

Is the South African labour market ready to embrace the gig economy?

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The gig economy is the "new kid on the block". The concept "gig economy" is a labour market characterised by freelance and flexible work rather than the traditional nine-to-five working model. The gig economy derives its name from the *ad hoc* nature of the work performed and is by and large, a technologically driven market.

Contrary to traditional nine-to-five employees who receive a monthly salary, workers who participate in the gig economy are remunerated for each "gig" they perform, such as transport services (for example, Uber) or food delivery services (for example, Uber Eats).

This new phenomenon of the labour market is novel in that for the first time, workers are allowed to work from wherever they like, whenever they like and for whomever they like. Contrary to the nine-to-five *grind* that has rigid working hours, the timing of gigs is often more spontaneous and heavily dependent on mobile apps. Workers in the gig economy find jobs by registering on websites or mobile apps and sign up for the type of work that they are willing to do.

While on the one hand there is a positive debate that the gig economy empowers upcoming entrepreneurs, on the other hand there is an argument that this new phenomenon is purely another means of exploiting workers. In South Africa, only employees as defined in section 213 of the Labour Relations Act (LRA) as amended, are entitled to the protection under the LRA and the Basic Conditions of Employment Act (BCEA), as amended.

In July 2017, we pointed out in our *Employment Alert* that the CCMA issued a ruling in favour of the seven Uber drivers who had been "deactivated" from the Uber app. The Commissioner ruled that the drivers were employees as defined by section 213 of the LRA.

In reaching her conclusion, the Commissioner held that Uber drivers rendered personal services, drove in their own name and were not permitted to outsource driving to anyone else. She further held that the relationship between Uber and its drivers was indefinite, as long as the drivers complied with the necessary requirements.

The Commissioner's ruling was in line with developments in the UK, where the London Central

Employment Tribunal held in *Aslam and Others v Uber BV and Others* that Uber drivers were employees and not self-employed contractors and fell within the definition of "worker" under local UK legislation.

In January 2018, the Labour Court in *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* overturned the Commissioner's ruling. The Labour Court held that the referring parties failed to discharge the onus to establish that they were employees of Uber SA.

The CCMA Commissioner applied the "realities of the relationship test" to determine whether someone was an employee. This test, according to the Commissioner, requires that, "despite the form of the contract, a person deciding whether someone is an employee, or an independent contractor must consider the real relationship between the parties". The Labour Court held that this was inconsistent with prevailing authorities which support the "dominant impression test".

It is noteworthy to highlight that the Labour Court's decision did not turn on the assessment of whether Uber drivers were employees or independent contractors.

The Labour Court judgment only settles the issue that Uber drivers are not employees of Uber SA on the facts of that case. The question of whether Uber drivers are employees of Uber BV therefore still remains unanswered and Uber SA may be called to court again on a different set of termination facts to test whether it is the employer.

Whether or not South Africa is ready to fully embrace the freelance or "gig" economy is an interesting question. One of the difficulties with the gig economy in the present South Africa is that this labour market is heavily dependent on technology. In South Africa, internet connectivity is not readily accessible to everyone. Without the internet, freelancers will not be able to participate in the gig economy.

Whether we like it or not, the gig economy, similar to the idea of robots taking on human roles, is headed our way and seems likely to remain as such in the foreseeable future. The business environment can either accept and adapt to these fast-changing developments in the rapidly evolving labour market or cling onto the traditional nine-to-five working model.

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