independent contractors of platforms such as Uber, Taxify, Sweepsouth etc. should be regarded as consumers.
17. The following protections extended to consumers by the CPA, among others, are of particular importance to platform workers:
 - 17.1. Section 4(4) states that contracts must be interpreted to the benefit of the consumer - in this case, platform workers.
 - 17.2. Section 48 contains a general prohibition on unfair, unreasonable and unjust contract terms and also prohibits any agreement that requires a consumer to waive any rights, assume any obligations or waive any liability of a supplier on terms that are unfair, unreasonable or unjust or if such terms are imposed as a condition of entering into an agreement. Criteria

to determine whether a condition of a contract is unfair, unreasonable or unjust include terms that are ‘excessively one-sided in favour of any person other than the consumer.’

Principle Four: Fair Management

18. Platform workers can be vulnerable to sudden termination (deactivation), and loss of income, often without due process. Workers may be subject to unfair penalties or decisions and may lack the ability to contact the platform to challenge or appeal them. Even when ordinary labour law provisions do not apply, platform workers’ constitutional right to fair labour practices entails that they should enjoy protection against such practices, including unfair practices equivalent to those set out in s 186(2) of the LRA.
19. In particular, there should be due process in relation to decisions which are detrimental to the worker and for resolving disputes in general. This should reasonably include:
 - 19.1. A documented channel for workers to communicate with a designated representative of the platform; and,
 - 19.2. A documented process for workers to appeal adverse decisions or deactivations; and,
 - 19.3. An interface on the platform featuring a channel for workers to communicate with the platform; and,
 - 19.4. An interface on the platform featuring a process for workers to appeal adverse decisions or deactivations; and,
 - 19.5. In the case of deactivations, the appeals process must be available to workers who no longer have access to the platform.
20. More generally, the law of contract entails that no change to workers’ terms and conditions may take place without genuine (informed) consent by the worker. In addition, fairness requires that platforms should not take decisions affecting workers or working practices without engaging in consultation with the purpose of reaching consensus.

Non-Discrimination

21. In South Africa, equality and anti-discrimination concepts are regulated by the Employment Equity Act (EEA) 55 of 1998 in the case of employees and the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) 4 of 2000 in the case of all other persons, including independent contractors. In cases where there has been discrimination and the complainant cannot prove the existence of an employment relationship in terms of the EEA, PEPUDA thus offers protection.
22. Section 1 of PEPUDA defines discrimination as ‘any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly-imposes burdens, obligations or disadvantage on; or withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds’. These prohibited grounds are listed in s 1 and include any ground

which causes or perpetuates systemic disadvantage, undermines human dignity or adversely affects the equal enjoyment of a person's rights and freedom.

23. PEPUDA, given that it includes both acts and omissions, as well as direct or indirect discrimination, entails both that the platform should not discriminate in its own right (e.g. by disadvantaging workers on prohibited grounds), and that it should minimise risks of users discriminating against workers.
24. The inclusion of indirect discrimination applies to a situation in which a protected group identified under PEPUDA is significantly underrepresented or disadvantaged on their platform. To fulfil their duties under PEPUDA, the platform must take steps to identify and remove barriers to inclusion. For example, if women are under-represented among ride-hailing drivers or delivery workers, the platform should, in consultation with the workers, attempt to identify barriers (e.g. safety concerns) and take steps to mitigate these. This applies also to algorithms which have the effect of excluding or disadvantaging workers who are protected by PEPUDA.

Principle 5: Fair Representation

25. Under the Constitution, everyone has the right to freedom of association (s.18), peacefully to assemble, demonstrate and picket (s.17), to form and join a trade union, participate in its activities and programmes and to strike (s.23). These rights are horizontally applicable. Where the LRA does not apply, the principle of subsidiarity is not applicable, and workers are able to assert their rights directly under the Constitution. This entails that workers may organise for the purpose of collective negotiation and platforms may not in any way victimise or disadvantage them for doing so.
26. Organisational rights are a critical aspect of workers' right to freedom of organisation. Making allowance for differences between physical workplaces and platform work, it means that platforms should afford workers reasonable opportunities to organise, equivalent to those embodied in Part A of Chapter III of the LRA, including:
 - 26.1. Providing facilities for workers and their organisations to communicate with each other via the platform, free of surveillance or interference by the platform;
 - 26.2. Allowing stop-order facilities for workers' organisations by deducting membership dues from workers' earnings and paying it to the organisation if mandated to do so by the workers; and
 - 26.3. Negotiating with workers' organisations about the implementation of such rights, subject to an agreed dispute-resolution process in the event of deadlock.
27. The right to strike is fundamental to employees' right to freedom of association and, following constitutional precedent, platform workers should likewise be entitled to withhold their labour as a deadlock-breaking mechanism in disputes of interest after following a fair procedure equivalent as far as possible to that in s 64 of the LRA.

CODE OF GOOD PRACTICE



A: Introduction

1. Work mediated by digital labour platforms ('platform work') is a rapidly growing source of livelihood for many people in South Africa and elsewhere.¹ Platform work often resembles employment in that workers operate under the platform's day-to-day control and are dependent on the platform for their work. Despite this, workers are routinely classified as 'independent contractors' and are therefore excluded from the scope of employment and labour legislation.
2. The absence of legal protection for platform workers is at variance with South Africa's international commitments² as well as the Constitutional guarantee of basic rights for all persons, including all workers.³
3. To ensure that the benefits of this growing source of employment are not undermined by exploitative working conditions, it will be necessary to develop a regulatory framework based on the standards of decent work and adapted to the unique environment of platform work. This Code, however, is concerned with the more immediate task of providing guidelines for protecting the rights of platform workers within the existing legal framework.

B: Policy Principles

4. Job creation is essential in the context of mass unemployment in South Africa. However, unemployment cannot be addressed by creating jobs based on high levels of exploitation. To do so would be contrary to the Bill of Rights, entrench inequality and undermine social stability and cohesion.
5. Section 9(1) of the Constitution guarantees everyone the right to equal protection of the law. This implies that platform workers whose working conditions resemble those of employees should enjoy no less protection than that of employees as set out in employment and labour legislation.
6. Section 39(2) of the Constitution states that, '[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'. This implies that, where applicable, decision-

makers should interpret existing legal rules in such a way as to give maximum effect to the underlying rights of platform workers.

C: Scope and Application

7. The Code is aimed at all stakeholders in the platform economy, especially platform owners and platform workers, as well as to courts and tribunals responsible for applying the law to platforms and platform workers, and to government officials responsible for administering the rights of platform workers.
8. The Code does not argue for changes in the law, though it may identify gaps that should ideally be addressed by legislation. In the absence of such legislation, the Code offers guidelines for interpreting the existing statutory and common law in such a way as to give maximum effect to the basic rights of platform workers.
9. Given the differences between platform work and conventional employment, existing labour law may not give adequate effect to platform workers' rights even if they are classified as employees. To this extent, the Code seeks to identify rights appropriate to platform workers in general, including those classified as employees.
10. The Code does not apply to genuine independent contractors - workers who work for themselves – i.e., conduct their own operations on their own terms. It is aimed at all workers who, regardless of the terminology in their contracts, are dependent on working for a platform. In identifying such workers, courts and tribunals should focus on the substance of the relationship in the same way as when distinguishing between employees and independent contractors.⁴ Relevant criteria include:
 - 10.1 Whether the service offered by the worker is designed and marketed by the platform or by the worker;
 - 10.2 Whether the price or other conditions attaching to the service are stipulated by the platform or by the worker;
 - 10.3 Whether workers are required to wear 'badges of employment' to identify themselves with the platform;

- 10.4 How much control is exercised by the platform and, in particular,
- 10.4.1 Whether the relationship between the worker and the platform is limited purely to the worker's use of the app in communicating with the worker's customers;
 - 10.4.2 Whether any control is exercised by means of the app, directly or indirectly, over the manner in which the worker performs services; and
 - 10.4.3 Whether any form of quality control (by customers or otherwise) is administered by the platform to the worker; and
 - 10.4.4 The degree of workers' economic dependence on the platform.

D: Decent Work for Platform Workers

11. Guidelines for determining the meaning of decent work in the context of the platform economy, derived from the basic rights to which all workers are entitled, are set out with reference to five criteria: fair pay, fair conditions, fair contracts, fair management and fair representation.⁵

Fair pay

12. For most workers, adequate earnings are a primary indicator of decent work. Although pay is generally a matter of interest which is determined through negotiation or collective bargaining rather than a matter of right, there are two considerations which bring it into the legal paradigm.
13. First, the state is involved in setting minimum wages through the issuing of sectoral and ministerial determinations by the Minister of Employment and Labour ('the Minister')⁶ and through the enactment of the National Minimum Wage Act (NMWA).⁷ Minimum wages are also set by bargaining councils which operate as organs of state in terms of the Labour Relations Act.⁸
14. Secondly, in performing these functions the state is bound to respect, protect, promote and fulfil the Constitutional principles of human dignity and equality.⁹ It is also bound by principles of international law which provide inter alia that '[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family'.¹⁰ It is furthermore bound to

take ‘appropriate steps’ to ensure the realisation of ‘the right of everyone to an adequate standard of living for himself and his family’.¹¹

15. Labour legislation is expressly intended to give effect to the requirements of the Constitution and international law. The state is accordingly bound by this purpose when applying labour statutes.
16. This has a number of implications:
 - 16.1 In issuing determinations for sectors where platforms are operating, the Minister should ensure that minimum wages are applicable to all platform workers. To this end the BCEA provides the Minister with the power to deem platform workers to be ‘employees’ for purposes of the BCEA or any other employment law.¹²
 - 16.2 Similarly, bargaining councils should ensure that all platform workers in their sectors are covered by bargaining council agreements.
 - 16.3 The NMWA must be interpreted as being applicable to all platform workers. Significantly, the NMWA applies to all ‘workers’ and not only to ‘employees’.¹³
17. In calculating minimum wages for purposes of the NMW as well as sectoral or Ministerial determinations, the special conditions of platform work should be taken into account. Where workers are required to incur costs in order to work for the platform, such as providing vehicles or equipment, minimum wages should be exclusive of such costs.
18. Similarly, the business model of platforms providing ride hailing and delivery services is based on the availability of a surplus number of workers ‘hovering’ near potential passengers or clients. The number of working hours used for calculating earnings should therefore include time spent by workers waiting for a job with their app switched on.¹⁴
19. Domestic workers working for a platform from home should be deemed to commence their working time when they leave their homes to set out for their first assigned job for the day and continue until they reach their homes at the end of the day.¹⁵ Time spent moving from one assignment to another should also be counted towards calculating minimum remuneration.¹⁶
20. There is a general acceptance that the NMW is well below the level of a living wage,¹⁷ based on the criterion of presumed affordability for all employers including those with limited resources. However, platforms in general represent a relatively well-resourced segment of work-providers. Net minimum earnings for platform workers should be based on the actual conditions under which

platforms operate to enable workers to earn a living wage over a maximum working week of 45 hours. As with the NMW and bargaining council agreements, provision may be made for exemptions on good cause shown.

Fair conditions

21. In the context of platform work, the principle of fair conditions relates most crucially to health and safety at work, compensation for occupational injuries and illness, working hours and paid leave.

Health and safety

22. Platform workers are exposed to a wide range of health and safety risks, including road accidents for drivers and various dangers in the home in the case of domestic workers.¹⁸ The scope of the Occupational Health and Safety Act¹⁹ (OHSA) is potentially broad enough to protect platform workers against these and other work-related risks:

22.1 'employee' is defined as including any person 'who works under the direction or supervision of an employer or any other person';²⁰

22.2 'employer' is defined as including any person who 'provides work for any person and remunerates that person or expressly or tacitly undertakes to remunerate him';

22.3 'workplace' is defined as 'any premises or place where a person performs work in the course of his employment'; and

22.4 'machinery' is defined as including 'any article or combination of articles ... which is used ... for converting any form of energy to performing work'.²¹

23. Once the Act applies, an employer is required to:

23.1 'provide and maintain, as far as reasonably practicable, a working environment that is safe and without risk to the health of his employees';²² and

23.2 'conduct his undertaking in such a manner as to ensure, as far as is reasonably practicable, that persons other than those in his employment who may be directly affected by his activities are not thereby exposed to hazards to their health or safety'.²³

24. These duties should be interpreted to hold platforms responsible for the health and safety of workers regardless of their contractual status.

Compensation for occupational injuries and diseases

25. Compensation for work-related injuries or illness suffered by employees is regulated by the Compensation for Occupational Injuries and Diseases Act (COIDA).²⁴ Again, the scope of the Act is wide enough to extend to all platform workers:

25.1 The definition of ‘employee’ includes ‘casual’ employees ‘employed for the purpose of the employer’s business’;²⁵

25.2 Independent contractors as such are not excluded; the excluded category is ‘a person who contracts for the carrying out of work and himself engages other persons to perform such work’;²⁶

25.3 ‘Remuneration’, in terms of an amendment currently before Parliament, is defined extremely broadly to include payment of any kind ‘in respect of services rendered’.²⁷

26. Compensation in terms of COIDA is premised on injuries or diseases ‘arising out of and in the course of an employee’s employment’.²⁸ The meaning of the quoted term will depend on the facts of each case but courts have been prepared to interpret it broadly.²⁹ Similarly, the term ‘employment’ has been interpreted broadly in various other contexts.³⁰ This implies that, in relation to platform work, it should include all activities undertaken by a worker as a result of services performed for the benefit of a platform.

27. Support for a broad interpretation is also found in the ILO’s Violence and Harassment Convention,³¹ which applies to all sectors and protects all workers while at ‘work’. ‘Work’ is defined comprehensively as including ‘work-related trips’, ‘through work-related communications, including those enabled by information and communication technologies’ or ‘when commuting to and from work’.³²

Working hours

28. Article 24 of the Universal Declaration of Human Rights states:

‘Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.’

29. The BCEA provides for a maximum of 45 ordinary working hours and 10 hours’ overtime per week for employees, subject to limited exceptions and provisions for flexibility.³³ Provision is also made for meal intervals³⁴ and daily and weekly rest periods of 12 hours and 36 hours respectively.³⁵ Given their right to equality and fair labour practices, platform workers should be entitled as of right to protection equivalent to that of employees.

Paid leave

30. Employees in South Africa are entitled to 21 consecutive days of annual leave on full pay.³⁶ Employees are further entitled to paid sick leave and family responsibility leave³⁷ as well as unpaid maternity leave (including protection of employees before and after birth of a child), parental leave, adoption leave and commissioning parental leave.³⁸ For reasons already given, these rights should extend to all platform workers within the scope of this Code.³⁹

Fair contracts

31. The imbalance of bargaining power between platforms and workers effectively allows platforms to determine the content of contracts. The law of contract is based on the principle of *pacta sunt servanda* ('agreements must be kept'). However, contracts or terms may be unlawful on the grounds set out below.
32. The first question is whether the contract reflects the true nature of the relationship. As noted already, contracts almost invariably describe workers as 'independent contractors' even if their working conditions are practically identical to those of employees. There has been much litigation internationally in which workers have challenged their classification as independent contractors, sometimes successfully and sometimes not, depending on the jurisdiction and the facts.⁴⁰
33. The question has not yet been tested in South Africa. However, courts have been ready to strike down contracts of 'disguised employment' in general and can be expected to do so in the case of platform workers described as 'independent contractors' who are, on the facts, found to be employees.⁴¹

Transparency, clarity and accessibility

34. The law of contract contains a number of safeguards for contracting parties. Most fundamentally, there must be a meeting of minds between parties as to the terms of their agreement. In the present context, this means that platforms must communicate the terms of proposed contracts to workers with sufficient clarity. It further means that platforms may not vary the terms of the contract unless the worker has genuinely consented, after having been given sufficient time and information to make an informed decision. Thus, simply requiring a worker to accept a variation

as a condition for logging into the app and starting work should not be regarded as a variation based on mutual consent.

35. The BCEA requires employers to provide employees with comprehensive written particulars of their terms and conditions of employment, including the full name and address of the employer, the employee's duties, the place of work, wage and overtime rates and numerous other aspects of the job,⁴² in a language and in a manner that the employee can understand.⁴³ The employer must also display a statement at the workplace informing employees of their statutory rights in the official languages spoken at the workplace.⁴⁴ For reasons already given, it would be contrary to the right to equality and fair labour practices for dependent platform workers to be treated less favourably.
36. Workers who are deemed to be independent contractors (i.e., merely making use of the platform's services in running their own operations) may fall within the definition of 'consumer' in terms of the Consumer Protection Act⁴⁵ (CPA) and the contracts should qualify as 'transactions' in terms of the CPA.⁴⁶
37. In such cases the Act requires that:
 - 37.1 terms and conditions in a contract must be in plain and understandable language and drawn to the consumer's attention in a conspicuous manner and form;⁴⁷
 - 37.2 terms that limit the risk or liability of the supplier (platform), or require the consumer (worker) to assume any risk or liability or acknowledge any fact, must also be drawn to consumer's attention;⁴⁸ and
 - 37.3 the supplier must draw the consumer's attention to the nature and potential effect of any risk to which the consumer may be exposed.⁴⁹

Unenforceable terms

38. The fact that a contractual term is harsh or onerous does not automatically make it unenforceable. However, an otherwise lawful contract or term will be void and unenforceable if it is in conflict with public policy⁵⁰ or any statutory requirement that implies nullity in the event of non-compliance.
39. In *Barkhuizen v Napier*⁵¹ the Constitutional Court explained that the meaning of public policy 'must now be determined by reference to the values that underlie our constitutional democracy as given

expression by the provisions of the Bill of Rights. Thus, a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable.⁵²

40. The court also recognised that ‘the relative situation of the contracting parties is a relevant consideration in determining whether a contractual term is contrary to public policy’.⁵³ In the platform economy, where workers are typically presented with contracts on a take-it-or-leave-it basis, there is reason for courts to look with added caution at the enforceability of terms which impose onerous conditions on workers.
41. For example, the arbitration clause in Uber drivers’ contracts in South Africa and elsewhere states that all disputes will be dealt with ‘in accordance with the laws of The Netherlands’ through mediation and arbitration in Amsterdam.⁵⁴ This can be seen as both unreasonable and unfair by placing dispute resolution beyond the reach of drivers. This is clearly in conflict with their right of access to justice⁵⁵ and, therefore, in conflict with public policy.⁵⁶
42. Such a clause may also be interdicted in terms of the Arbitration Act,⁵⁷ which provides that the High Court may set aside an arbitration agreement or prohibit its application on good cause shown.⁵⁸ Good cause will depend on the facts of each case, but would almost certainly exist where an arbitration agreement effectively deprives a platform worker of recourse to a remedy.
43. The CPA also sets out a number of protections that are important in the platform context. It prohibits unfair, unreasonable and unjust contractual terms as well as any agreement that requires a consumer to waive any rights or assume any obligations on terms that are unfair, unreasonable or unjust. A term will be deemed to fall in this category if, among others, it is ‘excessively one-sided’ in favour of the platform or ‘so adverse to the consumer as to be inequitable’.⁵⁹ Section 4(4) furthermore states that contracts must be interpreted to the benefit of the consumer.
44. The CPA further provides that, if a court determines that a provision is unconscionable, unjust, unreasonable or unfair, it may issue a declaration to that effect and make any order that it deems just and reasonable in the circumstances, including an order to compensate the consumer for losses and expenses.⁶⁰
45. Contractual terms that impose harsh conditions on workers on a take-it-or-leave-it basis may also be contrary to the Electronic Communications and Transactions Act,⁶¹ which requires a supplier

to allow a consumer the opportunity to review electronic transactions, correct mistakes and withdraw from the transaction before finally placing an order.

Fair management

46. The LRA regulates disciplinary processes, fair labour practices and dispute resolution in employment in order to protect workers against unilateral action by employers. In terms of the Constitutional rights to equality and fair labour practices, platform workers in employment-like relationships should be entitled to equivalent protection even if they are classified as independent contractors.
47. In *Murray vs Minister of Defence*⁶² the Supreme Court of Appeal extended the Constitutional right to fair labour practices to a naval officer falling outside the scope of the LRA through the constitutional development of the contract of employment. Noting that '[t]his contract has always imposed mutual obligations of confidence and trust between employer and employee', the court ruled that it 'must be held to impose on all employers a duty of fair dealing at all times with their employees – even those that the LRA does not cover'.⁶³ On this basis the Court found that the officer had been constructively dismissed as if he had been an employee.
48. Thus, *even if* platform workers are held not to be 'employees', appropriate rights of employees in terms of the LRA will implicitly be applicable to them in accordance with their right to 'fair dealing', underpinned by the right to fair labour practices.
49. In *Pretorius and anor v. Transport Pension Fund and anor*⁶⁴ the Constitutional Court underlined the need for a more inclusive interpretation of this right. Noting that 'the LRA tabulated the fair labour practice rights of only those enjoying the benefit of formal employment' the Court observed *obiter* that the facts of the case before it 'provide a compelling basis not to restrict the protection of section 23 to only those who have contracts of employment'.⁶⁵

Dispute Resolution

50. The LRA has established various institutions and processes for resolving disputes between employers and employees. The most prominent forums are bargaining councils, the Commission for Conciliation, Mediation and Arbitration (CCMA), the Labour Court and Labour Appeal Court (from which an appeal lies to the Constitutional Court). The High Court has concurrent jurisdiction with the Labour Court over employment contracts and exclusive jurisdiction over contracts other than employment contracts. Thus, platform workers classified as or claiming to be employees will have access to the dispute resolution processes created by the LRA, whereas independent contractors will need to approach the High Court.
51. Given the international operations of certain platforms, the question of jurisdiction is important. Employees in general lack the ability to litigate against an employer in a foreign country. The right of access to justice requires that claims brought by platform workers – employees as well as independent contractors – against foreign platforms operating in South Africa and arising from work done in South Africa should fall within the jurisdiction of the CCMA and the South African courts.
52. However, the CCMA has declined jurisdiction in a claim brought by an Uber driver because Uber BV, the alleged employer, was found to be located in the Netherlands.⁶⁶ This opens the door to abuse by enabling foreign enterprises conducting operations in South Africa to evade South African labour law, thus leaving employees unprotected and defeating the purposes of the LRA.
53. In *Uber Technologies Inc. v. Heller*,⁶⁷ as noted above, the Canadian Supreme Court struck down the arbitration clause in Uber drivers' contracts confining them to the jurisdiction of the Netherlands as unconscionable. Given the guarantee of access to justice in the South African Bill of Rights, clauses stipulating a foreign jurisdiction or otherwise denying workers access to justice should likewise be regarded as contrary to public policy.
54. In *Kleinhans v Parmalat SA (Pty) Ltd*⁶⁸ the Labour Court found that the determination of jurisdiction involves weighing up of those features of the employment relationship linking it to a foreign jurisdiction against those pointing to South African jurisdiction. The test, it was held, 'is qualitative rather than quantitative'.⁶⁹ Similarly, in *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and others*⁷⁰ the Labour Court found that there was no contractual relationship between Uber South Africa and the drivers but

expressly left open the question whether the drivers were employees of Uber BV in the Netherlands with which their contracts had been formally concluded.

55. In considering this question, it is submitted, a qualitative test would be akin to the common law doctrine as set out by the Supreme Court of Appeal in *Bid Industrial Holdings v Strang and another*,⁷¹ in terms of which a South African court will have jurisdiction if (a) the summons was served on the defendant in South Africa and (b) there is an ‘adequate connection between the suit and the area of jurisdiction of the South African court’. In this regard, ‘the strongest connection would be provided by the cause of action arising within that jurisdiction.’
56. In applying this doctrine to platforms, the virtual nature of their operations should be taken into account. Section 23 of the Companies Act⁷² requires foreign companies conducting business in South Africa to register as external companies. This will be the case where the foreign company is a party to one or more employment contracts in South Africa *or* has engaged in activities in the South Africa for at least six months ‘that would lead to the reasonable conclusion that it intended to continually engage in business activities within South Africa’.
57. Platforms such as Uber manifestly conduct business in South Africa in the form of operations from which they derive revenue and, if they comply with section 23, would place their South African operations within the jurisdiction of the South African courts. In the case of foreign-based platforms that fail to comply with section 23, the rule of law implies that they could not rely on such non-compliance as a basis for avoiding the jurisdiction of the South African courts.
58. For purposes of service of court papers, an entity representing a platform in its operations in South Africa should be deemed to be an agent of the platform or, alternatively, service on foreign-based platforms should be possible as provided for in the Rules of the Labour Court or the CCMA⁷³ or the Uniform Rules of Court.⁷⁴

Non-Discrimination

59. The equality clause of the Constitution⁷⁵ is given effect by the EEA in the case of employees and by the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)⁷⁶ in the case of all other persons, including independent contractors.⁷⁷
60. PEPUDA comprehensively prohibits discrimination on any ground which causes or perpetuates systemic disadvantage, undermines human dignity or adversely affects the equal enjoyment of a

person's rights and freedom, including race, gender, disability and sexual orientation. Thus, in *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park*⁷⁸ the Equality Court upheld the claim of an independent contractor based on unfair discrimination on the ground of homosexuality. Platform workers classified as independent contractors are entitled to similar protection against unfair discrimination in any form, direct or indirect.

Pregnancy

61. In terms of the BCEA, an employer may not 'require or permit a pregnant employee or an employee who is nursing her child to perform work that is hazardous to her health or the health of her child' and must, if practicable, offer such an employee 'suitable, alternative employment' on conditions that are no less favourable than her ordinary terms and conditions.⁷⁹ The right to equality and fair labour practices implies that platform workers should be entitled to equivalent protection.

Reasonable Accommodation

62. PEPUDA expressly prohibits discrimination on the grounds of race, gender and disability,⁸⁰ and also provides that failing to take steps to reasonably accommodate the needs of persons on these grounds constitutes unfair discrimination. The Equality Court is empowered to make an appropriate order in such cases, including an order directing the provision of reasonable accommodation for a group or class of persons.⁸¹
63. The EEA requires designated employers⁸² to take affirmative action measures, including 'reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce'.⁸³ 'Reasonable accommodation' means 'any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment'.⁸⁴
64. In practice it is unlikely that many platforms will fall within the definition of 'designated employer'. However, workers who are classified as independent contractors are entitled to the more extensive protection extended by PEPUDA.

Algorithmic discrimination

65. Algorithms used to regulate platform work are the property of platforms and made to the platforms' specifications. They serve as a medium through which workers are allowed to enter the working relationship or are excluded from work. Where algorithms apply criteria that impact disproportionately on groups such as women or people with disabilities, it will amount to indirect discrimination in terms of the EEA and PEPUDA for which platforms should be held responsible.
66. In addition, the Bill of Rights is binding on natural and juristic persons, such as platforms, to the extent 'applicable'.⁸⁵ The effect is to 'require private parties not to interfere with or diminish the enjoyment of a right' of any other person.⁸⁶ This offers a possible framework for crafting remedies in cases of algorithmic discrimination where the EEA or PEPUDA cannot be applied because the statutory criteria are difficult to meet.

Data protection

67. 'Data' refers to the personal details of workers. The use of such data is subject to section 14 of the Constitution, which grants the right to privacy to 'everyone', and to the Protection of Personal Information Act (PPIA).⁸⁷ The Act applies expressly to information entered in a record by 'automated means'.⁸⁸ The protection therefore applies to platform workers and data processing by means of apps.⁸⁹
68. Section 1 of the PPIA defines 'personal information' extensively as including information relating to a person's race, gender, sex, marital status, national origin, disability or religion as well as any identifying number, address, or 'the views or opinions of another individual about the person'. This will include ratings of workers by customers of the platform.
69. The Act sets strict conditions for the processing of personal information, including the right of data subjects to be notified about the collection of personal information and to object to the processing of personal information.⁹⁰ Platforms thus have a duty to ensure that workers' personal data is protected and that workers' right to privacy is respected.

Fair representation

70. The Constitution seeks to bring balance to the unequal relationship between employers and workers by entrenching the right of every ‘worker’ to form and join a trade union, to participate in its activities and to strike combined with the rights of every trade union, employers’ organisation and employer to engage in collective bargaining.⁹¹
71. The LRA implements these rights only in respect of employees.⁹² The Constitution, however, provides that basic rights may be limited only by law and only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors’.⁹³ It is submitted that exclusion of collective rights based purely on workers’ contractual status does not meet these criteria.
72. Section 23 of the Constitution should thus be interpreted to mean that all workers in employment-like relationships should have rights equivalent to those of employees, regardless of their contractual status.⁹⁴ In *SANDU v. Minister of Defence*⁹⁵ the Constitutional Court (CC) extended the rights contained in section 23(2) to members of the defence force who are excluded from the LRA on the basis that their conditions were akin to those of employees.⁹⁶
73. The same should apply to dependent platform workers who may be classified as independent contractors but are in relationships akin to those of employees and who seek to exercise collective rights.⁹⁷ This is supported by the broader interpretation of the right to fair labour practices in *Pretorius and anor v. Transport Pension Fund and anor*.⁹⁸ It is also supported by the following:
- 73.1 Section 9(3) of the Constitution states that ‘[e]quality includes the full and equal enjoyment of all rights and freedoms’ set out in the Bill of Rights;
 - 73.2 Section 18 of the Constitution grants ‘everyone’ the right to freedom of association, and section 17 grants ‘everyone’ the right to peaceful assembly, demonstration and picketing;⁹⁹
 - 73.3 The ILO’s Freedom of Association and Protection of the Right to Organise Convention¹⁰⁰ applies to workers and employers ‘without distinction whatsoever’;¹⁰¹
 - 73.4 The ILO recognises the right of collective bargaining as being ‘general in scope’ and that all organisations of workers in must benefit from it’ except for organisations representing ‘the armed forces, the police and public servants engaged in the administration of the State’.¹⁰²
74. However, given the individualised and fragmented nature of platform work, the sector does not easily lend itself to traditional trade union organisation. Trade unions and workers internationally have adopted varied and innovative approaches to promote the organisation of platform workers and address the challenges of collective action in the platform environment.¹⁰³ Despite this, the

degree of organisation remains limited. Even if platform workers' are deemed to have collective rights equivalent to those of employees, other forms of organisation may be required to enable them to exercise these rights effectively.

75. Two types of organisation that could potentially represent platform workers in negotiations are non-profit organisations (NPOs) and cooperatives formed by workers.

NPOs

76. An NPO is an organisation incorporated for a public benefit or any other object related to cultural or social activities, or communal or group interests.¹⁰⁴ NPOs are regulated by the Nonprofit Organisations Act.¹⁰⁵ NPOs that have successfully organised marginalised workers in South Africa include the Casual Workers Advice Office and Asiye eTafuleni.¹⁰⁶ Nothing would prevent an NPO representing platform workers from entering into agreements with platforms on behalf of its members.

77. To the extent that they exercise their members' rights in terms of section 23 of the Constitution, NPOs should be entitled to organisational and bargaining rights equivalent to those provided for employees in the LRA. These include:

77.1 The right to engage in collective negotiations without victimisation;

77.2 The right of access to information for bargaining purposes, subject to similar restrictions applicable to confidential or privileged information;

77.3 A right to stop-order facilities for payment of membership dues; and

77.4 The right to represent their members or other workers in grievance and disciplinary proceedings.

78. These rights will need to be adapted to the unique conditions of the platform economy. For example, an equivalent to trade unions' right of access to the workplace could lie in a right for NPOs to communicate with their members via platforms, without surveillance or interference by the platform management.

Cooperatives

79. Cooperatives provide a structure through which workers can act collectively while engaging in gainful economic activities.¹⁰⁷ Cooperatives are regulated by the Co-operatives Act.¹⁰⁸ A cooperative is defined as
- ‘an autonomous association of persons united voluntarily to meet their common economic, and social or cultural needs and aspiration through a jointly owned and democratically controlled enterprise organised and operated on co-operative principles.’¹⁰⁹
80. One form of cooperative is a ‘worker cooperative’,¹¹⁰ defined as ‘a primary co-operative in which the members pursue the objective of optimally utilising their labour by building a jointly owned and self-managed enterprise’.¹¹¹ To the extent that members of a co-operative satisfy the definition of ‘employee’ in the LRA, worker co-operatives must comply with labour legislation subject to a right to apply for certain exemptions.¹¹²
81. For platform workers who fall beyond the scope of current labour legislation, worker cooperatives offer a structure for organising and collectively negotiating terms and conditions for services they provide, also on a sectoral basis.¹¹³ This could include services rendered to platforms which do not recognise them as employees.

EXPLANATORY MEMORANDUM



INTRODUCTION

1. This Draft Explanatory Memorandum and Code of Good Practice (hereafter ‘Code’) are an outcome of two years of in-depth research by the Fairwork Foundation on the promotion of decent work for platform¹¹⁴ workers in South Africa, accompanied by parallel research in India, Germany and other countries. It therefore has no legal status, and does not purport to do so, but is presented in this form because it is intended as a contribution to much-needed debate on legal reform relating to new forms of work, particularly in the aftermath of the Covid-19 pandemic. It does not propose amendments to the law but sets out to demonstrate how existing law can be interpreted and applied in order to give better protection to the rights of platform workers in accordance with Constitutional principles. In doing so it also highlights areas where legal reform will be needed in order to address the problems more effectively.
2. Platform-mediated work is a growing source of livelihood for many in South Africa and internationally. It has been estimated that digital labour platforms worldwide earn at least US\$50bn per year¹¹⁵ and that 40 million people, representing around 1.5% of the total workforce, are working in the platform economy in the global south alone.¹¹⁶ Some estimates have suggested that by 2025 digital platforms could account for a third of all labour transactions worldwide, involving up to 540 million workers.¹¹⁷
3. Platform work provides essential income and opportunities to many. However, because platforms typically classify workers as ‘independent contractors’, they are excluded from the scope of labour rights under South African law as in many countries. This is because labour legislation across the world requires the existence of employment status as a legal pre-requisite for the grant of labour rights.
4. Furthermore, with most platforms positioning themselves as intermediaries and not employers, it is less clear who the work relationship is with.¹¹⁸ The result is that platforms do not take responsibility for paying a minimum wage, limiting working hours or providing leave pay or sick leave. Instead, both the risks and the costs of providing labour are transferred to the worker, often including equipment such as cars or bicycles as well as health and safety risks. This has a corrosive effect on working standards, not just of digital workers but of workers in competing enterprises whose terms and conditions are likely to be undermined. Nor do workers benefit from collective labour rights, leaving them unable to collectively negotiate improved working standards or wages.
5. Moreover, the use of apps and other digital tools for platform work means that workers are continuously monitored by platforms. They can be subjected to close surveillance and disciplined or deactivated without due process.

6. The absence of clear standards of decent work for platform workers undermines some of South Africa's international commitments. The Decent Work Agenda of the International Labour Organisation (ILO)¹¹⁹ is based on four main principles: job creation, rights at work, social protection and social dialogue, and with gender equality as a cross-cutting objective. In 2015, the United Nations' transformative Sustainable Development Goals Agenda included a commitment to decent work for all by 2030. The International Covenant on Economic, Social and Cultural Rights,¹²⁰ which South Africa has signed and ratified, recognises 'the right of everyone to the enjoyment of just and favourable conditions of work'.¹²¹ However, achievement of these aims is compromised by the growth of forms of platform work falling well short of decent work standards.
7. Furthermore, the absence of decent work standards in the platform economy is in conflict with South Africa's Constitution.¹²² This is a direct imperative for legal development and change, which provides the framework for this Code and is examined in more detail below.
8. For all these reasons, and to ensure that the benefits of this growing source of employment are not undermined by unfair and exploitative conditions, it is crucial to develop a regulatory framework to underpin terms and conditions of work and protect workers' rights. This is particularly pressing in the context of competition between platforms and the excess of labour supply over demand in South Africa, which can lead to a 'race-to-the-bottom' and undercut platforms trying to adhere to decent work standards. Voluntary solutions are therefore not sufficient.
9. The Code, read with this Memorandum, sets out to provide guidelines to platforms and workers as well as legal decision-makers for protecting the rights of platform workers within the existing legal framework and as a basis for future change. The Memorandum is divided into two main parts:
 - 9.1. Part A is concerned with identifying the category of workers who are regarded as being in need of legal protection comparable to that of employees. To this end it considers the relevant policy framework and draws on national and international legal sources.
 - 9.2. Part B examines more closely the content of legal rights appropriate for this purpose which can be derived from the existing law as well as gaps in protection that will require legal change.

PART A

POLICY FRAMEWORK

10. While job creation is essential in the context of high unemployment in South Africa, the problem of high unemployment is not solved by jobs with high levels of exploitation. There are two main reasons why all jobs should be decent jobs.
 - 10.1 The first is the intrinsic right of the worker. The Constitution is founded on the values of ‘human dignity, the achievement of equality and the advancement of human rights and freedoms,’¹²³ and public policy is determined with reference to rights embodied in the Constitution.¹²⁴ Under section 10 of the Constitution, ‘[e]veryone has inherent dignity and the right to have their dignity respected and protected.’ Workers’ rights to life,¹²⁵ freedom and security of the person,¹²⁶ and the right not to be subjected to forced labour,¹²⁷ are also at stake. Specifically, ‘[e]veryone has the right to fair labour practices’ and every ‘worker’ is guaranteed the right to form or join a trade union, to engage in collective bargaining and to strike.¹²⁸ When interpreting the Bill of Rights, a court, tribunal or forum must promote the values of dignity, equality and freedom.¹²⁹
 - 10.2 The second is the value to society. Workers whose income gives access to minimum standards of decency can support their families and ensure their children are adequately fed, housed and educated. Workers who are protected against foreseeable risks to their health and safety are also able to continue to provide for themselves and not be in need of support from the State. Conflict between workers and those whom they work for is minimised when workers’ terms and conditions are regulated in a fair and transparent way, and disputes can be resolved in accordance with clear legal standards. Otherwise, a power imbalance skews the balance of bargaining power in favour of employers, enabling them to impose conditions that are subversive of social cohesion.
11. Both these considerations apply to platform workers as much to all other workers.

LEGAL FRAMEWORK

12. No legal right can be open-ended. It must have a specific content and apply to specific persons. The starting point for the Code is to identify the category persons – in other words, ‘workers’ who are in need of protection because they fall beyond the definition of ‘employee’, before identifying the rights that are appropriate to their situation.
13. Employment status – i.e., whether a worker is an ‘employee’ or an ‘independent contractor’ – is determined in accordance with a legal framework including legislation, case law and

administrative processes. This section will first consider the existing statutory context, and then examine how the courts have dealt with the problem of ‘misclassification’ of employees as ‘independent contractors’ and, finally, with administrative processes whereby workers can be deemed or declared to be employees.

The Statutory Context

14. Generally, platforms argue that they are technology companies that connect independent contractors providing services with users that need such services.¹³⁰ To workers they offer flexibility, information, and facilitate access to consumers who need the services on offer. The relationship between platforms and workers is typically labelled a contract for services, in terms of which the workers are independent contractors. But, at the same time, platforms in many if not most cases exercise control over the performance of the services similar to that found in traditional employment relationships. Also, the services are given deceptive names such as ‘tasks’ or ‘rides’, implying that each is stand-alone even though the relationship with the platform is ongoing.¹³¹
15. All labour laws in South Africa are underpinned and governed by section 23 of the Constitution, which reads as follows:
 - ‘(1) Everyone has the right to fair labour practices.
 - ‘(2) Every worker has the right –
 - a. to form and join a trade union;
 - b. to participate in the activities and programmes of a trade union; and
 - c. to strike.
 - ‘(3) Every employer has the right –
 - a. to form and join an employers' organisation; and
 - b. to participate in the activities and programmes of an employers' organisation.
 - ‘(4) Every trade union and every employers' organisation has the right –
 - a. to determine its own administration, programmes and activities;
 - b. to organise; and
 - c. to form and join a federation.
 - ‘(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

‘(6) National legislation may recognise union security arrangements contained in collective agreements.¹³² To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).’

16. Despite the generality of section 23, the existence of an employment relationship is generally the basis for determining the application of labour legislation. This is done with reference to the definition of an ‘employee’ in relevant statutes. In South Africa, the major labour statutes are the LRA,¹³³ Basic Conditions of Employment Act (BCEA)¹³⁴ and the Employment Equity Act (EEA).¹³⁵ These statutes have practically identical definitions of ‘employee’.

17. Section 213 of the LRA defines an ‘employee’ as follows:

‘(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.’

This definition, thus, reiterates the classic binary between an ‘employee’ and an ‘independent contractor’ that exists in jurisdictions across the world. In numerous cases such as *Niselow v Liberty Life Association of Africa Ltd*¹³⁶ and *SA Broadcasting Corporation v McKenzie*¹³⁷ the courts have confirmed that the LRA does not apply to independent contractors. The same is true of the BCEA and EEA.

18. Other employment laws include the Occupational Health and Safety Act (OHSA)¹³⁸ and the Compensation for Occupational Injuries and Diseases Act (COIDA).¹³⁹ These laws likewise apply to ‘employees’ but are more open-ended. COIDA excludes any person ‘who contracts for the carrying out of work and himself engages other persons to perform such work’.¹⁴⁰ OHSA defines ‘employee’ as ‘any person who is employed by or works for an employer and who receives or is entitled to receive any remuneration or who works under the direction or supervision of an employer or any other person’¹⁴¹ and furthermore authorises the Minister of Employment and Labour (hereafter ‘the Minister’) to declare that a person belonging to a category of persons specified in the notice shall for the purposes of this Act or any provision thereof be deemed to be an employee’.¹⁴² These statutes, however, only apply in the specific context of risks to health and safety arising in the workplace.

Misclassification

19. Changes in the world of work and new forms of work have placed the traditional definition under increasing stress. Increasingly, employers have sought to put legal distance between themselves and workers in a bid to avoid labour costs and legal obligations towards workers.¹⁴³ This is achieved through casualisation, externalisation, and the framing of the relationship as a commercial rather than an employment relationship.

20. The latter approach is the norm in the platform economy. Most platforms seek to avoid the obligations pertaining to an employment relationship by classifying workers as independent contractors by means of service agreements stipulating this designation.¹⁴⁴ As a result, the parties are legally placed in a commercial relationship rather than an employment relationship.¹⁴⁵ This permits platforms to avoid not only direct costs such as minimum wages, maximum hours, paid leave and paid sick leave, but also the indirect costs arising from employee rights such as the right not to be unfairly dismissed.¹⁴⁶ It also prevents workers from engaging in collective bargaining and engaging in industrial action, all of which is limited to ‘employees’.
21. If workers are genuinely freelancers conducting their own operations on their own terms and using platforms purely as a device for marketing their own services independently of the platform, their relationship with the platform will genuinely be commercial and employee rights will find no application. ‘Electronic yellow pages’ would be an example of this. Typically, however, this is not the role played by platforms. The services performed by workers are designed by and associated with the platforms and their brands, not the workers’ own. Platforms derive their revenue from the fees by customers or users for those services rather than subscriptions paid by workers. In order to protect their brands, platforms exercise quality control over the services that are provided, overriding the supposed independence of the workers. In such cases, workers are in a position which is practically indistinguishable from that of employees, but for the fact that their contracts describe them as independent contractors. The term ‘misclassification’ is used with reference to this situation.¹⁴⁷

Legal responses

22. Misclassification of workers raises serious challenges in determining whether the terms of agreement between platforms and platform workers reflects the actual relationship between the parties. In South Africa, the courts have long used the ‘dominant expression test’¹⁴⁸ to establish whether a worker is an employee or an independent contractor. The systematic blurring of dividing lines, however, have made it necessary to introduce new criteria for identifying the distinction more clearly and narrowing the scope for misclassification.
23. The most important innovation has been the introduction of section 200A of the LRA in 2002, which reads as follows:
- ‘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;
 - (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.’ (Emphasis added)
24. In other words, if any one of these factors is present, the burden is on the putative employer to prove that the worker is not an employee. The same presumption is replicated in section 83A of the BCEA and elaborated on in the 2006 ‘Code of Good Practice: Who is an Employee?’¹⁴⁹
25. Importantly, the courts have accepted that, even without reference to section 200A, the wide scope of section 213 of the LRA may include workers without an employment contract. In *Discovery Health Ltd v. CCMA and others*¹⁵⁰ Van Niekerk J held as follows:
- ‘The protection against unfair labour practices established by 23(1) of the Constitution is not dependent on a contract of employment. Protection extends potentially to other contracts, relationships and arrangements in terms of a person performs work or provides personal services to another.’
- ‘[T]aking into account the provisions of s 23(1) of the Constitution, the purpose, nature and extent of relevant international standards and the more recent interpretations of the definitions of ‘employee’ by the Court, I do not consider that the definition of ‘employee’ in s23 of the LRA is necessarily rooted in a contract of employment. It follows that a person who renders work on a basis other than that recognised as employment by the common law may be an ‘employee’ for the purposes of the definition. Because a contract of employment is not the sole ticket for admission into the golden circle reserved for ‘employees.’¹⁵¹
26. In contrast, the scope of section 200A has been significantly limited by the courts’ strict interpretation of the term ‘regardless of the form of the contract’. According to the judgment in *Universal Church of the Kingdom of God v Myeni and others*,¹⁵² it means that a contractual relationship, even if not a contract of employment, must exist between the worker and the alleged employer before section 200A can be invoked. In the context of platform work this is problematic. It implies that section 200A can be circumvented by ensuring that any contract is entered into between the worker and a third party.¹⁵³ However, it is a well-established principle of South African law that substance must prevail over form.¹⁵⁴ On this basis it is suggested that the inquiry should focus not solely on the parties to a contract but also on its terms and its purpose, to avoid

situations where contracts are effectively entered into by intermediaries for the benefit of third parties.

27. Once the presumption has been triggered, the courts continue to rely on the dominant impression test to determine whether the putative employer has discharged the burden of rebutting it. What this entails has been demonstrated in numerous judgments, in which the courts have applied the principle that the substance of the relationship between the parties is of primary importance and have further refined the dominant impression test.¹⁵⁵ Thus, in *State Information Technology Agency (Pty) Ltd v CCMA*¹⁵⁶ the Labour Appeal Court held that,

‘when a court determines the question of an employment relationship, it must work with three primary criteria:

1. An employer’s right to supervision and control.
2. Whether the employee forms an integral part of the organisation with the employer.

And,

3. The extent to which the employee was economically dependent upon the employer.’

28. A recent application of the test can be found in *Vermooten vs Department of Public Enterprises and Others*¹⁵⁷ in which the Labour Appeal Court upheld a consultancy agreement, negotiated between the appellant and the Department of Public Enterprises, on the basis that ‘where the parties are in a relatively equal bargaining position and consciously elect one contract or relationship over another, legal effect should be given to their choice.’¹⁵⁸ The deciding factor was that ‘appellant was clearly in a good bargaining position and able to influence his rate of remuneration’.¹⁵⁹ Thus, courts will place substantial weight on the extent to which parties have the genuine power to shape the terms of their relationship in deciding whether or not a stipulation that a worker is an independent contractor is enforceable.

29. Although the presumption in section 200A is an evidentiary tool and does not replace the dominant impression test, it can assist those in non-typical work arrangements to determine the true nature of the relationship between the parties. Within the platform economy, the sometimes triangular nature of the work arrangements, fluid workspaces, seemingly temporary nature of their work and relative autonomy may complicate the inquiry into workers’ employment status. The 2006 ‘Code of Good Practice: Who is an Employee?’¹⁶⁰ however, provides an important point of reference.¹⁶¹ Noting that ‘the difficulties in establishing the existence of an employment relationship may create serious problems for those workers concerned, their communities, and society at large’,¹⁶² it states that contracts designating workers as independent contractors remain contracts of employment where the worker is in a ‘subordinate or dependent position’.¹⁶³ Conversely, the Code explains that

‘[t]he right of control by an employer includes the right to determine what work the employee will do and how the employee will perform that work. It can be seen in an employer’s right to

instruct or direct an employee to do certain things and then to supervise how those things are done.’¹⁶⁴

30. In the context of platform work, less emphasis should be placed on traditional or formal mechanisms, such as personal supervision, and more emphasis should be placed on the objective exercise of control through mechanisms peculiar to this work environment. These mechanisms, often driven by non-transparent algorithms designed and operated by platforms beyond the control of workers, include:
 - 30.1. rating and monitoring systems;
 - 30.2. the ability to unilaterally deactivate workers and prevent them from continuing to work;
 - 30.3. the power to determine how, when and where work is to be done;
 - 30.4. the power to determine the price of work to customers; and
 - 30.5. workers’ obligation to comply with the platform’s rules.
31. Another criterion triggering the presumption of an employment relationship is the duration of the relationship between the parties. Section 200A of the LRA states that an average of at least 40 hours per month raises a presumption of employment. Within the context of platform work, it is necessary to distinguish between the (ongoing) relationship between the worker and the platform on the one hand, and that between the worker and the customer or user of services on the other.¹⁶⁵ If the focus is on the latter, then the duration of the relationship will be extremely brief (e.g., a single taxi ride or delivery). However, platform work usually consists of a series of continuous short tasks that potentially span more than the ordinary hours of work as defined in the BCEA.¹⁶⁶ For purposes of section 200A, it is the duration of the relationship between the worker and the platform that needs to be considered.¹⁶⁷
32. Relevant also to the misclassification of platform workers is the identification of employers. Frequently, platform workers operate in work arrangements that make it difficult to identify the true employer. Section 200B of the LRA provides a legislative tool to assist in this regard. It states that an employer includes ‘one or more persons who carry on associated or related activity or business by or through an employer if the intent or effect of their doing so is or has been to directly or indirectly defeat the purposes of this Act or any other employment law’.
33. However, the courts have interpreted section 200B narrowly.¹⁶⁸ In *Masoga v Pick ’n Pay Retailers (Pty) Ltd*¹⁶⁹ the Labour Appeal Court held that its effect ‘is merely to fix or extend the liability that would ordinarily be that of the employer, as per the traditional tests, to another or others, who carry on as an associated or related activity or business by or through an employer’. Thus, it ‘cannot be utilised generally for making persons or entities the employer(s) of others’.
34. It is suggested this approach should be adapted to the unique environment of the platform economy. First, given that section 200B applies to activities carried on ‘through an employer’ and platform work typically does not involve contracts of employment, the application of section 200B

should, where necessary, include an inquiry into whether an alleged employer is in fact an employer.

35. Secondly, platforms may (and do) contract with workers via corporate entities located in jurisdictions other than those where workers perform work in their name. To ensure that substance prevails over form, the various corporate entities should in such cases be regarded as associated businesses whose operation has the effect of avoiding the application of South African employment legislation.

Administrative Processes

36. For workers who still fall outside the definition of ‘employee’, the BCEA provides a mechanism through which their working conditions could potentially be regulated. Section 83(1) of the BCEA provides:

‘The Minister may, on the advice of the Commission and by notice in the Gazette, deem any category of persons specified in the notice to be— (a) employees for purposes of the whole or any part of this Act, any other employment law other than the Unemployment Insurance Act, 1966 (Act No. 30 of 1966), or any sectoral determination’.

37. Similarly, section 69(1) of the Unemployment Insurance Act (UIA)¹⁷⁰ provides that

‘The Minister may, after receipt of an application in a prescribed form and with the concurrence of the Board, by notice in the Gazette, declare that as from a date specified in the notice any specified class of persons, or any person employed in any specified business or section of a business or in any specified area, must be regarded as contributors for purposes of this Act.’

Declaring persons to be contributors necessarily means that that they must also be regarded as employees for purposes of the UIA and the Unemployment Insurance Contributions Act.¹⁷¹

38. A similar ‘deeming power’ is present in the labour laws of many countries.¹⁷² It has been argued that this power ‘is another way for legislatures to correct judicial mistakes-or respond to the problems of misclassification and indeterminacy concerning ‘employee’ status- by granting the government the power to make ‘corrections in regulations.’¹⁷³ In South Africa, the Minister’s powers in this regard have yet to be implemented. A draft notice has been issued in terms of section 83 to deem persons in the film and television industry as employees for purposes of certain parts of the BCEA and LRA.¹⁷⁴ Similarly, the National Economic Development and Labour Council (NEDLAC) is conducting ‘a policy review to extend the social protection network to the self-employed’¹⁷⁵ and, to this end, the use of section 69 of the UIA is under consideration.

39. In addition, section 51 of the BCEA provides for the issuing of sectoral determinations by the Minister to regulate the working conditions of workers who are not bound by a sectoral collective agreement. Before doing so the Minister must direct the National Minimum Wage Commission to investigate the conditions of employment in the sector and area concerned.¹⁷⁶ Among the

conditions that can be regulated are minimum wages, leave days and ‘any other matter concerning remuneration or other terms or conditions of employment’.¹⁷⁷

40. Importantly, the Minister’s powers include the power to ‘specify minimum conditions of employment for persons other than employees’.¹⁷⁸ An example of this is Sectoral Determination (SD) 7, which regulates the working conditions of domestic workers, whether they are employees or independent contractors.¹⁷⁹
41. Similarly, section 50(1) of the BCEA empowers the Minister to ‘make a determination to replace or exclude any basic condition of employment provided for in this Act in respect of any category of employees or category of employers’.
42. Taken together, sections 50, 51 and 83 of the BCEA create a mechanism for regulating the rights of platform workers, regardless of their current employment status, by deeming such workers to be employees and issuing a Ministerial determination or sectoral determination applicable to them. Doing so, it is submitted would be in accordance with the Constitutional right to fair labour practices and the purposes of the BCEA.¹⁸⁰

PART B

1. This part of the Memorandum sets out to clarify the nature of the standards which need to be embodied in regulations in order to protect the basic rights of platform workers. The starting point is that the conditions and nature of work in the platform economy are substantially different from those in traditional (physical) workplaces, on which existing employment and labour law is very largely based. The inquiry that follows is based on the research done by the Fairwork Foundation and, for convenience, structures the discussion around implementation of the five principles that emerged from the research as being the most crucial in addressing work-related problems experienced by platform workers.
2. The five principles – fair pay, fair conditions, fair contracts, fair management and fair representation – are considered in turn.

PRINCIPLE 1: FAIR PAY

3. The first set of principles in the Code involves *fair pay*. The premise is that, irrespective of the employment status of the worker, he or she must earn at least the equivalent of the legal minimum wage or there must be a policy which requires payment above this level. Although earnings are generally seen a question of interest which is determined through negotiation or collective bargaining rather than a legal entitlement, there are two considerations which bring it into the legal paradigm.

4. The first is that the Constitution of the ILO,¹⁸¹ the Philadelphia Declaration¹⁸² and the ILO's Declaration on Social Justice for a Fair Globalisation¹⁸³ affirm 'a minimum living wage' as an objective for all nations to implement. Likewise, article 25(1) of the United Nations' Universal Declaration of Human Rights (UDHR) – which forms part of international customary law – states that '[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services'. Similarly, article 11(1) of the International Covenant on Economic, Social and Cultural Rights of 1966 'recognise[s] the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions'. It furthermore obliges the States Parties to take 'appropriate steps to ensure the realisation of this right'.
5. In this context, fair pay equivalent to 'at least' the local minimum wage should be understood as 'a minimum living wage' providing a basic but decent standard of living for a worker and her or his family. Elements of a decent standard of living include 'food, water, housing, education, health care, transport, clothing, and other essential needs, including provision for unexpected events.'¹⁸⁴ Implementing this can be seen as part of South Africa's obligations under international law which labour statutes seek to implement.
6. This points to the second consideration bringing the issue of fair pay into the legal framework. Wage-setting is no longer a purely private arrangement between employers and workers or trade unions. The state has become involved in wage-setting through the issuing of sectoral determinations by the Minister and through the enactment of the National Minimum Wage Act (NMWA).¹⁸⁵ These two mechanisms, and their relevance to achieving a living wage for platform workers (and, by implication, other vulnerable workers) will be considered in turn.

The NMWA

7. The first point to note is that the NMWA, unlike other labour statutes, applies to all 'workers' and their employers, with limited exceptions.¹⁸⁶ Section 1 defines a 'worker' as 'any person who works for another and who receives, or is entitled to receive, any payment for that work whether in money or in kind'. The National Minimum Wage Panel, reporting in 2016, expressly recommended that the Act apply to both employees and independent contractors.¹⁸⁷ Platform workers should therefore be covered irrespective of their employment status. In practice, however, the operational costs for many platform workers (such as vehicles or equipment) may be far in excess of the national minimum wage (NMW), thus limiting its relevance in relation to the platform economy.
8. The second point is the extremely low level of the NMW, currently R20.76 per ordinary hour worked.¹⁸⁸ The rates for farm workers and domestic workers¹⁸⁹ are even lower, at R18.68 and

R15.57 per ordinary hour respectively,¹⁹⁰ while workers employed on expanded public works programmes are entitled to only R11.42 per ordinary hour.¹⁹¹

9. There is general acceptance that the NMW is well below the level of a living wage.¹⁹² This is due to the fact that it represents a compromise reached between organised labour, organised business, community organisations, government and others, taking into consideration among other factors its general employment effect (i.e., affordability for all employers).¹⁹³ However, the affordability criterion finds less application in the platform economy to the extent that platforms represent a relatively well-resourced segment of work-providers, including multinational companies. For wage-setting purposes, it should be more appropriate to use the standard of a living wage for different sectors of the platform economy, subject to the usual provision for exemptions on good cause shown.¹⁹⁴
10. There is no nationally accepted methodology in South Africa for the calculation of a living wage. Since the cost of living may differ from one locality to another, the value of a living wage will likewise be variable. Sectoral determinations and bargaining council agreements seek to address this by prescribing different minimum wages for different regions within the country. Nonetheless, based on a triangulation of sources,¹⁹⁵ it is proposed that a living wage should not be less than R6800 per month for a 40-hour a week. This translates to R39.23 per hour for a 40-hour a week.
11. However, the unique circumstances of the platform economy need to be taken into account when calculating a living (or minimum) wage. As noted already, workers may be required to bear the costs of essential equipment such as vehicles used for ride-hailing which may be far in excess of a living wage. The notion of a living wage would be meaningless unless such costs are excluded.
12. The character of platform work also raises questions regarding the calculation of working hours. These include payment for 'downtime' (i.e., when the worker has the app turned on but has not yet been connected to a client). This corresponds to the employment paradigm, in that such payment can be seen as equivalent to remuneration of employees for time during which they make their services available to the employer.

Sectoral Determinations

13. The NMW sets a benchmark which employers cannot go below, although they can pay more. Thus, the NMWA does not override bargaining council agreements, employment contracts or sectoral determinations which prescribe higher wages than the minimum wage (discussed below). Section 51(3) of the BCEA adds that, where a sectoral determination did so as at the date of the

promulgation of the NMWA, the wages in that sectoral determination and benefits based on those wages must be increased proportionally to any annual adjustment of the NMW.¹⁹⁶ In the case of sectoral determinations prescribing lower wages, apart from the above-mentioned exemptions, the wage must be increased to R20.76.¹⁹⁷

14. As noted already, sectoral determinations represent another mechanism whereby minimum conditions applicable to that sector can be extended to platform workers in the sector who are deemed to be employees. It has also been noted that the NMW is subject to higher minimum wages in sectoral determinations and bargaining council agreements. A brief survey follows of sectoral agreements which could potentially be extended in this manner (or, in the case of the domestic work sector, may already apply to platform workers).

Domestic Work Sector

15. SD7 applies to all domestic workers employed or supplied by employment services or employed as independent contractors. This will include platform workers who offer domestic services. Minimum wages for domestic workers in terms of SD7 were below the NMW of R15.57 per hour set by the NMWA for all domestic workers¹⁹⁸ and were accordingly amended in March 2020. However, for domestic workers earning more than the NMW their contracts of employment take precedence.¹⁹⁹

Contract Cleaning Sector

16. The 'contract cleaning sector', as defined in SD1,²⁰⁰ is restricted to cleaning outside of private premises while domestic workers work only in private households and the minimum wage as amended in March 2020 varies from R22.84 per hour in metropolitan council areas and R23.04 per hour in KwaZulu-Natal to R20.83 in the rest of South Africa.²⁰¹

Hospitality Sector

17. This sector is regulated by SD14 and the minimum wage ranged from R17.34 per hour for firms with fewer than ten employees to R19.35 per hour for firms with 11-50 employees.²⁰² SD14 does not apply to employers and employees who are involved in the letting of flats, rooms or houses²⁰³ and will thus exclude workers of platforms providing these services. However, in terms of schedule 1 of the NMWA all workers in this sector are now entitled to R20.67 for each ordinary hour worked.

Relevance for Platform Workers

18. As discussed in the previous section, the deeming powers provided in section 83 of the BCEA combined with sectoral and ministerial determinations provide a means through which the NMWA could potentially be explicitly extended to those platform workers who could benefit from

the application of the NMW and a living wage, exclusive of operational costs, could be determined for sectors where this is appropriate.

Government Measures during COVID-19 relating to Fair Pay

19. The government's financial relief measures implemented during the Covid-19 lockdown illustrate the precarious position of platform workers along with other categories of non-standard workers who fall between the legal cracks when they lose their source of income.²⁰⁴
20. At the start of the pandemic the Unemployment Insurance Fund (UIF) had a surplus of over R100 billion, of which R30 billion was earmarked for the Temporary Employee Relief Scheme to pay a proportion of workers' wages while they are laid off.²⁰⁵ However, as platform workers do not have employers who pay UIF contributions on their behalf, they cannot apply for such benefits.²⁰⁶ On the other hand, very few platform workers have registered as independent businesses and thus do not qualify for the government's small business relief measures either.²⁰⁷
21. In response, government has created a special Social Relief of Distress grant to be administered by the national Social Security Agency, available to unemployed South Africans and to legally-registered²⁰⁸ migrants and refugees who receive no other social grant or UIF benefit.²⁰⁹ This involves a very simple registration system using WhatsApp or alternative channels for those without smartphones.²¹⁰ However, it will pay out only R350 per month; that is, less than 10% of the current minimum wage and around 5% of what Fairwork calculates to be a living wage in South Africa.²¹¹
22. These anomalies highlight the importance of extending regulation equivalent to that of employees to workers in the platform economy (and elsewhere) who perform equivalent work.

PRINCIPLE 2: FAIR CONDITIONS

23. Working conditions for the majority of platform workers have tended to be poor, irrespective of the nature of the work.²¹² The position in South Africa will be illustrated with reference to health and safety while at work and entitlement to paid sick leave.

Health and Safety at Work

24. Health and safety protection for workers in South Africa is regulated by the Occupational Health and Safety Act (OHSA).²¹³ The Act applies to all employment activities and instances where machinery and plant are used and, given its purpose of ensuring safety at work, its scope cannot be limited to employers and employees in a narrow technical sense.
25. This wider purpose is reflected, firstly, in the relative broadness of certain of the definitions set out in section 1. Thus:

- 25.1. ‘Machinery’ means ‘any article or combination of articles assembled, arranged or connected and which is used or intended to be used for converting any form of energy to performing work, or which is used or intended to be used, whether incidental thereto or not, for developing, receiving, storing, containing, confining, transforming, transmitting, transferring or controlling any form of energy’.²¹⁴
- 25.2. ‘Employee’ means ‘any person who is employed by or works for an employer and who receives, or, is entitled to receive any remuneration’ or ‘who works under the direction or supervision of an employer *or any other person*’.²¹⁵ The latter part of the definition could include independent contractors who are subject to the direction and supervision of platforms by electronic means.
- 25.3. ‘Employer’ means ‘any person who employs *or provides work for any person* and remunerates that person or expressly or *tacitly undertakes to remunerate him*’.²¹⁶

Although all these terms are subject to interpretation, the purpose of the Act suggests a wider rather than a narrower interpretation which could potentially extend to certain forms of platform work.

26. The broader scope of the Act further appears from the duties placed on employers. Firstly, ‘an employer shall provide and maintain, as far as reasonably practicable, *a working environment* that is safe and without risk to the health of his employees’.²¹⁷ Numerous responsibilities forming part of this duty are set out without detracting from its general nature. Various sets of regulations have furthermore been promulgated to determine the duties of employers and independent contractors in specified sectors, in which the term ‘employee’ is not used. These regulations should apply to all workers in the specified industry including, potentially, platform workers.²¹⁸
27. Secondly, the Act expressly extends health and safety protection and duties to persons other than employers and employees. Section 9 (1) states: ‘Every employer shall conduct his undertaking in such a manner as to ensure, as far as is reasonably practicable, that *persons other than those in his employment who may be directly affected by his activities* are not thereby exposed to hazards to their health or safety’ (emphasis added).
28. Section 9(2) adds that ‘[e]very self-employed person shall conduct his undertaking in such a manner as to ensure, as far as is reasonably practicable, that he and other persons who may be directly affected by his activities are not thereby exposed to hazards to their health or safety.’
29. In *Pikitup (Soc) Ltd v. SAMWU*²¹⁹, the Labour Appeal Court held that sections 8 and 9 of OHSA ‘place a duty on the employer to act proactively to avoid any harm or injury to its employees *and others*. There is no standard as to what is reasonably practicable. Each case will have to be determined on its own facts and circumstances’ (emphasis added). The court went on to explain;

30. 'Reasonably practicable is a variable standard that must be determined objectively. The employer and to a lesser extent the employee as the duty holders ... must do a risk assessment and consider what can or should be done under the circumstances, considering their knowledge of the situation to ensure the health and safety of employees, co-workers and others who might be put in harm's way, because of their activities. ... In essence, this means that what can be done, should be done, unless it is reasonable in the circumstances to do something less, or in extreme circumstances, more'.²²⁰
31. In *Van Den Heever v. Bray and another*²²¹ the obligation of the employer towards third parties was applied in respect of a self-employed contractor who had received an electrical shock while working at the employer's premises.
32. In *Du Pisanie v. Rent-a-Sign (Pty) Ltd and Anor*²²² the Supreme Court of Appeal found that, where a danger is not obvious, an employer is under a duty to point it out to an independent contractor. However, it was held, the wording of the OHS Act does not suggest that an independent contractor falls within the health and safety obligations of the employer, which are limited to persons working under its direct control.
33. In *Joubert v Buscor Proprietary Limited*²²³ the High Court, on different facts, arrived at a different conclusion. In this case the issue was the employer's liability for damages arising from the death of an apprentice with a company contracted by the employer to perform work. The court dismissed the defence that the deceased was not an employee as envisaged in the OHS Act and held that the obligation of the employer in section 9(1) is broad enough to include subcontractors and the public at large if affected by the employer's activities.²²⁴
34. The court further held that the liability of the employer under OHS Act is strict liability and set out a number of factors against which it be evaluated.²²⁵ Thus, section 9(1) of OHS Act provides a framework within which employers will be responsible for the health and safety of independent contractors who may be affected by their activities also in the absence of negligence.
35. Even if OHS Act is aimed at protecting the health and safety of all workers, including those classified as independent contractors, the features of platform work introduce a number of practical complications. Whether platform work is performed digitally or manually, it is generally not performed on the premises of the platforms but on the premises of the client (e.g. domestic workers), on the road (e.g. taxi services) or at any place chosen by the worker to work on their laptops. The implication is that the workplace should be the place where the work is done. Similarly, platform work has introduced new forms of health and safety issues; for example, for digital platform workers who are exposed to traumatic content for extended periods of time. In these and other respects courts may be challenged to develop purposive interpretations of existing categories to implement platform workers' right to a safe working environment.

Compensation for Occupational Injuries and Diseases

36. The corollary of occupational health and safety protection is the provision of compensation for work-related diseases or death of workers, which is regulated by the Compensation for Occupational Injuries and Diseases Act (COIDA).²²⁶

‘Employee’

37. COIDA extends protection to ‘employees’. Its definition of the term is different from that provided in the LRA, BCEA and EEA.²²⁷ On the one hand it is limited to persons ‘who work under a contract of service, apprenticeship or learnership with an employer’, which has been interpreted strictly as requiring a contract of employment stipulating payment of remuneration.²²⁸ On the other hand, there are some elements of flexibility which may potentially allow for the inclusion of certain categories of platform workers:

37.1. the contract of employment may be ‘express, implied, oral or in writing’ and remuneration may be ‘calculated by time or by work done, or in cash or in kind’, thus facilitating the exposure of disguised employment;

37.2. similarly, the definition includes ‘casual’ employees ‘employed for the purpose of the employer’s business’;²²⁹

37.3. independent contractors as such are not excluded; the excluded category is defined as ‘a person who contracts for the carrying out of work and himself engages other persons to perform such work’.²³⁰ This would not apply to platform workers providing individual services as alleged independent contractors

38. The Compensation for Occupational Injuries and Diseases Amendment Bill,²³¹ which is currently before Parliament, further equates the meaning of ‘earnings’ with the extremely detailed definition of ‘remuneration’ contained in Schedule 4 to the Income Tax Act of 1962.²³² This describes ‘remuneration’ as ‘any amount of income which is paid or is payable to any person by way of any salary, leave pay, wage, overtime pay, bonus, gratuity, commission, fee, emolument, pension, superannuation allowance, retiring allowance or stipend, whether in cash or otherwise and whether or not in respect of services rendered’, subject to six pages of inclusions and exclusions. Arguably, ‘remuneration’ in relation to the definition of an employee should mean the same as ‘earnings’ in this sense and should be applicable also to the earnings of platform workers.

39. Domestic workers in private households are excluded from COIDA. In *Mahlangu & Anr v Minister of Labour & others*²³³ the High Court found that this exclusion was unconstitutional. The ruling is currently awaiting confirmation by the Constitutional Court. Government has not opposed the application and the abovementioned Amendment Bill provides for the inclusion of domestic workers.

40. In terms of the definition, domestic workers employed outside of private households are covered by COIDA.

Scope of protection

41. Compensation in terms of COIDA is premised on injuries or diseases ‘arising out of and in the course of an employee’s employment’,²³⁴ a concept which has been the subject of much judicial interpretation in South Africa as in other countries. The meaning of the term will depend on the facts of each case but courts have been prepared to interpret it broadly.²³⁵ The issue for present purposes is how it applies to work done by platform workers. The problem is not the fact that work is done outside the platforms’ premises. Many employees are required to perform work in different places. The question is rather where ‘employment’, or the widely divergent duties performed by platform workers in a variety of sectors, begin and end.
42. The ILO’s Violence and Harassment Convention²³⁶ offers a precedent of comprehensive protection applicable to work in general. of Article 2, It applies to all sectors, whether private or public, both in the formal and informal economy, and whether in urban or rural areas. It aims to protect workers and employees, irrespective of their contractual status, and includes persons in training, workers whose employment has been terminated, volunteers and job seekers.²³⁷
43. ‘Work’ is understood in the widest possible sense as including activities:
 - 43.1. in the workplace, including public and private spaces where is performed;
 - 43.2. in places where the worker is paid, takes a rest break or a meal, or uses sanitary, washing and changing facilities;
 - 43.3. during work-related trips, travel, training, events or social activities;
 - 43.4. through work-related communications, including those enabled by information and communication technologies;
 - 43.5. in employer-provided accommodation; and
 - 43.6. when commuting to and from work.²³⁸
44. Thus, this Convention can extend to workers engaged in platform work and can serve as a point of reference for interpreting ‘course of employment’ in relation to non-standard forms of work in general.

South African Case Law

45. South African courts have long acknowledged that the employment relationship extends beyond an employee’s formal duties and the workplace. This has been established with [articular clarity in relation to disciplinary action in respect of misconduct committed outside the workplace or outside working hours.
46. The general rule is that an employer has no competency to discipline an employee for conduct that is not work-related. However, even where misconduct does not fall within the express terms of a disciplinary code or took place away from the workplace, it may still be of such a nature that the employer may be entitled to take disciplinary action.²³⁹

47. Thus, in *Biggar v City of Johannesburg, Emergency Management Services*²⁴⁰ a firefighter and his family had been subjected to racial harassment by certain colleagues who were accommodated in the same residential premises at the fire station. The Labour Court confirmed that disciplinary action may be taken against employees for conduct committed outside the workplace if it has an impact on the employment relationship.²⁴¹
48. A crucial consideration was the fact that ‘the employer did not take all necessary steps to eliminate the racial abuse that was being perpetrated by some of its employees’.²⁴² Similarly, in *Media 24 Ltd v Grobler*²⁴³ an employer was held liable for damages suffered by an employee due to sexual harassment on the basis that it had failed in its common-law duty to its employees ‘to take reasonable care for their safety’.
49. The above cases indicate that the reciprocal obligations of employers and employees other extend beyond the contractual scope of the employment relationship and the place(s) where work must be performed. This includes the employer’s duty to safeguard employees against foreseeable harm in terms of OHS Act as well as the common law. The ILO’s Violence and Harassment Convention indicates the broad meaning that should be given to ‘work’ in this context. Since the Constitution extends the same basic rights to all workers, platform workers should be entitled to the same protection regardless of their contractual status. This is particularly important in respect of work such as ride-hailing and domestic services.

Maximum working hours

50. The BCEA provides for maximum working hours of employees, with limited exceptions.²⁴⁴ The number of ordinary hours is limited to 45 per week, or nine hours daily for workers who work a five-day week.²⁴⁵ Overtime is limited to ten hours per week and may only be worked by agreement.²⁴⁶ There is, however, scope for flexibility in the form of a ‘compressed working week’ or ‘averaging of hours of work’ over a four-month period, provided in both case that (average) working time does not exceed the above-mentioned weekly maximums.²⁴⁷
51. Various other limits are placed on working time, including meal intervals²⁴⁸ and daily and weekly rest periods of 12 hours and 36 hours respectively.²⁴⁹
52. Platform workers classified as independent contractors are excluded from this protection, even though the unpredictable working schedules of these workers expose them particularly to long and unsocial hours and the absence of breaks. Given their right to equality and fair labour practices,²⁵⁰ platform workers are entitled to the same or equivalent rights as those guaranteed to employees under the BCEA.

Paid leave

53. For platform workers outside the protection of the BCEA, taking leave means loss of income. For e-hailing app workers, being inactive for certain periods may lead to deactivation or low ratings, ultimately impacting on their earnings.
54. A right to paid annual leave is in consonance with article 24 of the Universal Declaration of Human Rights. Employees in South Africa are entitled to 21 consecutive days of annual leave on full pay, which may also be taken at the rate of one day's leave for each 17 days worked or one hour's leave for every 17 hours worked.²⁵¹
55. In terms of the BCEA, all employees are further entitled to paid sick leave per 36-month 'leave cycle' equal to the number of days the employee would normally work during a period of six weeks. For reasons already given, the same right should be extended to all platform workers.
56. The BCEA also provides for maternity leave (including protection of employees before and after birth of a child), parental leave, adoption leave, commissioning parental leave and family responsibility leave.²⁵²
57. All platform workers should be entitled to similar rights.²⁵³

PRINCIPLE 3: FAIR CONTRACTS

58. In the platform economy, contracts define the interactions between platforms and platform workers, whether employees or independent contractors. The key question is the fairness of contracts between platforms and workers.
59. As noted already, the employment relationship can be disguised and workers can be deprived of the protections due to them. Furthermore, in some instances, there are multiple parties in the work arrangement, making the determination and enforcement of obligations more complicated. While the contract of employment is subject to employment legislation such as the BCEA, for platform workers who are independent contractors it is necessary to consider the terms of the agreement between them and the platforms under the South African law of contract and the Consumer Protection Act²⁵⁴ (CPA) and other statutes.
60. The primary question is whether the contract genuinely reflects the nature of the relationship or the status of the worker, which has already been discussed.²⁵⁵ The focus here is on two further aspects of contractual fairness, namely:
 - 60.1. the terms and conditions must be transparent, concise and provided to workers in an accessible form; and,
 - 60.2. the contract is free of unreasonable terms.

Transparency, clarity and accessibility

61. The BCEA gives employees a right to clear and accessible contracts in three ways:
 - 61.1. Employers must supply employees at the commencement of their employment with written particulars of their terms and conditions of employment, including the full name and address of the employer, the employee's duties, the place of work, wage and overtime rates and numerous other aspects of the job.²⁵⁶
 - 61.2. If an employee is unable to understand the written particulars of employment, the employer must ensure that they are explained to the employee in a language and in a manner that the employee understands.²⁵⁷
 - 61.3. The employer must display at the workplace, in a place where it can be read by employees, a statement informing employees of their statutory rights in the official languages which are spoken at the workplace.²⁵⁸

62. For reasons already given, it would be contrary to the right to equality under section 9(1) of the Constitution for platform workers who are similarly situated to be treated less favourably.

63. It is argued below that, if workers are not 'employees' of a platform, they may fall within the definition of 'consumer' based on their use of the platform's services. If so, the CPA requires that terms and conditions in a contract must be written in plain and understandable language and drawn to the attention of the consumer in a conspicuous manner and form likely to attract the attention of an ordinarily alert consumer having regard to the circumstances.²⁵⁹

64. Section 49(1) further states that provisions in consumer agreements must be drawn to the consumers' attention if such provisions:
 - 64.1. in any way limit the risk or liability of the supplier or any other person;²⁶⁰
 - 64.2. constitute an assumption of risk or liability by the consumer;
 - 64.3. impose an obligation on the consumer to indemnify the supplier or any other person for any cause;²⁶¹ or
 - 64.4. are an acknowledgement of any fact by the consumer.

65. In addition, section 49(2) states that, if a provision or notice concerns any activity or facility which is subject to risks, the supplier must specifically draw the fact, nature and potential effect of those risks to the consumer's attention. The consumer must agree thereto by signing or initialling or otherwise indicating acknowledgment thereof. This is required for any risks: that are of an unusual character or nature; the presence of which the consumer could not reasonably be expected to be aware of or notice, which an ordinarily alert consumer could not reasonably be expected to notice or contemplate in the circumstances; that could result in serious injury or death.

66. Furthermore, this must be done before the consumer enters into the transaction or agreement, begins to engage in the activity, enters or gains access to the facility, or is required to make any

payment.²⁶² It also means that the consumer must be given adequate opportunity in the circumstances to understand the provision or notice.²⁶³

67. In *Standard Bank of South Africa Limited v Dlamini*²⁶⁴ the High Court noted that ‘for the purposes of the NCA,²⁶⁵ a document is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the document is intended, with average literacy skills and minimal credit experience, could be expected to understand the content, significance and import of the document without undue effort, having regard to, the organisation, form and style of the document, and the vocabulary, usage and sentence structure of the text.’²⁶⁶ Although the transaction in this case preceded the CPA, the reasoning of the court aligns with the rights of consumers in the CPA.

68. In *Mitsubishi Hitachi Power Systems Africa (Pty) Ltd v Murray and Roberts Ltd and Another*²⁶⁷ the Supreme Court of Appeal further recognised that a subcontractor had a right to information regarding incentive arrangements concluded between a contractor and employer. The court upheld the respondent’s claim that:

‘Mitsubishi, as the recipient of the contractual benefits, has a duty to pass on to M&R its share of the benefits. It is an incident of this duty and the overarching obligation to act in good faith that renders Mitsubishi liable to make the disclosures sought of it.’²⁶⁸

By the same reasoning, platforms should be under a duty to pass on to workers benefits that may accrue from their work as well as information relating to relevant arrangements with third parties and, generally, to act in good faith. Transparency should be seen as an aspect of good faith.

Unreasonable terms

69. The principle of *pacta sunt servanda* (‘agreements must be kept’) forms the basis of the law of contract. Thus, parties who willingly enter into a contract are bound by its terms. Provided it is lawful, the fact that a contractual term operates harshly does not on its own mean that it will be unenforceable. This applies also to contracts between platforms and platform workers. However, an otherwise lawful contract or contractual term that has been freely entered into may be declared void if it is against public policy.²⁶⁹

Public policy

70. Public policy is therefore the touchstone in determining the enforceability of a contract. This was further clarified in *Barkhuizen v Napier*²⁷⁰ where the Constitutional Court held that ‘[p]ublic policy represents the legal convictions of the community; it represents those values that are held most dear by the society’.²⁷¹ The court went on to explain:

‘What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus, a term in a contract that is inimical to

the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable.²⁷²

71. The court further recognised that unequal bargaining power is ‘a factor which together with other factors, plays a role in the consideration of public policy’ and endorsed the principle that ‘the relative situation of the contracting parties is a relevant consideration in determining whether a contractual term is contrary to public policy’.²⁷³
72. In the platform economy the power balance between platforms and workers is heavily skewed in favour of platforms²⁷⁴ and it is common for workers to be presented with contracts on a take-it-or-leave-it basis. This is reason for courts to look with added caution at the reasonableness of terms which impose onerous conditions on workers and use the public policy test to determine the fairness of such clauses.
73. An example of this is the arbitration clause in Uber drivers’ contracts in South Africa, stating that all disputes will be dealt with ‘in accordance with the laws of The Netherlands’ by way of mediation and arbitration and that ‘[t]he place of both mediation and arbitration shall be Amsterdam’.²⁷⁵ This can be seen as both unreasonable and unfair, in that it places dispute resolution beyond the reach of drivers in conflict with their constitutional right of access to justice²⁷⁶ and, therefore, in conflict with public policy.
74. This reasoning was applied by the Supreme Court of Canada in *Uber Technologies Inc. v. Heller*.²⁷⁷ The majority of the court adopted a widened doctrine of unconscionability targeted specifically at standard ‘contracts of adhesion’,²⁷⁸ based on two elements: (i) inequality of bargaining power resulting in (ii) an improvident transaction. But even on the narrower or ‘constitutional’ approach adopted by the minority of the court, the arbitration clause was held to contrary to public policy by impeding access to justice and undermining the rule of law. This sets a persuasive precedent for the protection of Uber drivers and platform workers subject to similar clauses in South Africa.

The Consumer Protection Act (CPA)

75. Although the CPA was not enacted with the platform economy in mind, it can nonetheless apply to certain aspects of agreements between platforms and their workers. Many platforms such as Uber or SweepSouth insist that the relationship between workers and themselves is a business transaction, where the platform merely supplies an app or other digital resource and workers are independent contractors using the app for their own purposes. In such cases workers may qualify as consumers of the services provided by platforms, thus bringing their relationship within the scope of the CPA.
76. Section 1 of the CPA defines a consumer in respect of any goods or services *inter alia* as ‘a person who has entered into a *transaction* with a supplier in the ordinary course of the supplier’s

business, unless the transaction is exempt from the application of this Act'. 'Business' is defined as 'continual marketing of any goods and services'.²⁷⁹ In terms of the platform model outlined above, the supply of information services/app is 'the ordinary course of business' of the platform. If workers are independent contractors using this service, there is a strong case for arguing that they fall within the definition of 'consumer'.

77. Section 1 of the CPA defines a 'transaction' in respect of a party's ordinary course of business very broadly to include an agreement for 'the supply or potential supply of any goods or services in exchange for consideration' or 'the performance by, or at the direction of, that person of any services for or at the direction of a consumer for consideration'.²⁸⁰ 'Consideration' is defined as 'anything of value given and accepted in exchange for goods or services' and should include monetary deductions by platforms from payments made to workers by clients. The supply of information technology by platforms in exchange for such payment should therefore amount to a 'transaction' within the context of the CPA.²⁸¹
78. Section 48 of the CPA contains a general prohibition of unfair, unreasonable and unjust contract terms as well as any agreement that requires a consumer to waive any rights, assume any obligations or waive any liability of a supplier on terms that are unfair, unreasonable or unjust. A term will be deemed to be unfair, unreasonable or unjust if, among others, it is 'excessively one-sided' in favour of the platform or 'so adverse to the consumer as to be inequitable'.²⁸² This may apply, for example, to terms that entitle platforms to unilaterally 'deactivate' workers if, in the platform's opinion, they have failed to meet criteria stipulated by the platform. In particular, these requirements take into consideration contracts where consumers have limited opportunity to influence the terms of the contracts.²⁸³
79. Furthermore, section 51 contains outright prohibitions of contractual terms in a wide range of circumstances where consumers are exposed to unfair disadvantage. This includes terms that have the purpose or, more importantly, the effect of defeating the purposes of the Act or misleading the consumer. Clauses are also unlawful if they purport to 'waive or deprive a consumer of a right in terms of this Act' or 'avoid a supplier's obligation or duty in terms of this Act'.²⁸⁴
80. Furthermore, section 4(4) of the CPA states that contracts must be interpreted to the benefit of the consumer. Therefore, the interpretation of every contract or document prepared by the supplier must be to the benefit of the consumer – in this case, platform workers.
81. If a court determines that a provision was unconscionable, unjust, unreasonable or unfair, the Court may make a declaration to that effect and make any order that it deems just and reasonable in the circumstances.²⁸⁵ This includes an order to compensate the consumer for losses and expenses. In *Bank of Lisbon & South Africa v Ornelas and Another*²⁸⁶ the court defined

unconscionable terms as that which affront the sense of decency and ‘sense of justice of the community.’ In such cases, it was found, discretion needs to be exercised for the principle of *pacta servanda sunt* to give way to the prevention of injustice.

The Arbitration Act

82. The Arbitration Act²⁸⁷ provides that the High Court may, on good cause shown, set aside an arbitration agreement or interdict its application.²⁸⁸ This offers a basis on which an arbitration clause such as that in the Uber contract may be challenged.²⁸⁹
83. Good cause will depend on the facts of each case. In *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being and another*²⁹⁰ the applicant sought to challenge her discontinuation as a minister of the Methodist Church, after publicly announcing her intention to marry her same-sex partner, and wished to take action in the High Court but was required by the Church’s Laws to refer any dispute to arbitration by a panel of Church members. Given the facts of the case, the Constitutional Court held that the applicant had not shown any good reason why the arbitration agreement should be set aside. Within the context of platform work, however, workers’ right of access to justice and right to fair labour practices should constitute good cause.

The Electronic Communications and Transactions Act

84. Contractual terms that seek to avoid liability on the part of platforms or place disadvantageous conditions on workers may also be contrary to section 43(2) of the Electronic Communications and Transactions Act²⁹¹ which requires a supplier to provide a consumer with the opportunity to review electronic transactions, correct mistakes and withdraw from the transaction before finally placing an order.

PRINCIPLE 4: FAIR MANAGEMENT

Fair Procedures

85. South African labour laws regulate the work process, including disciplinary procedures, fair labour practices and dispute resolution in employment in order to protect workers against unilateral action by employers. The rights to equality and fair labour practices require the extension of equivalent protection to platform workers, including those in employment-like relationships who are as classified independent contractors.
86. Rules or standards of conduct governing the work process (hereafter ‘workplace rules’) may be determined in a number of ways, including the contract of employment for workers who are employees, contracts for independent contractors, disciplinary codes or industry standards deemed to be incorporated into contracts, sectoral and ministerial determinations or collective agreements.²⁹² A breach of these rules or standards can be termed ‘misconduct.’ In the case of

employees, such breaches could lead to disciplinary sanctions subject to the right to substantive and procedural fairness set out in the LRA²⁹³ and the Code of Good Practice: Dismissal²⁹⁴ (hereafter ‘Dismissal Code’). The procedures followed in such cases are referred to as ‘workplace procedures’.

87. For platform workers who are classified as independent contractors, workplace procedures will be determined in the first place by the contract between themselves and platforms. As argued above, such contracts must comply with the South African law of contract and the CPA.

88. In *Murray vs Minister of Defence*²⁹⁵ the Supreme Court of Appeal extended the Constitutional right to fair labour practices to workers other than employees. The case involved a constructive dismissal claim by a naval officer whose position as a member of the South African defence forces meant that he was expressly excluded from the ambit of the LRA. However, the Court noted that section 23(1) of the Constitution ‘(of which the LRA is the principal legislative off-shoot) provides that “everyone has the right to fair labour practices”. This includes members of the defence force’.²⁹⁶ But, although the parties had agreed that the plaintiff was entitled to rely directly on this right as well as the right to dignity, the Court found it ‘best to understand the impact of these rights on this case through the constitutional development of the common law contract of employment’. The judgment continues:

‘This contract has always imposed mutual obligations of confidence and trust between employer and employee. Developed as it must be to promote the spirit, purport and objects of the Bill of Rights, the common law of employment must be held to impose on all employers a duty of fair dealing at all times with their employees – even those that the LRA does not cover.’²⁹⁷

89. Commander Murray was not an ‘employee’ but a ‘member’ of the Defence Force. However, the Constitutional Court had previously held that the term ‘worker’ in section 23 of the Constitution includes members of the SANDF.²⁹⁸ The Court then proceeded to apply the rights relating to constructive dismissal in terms of the LRA. This judgment, therefore, is authority for the proposition that *even if* platform workers are held not to be employees within the meaning of the LRA, appropriate rights of employees in terms of the LRA will implicitly be applicable to them in accordance with the right to fair labour practices.

90. In *Pretorius and anor v. Transport Pension Fund and anor*²⁹⁹ the Constitutional Court again expressed the need for a more inclusive interpretation of this right:

‘Contemporary labour trends highlight the need to take a broad view of fair labour practice rights in section 23(1). Fewer and fewer people are in formal employment; fewer of those in formal employment have union backing and protection. More and more people find themselves in the ‘twilight zone’ of employment as supposed ‘independent contractors’ in time-based employment subject to faceless multinational companies who may operate from a web

presence. In short, the LRA tabulated the fair labour practice rights of only those enjoying the benefit of formal employment – but not otherwise. Though the facts of this case do not involve these considerations, they provide a compelling basis not to restrict the protection of section 23 to only those who have contracts of employment’.

Dispute Resolution

91. Given the highly adversarial history of labour relations in South Africa, one of the primary objectives of the LRA is ‘to promote the effective resolution of labour disputes’.³⁰⁰ The LRA does this by establishing various institutions and processes for resolving disputes in the workplace. The most prominent forums are bargaining councils, the Commission for Conciliation, Mediation and Arbitration (CCMA), the Labour Court and Labour Appeal Court (from which an appeal lies to the Constitutional Court).
92. Bargaining councils primarily engage in collective bargaining at the sectoral level. However, those accredited to do so can also provide dispute resolution services to parties within their registered scope, including parties that are not members of the council.³⁰¹ In contrast, the CCMA and the Labour Court both have jurisdiction across South Africa.³⁰² Subject to the Constitution and the jurisdiction of the Labour Appeal Court, the Labour Court has exclusive jurisdiction in respect of all matters prescribed by the LRA or any other law.³⁰³ It also has concurrent jurisdiction with the High Court to hear disputes arising from rights in the Bill of Rights relating to employment and labour relations, executive or administrative acts by the State in its capacity as an employer and the application of any law administered by the Department of Employment and Labour.³⁰⁴
93. The concurrent jurisdiction of the High Court thus relates to matters not regulated by the LRA and, in practice, is mainly exercised in respect of contractual claims. This means that platform workers classified as employees will have access to the dispute resolution processes created by the LRA, whereas those classified as independent contractors will be subject to the jurisdiction of the High Court.
94. Given the international dimensions of the operations of certain platforms, the question of extraterritorial jurisdiction is important. The case law to date has mainly been concerned with disputes brought by employees working outside South Africa for companies situated within South Africa or linked to South African companies.³⁰⁵ The rule that has emerged is that, in such cases, the CCMA will have jurisdiction if the undertaking of the employer is situated within South Africa. This leaves the position less clear in respect of employees working within South Africa for undertakings (allegedly) situated outside South Africa.
95. In *NUPSAW obo Mostert v Uber South Africa Technology Services (Pty) Ltd and others*³⁰⁶ the CCMA accepted that the location of the alleged employer will determine the question of jurisdiction. It was accordingly ruled that the CCMA lacked jurisdiction because Uber BV, the alleged employer, was located in the Netherlands. This ruling is questionable in that it opens the door to abuse by

allowing employers of South African workers to evade South African labour law by ensuring that their registered office is located outside South Africa, thus defeating the purposes of the LRA.

96. A better approach in such cases, it is suggested, is that formulated by the Labour Court in *Kleinhans v Parmalat SA (Pty) Ltd*³⁰⁷ where it was found that the determination of jurisdiction involves weighing up of those features of the employment relationship linking it to a foreign jurisdiction against those pointing to South African jurisdiction. The test, it was held, 'is qualitative rather than quantitative'.³⁰⁸
97. In *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and others*³⁰⁹ the Labour Court, faced with the question whether Uber drivers were employees of Uber South Africa, found that there was no contractual relationship between Uber South Africa and the drivers. However, the court expressly left open the question as to whether the drivers were employees of Uber BV in the Netherlands with which their contracts had been formally concluded. The question of jurisdiction over such a dispute was therefore not considered.
98. In considering this question, it is submitted, a qualitative test would be akin to the common law test outlined in paragraph 99 below. This would involve looking not only at the alleged employer's address but also at the nature of its operation, the economic realities and the place in which the work in question was being carried out. Also critical is the fact that employees in general will lack the ability to litigate against an employer in a foreign country. In *Uber Technologies Inc. v. Heller*,³¹⁰ as noted above, the Canadian Supreme Court found the arbitration clause in Uber drivers' contracts confining them to the jurisdiction of the Netherlands to be unconscionable. Given the guarantee of access to justice in the South African Bill of Rights, this factor should weigh equally heavily in determining whether the CCMA or Labour Court has jurisdiction over a dispute between a South African worker and a platform with an office outside South Africa.
99. In addition, section 23 of the Companies Act³¹¹ requires foreign companies conducting business in South Africa to register as external companies. Companies are regarded as conducting business where the foreign company:
- 99.1. is a party to one or more employment contracts within South Africa; or
 - 99.2. has engaged in activities within the South Africa over a period of at least six months that would lead to the reasonable conclusion that it intended to continually engage in business activities within South Africa.
100. This provision should be applicable to foreign platforms which are corporate entities operating in South Africa. Those that comply with section 23 would thereby place their South African operations within the jurisdiction of the CCMA and South African courts. Where foreign-based platforms fail to comply with section 23, it is submitted that legal non-compliance cannot be relied

on as a basis for avoiding the jurisdiction of the CCMA or Labour Court but should be a factor taken into account in determining the question of jurisdiction.

101. For platform workers classified as independent contractors, jurisdiction might be stipulated by the terms of the contract at the instance of platforms. For the reasons given above,³¹² clauses stipulating a foreign jurisdiction or otherwise denying workers access to justice should be regarded as contrary to public policy. Beyond this, the common law doctrine of jurisdiction was summed up as follows by the Supreme Court of Appeal in *Bid Industrial Holdings v Strang and another*:³¹³

‘it would suffice to empower the court to take cognisance of the suit if the defendant were served with the summons while in South Africa and, in addition, there were an adequate connection between the suit and the area of jurisdiction of the South African court concerned from the point of view of the appropriateness and convenience of its being decided by that court. Appropriateness and convenience are elastic concepts which can be developed case by case. Obviously, the strongest connection would be provided by the cause of action arising within that jurisdiction.’

102. Claims brought by platform workers, employees as well as independent contractors, against foreign platforms operating in South Africa and arising from work done in South Africa should therefore fall within the jurisdiction of the CCMA, Labour Court or High Court.

Non-discrimination

103. In South Africa, the equality clause of the Constitution³¹⁴ is given effect by the EEA in the case of employees and by the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)³¹⁵ in the case of all other persons, including independent contractors.³¹⁶ Thus, for platform workers who are not employees PEPUDA offers protection in cases of unfair discrimination or inequality.

104. Section 1 of PEPUDA defines discrimination as ‘any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly imposes burdens, obligations or disadvantage on; or withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds’. These prohibited grounds include any ground which causes or perpetuates systemic disadvantage, undermines human dignity or adversely affects the equal enjoyment of a person’s rights and freedom, including race, gender, disability and sexual orientation.

105. In *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park*³¹⁷ an independent contractor instituted proceedings under PEPUDA claiming unfair discrimination on the ground of his homosexuality orientation. The Equality Court found that the right to religious freedom, relied on

by the respondent church, could not outweigh the right to equality since it was not merely a fundamental right but a core value of the Constitution. The fact that the complainant was an independent contractor was irrelevant to proving discrimination.

Pregnancy

106. An employer may not 'require or permit a pregnant employee or an employee who is nursing her child to perform work that is hazardous to her health or the health of her child' and must, if practicable, offer such an employee 'suitable, alternative employment' on terms and conditions that are no less favourable than her ordinary terms and conditions. This also applies to night work.³¹⁸ The right to equality and fair labour practices imply that platform workers should be entitled to equivalent protection.

Reasonable Accommodation

107. PEPUDA expressly prohibits discrimination on the grounds of race, gender and disability.³¹⁹ It also provides that denial of access to opportunities, or failing to eliminate obstacles, or failing to take steps to reasonably accommodate the needs of persons on these grounds constitutes unfair discrimination. The Equality Court is empowered to make an appropriate order in cases of unfair discrimination, including an order directing the reasonable accommodation of a group or class of persons.³²⁰

108. The EEA requires designated employers³²¹ to take affirmative action measures which are defined as including 'reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer'.³²² 'Reasonable accommodation' is defined as 'any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment'.³²³ What it entails in respect of persons with disabilities is explained in detail in the Code of Good Practice: Key Aspects on the Employment of People with Disabilities.³²⁴

109. A platform will thus be obliged to offer reasonable accommodation to workers who are 'employees' only if the platform is classified as a 'designated employer'. In practice it is unlikely that many platforms will fall within this definition. However, workers who are classified as independent contractors are entitled to the more extensive protection extended by PEPUDA.

Algorithmic discrimination

110. Platforms often assert that they do not control workers but that work is regulated by an app using algorithms that operate objectively. In fact, the algorithms are the property of platforms and made to the platforms' non-transparent specifications. They serve as a gateway through which workers enter the working relationship, determine workers' status within it through non-transparent

ratings systems, and can also exclude them from work – for example, if their ratings fall below a certain level.

111. Where algorithms apply criteria that impact disproportionately on groups such as women or people with disabilities, it will amount to indirect discrimination in terms of the EEA and PEPUDA for which platforms are ultimately responsible. However, in cases where a causal link between a platform's conduct and disproportionate impact on workers is difficult to establish, the Bill of Rights is binding on natural and juristic persons, such as platforms, to the extent 'applicable'.³²⁵ The Constitutional Court has explained that the effect is to 'require private parties not to interfere with or diminish the enjoyment of a right.' Its application depends upon the 'intensity of the right' and the 'potential invasion of that right which could be occasioned by persons other than the State or organs of the State'.³²⁶ This offers a flexible framework for crafting remedies for discriminatory outcomes in cases where the EEA or PEPUDA cannot be applied.

Data protection

112. 'Data' refers to the personal details of workers. Mishandling of personal data can expose workers to identity fraud and related crimes. The use of personal data is subject to section 14 of the Constitution, which grants the right to privacy to 'everyone', and to the Protection of Personal Information Act (PPIA).³²⁷ Importantly, it expressly applies to information entered in a record by 'automated means', which is defined as 'any equipment capable of operating automatically in response to instructions given for the purpose of processing information'.³²⁸ The protection therefore applies to platform workers and to data processing by means of apps.³²⁹

113. Section 1 of the PPIA defines personal information extensively as including information relating to a person's race, gender, sex, marital status, national origin, disability or religion. It further includes:

- 113.1. information relating to the education or the medical, financial, criminal or employment history of the person;
- 113.2. any identifying number, e-mail address, physical address, telephone number, location information, online identifier or other particular assignment to the person;
- 113.3. biometric information;
- 113.4. private or confidential correspondence; or
- 113.5. the views or opinions of another individual about the person.³³⁰

114. The Act further sets conditions for the lawful processing of personal information and provides for the rights of data subjects, including the right to be notified about the collection of personal information and to object to the processing of personal information.³³¹ The effect is that platforms have a legal duty to ensure that workers' personal data is protected and that workers' right to privacy is respected.

PRINCIPLE 5: FAIR REPRESENTATION

115. Labour law seeks to bring balance to the unequal relationship between employers and workers by providing the right to freedom of association and collective bargaining, which enable workers to collectively negotiate for their interests and influence their working conditions. Platform workers should have similar rights, regardless of their contractual status.³³² Although there is no duty to bargain in South Africa, the LRA is strongly supportive of collective bargaining.³³³ Platforms should similarly be encouraged to recognise and negotiate with workers' representatives about matters of mutual interest.
116. In South Africa, the right to collective bargaining is guaranteed by the Constitution and implemented by the LRA. Section 23(2) of the Constitution grants every worker the right '(a) to form and join a trade union; (b) to participate in the activities and programmes of a trade union; and (c) to strike'. Section 23(3) states that every trade union and employer's organisation has the right to determine its own administration. Section 23(5) provides that '[e]very trade union, employers' organisation and employer has the right to engage in collective bargaining.'
117. The right to organise and engage in collective bargaining is regulated in chapter III of the LRA and the concomitant right to strike is regulated in Chapter IV. However, despite the broad sweep of the Constitutional guarantee, these statutory rights are by definition limited to 'employees'.
118. The Constitution provides that basic rights may be limited only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors'.³³⁴ It is submitted that exclusion of collective rights based purely on workers' contractual status does not meet these criteria.
119. The constitutionality of the exclusionary provisions of the LRA has not been tested. However, in *SANDU v. Minister of Defence*³³⁵ the Constitutional Court (CC) extended the rights contained in section 23(2) of the Constitution to members of the defence force who are excluded from the LRA. While section 23 primarily refers to persons who have entered into an employment contract, it was held, the conditions of enrolment in the defence force were akin to those of employees.³³⁶ The rights set out in section 23 thus also apply to 'employment-like' relationships, including platform workers who may be classified as independent contractors but are in relationships akin to those of employees.³³⁷
120. Likewise, the broader interpretation of the right to fair labour practices in *Pretorius and anor v. Transport Pension Fund and anor*³³⁸ gives scope for courts to find that non-independent platform workers should have a right to engage in collective bargaining equivalent to that of employees. This is underlined by section 9(3) of the Constitution, which states that '[e]quality includes the full and equal enjoyment of all rights and freedoms' set out in the Bill of Rights.

121. A broader interpretation of the definition of ‘employee’ for purposes of collective bargaining is reinforced by section 18 of the Constitution, which grants ‘everyone’ the right to freedom of association, and section 17, which grants ‘everyone’ the right to peaceful assembly, demonstration and picketing. It is further supported by the ILO’s Freedom of Association and Protection of the Right to Organise Convention,³³⁹ which establishes that the principle of freedom of association has universal application that covers workers and employers ‘without distinction whatsoever’.³⁴⁰ Similarly, the ILO recognises the right of collective bargaining as being ‘general in scope’ and, except for organisations representing ‘the armed forces, the police and public servants engaged in the administration of the State’ all other organisations of workers in the public and private sectors must benefit from it’.³⁴¹

122. As noted above, South African law recognises organisations representing the armed forces for collective bargaining purposes. There is no reasonable ground on which organisations of platform workers, who are not affected by any exclusion, should not be recognised.

123. Similarly, the Regulation of Gatherings Act,³⁴² which regulates the holding of public gatherings and demonstration at certain places, provides a structure for workers other than employees to publicly gather and demonstrate in the context of seeking to negotiate their rights.³⁴³

124. However, given the individualised and fragmented nature of platform work, the sector does not lend itself to traditional trade union organisation. Trade unions internationally have adopted varied and innovative approaches to support the organisation of platform workers and overcome the challenges of collective action in the challenging platform environment.³⁴⁴ These difficulties are exacerbated by the fact that, since the onset of globalisation, the rates of union membership have decreased globally and are particularly low for non-standard workers.³⁴⁵ Even if platform workers’ are deemed to have the rights of employees in terms of the LRA, new forms of organisation would be required before they could effectively exercise their right to engage in collective bargaining.

125. By way of example, two types of organisation that could potentially represent platform workers in negotiations will briefly be considered: non-profit organisations and cooperatives.

Non-Profit Organisations (NPOs)

126. For purposes of corporate law, a NPO is an organisation incorporated for a public benefit or any other object related to cultural or social activities, or communal or group interests.³⁴⁶ In addition, NPOs are regulated by the Non-profit Organisations Act.³⁴⁷ There are three types of NPOs; voluntary associations, non-profit trusts and non-profit companies. NPOs that have successfully organised marginalised workers in South Africa include the Casual Workers Advice Office and Asiye eTafuleni.³⁴⁸

Cooperatives

127. Cooperatives provide a structure through which workers can achieve solidarity and act collectively, while also engaging in gainful economic activities.³⁴⁹ Cooperatives are regulated by the Co-operatives Act.³⁵⁰ A cooperative is defined as

‘an autonomous association of persons united voluntarily to meet their common economic, and social or cultural needs and aspiration through a jointly owned and democratically controlled enterprise organised and operated on co-operative principles.’³⁵¹

128. One form of cooperative is a ‘worker cooperative’,³⁵² defined as ‘a primary co-operative in which the members pursue the objective of optimally utilising their labour by building a jointly owned and self-managed enterprise’.³⁵³ The Act defines an ‘employee’ in this context as any member or non-member of a co-operative who satisfies the definition of ‘employee’ in the LRA, and states that ‘[a]ll worker co-operatives must comply with labour legislation’, subject to a right to apply for certain exemptions.³⁵⁴

129. For platform workers who fall outside the protection of current labour legislation, the Co-operatives Act offers a structure for organising and collectively negotiating terms and conditions for services they provide, also on a sectoral basis,³⁵⁵ thus engaging in de facto collective bargaining. In addition, the operation of tertiary platforms cooperatives³⁵⁶ could be a means to trigger sectoral determinations in the platform economy.

Endnotes

¹ ‘Digital labour platforms can be defined as appliances (apps) comprising “a set of digital resources – including services and content – that enable value-creating interactions between consumers and individual service-providing workers” (adapted from Adapted from Panos Constantinides, Ola Henfridsson, & Geoffrey G. Parker, ‘Introduction- Platforms and Infrastructures in the Digital Age’ (2018) 29(2) *Information Systems Research* <<https://pubsonline.informs.org/doi/10.1287/isre.2018.0794>> 381-400. Examples of digital labour platforms include platforms operating in food delivery, personal services, ride hailing and digital ride hailing.

² For example, in terms of the Constitution of the International Labour Organisation (ILO) and its Decent Work Agenda, the United Nations’ Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights.

³ Chapter 2, Constitution of the Republic of South Africa, 1996 (‘the Constitution’).

⁴ See, for example, *Denel (Pty) Ltd v. Gerber* ((2005) 26 ILJ 1256 (LAC); *Kambule v Commission for Conciliation Mediation and Arbitration and Others* [2013] ZALCJHB 11; *State Information Technology Agency (Pty) Ltd v CCMA* 7 BLLR 611 (LAC). See also Code of Good Practice: Who is an Employee? issued by NEDLAC on 1 December 2006.

⁵ These criteria are based on extensive research by the Fairwork Foundation in South Africa and other countries and provide a comprehensive framework for giving content to the principle of decent work in the platform environment..

⁶ In terms of ss 50 to 55 of the Basic Conditions of Employment Act 75 of 1997 (BCEA).

⁷ Act 9 of 2018.

⁸ Act 66 of 1995 (LRA).

⁹ Constitution of the Republic of South Africa, 1996, sections 7(2) and 9.

¹⁰ Article 25(1) of the United Nations’ Universal Declaration of Human Rights of 1948.

¹¹ Article 11(1) of the International Covenant on Economic, Social and Cultural Rights, of 1966.

¹² Section 83, BCEA.

¹³ ‘Worker’ is defined as *

¹⁴ *Uber BV v Aslam* [2018] EWCA Civ 2748 ; see S Fredman and D du Toit, ‘One Small Step Towards Decent Work: Uber v Aslam in the Court of Appeal’ (2019) 48 *Industrial Law Journal* 260.

¹⁵ *Federacion de Servicios Privados del sindicato Comisiones obreras (CC OO) v Tyco Integrated Security SL (C-266/14)* [2016] CMLR 22 c-266/14 (CJEU).

¹⁶ This is the case for care workers in the UK: See Department for Business, Energy & Industrial Strategy National Minimum Wage and National Living Wage: Calculating the minimum wage (2019) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/835794/calculating-minimum-wage-guidance-april-2019.pdf accessed 21 May 2020, p.36.

¹⁷ Naledi Shange ‘We know R3,000 is not a normal living wage, says Ramaphosa’ *TimesLIVE* 1 May 2018. ‘Living wage’ refers a wage adequate to provide for ‘a basic but decent standard of living’: Richard Heeks, Sandra Fredman, Darcy du Toit, A Osiki, J.P. Van Belle, Mark Graham, Paul Mungai & J. Woodcock, ‘A Living Wage for South African Platform Workers’ (2019) Fairwork < <https://fair.work/a-living-wage-for-south-african-platform-workers/> > accessed 24 May 2020. See Eddie Cottle & Trenton Elsley (eds) *Bargaining Indicators 2015: A Collective Bargaining Omnibus* (Labour Research Service 2015).

¹⁸ See, e.g., *Mahlangu & Anr v Minister of Labour & others* (Case No 79180/15, 23 May 2019), a case which arose from the death of a domestic worker who drowned in a swimming pool at her employer’s residence.

¹⁹ Act 85 of 1993.

²⁰ Section 1(1); emphasis added.

²¹ Ibid; emphasis added.

²² Section 8; emphasis added.

²³ Section 9(1); emphasis added. For cases illustrating the liability of employers towards persons other than employees, see *Pikitup (Soc) Ltd v. SAMWU* [2014] 3 BLLR 217 (LAC); *Van Den Heever v. Bray and another* (867/2011) [2016] ZANHC 82; *Langley Fox Building Partnership (Pty) Ltd v. De Valence* (647/88) ZASCA 128; *Joubert v Buscor Proprietary Limited* (2013/13116) [2016] ZAGPPHC 1024.

²⁴ Act 61 of 1997. The injuries and diseases that are covered by the compensation fund are set out in schedule 3 to COIDA: s 65(1). However, claims can be made for other diseases or injuries if it is proved that they were caused by conditions at work.

²⁵ Both elements must be present, as will be the case with platform workers found to be ‘casual’ employees: *Padayachee v Ideal Motor Transport* [1974] 2 All SA 590 (N).

²⁶ COIDA, s 1; emphasis added.

²⁷ Compensation for Occupational Injuries and Diseases Amendment Bill B21-2020; GG No. 43658 of 27 August 2020.

²⁸ Section 1.

²⁹ See, e.g., *Nel v Minister van Publieke Werke* 1962 (2) SA 147 (T); *Minister of Justice v Khoza* 1966 (1) SA 410 (A); *MEC Department of Health v EDN* [2014] 12 BLLR 1155 (SCA).

³⁰ *Biggar v City of Johannesburg, Emergency Management Services* [2011] 6 BLLR 577 (LC); *Media 24 Ltd v Grobler* [2005] 7 BLLR 649 (SCA) at paras 65–76.

³¹ C190 of 2019.

³² Art 3.

³³ Sections 6(1) and 9 to 12, BCEA. The exceptions are senior managers, sales staff and employees who work for less than 24 hours in a month.

³⁴ Of at least one hour where a worker has worked continuously for more than five hours: s 14.

³⁵ Section 15.

³⁶ Leave may also be taken at the rate of one day’s leave for each 17 days worked or one hour’s leave for every 17 hours worked: BCEA, ss 20 and 21.

³⁷ Sections 22 and 27, BCEA.

³⁸ Sections 25 to 25C.

³⁹ See *Uber BV v Aslam and Others* [2018] EWCA Civ 2748, where the UK Court of Appeal ruled that Uber drivers were ‘workers’, not independent contractors, and therefore entitled to holiday pay.

⁴⁰ See, e.g., *Uber B.V. v. Aslam and ors* [2018] EWCA Civ 2748 in which the UK Court of Appeal held that, under UK law, Uber drivers were ‘workers’ despite their description as ‘independent contractors’. Similar decisions were reached in certain other jurisdiction whereas, in others, the classification of ‘independent contractor was upheld.

⁴¹ See, for example, *Building Bargaining Council (Southern & Eastern Cape) v Melmon Cabinets CC & another* [2001] 3 BLLR 329 (LC); *Denel (Pty) Ltd v. Gerber* (2005) 26 ILJ 1256 (LAC); *Kambule v Commission for Conciliation Mediation and Arbitration and Others* [2013] 7 BLLR 682 (LC); *Linda Erasmus Properties Enterprise (Pty) Ltd v Mhlongo & others* [2007] 6 BLLR 530 (LC); *Hydraulic Engineering Repair Services v Ntshona* (2008) 29 ILJ 163 (LC).

⁴² Section 29(1).

⁴³ Section 29(3).

⁴⁴ Section 30. In the case of platform workers, equivalent publication could take place on the app.

⁴⁵ Act 68 of 2008.

⁴⁶ See the definition of ‘consumer’ in s 1 of the CPA, read with the definitions of ‘business’, ‘transaction’ and ‘consideration’ (ibid). Thus, the supply of information technology by platforms in exchange for payment should amount to a ‘transaction’ within the context of the CPA.

⁴⁷ Section 22, read with ss 49(3), 49(4) and 3(1)(b)(iv). On the meaning of ‘plain language’, see *Standard Bank of South Africa Limited v Dlamini* 2013 (1) SA 219 (KZD).

⁴⁸ Section 49(1), CPA. On the duty of disclosure, including information of benefits that may accrue from their work, see *Mitsubishi Hitachi Power Systems Africa (Pty) Ltd v Murray and Roberts Ltd and Another* (1011/2019) [2020] ZASCA 110 (29 September 2020).

⁴⁹ Section 49(2), CPA.

⁵⁰ See *Sasfin (Pty) Ltd v Beukes* [1989] 1 All SA 347 (A) where it was held that ‘no court should therefore shrink from the duty of declaring a contract contrary to public policy when the occasion so demands’.

⁵¹ 2007 (5) SA 323 (CC).

⁵² Para 29.

⁵³ Para 59.

⁵⁴ See ‘Uber B.V. Terms and Conditions (last modified 1 January 2020)’ art 7 at <http://www.ubermds.com/legal.html>.

⁵⁵ Section 34 of the Constitution grants everyone the right ‘to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum’.

⁵⁶ In *Uber Technologies Inc. v. Heller* 2020 SCC 16 the Supreme Court of Canada held a similar arbitration clause to be contrary to public policy by impeding access to justice.

⁵⁷ Act 42 of 1965.

⁵⁸ Section 3(2).

⁵⁹ Section 48(2)(b). This may apply, for example, to terms that entitle platforms to unilaterally ‘deactivate’ workers if, in the platform’s opinion, they have failed to meet criteria imposed by the platform. Further specific prohibitions are set out in s 51.

⁶⁰ Section 52(3). See *Bank of Lisbon & South Africa v Ornelas and Another* [1988] ZASCA 35; [1988] 2 All SA 393 (A); *Four Wheel Drive Accessory Distributors CC v Rattan NO* (1048/17) [2018] ZASCA 124.

⁶¹ Act 25 of 2002. See s 43(2).

⁶² [2008] 6 BLLR 513 (SCA).

⁶³ Para 5.

⁶⁴ (2018) 39 ILJ 1937 (CC).

⁶⁵ Para 48.

⁶⁶ *NUPSAW obo Mostert v Uber South Africa Technology Services (Pty) Ltd and others* WECT 18234-18 (31 May 2018).

⁶⁷ 2020 SCC 16 at para 62.

⁶⁸ [2002] 9 BLLR 879 (LC).

⁶⁹ At para 21, endorsing the ruling in *Serfontein v Balmoral Central Contracts SA (Pty) Ltd* (2000) 21 ILJ 1019 (CCMA).

⁷⁰ [2018] 4 BLLR 399 (LC).

⁷¹ [2008] 2 All SA 373 (SCA) para 56.

⁷² Act 71 of 2008.

⁷³ Rule 5 of the CCMA and rule 4 of the Labour Court provide, inter alia, for service by means of registered post, fax or email.

⁷⁴ Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa, rules 4(3), 4(4) and 5.

⁷⁵ Section 9.

⁷⁶ Act 4 of 2000.

⁷⁷ See *Nongena v. M Ali NO and others* (JR231/109) [2010] ZALC 281 where the constitutionality of the exclusion of employment disputes from PEPUDA was upheld.

⁷⁸ (2009) 30 ILJ 868 (EqC).

⁷⁹ Section 26, BCEA. The meaning of ‘hazards’ and the employer’s duties are set out in the Code of good practice on the protection of employees during pregnancy and after the birth of a child: GNR.1441 of 13 November 1998.

⁸⁰ PEPUDA, ss 7, 8 and 9.

⁸¹ Section 21(2)(i).

⁸² In essence, employers with more than 50 employees and employers in the public sector: s 1, EEA.

⁸³ Section 15(2)(c), EEA.

⁸⁴ Section 1, EEA. What it entails in respect of persons with disabilities is explained in detail in the Code of Good Practice: Key Aspects on the Employment of People with Disabilities: GNR.1345 of 2002.

⁸⁵ Constitution, s 8.

⁸⁶ *Governing Body of the Juma Masjid Primary School vs Essa N.O.* 2011 (8) BCLR 761 (CC), para 58.

⁸⁷ Act 4 of 2013.

⁸⁸ PPIA, s 3(4). ‘Automated means’ refers to ‘any equipment capable of operating automatically in response to instructions given for the purpose of processing information’.

⁸⁹ Section 2(a), PPIA, read with s 14 of the Constitution.

⁹⁰ PPIA, ss 4 and 5. Platforms do not fall under any of the exclusions from the Act: see ss 6 and 7.

⁹¹ Constitution, s 23.

⁹² LRA, chapters III and IV.

⁹³ Constitution, s. 36(1). Relevant factors include (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose’.

⁹⁴ In France, for example, Law 2016–1088 gives platform workers the right to take collective action, form or join unions, or have their collective interests defended: Eurofound, *Employment and Working Conditions of Selected Types of Platform Work* (2018),

<<https://www.eurofound.europa.eu/publications/report/2018/employment-and-working-conditions-of-selected-types-of-platform-work>> accessed 27 August 2020 at 53-54.

⁹⁵ 1999 (4) SA 469 (CC).

⁹⁶ *Ibid.*, paras 20 to 30.

⁹⁷ See also *Murray vs Minister of Defence* [2008] 6 BLLR 513 (SCA) in which a member of the defence force was accorded the rights of an employee in an unfair dismissal dispute.

⁹⁸ (2018) 39 *ILJ* 1937 (CC) at para 48. See para 4.42 above.

⁹⁹ Section 17 is implemented by the Regulation of Gatherings Act 205 of 1993, which provides a structure for workers other than employees to assemble and demonstrate in the context of seeking to negotiate their rights.

¹⁰⁰ Convention no 87 of 1948.

¹⁰¹ Art. 2.

¹⁰² ILO *Giving Globalization a Human Face: General Survey on the Fundamental Conventions Concerning Rights at Work in Light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* (ILO 2012) 85.

¹⁰³ See, e.g., H Johnston & C Land-Kazlauskas ‘On Demand and Organized: Developing Collective Agency, Representation and Bargaining in the Gig Economy’ paper presented to the 5th conference of the Regulating for Decent Work Network, ILO, 3-5 July 2017; Michael Doherty and Valentina Franca, ‘Solving the ‘Gig-saw’? Collective Rights and Platform Work’ (2019) 49 *ILJ* (UK) 363.

¹⁰⁴ Section 1, Companies Act 71 of 2008.

¹⁰⁵ Act 71 of 1997.

¹⁰⁶ The Casual Workers Advice Office has been active especially in the organisation and representation of labour broker workers. Asiye eTafuleni has organised informal traders in Durban.

¹⁰⁷ Mshiu Sam ‘The cooperatives enterprise as a practical option for the formalisation of informal economy’ at

http://www.businessenvironment.org/dyn/be/docs/200/2.2.2_Cooperative_Practical_Option_Informal_Econ.pdf 4.

¹⁰⁸ Act 14 of 2005.

¹⁰⁹ Cooperative Act, s. 1.

¹¹⁰ Ibid, s 2(b).

¹¹¹ Ibid, s 1.

¹¹² Schedule 1 to the Act, Part 2, item 6.

¹¹³ E.g., through a 'secondary cooperative', defined as 'a co-operative formed by two or more primary co-operatives to provide sectoral services to its members': s 1. Sectoral determinations in the platform economy. Could be triggered by 'tertiary' cooperatives, defined as sectoral or multi-sectoral co-operatives 'whose members are secondary co-operatives and whose objectives are to advocate and engage organs of state, the private sector and stakeholders on behalf of its members': s1.

¹¹⁴ 'Platform' or 'digital labour platform' can be defined as 'a set of digital resources – including services and content – that enable value-creating interactions between consumers and individual service-providing workers' (adapted from Panos Constantinides, Ola Henfridsson, & Geoffrey G. Parker, 'Introduction- Platforms and Infrastructures in the Digital Age' (2018) 29(2) *Information Systems Research* <<https://pubsonline.informs.org/doi/10.1287/isre.2018.0794>> 381-400. Examples of digital labour platforms include platforms operating in food delivery, personal services, ride hailing and digital ride hailing.

¹¹⁵ Richard Heeks, 'How many platform workers are there in the Global South?' (*ICT4DBlog*, 29 January 2019) <<<https://ict4dblog.wordpress.com/2019/01/29/how-many-platform-workers-are-there-in-the-global-south/>> accessed 12 May 2020.

¹¹⁶ *ibid.*

¹¹⁷ James Manyika, Susan Lund, Kelsey Robinson, John Valentino, and Richard Dobbs, 'A Labour Market That Works: Connecting talent with opportunity in the digital age' (2015) McKinsey & Company <https://www.mckinsey.com/~media/McKinsey/Featured%20Insights/Employment%20and%20Growth/Connecting%20talent%20with%20opportunity%20in%20the%20digital%20age/MGI_Online_talent_A_lab_or_market_that_works_Full_report_June_2015.ashx> accessed 12 May 2020.

¹¹⁸ Mark Graham and others, 'The Fairwork Foundation: Strategies for improving platform work in global context' (2020) *Geoforum* <<https://www.sciencedirect.com/science/article/pii/S0016718520300257?via%3Dihub>> accessed 14 May 2020.

¹¹⁹ *ILO Decent work indicators: guidelines for producers and users of statistical and legal framework indicators: ILO manual* (2nd version) International Labour Office, Geneva, 2013.

¹²⁰ Adopted by the General Assembly of the United Nations on 16 December 1966.

¹²¹ *Ibid*, art 7.

¹²² Constitution of the Republic of South Africa, 1996 (hereafter 'the Constitution').

¹²³ Constitution, section 1(a), section 7(1).

¹²⁴ *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC) para 28.

¹²⁵ Constitution, section 11.

¹²⁶ Constitution, section 12.

¹²⁷ Constitution, section 13.

¹²⁸ Constitution, section 23. These rights are considered more fully in the next section.

¹²⁹ Constitution, section 39(1)(a).

¹³⁰ See item 1.3 of the SweepStar contract; 1.18 Uber contract; 1 of Nomad Contract and 1 of Domestly contract.

¹³¹ Valerio De Stefano, 'The rise of the just-in-time workforce: On-demand work, crowdwork, and labor protection in the gig-economy' (2015) 37 *Comp. Lab. L. & Pol'y J.* 471.

¹³² The Labour Relations Act 66 of 1995 (hereafter LRA) was enacted for this purpose and to create the institutional framework for the enforcement of labour rights, including individual rights.

¹³³ The purpose of the LRA is to regulate unfair labour practices, provide a framework for collective bargaining and give effect to South Africa's obligations through its membership of the International Labour Organisation: section 1 of the LRA.

¹³⁴ Act 75 of 1997. The purpose of the Basic Condition of Employment Act (hereinafter BCEA) is to establish and enforce basic conditions of employment and regulate the variations of these conditions: Section 1, BCEA.

¹³⁵ Act 55 of 1998. The purpose of the EEA is to achieve equal opportunity and fair treatment in employment, and implement affirmative action measures to redress disadvantages in employment experienced by designated groups: section 1, EEA.

¹³⁶ 1998 (4) SA 163 (SCA); this case concerned the contract of an insurance sales agent who was contracted to canvass full-time and exclusively for the respondent for applications for contracts of insurance. The Supreme Court of Appeal, considering the obligation of the worker to produce certain results in order to keep the contract alive, remuneration being commission-based and the lack of control by the respondent over the time and manner of doing his work, held that he was an independent contractor and not an employee.

¹³⁷ (1999) 20 ILJ 585 (LAC).

¹³⁸ Act 85 of 1993.

¹³⁹ Act 130 of 1993.

¹⁴⁰ Section 1.

¹⁴¹ Section 1(1).

¹⁴² Section 1(2)

¹⁴³ Debbie Collier et al. *Labour Law in South Africa: Context and Principles* (Oxford University Press Southern Africa (Pty) Limited 2018).

¹⁴⁴ Mark Graham, Isis Hjorth, and Vili Lehdonvirta, 'Digital labour and development: impacts of global digital labour platforms and the gig economy on worker livelihoods' (2017) 23(2) *Transfer: European Review of Labour and Research* 135-162.

¹⁴⁵ Niels Van Doorn, 'Platform labor: on the gendered and racialized exploitation of low-income service work in the 'on-demand' economy.'" (2017) 20(6) *Information, Communication & Society*.

¹⁴⁶ I.e., not being able to dismiss workers without a fair reason and following a fair procedure and being liable to pay compensation or reinstate workers who have been unfairly dismissed: Chapter VIII, LRA. For many employers the time required to oppose employees' claims in labour tribunals represent a greater cost than any remedy that may be ordered.

¹⁴⁷ There is a voluminous literature on this – can we include one or two references?

¹⁴⁸ This test became accepted after the judgement in *Smit v. Workmen Compensation Commissioner* 1979 (4) SA 51 (A).

¹⁴⁹ General Notice 1774, *Government Gazette* 1 December 2006.

¹⁵⁰ (2008) 29 ILJ 1480 (LC) paras 41, 49; emphasis added.

¹⁵¹ Ibid paras 41 and 49, with reference *South African National Defence Union v Minister of Defence & another* 1999 (4) SA 469 (CC).

¹⁵² [2015] 9 BLLR 918 (LAC).

¹⁵³ As noted below, section 200B was enacted to address this problem.

¹⁵⁴ See, for example, *Pharmaceutical Manufacturers Association of SA and Others; In Re: Ex Parte Application of President of the RSA and Others* 2000 (3) BCLR 241 (CC); *NUMSA & others v Bader Bop (Pty) Ltd & another* [2003] 2 BLLR 103 (CC)

¹⁵⁵ See, for example, *Building Bargaining Council (Southern & Eastern Cape) v Melmon Cabinets CC & another* [2001] 3 BLLR 329 (LC); *Denel (Pty) Ltd v. Gerber* (2005) 26 ILJ 1256 (LAC); *Kambule v Commission*

for Conciliation Mediation and Arbitration and Others [2013] 7 BLLR 682 (LC); *Linda Erasmus Properties Enterprise (Pty) Ltd v Mhlongo & others* [2007] 6 BLLR 530 (LC); *Hydraulic Engineering Repair Services v Ntshona* (2008) 29 ILJ 163 (LC).

¹⁵⁶ (2008) ILJ 2234 (LAC) at para 12.

¹⁵⁷ [2017] 6 BLLR 606 [LAC].

¹⁵⁸ Ibid para 26; emphasis added.

¹⁵⁹ Ibid para 22.

¹⁶⁰ General Notice 1774, *Government Gazette* 1 December 2006.

¹⁶¹ In *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and others* [2018] 4 BLLR 399 (LC), while not pronouncing on employment status of the drivers because it was found that the wrong Uber corporate entity had been cited, the court indicated that the presumptions in section 200A and the dominant impression test would be applicable in determining whether drivers are employees of Uber BV: at para 99.

¹⁶² Citing the ILO Recommendation Concerning the Employment Relationship: R198 of 2006.

¹⁶³ Code, item 30.

¹⁶⁴ Ibid, item 39.

¹⁶⁵ Sacha Garben, 'Protecting Workers in the Online Platform Economy: An overview of regulatory and policy developments in the EU' (2017) European Agency for Safety and Health at Work, Luxembourg, Publications Office of the European Union.

¹⁶⁶ In *Uber B.V. v. Aslam and ors* [2018] EWCA Civ 2748 at para. 101 the UK Court of Appeal upheld the decision of the Employment Tribunal that the working hours of Uber driver commence when the App is switched on and the driver is the territory in which is licensed to use the App and is ready and willing to accept trips.

¹⁶⁷ A parallel can be drawn with conventional employment in the services sector. For example, the job of a shop assistant will consist of an ongoing relationship with the shop owner combined with a series of brief relationships with customers.

¹⁶⁸ See, for example, *Association of Mineworkers and Construction Union (AMCU) and others v Buffalo Coal Dundee (Pty) Ltd and another* [2016] 9 BLLR 855 (LAC).

¹⁶⁹ [2019] 12 BLLR 1311 (LAC) at paras 46-47. See also *Dyokhwe v De Kock NO and others* [2012] 10 BLLR 1012 (LC); *National Union of Metalworkers of South Africa v Lee Electronics (Pty) Ltd and others* [2013] 2 BLLR 155 (LAC); *Footwear Trading CC v Mdlalose* [2005] 5 BLLR 452 (LAC).

¹⁷⁰ Act 63 of 2001.

¹⁷¹ Act 4 of 2002.

¹⁷² See section 23(2) of the Employment Relations Act, 1999 of the United Kingdom: Frans Pennings, 'The Protection of Working Relationships in the Netherlands' in Frans Pennings and Claire Bosse (eds), *The Protection of Working Relationships: A Comparative Study* (Leiden: Kluwer Law International 2011) 96.

¹⁷³ G Davidov, M Freedland & N Kountouris, 'The subjects of labour law: 'Employees' and other workers' (2015) in Matthew Finkin & Guy Munlak (eds), *Research Handbook in Comparative Labor Law* (Edward Elgar Publishing Ltd 2015) 14.

¹⁷⁴ Government Notice 1591, GG 42900 dated 11 December 2019.

¹⁷⁵ *Daily Maverick*, 22 July 2020.

¹⁷⁶ Section 52, BCEA

¹⁷⁷ Section 55(4)(n).

¹⁷⁸ Section 55(4)(k).

¹⁷⁹ Sectoral Determination 7: Domestic Worker Sector Government Notice R. 1068 15 Department of Labour August 2002, South Africa.

¹⁸⁰ Like the LRA, the purposes of the BCEA are ‘to give effect to and regulate the right to fair labour practices conferred by section 23 (1) of the Constitution’ and ‘to give effect to and regulate the right to fair labour practices conferred by section 23 (1) of the Constitution’: s 2, BCEA.

¹⁸¹ ILO Constitution, 1919, Preamble.

¹⁸² Declaration of Philadelphia, 1944, Part III (d).

¹⁸³ Adopted by the 97th Session of the International Labour Conference, Geneva, 2008.

¹⁸⁴ See Richard Heeks, Sandra Fredman, Darcy du Toit, A Osiki, J.P. Van Belle, Mark Graham, Paul Mungai & J. Woodcock, ‘A Living Wage for South African Platform Workers’ (2019) Fairwork < <https://fair.work/a-living-wage-for-south-african-platform-workers/> > accessed 24 May 2020; See also ‘What is a living wage’ < <https://www.globallivingwage.org/about/what-is-a-living-wage/> > accessed 24 May 2020.

¹⁸⁵ Act 9 of 2018. The Act came into effect on 1 January 2019.

¹⁸⁶ Section 3 (1). The exceptions are members of the South African National Defence Force, the National Intelligence Agency, the South African Secret Service and volunteers.

¹⁸⁷ National Minimum Wage Panel Report to the Deputy President: Recommendations on Policy and Implementation (2016) at 97

<http://www.treasury.gov.za/publications/other/NMW%20Report%20Draft%20CoP%20FINAL.PDF> > accessed 24 August 2020.

¹⁸⁸ Section 6, NMWA. Every employer is obliged to pay the minimum wage; no contract, collective agreement, sectoral determination or law can waive it: NMWA, s. 4(6). See Department of Employment and Labour (DoEL) ‘Employment and Labour on new National Minimum Wage rate’ (2020) < https://www.gov.za/speeches/new-nmw-base-rate-come-effect-march---department-employment-and-labour-24-feb-2020-0000?gclid=CjwKCAjwr7X4BRA4EiwAUXjbt8FJ9RKSgOi--T5G-IrlpSUwAQCK2eidsM7spFhykuAey5xXiCM9ZR0CRZAQAvD_BwE > accessed 24 August 2020.

¹⁸⁹ See section 3 of Schedule 1 of NMWA for the definition of farm and domestic worker.

¹⁹⁰ DoEL ‘Employment and Labour on new National Minimum Wage rate’ (2020) n 75 above.

¹⁹¹ Ibid. On the positive side, although ‘ordinary hours’ are set at 45 hours per week in terms of section 9 of the BCEA, in terms of the NMWA it means 40 hours per week. This is also the recommended working time to ensure a decent living standard: Forty-Hour Week Convention, 1935 (No. 47) (ILO).

¹⁹² According to the President of South Africa, the NMW is not a living wage but a starting point towards socio-economic development and social justice in South Africa: Thetho Mahlakoana, ‘Cyril Ramaphosa signs National Minimum Wage Bill into law’ *Sunday Times* (South Africa, 23 November 2018) < <https://www.timeslive.co.za/sunday-times/business/2018-11-23-cyril-ramaphosa-signs-national-minimum-wage-bill-into-law/> > accessed 24 August 2020.

¹⁹³ National Minimum Wage Panel Report to the Deputy President: Recommendations on Policy and Implementation (2016) <

<http://www.treasury.gov.za/publications/other/NMW%20Report%20Draft%20CoP%20FINAL.PDF> > accessed 24 August 2020.

¹⁹⁴ See, e.g., s 15, NMWA.

¹⁹⁵ See *Trading Economics*: ‘South Africa Living Wage Individual’ at <https://tradingeconomics.com/south-africa/living-wage-individual>; *Living Wage* at <https://living-wage.co.za/> and *WageIndicator.org*: ‘Living Wage Series - South Africa - September 2019’ at <https://wageindicator.org/salary/living-wage/south-africa-living-wage-series-september-2019> >; accessed 24 August 2020.

¹⁹⁶ BCEA Amendment of 2018.

¹⁹⁷ The exemptions are discussed above: section 4(4-6) of the NMWA provides (4) Every worker is entitled to payment of a wage in an amount no less than the national minimum wage. (5) Every employer must pay wages to its workers that is no less than the national minimum wage. (6) The payment of a national minimum wage cannot be waived, and the national minimum wage takes precedence over any contrary

provision in any contract, collective agreement, sectoral determination or law, except a law amending this Act.

¹⁹⁸ Item 2, schedule 1 of the NMWA.

¹⁹⁹ NMWA, s 4(7).

²⁰⁰ GNR.622 of 1999: Sectoral Determination 1: Contract Cleaning Sector South Africa.

²⁰¹ Ibid, item 3. The minimum wage in KwaZulu Natal is higher because it is subject to the collective agreement concluded in the Bargaining Council for the Contract Cleaning Service Industry KwaZulu-Natal (BCCCI): *ibid*.

²⁰² GNR.437 of 15 May 2007: Sectoral Determination 14: Hospitality Sector, South Africa as amended July 2018.

²⁰³ Sectoral Determination 14: Hospitality Sector, s. 1.

²⁰⁴ Fairwork, 'Gig Workers, Platforms and Government During Covid-19 in South Africa' (Oxford UK, Cape Town South Africa, 2020).

²⁰⁵ Ray Mahalka, 'UIF has R30bn available for Covid-19 income support to laid-off workers' *Daily Maverick* (South Africa, 1 April 2020) < <https://www.dailymaverick.co.za/article/2020-04-01-uif-has-r30bn-available-for-covid-19-income-support-to-laid-off-workers/>> accessed 24 August 2020.

²⁰⁶ Fairwork, 'Gig Workers, Platforms and Government During Covid-19 in South Africa' (Oxford UK, Cape Town South Africa, 2020).

²⁰⁷ *ibid*.

²⁰⁸ A proportion of gig workers in South Africa are illegal migrants who will still fall outside the scope of this scheme.

²⁰⁹ SA Government (2020) Social grants - Coronavirus COVID-19, SA Government <<https://www.gov.za/coronavirus/socialgrants>> accessed 24 August 2020.

²¹⁰ *ibid*.

²¹¹ Richard Heeks et al, 'A living wage for South African platform workers' (2019) Fairwork < <https://fair.work/a-living-wage-for-south-african-platform-workers/>> accessed 24 August 2020. See also Fairwork, 'Gig Workers, Platforms and Government During Covid-19 in South Africa' (Oxford UK, Cape Town South Africa, 2020).

²¹² Graham, Mark, and Jamie Woodcock, 'Towards a fairer platform economy: introducing the Fairwork Foundation' (2018) 29 *Alternate Routes*; Martin Risak, *Fair Working Conditions for Platform Workers: Possible Regulatory Approaches at the EU Level* (2018) Friedrich-Ebert-Stiftung, International Policy Analysis.

²¹³ Act 85 of 1993.

²¹⁴ Section 1(1).

²¹⁵ *Ibid*; emphasis added.

²¹⁶ Section 1(3); emphasis added. Activities in the mining and merchant marine sectors are excluded, which are regulated by separate legislation.

²¹⁷ Section 8; emphasis added.

²¹⁸ For example, Electrical Installation Regulations, 2009; Environmental Regulations for workplaces, 1987; Electrical Machinery Regulations, 1988.

²¹⁹ [2013] ZALAC 33; [2014] 3 BLLR 217 (LAC).

²²⁰ Para 52.

²²¹ (867/2011) [2016] ZANHC 82. See also *Langley Fox Building Partnership (Pty) Ltd v. De Valence* (647/88) ZASCA 128, the court held an employer liable for injury caused to a third party when she struck her head on a suspended wooden beam across a sidewalk.

²²² (2001) 22 *ILJ* 1063 (SCA).

²²³ (2013/13116) [2016] ZAGPPHC 1024 at para 22.

²²⁴ See also *Industrial Health Resource Group and ors v. Minister of Labour and ors* 2015 (4) All SA 78 (GP), where the court held that section 32 of the OHS Act extends to non-employees.

²²⁵ D Millard D and EG Bascerano, 'Employers' Statutory Vicarious Liability in Terms of the Protection of Personal Information Act' (2016) 19 PER / PELJ.

²²⁶ Act 61 of 1997. The working conditions and diseases caused by these conditions that are covered by the compensation fund are set out in schedule 3 to COIDA: s 65(1). However, claims can be made for other diseases or injuries if it is proved that they were caused by conditions at work.

²²⁷ COIDA, s 1.

²²⁸ *Sterris v Minister of Safety & Security & others* (2007) 28 ILJ 2522 (C).

²²⁹ Both elements must be present, as will be the case with platform workers found to be 'casual' employees: *Padayachee v Ideal Motor Transport* [1974] 2 All SA 590 (N).

²³⁰ COIDA, s 1.

²³¹ B21-2020, published in *Government Gazette* No. 43658 of 27 August 2020.

²³² COIDA Amendment Bill, s 1(g).

²³³ Case No 79180/15, 23 May 2019. The case arose from the death of a domestic worker who drowned in a swimming pool at her employer's residence, tragically demonstrating one of the many hazards that domestic workers are exposed to.

²³⁴ Section 1.

²³⁵ See, e.g., *Nel v Minister van Publieke Werke* 1962 (2) SA 147 (T); *Minister of Justice v Khoza* 1966 (1) SA 410 (A); *MEC Department of Health v EDN* [2014] 12 BLLR 1155 (SCA).

²³⁶ C190 of 2019.

²³⁷ Art 2.

²³⁸ Art 3.

²³⁹ See, e.g., *Edcon Ltd v Cantamessa and others* [2020] 2 BLLR 186 (LC), where an employee was fairly dismissed posting a comment on Facebook while on leave and from home criticising the government in racist terms. See also *Dolo v Commission for Conciliation, Mediation and Arbitration and Others* (2011) 32 ILJ 905 (LC), where the dismissal of a casino table supervisor for fraud committed outside her workplace was found to be fair in that her employer could no longer trust her to handle money.

²⁴⁰ [2011] 6 BLLR 577 (LC).

²⁴¹ At para 20. In *Hoechst (Pty) Ltd v Chemical Workers Industrial Union & Another* (1993) 14 ILJ 1449 (LAC) it was held that the inquiry is multi-faceted, covering the nature of the misconduct, the nature of the work performed by the employee, the employer's size, the impact of the misconduct on the work-force as a whole and various other factors.

²⁴² *Ibid.*

²⁴³ [2005] 7 BLLR 649 (SCA) at paras 65–76.

²⁴⁴ Section. 6(1). The exceptions are senior managers, sales staff and employees who work for less than 24 hours in a month.

²⁴⁵ Section 9.

²⁴⁶ Section 10.

²⁴⁷ Sections 11 and 12, BCEA. In the case of averaging of working hours, overtime may not exceed five hours per week on average.

²⁴⁸ Of at least one hour where a worker has worked continuously for more than five hours: s 14.

²⁴⁹ Section 15.

²⁵⁰ Constitution, s. 9.

²⁵¹ BCEA, ss 20 and 21.

²⁵² Sections 25 to 27.

²⁵³ See *Uber BV v Aslam and Others* [2018] EWCA Civ 2748, where the UK Court of Appeal ruled that Uber drivers were 'workers', not independent contractors, and therefore entitled to holiday pay.

²⁵⁴ Act 68 of 2008.

²⁵⁵ See paras 19-35 above.

²⁵⁶ Section 29(1).

²⁵⁷ Section 29(3).

²⁵⁸ Section 30. In the case of platform workers, equivalent publication could take place on the app.

²⁵⁹ Section 22, read with ss 49(3), 49(4) and 3(1)(b)(iv).

²⁶⁰ Examples of this in contracts between platform workers and platforms are clause 8 of Droppa-driver-contract; Disclaimer clause Nomad terms and Conditions; clause 6.1 Sweepstar Agreement; clauses 2.3 and 9.3 Uber B.V. Services Agreement.

²⁶¹ Clause 6.2 Sweepstar Agreement.

²⁶² Section 49(4), CPA.

²⁶³ Section 49(5), CPA.

²⁶⁴ 2013 (1) SA 219 (KZD).

²⁶⁵ National Credit Act 34 of 2005.

²⁶⁶ *Dlamini* at para 47.

²⁶⁷ (1011/2019) [2020] ZASCA 110 (29 September 2020).

²⁶⁸ At para 9.

²⁶⁹ See *Sasfin (Pty) Ltd v Beukes* [1989] 1 All SA 347 (A) where it was held that 'no court should therefore shrink from the duty of declaring a contract contrary to public policy when the occasion so demands'.

²⁷⁰ 2007 (5) SA 323 (CC).

²⁷¹ Para 28.

²⁷² Para 29.

²⁷³ Para 59.

²⁷⁴ Juliet B. Schor et al. 'Dependence and precarity in the platform economy' (2017) Unpublished paper. Boston College at

<https://www.bc.edu/content/dam/bc1/schools/mcas/sociology/pdf/connected/Dependence%20and%20Precarity%20Aug%202018.pdf> accessed 18 May 2020.

²⁷⁵ Uber B.V. Terms and Conditions (last modified 1 January 2020) art 7 at

<http://www.ubermds.com/legal.html>.

²⁷⁶ Section 34 of the Constitution grants everyone the right 'to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'.

²⁷⁷ 2020 SCC 16.

²⁷⁸ I.e., take-it-or-leave-it contracts, See Alan Bogg, 'Uber v Heller and the Prospects for a Transnational Judicial Dialogue on the Gig Economy – I', (OxHRH Blog, July 2020), <http://ohrh.law.ox.ac.uk/uber-v-heller-and-the-prospects-for-a-transnational-judicial-dialogue-on-the-gig-economy-i/> accessed 21 August 2020.

²⁷⁹ On the meaning of 'business', see *Doyle v Killeen and Others* [2014] ZANCT 43 [59].

²⁸⁰ Section 5 of the CPA states that the Act applies to every transaction except those exempted. No platform sectors have exempted from the CPA.

²⁸¹ See *Four Wheel Drive Accessory Distributors CC v Rattan NO* 2019 (3) SA 451 (SCA); [2018] ZASCA 124 para 33, where the Supreme Court of Appeal held that the provision of a courtesy car was not a transaction contemplated by the CPA since nothing of value was given or accepted in return.

²⁸² Section 48(2)(b).

²⁸³ T Nuade 'The consumer's right to fair, reasonable and just terms under the new Consumer Protection Act in comparative perspective' (2009) 126(3) South African Law Journal 505.

²⁸⁴ Section 51(1)(b).

²⁸⁵ Section 52(3).

²⁸⁶ 53/85) [1988] ZASCA 35; [1988] 2 All SA 393 (A) (30 March 1988). See also *Four Wheel Drive Accessory Distributors CC v Rattan NO* (1048/17) [2018] ZASCA 124.

²⁸⁷ Act 42 of 1965.

²⁸⁸ Section 3(2).

²⁸⁹ For examples of the application of s 3(2), see *Botswana Teachers' Union v. Indumiso Outsourcing (Pty) Ltd* [2015] ZAGPPHC 349 (20 May 2015); *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W); *Universiteit van Stellenbosch v JA Louw* 1983 (4) SA 321 (AD); *South African Forestry Co Ltd v York Timbers Ltd* 2003 (1) SA 331 (SCA).

²⁹⁰ 2016 (1) BCLR 1 (CC).

²⁹¹ Act 25 of 2002.

²⁹² Debbie Collier *et al Labour law in South Africa: Context and principles* (2018).

²⁹³ Sections 185, 186(2)

²⁹⁴ Schedule 8 to the LRA.

²⁹⁵ [2008] 6 BLLR 513 (SCA).

²⁹⁶ Para 5.

²⁹⁷ *Ibid.*

²⁹⁸ *South African National Defence Union v Minister of Defence and Another* 1999 (6) BCLR 615 (CC).

²⁹⁹ (2018) 39 *ILJ* 1937 (CC) at para 48.

³⁰⁰ LRA, s. 1(d)(iv).

³⁰¹ Sections 28 and 51, LRA.

³⁰² Sections 114, 115 and 156, LRA.

³⁰³ Section 157(1), LRA; *Chirwa v Transnet Limited and Others* 2008 (3) BCLR 251 (CC); *Fredericks and Others v MEC for Education and Training, Eastern Cape and Others* 2002 (2) BCLR 113 (CC);

³⁰⁴ Section 157(2), LRA.

³⁰⁵ See *Kleinhans v Parmalat SA (Pty) Ltd* [2002] 9 BLLR 879 (LC); *Astral Operations Ltd v. Parry* (2008) 29 *ILJ* 2668 (LAC); *Monare v South African Tourism and others* [2016] 2 BLLR 115 (LAC).

³⁰⁶ WECT 18234-18 (31 May 2018).

³⁰⁷ [2002] 9 BLLR 879 (LC).

³⁰⁸ At para 21, endorsing the ruling in *Serfontein v Balmoral Central Contracts SA (Pty) Ltd* (2000) 21 *ILJ* 1019 (CCMA).

³⁰⁹ [2018] 4 BLLR 399 (LC).

³¹⁰ 2020 SCC 16 at para 62.

³¹¹ Act 71 of 2008.

³¹² See paras 72-73 and 96 above.

³¹³ [2008] 2 All SA 373 (SCA) para 56.

³¹⁴ Section 9.

³¹⁵ Act 4 of 2000.

³¹⁶ See *Nongena v. M Ali NO and others* (JR231/109) [2010] ZALC 281 where the constitutionality of the exclusion of employment disputes from PEPUDA was upheld.

³¹⁷ (2009) 30 *ILJ* 868 (EqC).

³¹⁸ Section 26, BCEA. The meaning of 'hazards' and the employer's duties are set in detail in the Code of good practice on the protection of employees during pregnancy and after the birth of a child: GNR.1441 of 13 November 1998.

³¹⁹ PEPUDA, ss 7, 8 and 9.

³²⁰ Section 21(2)(i).

³²¹ In essence, employers with more than 50 employees and employers in the public sector: s 1, EEA.

³²² Section 15(2)(c), EEA.

³²³ Section 1, EEA

³²⁴ GNR.1345 of 2002; see in particular item 6.

³²⁵ Constitution, s 8.

³²⁶ *Governing Body of the Juma Masjid Primary School vs Essa N.O.* 2011 (8) BCLR 761 (CC), para 58.

³²⁷ Act 4 of 2013.

³²⁸ PPIA, s 3(4).

³²⁹ Section 2(a), PPIA, read with s 14 of the Constitution.

³³⁰ For example, ratings of workers by customers of the platform.

³³¹ PPIA, ss 4 and 5. Platforms do not fall under any of the exclusions from the Act: see ss 6 and 7.

³³² Constitution, s 18.

³³³ A unique case is that of France, where Law 2016–1088 gives platform workers the right to take collective action, have to form or join unions, or have their collective interests defended: Eurofound, *Employment and Working Conditions of Selected Types of Platform Work* (2018), <<https://www.eurofound.europa.eu/publications/report/2018/employment-and-working-conditions-of-selected-types-of-platform-work>> accessed 27 August 2020 at 53-54. See also, Michael Doherty and Valentina Franca, 'Solving the 'Gig-saw'? Collective Rights and Platform Work' (2019) 49 *ILJ* (UK) 363.

³³⁴ Constitution, s. 36. Relevant factors include (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose'.

³³⁵ 1999 (4) SA 469 (CC).

³³⁶ *Ibid.*, paras 20 to 30.

³³⁷ See also *Murray vs Minister of Defence* [2008] 6 BLLR 513 (SCA) in which a member of the defence force was accorded the rights of an employee in an unfair dismissal dispute.

³³⁸ (2018) 39 *ILJ* 1937 (CC) at para 48. See para 89 above.

³³⁹ Convention no 87 of 1948.

³⁴⁰ Art. 2.

³⁴¹ ILO *Giving Globalization a Human Face: General Survey on the Fundamental Conventions Concerning Rights at Work in Light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* (ILO 2012) 85.

³⁴² Act 205 of 1993. This is the implementing Act for the right of assembly and demonstration in s 17 of the Constitution.

³⁴³ See *ADT Security (Pty) Ltd v National Security & Unqualified Workers Union* [2014] 11 BLLR 1096 (LAC) in which it was held that a trade union engaged in industrial action cannot rely on the Regulation of Gatherings Act but must utilise the procedures created by the LRA.

³⁴⁴ See, e.g., H Johnston & C Land-Kazlauskas 'On Demand and Organized: Developing Collective Agency, Representation and Bargaining in the Gig Economy' paper presented to the 5th conference of the Regulating for Decent Work Network, ILO, 3-5 July 2017;

³⁴⁵ Jaumotte Florence & Carolina Osorio, *Inequality and labor market institutions* (2015) International Monetary Fund.

³⁴⁶ Section 1, Companies Act 71 of 2008.

³⁴⁷ Act 71 of 1997.

³⁴⁸ The Casual Workers Advice Office has been active especially in the organisation and representation of labour broker workers. Asiye eTafuleni has organised informal traders in Durban.

³⁴⁹ Mshiu Sam, 'The cooperatives enterprise as a practical option for the formalisation of informal economy' available at <http://www.businessenvironment.org/dyn/be/docs/200/2.2.2_Cooperative_Practical_Option_Informal_Econ.pdf> 4.

³⁵⁰ Act 14 of 2005.

³⁵¹ Cooperative Act, s. 1.

³⁵² *Ibid.*, s 2(b).

³⁵³ Ibid, s 1.

³⁵⁴ Schedule 1 to the Act, Part 2, item 6.

³⁵⁵ E.g., through a ‘secondary cooperative’ defined as ‘a co-operative formed by two or more primary co-operatives to provide sectoral services to its members’: s 1.

³⁵⁶ ‘Tertiary co-operative’ means ‘a sectoral or multi-sectoral co-operative whose members are secondary co-operatives and whose objectives are to advocate and engage organs of state, the private sector and stakeholders on behalf of its members, in line with its sectoral or geographical mandate’: s 1.

Credits

Fairwork draws on the expertise and experience of staff at the University of the Western Cape, the University of Oxford, the University of Cape Town, the University of Manchester, the International Institute of Information Technology Bangalore, and the Technical University of Berlin. Project staff work to translate our principles into measurable thresholds, conduct rigorous research to evaluate platforms against those thresholds, and publish our results in a transparent manner.

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