THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Reportable

Case no: C 449/17

In the matter between:

UBER SOUTH AFRICA TECHNOLOGY

SERVICES (PTY)

LTD

Applicant

and

NATIONAL UNION OF PUBLIC SERVICE

AND ALLIED WORKERS

(NUPSAW)

First Respondent

SOUTH AFRICAN TRANSPORT AND

ALLIED WORKERS UNION

(SATAWU)

Second Respondent

TSHEPO

MOREKURE

Third

Respondent

DERICK

ONGANSIE

Fourt

h Respondent

LEE STETSON CARL DE

OLIVEIRA

Fifth Respondent

JOSEPH

MUNZVENGA

Sixth

Respondent

FELICIEN

NZISABIRA

Seventh Respondent

DEUCE

NDAYAJEHWHO

Eighth Respondent

GUYLANI

ALOMYI

Ninth Respondent

KHOTSO

MOREKURE

Tenth

Respondent

COMMISSION FOR CONCILIATION,

MEDIATION AND

ARBITRATION

Eleventh Respondent

WINNIE EVERETT

N.O

Twelfth Respondent

Date of application: 13 December 2017

Date of judgment: 12 January 2018

Summary: Review of jurisdictional ruling by CCMA commissioner that referring parties in unfair dismissal dispute were 'employees' for the purposes of s 213 of the Labour Relations Act. Ruling made against entity 'Uber SA' in circumstances where commissioner had earlier refused to join international company 'Uber BV' to the

proceedings. Commissioner nonetheless finding, on the basis of a 'realities of the relationship test' that referring parties were employees of Uber SA. Test inconsistent with prevailing authorities. No viva voce evidence led at hearing- by agreement, jurisdictional point decided on affidavit. On review, held that the referring parties had failed to discharge the onus to establish that they were employees of Uber SA. The commissioner, having refused to join Uber BV, proceeded to make a ruling on a basis that conflated Uber SA and Uber BV. The facts before the commissioner disclosed that Uber SA did no more than provide administrative and marketing support to Uber BV. The commissioner's decision was incorrect and is thus reviewable. Question whether the referring parties were employees of Uber BV left open.

JUDGMENT

VAN NIEKERK J

Introduction

[1] Uber BV, a company incorporated in the Netherlands, owns and operates a smart phone application (the Uber App), the tool through which it conducts business on six continents, in approximately 70 countries and almost 500 cities. The Uber App mediates demand between two user groups - the first being drivers and the second persons seeking transportation, referred to as 'riders'. On average, more than 5 million trips take place through the Uber App every day.

[2] The nature of the engagement of drivers who use the Uber App (and indeed the many others who provide services in what has been described as the 'gig economy'),[1] poses a challenge to traditional conceptions of employment world wide, and has tested the boundaries of the protection extended to working people by domestic labour legislation.[2]

[3] This is an application to review and set aside a ruling issued by the twelfth respondent

(the commissioner) on 7 July 2017, when she ruled that the third to ninth respondents (the drivers) were employees as defined in s 213 of the Labour Relations Act, 66 of 1995 (LRA), and that they were employed by the applicant (Uber SA). The effect of that preliminary ruling is that the eleventh respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA), has jurisdiction to arbitrate claims of unfair dismissal referred by the drivers after they were 'deactivated', or denied access to the Uber App. The facts that gave rise to the drivers' deactivation are not material for present purposes, nor is the question whether deactivation constitutes a 'dismissal' for the purposes of the LRA The sole issue that the commissioner was required to determine is whether the drivers were employees of Uber SA

[4] The CCMA and the commissioner do not oppose this application.

[5] The identity of the drivers' employer assumed some significance in the CCMA hearing. Two legally separate entities emerged as possible candidates during the course of referral and conciliation processes in the CCMA - Uber SA and Uber BV. Ultimately, after the commissioner dismissed an application by the drivers to join Uber BV, the only employer party to the arbitration proceedings was Uber SA

[6] The limited question that the commissioner had to answer therefore was whether the drivers were employees of Uber SA at the time that they were refused access to the Uber App or 'deactivated'. Given the nature of the test that applies in review proceedings where a jurisdictional ruling is in issue, this court must decide whether the commissioner's decision was correct.

Interlocutory issues

[7] There are two interlocutory issues to be considered. The first is an application to strike out paragraphs 20 and 21 of the drivers' answering affidavit and annexure OP3 to the affidavit. The annexure is a study compiled by graduate students at the University of Oxford. The nature of the document and the purpose for which it is sought to be admitted

as evidence is explained by the deponent in paragraphs 20 and 21:

> 20. I attach, marked "OP3", a comparative report on The Employment Status of Uber Drivers, prepared by scholars and researchers at Oxford University, for The Social Law Project of the University of the Western Cape. I am advised that the research was carried out in response to a request by our legal team, members of which met Prof Sandra Friedman at the 2017 SASLAW conference held at Sun City in September.
>
> 21. OP3 shows that the legal issues and relationships are by no means obvious, as the applicant seeks to suggest. Faced with the question of the employment status of Uber Drivers, courts and tribunals in most Jurisdictions courts (sic) examine the realities of the way in which the work is done; the manner in which Uber seeks to formally define or to portray their relationship with partners and drivers is of little significance. Uber, naturally, endeavours to avoid regulation by employment (and other) law, while those who drive for Uber seek protection under employment law.

[8] Writings by legal scholars may well be recognised as valid secondary sources of authority which may have persuasive effect[3] but they do not ordinarily constitute evidence. As Joffe J said in Swissborough Diamond Mines v Government of the RSA 1999 (2) SA 279 (TPD), in motion proceedings, an applicant must raise the issues by defining them, and set out the evidence on which it relies. The applicant must set out the facts simply, clearly, in chronological sequence and without argumentative matter. In particular, it is not open to the applicant (or a respondent for that matter) merely to annex documentation to its affidavit and request the court to have regard to it. What is required is that the portions of the documentation on which reliance is placed are identified, with an indication of the case which is sought to be made out (at 323-324).

[9] The drivers do not rely on annexure OP3 to advance any factually based contentions,

nor have they identified any of the portions of the memorandum on which they specifically rely or in respect of which they seek to make out their case. To the extent that the content of the annexure is proffered as evidence that the legal regulation of work in other jurisdictions is complex and that courts elsewhere concern themselves with the realities of the manner in which work is performed, the South African courts have acknowledged that the relationships through which work is performed or services rendered are complex, and have developed criteria to determine whether a person is an 'employee' for the purposes of the LRA. The test to be applied acknowledges the significance of the realities of the relationship as opposed to the terms of any formal agreement between the parties or any label that they seek to attach to it.[4] The memorandum attached as OP3 may well have some relevance for the purposes of argument, and indeed, may well constitute a valuable source of reference, as comparative legal studies often do. But it has no place in the pleadings and has served only to burden the already voluminous papers before the court.

[10] Paragraphs 20 and 21 of the answering affidavit and annexure OP3 to the answering affidavit accordingly stand to be struck out.

[11] The second interlocutory issue is relates to an application to join Uber BV as a party to these proceedings. The application does not advance any specific grounds on which joinder is sought, other than to assert that Uber SA has a substantial interest in the matter. As mentioned above, a similar application was brought in the course of the proceedings before her. The commissioner dismissed the application in the following terms:

4) This matter was previously set down for hearing on three occasions and each time a ruling was issued. At the last hearing on 15 March 2017, the respondents applied for joinder of the holding company Uber BV, based in the Netherlands, as second respondent in the unfair dismissal cases. I refused joinder on the basis of the Constitutional Court decision of NUMSA v Intervalve (Pty) Ltd and others [2015] 3 BLLR 205 (CC) in which it was held that employers not cited in the referral to conciliation cannot be joined in the

Labour Court proceedings and referral to conciliation of an unfair dismissal dispute is an absolute pre-condition for adjudication. Due to the decision in lntervalve and despite CCMA Rule 26, it was not possible to join Uber BV as a second alleged employer at this stage of the proceedings. I also took into account the jurisdictional challenges of a respondent based in the Netherlands.

[12] The reference to the lntervalve judgment is to the judgment of the majority of the Constitutional Court, who referred with approval to the judgment of the Labour Appeal Court in NUMSA v Driveline Technologies (Pty) Ltd and another 2000 (4) SA 645 (LAC). The Constitutional Court said the following:

The reasoning of the Driveline majority is, in my view, convincing. Section 191 (5) stipulates one of two preconditions before the dispute can be referred to the Labour Court for adjudication: there must be a certificate of non-resolution, or 30 days must have passed. If neither condition is fulfilled, the statute provides no avenue through which the employee may bring the dispute to the Labour Court for adjudication. As Zondo J shows in his judgment, with which I concur, this requirement has been deeply rooted in South African labour law history for nearly a century. We should not tamper with it now... Referral for conciliation is indispensable. It is a precondition to the Labour Court's jurisdiction over unfair dismissal disputes. NUMSA, therefore, had to refer the dispute between the employees and lntervalve and BHR for conciliation...[5]

[13] The court went on to find that the referral in that case 'did not embrace lntervalve and BHR' and that the alleged employers' exclusion from the conciliation process was accordingly fatal to the union's attempt to join them as parties to proceedings that the union had instituted in this court.

[14] In the present instance, the commissioner had before her a number of separate referrals, all consolidated in terms of rulings that she issued on 9 November 2016 and 23 December 2016 respectively, or by agreement. It is not disputed that when the referrals

were made to the CCMA, the employer party was cited as 'Uber'. That is not surprising, since that was no doubt how the drivers identified their employer. Uber BV assumed that the referral had been made as against it, since it regarded itself as the corporate entity against whom the drivers would have any claim, if they had a claim at all. What subsequently transpired is not entirely clear. What is apparent from the papers is that at some stage, the CCMA amended the citation to read 'Uber SA Technology (Pty) Ltd' as the employer, and all of the documentation that followed reflected this amendment.[6]

[15] Despite whatever initial confusion may have existed, it was ultimately accepted by all concerned (including the drivers, their union representatives and the commissioner) that the only alleged employer party to the dispute was Uber SA. That is no doubt why the first respondent (NUPSAW), when it later became involved in the dispute, sought in March 2017 to join Uber BV to the proceedings.

[16] The respondents' counsel acknowledged that in these proceedings, no cross review had been filed against the commissioner's refusa, to join Uber BV. I was advised during argument that a cross-review had apparently been filed on 3 November 2017, under a different case number. That does not assist the drivers at this late stage. The fact remains that the commissioner's ruling dismissing the application to join Uber BV remains in force until is reviewed and set aside.

[17] To the extent that the application to join Uber BV was motivated by the remedy sought by the drivers in these proceedings (that if the commissioner's ruling is reviewed and set aside the matter ought appropriately to be remitted to the CCMA with directives, to include the joinder of Uber BV), I deal with this below.

[18] The application to Jorn Uber BV to these proceedings accordingly stands to be dismissed.

<u>The evidence before the commissioner</u>

[19] Despite what appears to have been an intention to lead viva voce evidence, the parties to the proceedings under review agreed ultimately that the issue of the CCMA's jurisdiction should be decided on affidavit. The commissioner had before her the founding affidavit filed by Uber SA in the matter between it and the third respondent in these proceedings, Morekure, prior to the consolidation of the various disputes that had been referred to the CCMA. After consolidation, the answering affidavit was deposed to by Morekure, and relates specifically to his experience and that of the sixth respondent, Muzvenga. Morekure says very little about the other drivers, but records that the fourth to ninth respondents agreed that he should depose to the affidavit on behalf of all of the drivers. Uber SA filed a lengthy replying affidavit and with the benefit of heads of argument, these were the papers that served before the commissioner and the basis on which she made her ruling.

[20] In essence, Uber SA denied that there was any contractual relationship between it and the drivers, and averred that any relevant contractual relationship existed as between the drivers and Uber BV, which was not a party to the dispute. Uber SA further asserted that the drivers were in any event independent contractors and not employees vis-a-vis Uber BV.[7]

[21] Given that the existence of any employment relationship between the drivers and Uber BV was specifically not an issue that the commissioner was required to decide, no more need be said for present purposes about Uber SA's averments that relate to the employment status or otherwise of the drivers in relation to Uber BV and in particular, the contention that the drivers were independent contractors of Uber BV. However, certain of the contracts between Uber SA and Uber BV and between Uber BV and the drivers and their partners are relevant to a determination of the nature of the relationship between Uber SA and the drivers, and I shall refer to them as necessary.

[22] It is not in dispute (and the commissioner records as much) that the Uber business

model recognises three categories of relationship. The first is that of a partner driver. This refers to a vehicle-owning partner of Uber BV. A partner-driver is someone who owns one or more vehicles, which have been registered under his or her profile with Uber BV on the Uber App, and is also registered with Uber BV in his or her own right as a driver authorised to make use of the Uber App. A partner driver pays a fee to Uber BV for its services. Uber BV deducts that fee from the fare that it collects from the rider, and pays the balance to the partner.

[23] The second category is the driver only. This is a person who does not own a vehicle that is registered with Uber BV, but who drives on the Uber BV profile of one of Uber BV's partners, in agreement with that partner. The driver must register as a driver with Uber BV, and agree to be bound by its standard contracts. Once the relevant requirements have been met, the driver is registered and activated. The driver pays no fee to Uber BV, and receives no payment from Uber BV. The driver's remuneration is received from the partner concerned, in accordance with whatever terms the driver and partner may have agreed.

[24] The third category is that of partner only. This is a person who owns one or more vehicles registered with Uber BV on the Uber App but who does not drive a vehicle. Partners contract with drivers in the 'driver only' category on terms agreed between them.

[25] The parties are agreed that the present dispute concerns only partner-drivers and drivers.

[26] In the founding affidavit, Uber SA sets out in some detail the nature of the business of Uber BV. Uber BV does not own or operate any vehicles in South Africa; it is a technology company that connects independent transport operators with riders via the Uber App. Uber BV licenses the Uber App, which enables riders to request transportation services which are then accepted and provided by what are referred to as independent transport operators. Through the Uber App, drivers are able to provide transportation services in their capacity as independent transport operators, with the ability to establish, develop and

expand their own businesses in accordance with their needs, time schedules and individual business skills and plans.[8]

[27] The relationship between Uber BV and Uber SA is described in some detail, and in particular, the relevant contractual arrangements between them. The relationship between the two entities is governed by a written intercompany service agreement which records, amongst other things, that Uber BV and not Uber SA is the entity that provides lead generation services on an intermediary, fee paying basis to partners/drivers who provide on-demand transport services, whereby partners/drivers are able to receive and accept requests for transportation made by riders. Uber BV is the contracting party to all of the agreements relating to the provision of intermediary services and the use of the Uber App with the partners/drivers and the users within South Africa. In terms of the agreement, Uber SA provides specified support services to Uber BV, for which Uber SA is compensated. These support services are defined in the agreement but in effect, amount to marketing and support services to be provided by Uber SA for and on behalf of Uber BV. Uber SA is specifically not entitled to negotiate or enter into any agreements for and on behalf of Uber BV, and does not have the power authority to conclude any contracts with partners/drivers. It is not disputed that there is no contractual relationship of any nature between Uber SA one the one hand, and Uber BV's partners and/or drivers in South Africa on the other. Uber BV contracts directly with the partners/drivers and is the entity that decides to deactivate any driver from use of the Uber App.

[28] Uber SA provides a brief overview of what is described as the 'on-boarding' process. That process requires a driver to create a profile by registering a username and password on the uber.com website, which is hosted by Uber BV. In the course of setting up a profile, the driver must agree to a driver privacy statement and afterward receives an email from Uber BV requesting him or her to upload a valid South African driving licence and professional drivers permit on the website, under his driver profile. Once this

documentation has been verified, the driver receives an email informing of the next steps. All of these emails are generated by Uber BV. The driver then attends a driver competency test conducted by a third-party service provider, a requirement that was not in place at the time when Morekure completed his on-boarding process. Afterward, the driver attends a screening and background check, conducted by third party. In essence, this involves a prior criminal record check.

[29] The driver is then invited to attend an information session, a two-hour session that takes place at the offices of Uber SA in Green Point, Cape Town. During that session, drivers are provided with information on how to use the Uber App, including login requirements, navigation via Google maps, how to accept or cancel a request, and how to go online and off-line. In addition to this information, Uber BV provides suggestions and best practices on, amongst other things, how to maintain good ratings from riders. These are not mandatory, but rather are aimed at helping a driver improve his or her business. The driver's profile is then activated, pending approval of the applicable terms and conditions associated with use of the Uber App.

[30] A driver will not be 'activated' or permitted by Uber BV to make use of the Uber App unless he or she has agreed, during the on-boarding process, to be bound by Uber BV's standard terms and conditions contained, inter alia, in its services agreement and driver addendum. Again, because Uber BV was not a party to the proceedings under review and is not a party to these proceedings, it is not necessary to canvass the terms of these agreements in any detail. For present purposes, it is sufficient to record that the material terms of the agreement provide that the provision of transportation services by partners and/or drivers creates a legal and direct business relationship between the partner-drivers and drivers concerned and the rider; Uber BV is not a party to this relationship. The provision of the Uber App and the Uber services to the partner creates a legal business relationship between the partner and Uber BV. Uber BV does not control or direct the

drivers in their performances under the services agreement - the drivers retain the sole right to determine when and for how long they will use the Uber App. The parties to the agreement specifically agree that the relationship between them is solely that of a principal and independent contractor. They specifically agree that the services agreement is not an employment agreement, nor does it create an employment relationship between Uber BV and the driver, and that no joint venture, partnership, or agency relationship exists between Uber BV and any driver.

[31] The addendum to the agreement recalls specifically that the driver maintains a contractual employment relationship with an independent company in the business of providing transportation services (i.e. the partner) and that Uber BV does not direct or control the driver generally, the driver's performance of transportation services or the maintenance of any vehicles. The driver specifically acknowledges that Uber BV does not control, or purport to control when or for how long the driver will utilise the Uber App or Uber services, or the drivers decision, v1a the Uber App, to accept, decline or ignore a request for transportation services.

[32] Once a driver has been on-boarded, the driver is solely responsible for generating his or her own income and controls his or her own expenses. Uber BV does not guarantee drivers any minimum number of riders, and it has no control over whether riders utilise the services of drivers via the Uber App on any given day or at any given location. In short, drivers assume the economic risk of whether riders will log on and require transportation via the Uber App, in circumstances where the drivers retain the unfettered right to provide transportation services or obtain passenger generation leads through means other than the Uber App.

[33] The fee attributable to Uber BV is electronically calculated per trip, as a percentage of the fee charged by the partner to the rider. Once Uber BV's service fee has been deducted, the partner electronically receives the aggregate revenues earned over the course of the

week, via an electronic direct deposit into his or her bank account. Funds collected from a rider's credit card in South Africa are transferred into a South African bank account operated by Uber BV from which the balance of the fee owing to the partner is transferred directly to the partner's nominated bank account. None of this is disputed by the drivers.

[34] Uber SA submits that given the factual matrix described, there is no contractual relationship of any nature, much less a contract of employment, between Uber SA and the drivers, and that the parties to any contractual relationship relevant in the dispute are the drivers and Uber BV, which is not a party to the dispute. Further, Uber SA submits that the CCMA would in any event not have jurisdiction to entertain a dispute between Uber BV and the drivers, because the drivers are independent contractors to Uber BV and not its employees.

[35] More than half the answering affidavit comprises a series of what are referred to as 'background facts', the balance being an answer in more specific terms to the averments made in the founding affidavit. In broad terms, the drivers submit that in reality, Uber SA was their employer and the drivers its employees, and that Uber SA, acting as the local entity through which Uber BV does business in South Africa, interacts, manages and contracts with them, for example, by reactivating drivers after negotiation, authorising disbursements for cleaning, providing income guarantees, setting rules for airport queues, negotiating incentive bonuses and 'locking out' protesters.

[36] Despite the distinction drawn between Uber SA and Uber BV in the introduction to the answering affidavit, the drivers continue to refer to 'Uber'. The deponent Morekure describes how he came to relocate to Cape Town after approaching Uber's offices in Johannesburg and being informed that there were no positions available in Johannesburg but that he should apply in Cape Town. He states that he attended a presentation at Uber's headquarters in Green Point and that he was required to attend 'several training sessions'. At these training sessions, he was taught how to behave toward riders in order to promote

the Uber brand, and shown how to use the Uber App. He was also informed that this training was compulsory. He was screened and his vehicle was inspected. Morekure states that he was then registered online with Uber, when he was required to upload certain documents. After the screening and training, he was 'activated' as a driver, and issued with a username and password allowing him to log onto the Uber App.

[37] The drivers aver that Uber had many rules, some of which were explained during training and others communicated later, from time to time. They record that Uber 'controls when and where we work by limiting the maximum number of Uber drivers in a particular zone' and went on to give the example of the airport zone, where demand was high and where Uber in its sole discretion decided which drivers were permitted to queue there.

[38] In relation to performance management, the drivers aver that 'Uber monitors us closely' and subjects drivers to comprehensive performance management. This is accomplished through a rating of the drivers by riders and a requirement that drivers maintain a minimum rating.

[39] The drivers state that there is no provision for meal breaks, comfort breaks or any driver discretion to refuse to drive to an unsafe area. In particular, it is averred that Uber regards cancellation and acceptance rates as measures of performance and deactivates drivers who cancel or decline requests too often.

[40] The next heading in the general section under which the drivers make a case to the effect that drivers are employees of 'Uber' is that which denies that drivers are independent operators of their own businesses. The drivers record that when a rider requests a ride, Uber assigns a driver to the rider based on the proximity of the driver to the rider. In other words, drivers cannot independently source riders

- they have information only regarding the rider's name and requested pickup location. Further, drivers have no control over pricing - fares are unilaterally set by 'Uber' as is the portion of the ride is fair that it pays as 'commission'.

[41] The drivers acknowledge that while they are in theory free to work flexible hours, in practice, they are forced to work long hours in order to have the income that they need to meet their financial commitments. Morekure states that out of his earnings, he was required to pay for the car, insurance and maintenance, petrol, and air time necessary to use the Uber App. He earned on average R7000 per month after covering his expenses. Drivers who are insufficiently active on the Uber App are 'archived'.

[42] In regard to the source of control, the drivers submit that they are controlled and managed partly by the Uber App itself, and partly by 'Uber' management operating out of the Green Point office.

[43] In relation to the risk of loss and damage, the drivers aver that this is borne by Uber, and that Uber guarantees the fare to the driver and also reimburses the costs of cleaning and repair if a rider damages or dirties a vehicle.

[44] Under the heading 'Uber is my employer' the drivers state that they regard 'Uber' as their employer and that in their understanding, Uber BV is the founding parent company and that Uber SA 'is its local presence in South Africa'. This of course is not relevant in what is necessarily an objective enquiry, but In support of their contention, and central to their claim, they say the following:

All of us who drive for Uber in Cape Town were recruited and trained in Cape Town, and our work is performed in Cape Town. When we have problems or issues, we discuss them with Uber employees based at Uber's offices (now at the Airport, but formerly at Green Point, Cape Town). We correspond by email with Uber management in Cape Town, and emails sent to us come from various addresses belonging to Uber SA. There is also an international portal which sends automated emails (help@uber.com). We are paid in South African rands from a South African bank account, into our South African bank accounts. When we are dismissed, we are dismissed in Cape Town, and it is with Cape Town based Uber management that we can negotiate in the event that we want to be reactivated. As

drivers, we do not distinguish between Uber SA and Uber BV.

[45] In its replying affidavit, Uber SA denies that it employed Morekure as a driver or in any other capacity. Uber SA also denies that it ever had any contractual relationship with Morekure, that he ever rendered any services to it, received any remuneration payments from it, either directly or indirectly via the partner whose vehicle he drove during the period that Uber BV permitted him access to the Uber App.

[46] Uber SA contends that any contractual relationship relevant to the dispute was between the drivers and Uber BV, which, without creating any employment relationship, permitted them to make use of the Uber App to connect with and transport riders. Uber SA contends that at all relevant times, the drivers were (and remain) free to earn revenue from transport services using any other means available to them - the Uber App was only one tool available to them as drivers.

[47] Uber SA does not dispute that from time to time, it has limited interactions with Uber BV's partners and their drivers, either by email or by personal interaction at its Cape Town support office. Uber SA acknowledges that when drivers and/or partners are on-boarding onto Uber BV's system, Uber SA may assist them to do so, and that it also deals with routine administrative matters, for example, assisting partners will drivers to make changes to their profiles on Uber BV's system. Uber SA also deals on behalf of Uber BV with local administrative problems and sometimes takes up issues raised by specific partners or drivers. For example, Uber SA would assist a driver to process a cleaning claim, although the actual payment is made by Uber BV and recovered by Uber BV from the rider. Uber SA denies that these limited interactions in any manner, shape or form render Uber SA the drivers' employer.

[48] More specifically, Uber SA records that the presentation in Green Point referred to by the deponent was no more than a 'partner introduction' session, run on a weekly basis, for the benefit of prospective partners and drivers. This is not compulsory, and is for

information purposes only and in particular, intended to give prospective drivers and partners an overview of the Uber App and how to use it to connect with riders. Uber SA disputed that Morekure was required to attend 'several' training sessions and averred that the single, non-compulsory partner introduction session was all that was provided. Uber SA also acknowledged that in the past, its employees would inspect new vehicles registered by partners on the Uber App, but recorded that this function is now performed by a third party and is in any event limited to checking that the vehicle is the same vehicle registered by the partner on the Uber App.

[49] Central to the replying affidavit is the averment that drivers are entitled to move, and in fact frequently do move between partners, on terms and conditions negotiated with them and without reference to either Uber BV or Uber SA. Further, neither Uber BV nor Uber SA has any interest in or say over the arrangements made between vehicle-owning partners and drivers - this is strictly a matter to be regulated by agreement between them. Once agreement is reached between the driver and a new partner, the driver him or herself effects the change on the Uber App. Provided that the new partner is an existing partner of Uber BV, no further consent is required, either from Uber BV or Uber SA.

[50] The drivers' own histories are recorded to illustrate the point. For example, the fifth respondent, De Oliveira, was employed by four different vehicle owning partners in turn before eventually registering with Uber BV as a vehicle-owning partner in his own right. In this capacity, he employed his brother as a driver under his profile. The sixth respondent, Munzvenga, contracted with four different vehicle owning partners in turn before becoming a vehicle-owning partner himself. The fourth respondent, Ongansie, was at the time of his deactivation as a driver, regarded by Uber BV is a driver only, having transferred the vehicles previously registered under his own partner profile to his wife's partner profile. On his own version before the CCMA, he and his wife were operating a transport business together. In addition to the fares he generated from driving one of the vehicles, he and his

wife have three other vehicles registered with Uber BV and in this capacity, have contracted with multiple drivers to operate those vehicles. The third respondent, Morekure, was regarded by Uber BV as a driver only, but on his own version, appears to be in a de facto informal vehicle-owning partnership with his brother. The ninth respondent, Alomyi, contracted with five different vehicle-owning partners and after his deactivation by Uber BV, he registered as a vehicle-owning partner in his own right and currently employs a driver to operate under his profile. The seventh and eighth respondents, Ndayajehwo and Nzisabira respectively, contracted with four and three different vehicle-owning partners by whom they are remunerated in accordance with the terms agreed between them. None of these averments are disputed.

[51] Insofar as the drivers averred that it is impossible to use the Uber App and drive for Uber without having been through the on-boarding process and that a driver must accordingly perform his or her work personally, in reply, Uber SA contends that this formulation is misleading - if the driver is a partner he or she can get any other driver approved by Uber BV to drive his or her vehicle and use the Uber App whenever he or she so chooses. If the driver is not a partner, he or she is under no obligation to perform any services for Uber BV (or Uber SA for that matter) and may drive whenever and if ever he or she chooses. As noted above, the only limitation is that no driver may use the Uber App if he or she is not, or does not, remain registered with Uber BV as an approved driver. Uber SA submits that it is therefore incorrect to make the unqualified statement that every driver who makes use of the Uber App must perform his or her work personally.

[52] The assertion that Uber requires drivers to supply their own vehicles is denied in reply. Uber SA contends that many drivers who make use of the Uber App do not own their own vehicles. In so far as Morekure suggests that he entered into a lease with his brother in terms of which he would be the vehicle-owning partner of Uber BV, Uber SA records that the arrangement was not disclosed to Uber BV (or Uber SA) but that on face value, in

substance, Morekure was in the same position as a vehicle-owning partner, and used his brother's access to finance to accomplish this. As such, he had the ability (as did De Oliveira, Munzvenga and for a time, Ongansie) to employ one or more drivers to operate the vehicle registered under person's profile. Uber SA submits that this is entirely irreconcilable with his alleged status as an 'employee' of Uber SA.

[53] Uber SA specifically denies the averment that 'Uber' required Morekure to submit an application to the City of Cape Town for an operating licence. Uber SA avers that the city requires vehicle-owning partners who make use of the Uber App to hold an operating licence, as it does in respect of all passenger transportation service providers. In Morekure's case, the registered vehicle owner was his brother, Khotso, the 10th respondent. In the answering affidavit, Morekure states that he submitted a business plan to the city on behalf of his brother, the owner of the vehicle and the party who needed to licence the vehicle. Morekure's assertion that Uber required him to submit application forms together with a standardised Uber business plan to obtain an operating licence is therefore false.

[54] Insofar as payments are concerned, Uber SA notes that it is not in dispute that Uber SA does not remit any payments of any nature to any of the drivers and avers that in so far as Uber BV's involvement in remitting payments to partners is concerned, payment of fares is made to the partner concerned (and not to the driver), the payment arrangement between a partner and a driver being a matter for agreement between them. In terms of the relevant agreement applicable to all registered riders in South Africa, Uber BV deducts the fare amount from the rider's credit card and acting as a collection agent on behalf of the vehicle-owning partner, pays over the fare subject only to the deduction of the service fee which the partner pays to Uber BV in consideration for the technology and fare collection services which it provides.

[55] Uber SA asserts that the deactivation of all of the drivers was effected by Uber BV

and that no-one in Uber SA was party to this decision or had any knowledge of it prior to the deactivation being brought to its attention by the drivers. The documentary evidence attached to the replying affidavit makes clear that the email correspondence advising of deactivation is addressed to the driver concerned by Uber BV.

[56] In the light of the various agreements entered into between the drivers and Uber BV, the contractual arrangements as between Uber BV and Uber SA, and the facts disclosed in relation to the implementation of those agreements, Uber SA submits that the drivers are not employees of Uber SA.

The commissioner's ruling

[57] In her analysis of the evidence and argument in the proceedings under review, the commissioner refers to the definition of 'employee' in s 213 and the test used to determine the existence of an employment relationship. She records that the statutory Code of Good Practice: Who is an Employee? (the Code) establishes a 'new comprehensive test', this being what she describes as the 'reality of the relationship test'. The nature and extent of that test is apparent from the following extract from her award:

> 39) In so-doing, several tests have been developed to indicate the existence or not of an employment relationship. These include the control test, the organizational test, the economic dependence test and the dominant impression test. In my view, the tests used to distinguish between employees and independent contractors have become largely unhelpful, and in many instances key aspects of the tests point to employment, and others point to independent contracting.
>
> 40) No single test is decisive, nor even consistently preferred by our courts, although control or supervision have repeatedly emerged as the most helpful determinants. The Code of Good Practice: Who is an employee? endorses the dominant impression test. The Code identifies various factors to be taken into

account, and these factors are actually an embodiment of the various tests. Similarly, most of the factors in section 200A embody the same tests, and the presence of any one (along with earnings below the threshold) triggers the presumption of who is an employee in terms of the Labour Relations Act. [In this matter, the parties agreed that the presumption did not apply to each of the drivers and. as it is essentially a tool to determine onus rather than determinative of the relationship, the objection to the CCMA's jurisdiction was heard first, followed by the answering and replying heads of argument.] The drivers accordingly bear the onus of proving that they are employees for the purposes of the LRA.

41) Although not stated in so many words, the Code introduces a new comprehensive test, which includes as factors the past tests. This is the "reality of the relationship" test. This 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. Item 52 states: "Courts, tribunals and officials must determine whether a person is an employee or independent contractor based on the dominant impression gained from considering au relevant factors that emerge from an examination of the realities of the parties' relationship."

[58] The commissioner then proceeded to make a series of factual findings, by reference to the factors listed in the Code and in relation to 'Uber'. The commissioner found:

43) Drivers render **personal services**. They must be on-boarded personally with the necessary personal details, licenses and applications. They drive in their own name and may not out-source driving to someone else. The relationship between Uber and the driver would terminate on death of the driver.

44) The relationship is **indefinite** as long as the driver complies with requirements. For example, the driver is required to electronically sign new policies and contracts before she may drive. The relationship is not dependent on

achievement of a specific outcome.

45) Drivers are subject to the control of Uber. Drivers choose their hours of work and they may accept, decline or ignore a list request. However, Uber controls the manner in which they work by setting clear standards and performance requirements, (such as contained in the Deactivation policy. Uber has control in that it may suspend and deactivate access to the app, thereby depriving the driver of the opportunity to work and earn an income. Even though there is no direct or physical supervision, control is exercised through technology, to the point that even the movement of the cell phone can be detected, indicating reckless driving.

46) Uber argued that partners **control** their drivers. To some extent this is true because a driver cannot drive without a car and the partner has control of the car and the terms on which it is used for driving. But Uber retains control over the particular performance of each driver and it has the ultimate power to deactivate a driver, thereby depriving her of the opportunity to work and earn an income. The Code identifies at item 37 that: "A relevant factor would be the extent to which the employer exercises control over a decision to terminate the services of persons engaged by the sub-contractor."

47) If the driver does not meet the required standards, the driver is effectively dismissed. Uber also argued that each rider contracts with each driver for each trip. This is a fiction and is not a reflection of the real relationship between the parties. Riders choose Uber to provide them with a lift through one of its drivers. The rider has no interest in or say over which driver arrives. The driver has no say over the fare and is not aware of the destination until the rider is picked up. The driver has minimal knowledge of the rider's personal details and is prohibited from further contact in terms of the service agreement.

48) These factors indicate that the driver is by no means independent or

running her own transportation business. The driver is very much at the mercy of Uber, and **economically dependent** on the ability to drive for Uber, an infinitely more powerful juristic person than the individual drivers.

49) Uber drivers are the essential part of Uber's service. The app is a tool to request and provide lifts but it is the drivers who provide the riders with what they want. Riders want rides, not technology, and app merely provides an extremely convenient and accessible tool for riders to get a lift and for drivers to provide one. As such, drivers are an essential part of the organisation which is Uber. If a customer complains, the complaint goes to Uber.

[59] This analysis conflates Uber SA and Uber BV and creates a reference point described as 'Uber'. In the passages that follow, from which commissioner's reasoning is apparent, she discontinues her reference to 'Uber' and proceeds to make findings specifically in relation to Uber SA:

50) The real relationship between drivers in South Africa is that Uber SA is the employer. Uber SA appoints them and assists them to obtain the necessary licenses. Uber SA approves the vehicle they will drive. The relationship between drivers and Uber BV is distant and completely anonymized. Uber BV provides the legal contracts, the technology, the collection and payment of monies, but it is Uber SA, the subsidiary and local company, that appoints, approves and controls drivers, and Uber'. It is at this point that drivers engage and occasionally negotiate.

[59] Finally, the commissioner rejects Uber SA's submission that the drivers were employees of the partner whose vehicles they drove, or that they were independent contractors vis-a-vis the rider:

51) I reject Uber's argument that the partner is the driver's employer, or that the rider contracts the driver directly as an independent service provider. The partner or vehicle owner merely provides a vehicle for a driver to drive and takes a

fee in return. This is akin to a lease agreement, and examples of vehicles being leased

to potential drivers on Gumtree demonstrate that there is no employment relationship. Furthermore, the partner has no say over the driver's deactivation or other controls implemented by Uber.

[60] The commissioner's conclusions are recorded in the following terms:

(52) I am of the view that in applying the Code of Good Practice, in particular the realities of the relationship test, there is sufficient basis for finding that Uber drivers are employees of Uber SA. However, I accept that certain factors indicate that drivers are employees and others indicate that they are not and I accept that the identity of the employer is blurred. In the event that I have adopted what appears to be a broad or generous interpretation of section 213 of the LRA, I believe this is justified by the requirement to adopt an interpretation which is in compliance with the Constitution and which promotes social justice and effective dispute resolution...

59) My conclusion is that even though Uber BV provides the app and generates the contracts, Uber SA is, for all intents and purposes, Uber in South Africa. Uber SA directs operations in the country and the city in question. Insofar as Uber BV is the party that concludes contracts with drivers, it is anonymous and has no relevance for drivers.

<u>The legal principles applicable to the review of jurisdictional rulings</u>

[61] The legal principles to be applied in an application to review and set aside a jurisdictional ruling made by a commissioner are well-established. Section 158 (1) (g) of the LRA provides that subject to s 145, this court may review the performance of any function provided for in the LRA on any grounds that are permissible in law.

In a review of a jurisdictional ruling, the applicable thresho ld is not that of Reasonableness;[9] the review court must determine

whether or not the commissioner's decision is correct. In SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others (2008) 29 ILJ 2218 (LAC) the LAC said the following:

> [39] The issue that was before the commissioner was whether there had been a dismissal or not. It is an issue that goes to the jurisdiction of the CCMA. The significance of establishing whether there was a dismissal or not is to determine whether the CCMA had jurisdiction to entertain the dispute. It follows that if there was no dismissal, then, the CCMA had no jurisdiction to entertain the dispute in terms of s 191 of the Act.
>
> [40] The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court.

[62] More recently, in Phaka v Commissioner Bracks [2015] 5 BLLR 514 (LAC), the LAC confirmed that when the jurisdiction of an arbitrator is in question (the case concerned a bargaining council but the same holds for the CCMA), the issue is whether he or she objectively had jurisdiction in law and fact - a finding that the arbitrator had jurisdiction because he or she might reasonably have assumed as much 'is wholly untenable in principle'.[10]

[63] The parties do not dispute the application of the 'correctness' threshold. In other words, the question of the reasonableness of the commissioner's decision does not arise and in effect, the commissioner's decision is of no real consequence. The court must decide the jurisdictional issue de novo [11] on the basis of the record filed in the review proceedings.

Evaluation

[64] The only question to be determined on review is whether objectively, on a conspectus of all of the relevant facts, the CCMA had jurisdiction to entertain the unfair dismissal disputes referred by the drivers. The answer to that

question depends, as the commissioner correctly recognised at the outset of her ruling, on whether the drivers were 'employees' of Uber SA.

[65] I turn first to the legal principles that the commissioner was obliged to apply. As I have noted, the test is well-established, and in broad terms, the parties are not in dispute about the relevant principles. The starting point is s 213 of the LRA, which defines an employee in the following terms:

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

[66] Section 200 A of the LRA introduces a presumption in favour of persons who work for or render services to any other person, regardless of the forms of any contract between them, of the status of 'employee', provided that one or more listed factors are present. In her ruling, the commissioner recorded that S 200A does not apply in the present instance, and that part of her ruling is not in dispute in these proceedings.[12]

[67] Both subparagraphs (a) and (b) of the definition of 'employee' have been held to exclude independent contractors.[13] Subparagraph (a) of the definition has been held to apply to a person who works for another person in terms of a common law contract of employment. In other words, it is implicit that there must be a contract between the person claiming to be an 'employee' and the person alleged to be the 'employer' and secondly, the contract must be one of employment. Subparagraph (b) is more significant for present purposes, since the case made by the drivers (at least in

argument) is one that relies on that subparagraph.

[68] In Liberty Life Association of Africa Ltd v Niselow (1996) 17 ILJ 673 (LAC), Nugent J said the following of subparagraph (b):

> The latter part in particular may seem to extend the concept of employment far beyond what is commonly understood thereby. To adopt a literal interpretation though would clearly result in absurdity. I think that the history of legislation which has culminated in the present statute, and the subject-matter of the statute itself, lends support to a construction which confirms its operation to those who place their capacity to work at the disposal of others. which is the essence of employment. It is not necessary in this case to decide where the limits of the definition lie. It is sufficient to say that in my view the 'assistance' which is referred to in the definition contemplates that form of assistance which is rendered by an employee, though the person he assists may not necessarily be his employer. In my view it does not extend to assistance of the kind which is rendered by independent contractors. That seems now to be well accepted.[14]

[69] The interpretation of subparagraph (b) is also canvassed in the Code. The Code states that subparagraph (b) 'has the consequence that persons who are not engaged in terms of the contract of employment may nevertheless be statutory employees.'

[70] The LAC has held that it is a necessary precondition for a party to establish the existence of a contractual relationship between that party and any putative employer, whether or not the benefit of the presumption of employment under s 200A is claimed. In Universal Church of the Kingdom of God v Myeni [2015] 9 BLLR 918 (LAC), Ndlovu JA said the following:

> [49] In his pleadings, Mr Myeni relied especially on the section 200A presumption, which I have found did not apply in this case, by reason of the fact that there was neither an employment contract nor

a contractual working arrangement in place between Mr Myeni and the Church. Nonetheless, even if I were to consider the matter to the exclusion of section 200A, it does not appear to me that I would have reached a different conclusion. In other words, even during the "pre-section 200A" era, the existence of an employment contract or contractual working arrangement was, in my view, still prerequisite for the creation of an employment relationship. I am aware that this was a rather contentious, if not controversial issue, occasioned particularly by the wording in the second leg of the definition of an 'employee' in section 213, which includes "any oth.er person who in any manner assists in carrying on or conducting the business of an employer". [15]

[71] Ndlovu JA went on the say, at paragraph 51 of the judgment:

> Indeed, it appears to me that, by its very nature, an employment relationship presupposes a working arrangement of a contractual nature between two or more persons, in circumstances where the rights, duties and obligations inter partes are legally enforceable. Therefore, in the present instance, even if Mr Myeni had not relied on s 200A, I would still find that there was no legally enforceable agreement between him and the Church and that, for that reason, no employer and employee relationship existed between them. There was simply no contract that could be classified as an employment contract on the evidence.

[72] On this basis alone, given the concession by the drivers that there was no contractual arrangement between them and Uber SA, the commissioner ought to have upheld Uber SA's jurisdictional challenge. The commissioner was bound (as is this court) by judgments of the LAC. On the authority referred to above, the absence of any contractual arrangement between the drivers and Uber SA was fatal to the drivers' claim to be employees of Uber SA. The commissioner thus committed a material error of law, which in itself warrants the setting aside of her ruling.

[73] On the assumption that I am wrong in coming to that conclusion and that it remains open to the court to determine the existence of any employment relationship despite the absence of any contractual arrangement between the drivers and Uber SA, the courts have developed three major approaches over the years. These are the supervision and control test, the organisation or integration test (which is an enquiry into the extent to which a person claiming to be an employee has been integrated into the organisation in question) and the dominant impression test, which requires a finding to be made in accordance with the dominant impression of the relationship, taking into account all relevant factors.[16]

[74] The dominant impression test, first applied in 1979 by what was then the Appellate Division of the Supreme Court in Smit v Workman's Compensation Commissioner 1979 (1) SA 51 (A), has gained favour and has been consistently followed by the High Court, the industrial court, the Labour Court and the Labour Appeal Court. More recently, in State Information Technology Agency (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others (2008) 29 ILJ 2234 (LAC), the LAC took a different view and held that when a court determines the existence of an employment relationship, it must have regard to three primary criteria. These are an employer's right to supervision and control, whether the employee forms an integral part of the organisation with the employer and the extent to which the employee was economically dependent on the employer.[17] In its application of the this approach to the facts of the case, the LAC made reference to what it termed the 'reality' test, one which has regard to the substance of the relationship, rather than its form. The 'reality' test had been previously referred to by the LAC in Dene/ (Pty) Ltd v Gerber (2005) 26 ILJ 1256 (LAC), a case where a legal entity in the form of close corporation had been interposed between what was ultimately found to be an employer and an employee.

[75] Given the basis of the commissioner's ruling and her reliance on the 'reality test' that she discerns from the Code, it is important for present purposes to recognise that the root

of what is referred as the 'reality test' is no more than the assertion that where parties have concluded an agreement to structure the relationship between in a particular form, that does not preclude the court from enquiring into the substance of the arrangement and to determine that despite the terms of the contract, an employment relationship exists when one in fact exists. In other words, what the commissioner referred to as the 'reality test' is not a discrete test. It is no more than a measure to be applied to combat disguised employment relationships where contractual arrangements between the parties serve to conceal what is in truth an employment relationship, and thus deprive an employee of the statutory protection that is his or her due.[18]

[76] The Code, on which the commissioner places much store, does not override the legal principles referred to above nor, as I have said, does it serve as a self standing source of interpretation of the definition of 'employee.' Indeed, on the contrary, the Code acknowledges that the dominant impression test remains intact.[19] The factors that the Appellate Division considered relevant in that case and which are recorded in the Code as constituting the hallmark of a contract of employment are not definitive, but include the requirements that an employee must perform services personally, that the employer may choose when to make use of the services of an employee, that the employee be obliged to perform lawful commands and instructions of the employer, that the contract terminates on the death of the employee and that he contract also terminates on expiry of the period of service stipulated in the contract, as opposed to the completion of work or the production of a specified result.

[77] The test ultimately applied by the commissioner is not clear - despite her reference to a 'new comprehensive test', the approach she applies bears close resemblance to the dominant impression test. To the extent that the commissioner purported to adopt a 'generous interpretation of section 213' and thus depart from binding authority, she ought properly to have applied the interpretations of s 213 by which she was bound.

[78] What is apparent from all of the judgments of the LAC is that the test to determine the existence of an employment relationship ultimately remains a multi-factoral one. In terms of the prevailing law, the 'realities of the relationship' cannot be reduced to a single, substantive test - a conspectus of all of the relevant facts and circumstances is required, including an examination of the realities of the relationship where this is warranted, typically in circumstances where contractual arrangements are used to disguise those realities.

[79] The legal principles that ought to have been applied aside, in any event, it was not open to the commissioner, in her consideration of the facts before her, to disregard and the factual matrix in which the nature, extent and significance of the material distinction between Uber SA and Uber BV and their respective functions were expounded in vast and largely undisputed detail.

[80] Despite having dismissed an application to join Uber BV to the proceedings, the commissioner proceeded to make a jurisdictional finding oblivious to the material distinction drawn between Uber BV and Uber SA. Indeed, a reading of the ruling indicates clearly that the commissioner conflated the two - references in both her factual findings and conclusions are to 'Uber'. This, of course, is what the drivers had done in their answering affidavit - interchangeably referred to Uber SA and Uber BV as 'Uber'. The commissioner must have been acutely aware that Uber SA and Uber BV are distinct legal entities, and of the materiality of the distinction. She must also have been aware that what was in issue before was whether the drivers were employees of Uber SA. She ought accordingly to have approached the determination of the facts on this basis.

[81] In my view, for the reasons that follow, the facts that served before the commissioner do not sustain the conclusion that the drivers were employees of Uber SA.

[82] The drivers concede (as I have noted) that they have no contractual relationship in any form with Uber SA, and that there are no written agreements as between them and

Uber SA. It is not necessary therefore for me to consider the various written instruments that have are referred to in the papers; they concern Uber BV. It is also not necessary for me to consider whether those contracts reflect the reality of any relationship between Uber BV and the drivers - Uber BV was not a party to the proceedings under review and it is not a party to these proceedings. Nonetheless, the drivers submit that their relationship with Uber SA is one of employment. In particular, they contend that Uber SA holds itself out to be 'Uber' in South Africa and that the nature of the engagement between them and Uber SA amounts to an employment relationship for the purposes of South African law. In argument, the drivers point to some 12 factors or indicators which in their view, illustrate the manner in which work is controlled through the Uber App and which constitute activities of Uber SA, with the consequence that Uber SA is their employer.[20]

[83] First, the drivers contend that Uber SA recruits, select and screens drivers. The record of the proceedings under review suggests the contrary. The on-boarding process followed by drivers is described in detail and recorded above. It entails establishing an online profile on Uber BV's website, uploading various documents under a driver profile, attending a driving competency test conducted by a third party service provider, attending a two-hour information session at Uber SA's offices and electronically conclud1ng agreements with Uber BV. But for minor exceptions not relevant to the present proceedings, the drivers did not dispute to these facts in the answering affidavit and the commissioner was accordingly required to accept that Uber SA does not recruit, select or screen drivers.

[84] Secondly, the drivers contend that Uber SA will only on-board a driver who is authorised or licensed to use the Uber App through the licence agreement with Uber BV and that it necessarily follows both that drivers must perform the services personally, and that their continued access to the Uber App is a precondition for the continuation of work. This is broadly the conclusion to which the commissioner came at paragraph 43 of her

award. The undisputed evidence before the commissioner established that Uber SA does not on-board drivers. Rather, on boarding takes place consequent on direct electronic communication between a prospective driver and Uber BV. There is no evidence to support the conclusion that any personal services rendered by the drivers are rendered to Uber SA. To the extent that the drivers contend that Uber SA will only on-board a driver who concludes the relevant agreements with Uber BV, the undisputed evidence before the commissioner was that Uber SA does not on-board drivers. On the contrary, it was common cause that on-boarding takes place consequent on direct electronic communication between the prospective driver and Uber BV.

[85] The drivers contend that Uber SA actively assists drivers to obtain the necessary operating permits. At best for the drivers, this is misleading. The papers before the commissioner disclosed, as recorded above, that the City of Cape Town's requirement for a metered taxi operating licence relates only to vehicle-owning partners, and not to drivers. The documentary evidence before the commissioner supported this contention. While Uber SA acknowledged that it assisted the vehicle owning partners with the formulation and submission of business plans and other documentation relevant to the securing of the required licence, this has no application to drivers and is by no means an indication of any employment relationship between them and Uber SA.

[86] The drivers contend that Uber SA trains drivers in the use of the Uber App. This is presumably a reference to the information session conducted by Uber SA. It is clear from the papers that this session, which Uber SA does not dispute that it conducts, provides no more than a high-level overview of how to use the Uber App. In other words, this is one of the support functions provided by Uber SA to Uber BV - it is not in itself any indication of any employment relationship between Uber SA and the drivers. Again, this is not a version that the drivers specifically placed in dispute, and the commissioner was obliged to accept it.

[87] To the extent that the drivers' allege that Uber SA determines the remuneration of drivers through the setting of fares, the replying affidavit before the commissioner makes clear that it is Uber BV and not Uber SA that sets maximum fare rates. The same applies to the drivers' averments concerning price cuts and income guarantees where reference was made only to 'Uber'. The replying affidavit makes clear that all of these averments pertained to Uber BV. It remains undisputed that all matters regarding the collection and payment of fares pertained to the relationship between Uber BV and vehicle-owning partners.

[88] The drivers contend that Uber SA is the entity that pays the partner-drivers. The facts before the commissioner were that Uber BV provides a digital payment facilitation feature as part of the platform, that the technology provided by Uber BV calculates and collects fares from riders, computes and pays the amounts due to partners at regular intervals, after deducting the fees due to Uber BV. That was not in dispute.

[89] It is also common cause that Uber BV operates a local, non-resident bank account in South Africa, under the name 'Uber BV South Africa' and that funds collected from riders' credit cards in South Africa are transferred to that account. It was also not in dispute that the balance of the fare is transferred from Uber BV's account directly to the partner's nominated bank account, and that Uber SA does not make any payment of any nature from its bank account to any partner or driver. It was also not in dispute that whatever arrangements regarding payment were concluded between the partner and driver, this ts of no concern to either Uber SA or Uber BV. There is accordingly no basis for the contention that Uber SA is the entity that pays partner drivers.

[90] To the extent that the drivers contend that the automated aspects of the supervision and control exercised over the drivers as mediated through the Uber App are to be imputed to Uber SA and not what is referred to as the 'software developer, Uber BV' there is no factual basis of this contention. The role of Uber BV was recorded in detail in the

founding affidavit before the commissioner, and amplified in the replying affidavit. It is manifestly not a role that is limited to that of a software developer. In so far as operational functions are concerned, there is no factual basis to impute or ascribe any of Uber BV's functions to Uber SA. To the extent that the drivers contend that Uber SA controls drivers through what was referred to as the sub-Saharan deactivation policy, this too is irreconcilable with the undisputed facts that served before the commissioner. The drivers did not allege,

let alone establish in the answering affidavit filed by them that the deactivation policy emanated from Uber SA. In the founding affidavit, Uber SA had pertinently recorded that the driver deactivation policy was distributed by Uber BV and that the rating system and deactivation policy were devised and implemented by Uber BV. The respondents did not take issue with these averments and in reply, Uber SA confirmed that the policy was drawn up and implemented by Uber BV, not Uber SA. To the extent then that the drivers assert (and the commissioner found) that Uber SA retains control over the performance of each driver and retains ultimately the power to deactivate a driver, this is not a conclusion that can be sustained by reference to the papers.

[91] To the extent that the drivers contend that Uber SA offers improvement training to poorly performing drivers and that it disciplines and dismisses them, this is not borne out by the record. Again, the relevant documents, including the deactivation policy, are issued by Uber BV and not Uber SA. It was also established in the papers that served before the commissioner that while it is correct that historically, Uber SA was authorised by Uber BV to deal with rider complaints received against drivers in South Africa, since 2016 (well before the respective dates of deactivation of the drivers), Uber BV had established its own incident response team, based in Ireland, to deal with rider complaints from South Africa and any possible deactivation. It is clear that any decision to deactivate remains that of Uber BV, not Uber SA.

[92] The papers that served before the commissioner establish that it has throughout been common cause that Uber BV and not Uber SA operates the Uber App, that Uber BV and not Uber SA licences others (including partners, drivers and riders) to use this technology, that riders who have agreed to accept Uber BV's standard contractual terms for riders are connected by the Uber App to drivers who have accepted Uber BV's services agreement and have been authorised to have access to riders via the App. It was also not in dispute that drivers themselves may be partners who have one or more vehicles registered with Uber BV, alternatively they may be employees driving for and on behalf of a partner. It was also not seriously disputed that a driver-only pays no fee to Uber BV, that the fee is paid by the partner concerned and that a driver never receives any payments from Uber BV, or from Uber SA for that matter. The remuneration of a driver is derived exclusively from the partner concerned, in accordance with whatever terms the partner and driver may have agreed. There was evidence that most, if not all, drivers-only employed by partners, sometimes in terms of written employment contract. At least some of the drivers were or had been employed in terms of written agreements by the vehicle owning partners with whom they contracted. Examples of employment contracts entered into with partners were provided in respect of the fifth and sixth respondents, together with their payslips.

[93] It was also not in dispute that none of the drivers, whether partner-drivers or drivers-only, are ever under any obligation to Uber SA to use the Uber App, or ever under any obligation to drive an Uber BV registered vehicle. Further, it was not seriously disputed that Uber SA had any right to instruct or require either category of driver to drive at any particular time, or to dictate where they are to drive, or which passengers they are to transport.

[94] The objection to the drivers' (and the commissioner's) conflation of Uber SA and Uber BV is not merely technical. The consequence of the drivers' election in their answering affidavit not to distinguish between Uber SA and Uber BV was that there was no dispute of

fact before the commissioner regarding the delineation of function between Uber SA and Uber BV, as pleaded by Uber SA. It was not for the commissioner to disregard those facts.

[95] It is not enough to assert, as the drivers do, that 'Uber' is a valid designation for a well-known brand with a global presence, or that Uber SA holds itself out as Uber or that the same legal team represented, at various stages of the proceedings in the CCMA, both Uber SA and Uber BV. The fact remains that the drivers and their representatives at the time were fully aware as early as 9 September 2016, when Uber SA filed its application for a declaratory order to the effect that the CCMA lacked jurisdiction to entertain the unfair dismissal dispute, of the assertion that the parties to any contractual relationship that existed were the drivers and Uber BV, and that the drivers were independent contractors of Uber BV. This is the case that should have been met. Instead, the drivers filed an answering affidavit characterised by polemic rather than fact. If there was any doubt about the significance of the respective roles and functions of Uber BV and Uber SA, these ought to have been dispelled by the time the replying affidavit was filed. There was no challenge to Uber SA's averments of fact in that affidavit.

[96] There is no explanation in the papers before me as to why the drivers at that stage (or at least at the point when their application to join Uber BV was dismissed) did not withdraw their referral and seek to refer a fresh dispute against Uber BV and/or Uber SA, or any of the parties with whom they had concluded an employment contract.

[97] In summary, in relation to the facts that served before the commissioner, the commissioner erred by failing to distinguish between Uber SA and Uber BV as discrete legal entities. There was no dispute of fact before the commissioner regarding the delineation of functions as between Uber SA and Uber BV. Each of the building blocks of the drivers' case pertains to Uber BV and not Uber SA Given the nature of the enquiry before her, and in particular, the undisputed facts before disclosed on the affidavits, the

commissioner was obliged to consider the respective roles of Uber BV and Uber SA in relation to the drivers. She failed to embark on this enquiry and, as I have recorded, simply conflated the two entities. Had the commissioner maintained the critical distinction between Uber BV and Uber SA and considered (as she was obliged to do), only whether the drivers were employees of Uber SA, she would have come to the conclusion that on the drivers' own version, they had failed to discharge the onus they bore to establish the existence of an employment relationship with Uber SA

[98] Finally, it warrants mention (and emphasis) that this judgment does no more than conclude that on the facts, the drivers were not employees of Uber SA, and that they therefore have no right to refer an unfair dismissal dispute to the CCMA as against Uber SA Whether the drivers are employees of Uber BV (either alone or in a co-employment relationship with another or other parties), or whether they are independent contractors of Uber BV, is a matter that remains for decision on another day. It was not the question before the commissioner, and it is not the question before this court.

Remedy

[99] In review applications, should a commissioner's decision be reviewed and set aside, this court ordinarily exercises a discretion to either remit the matter to the CCMA for rehearing, or substitute the commissioner's finding. The source of this discretion is s 145 (4) of the LRA, which provides that this court may either 'determine the dispute in the manner it considers appropriate' or 'make any order it considers appropriate about the procedures to be followed to determine the dispute. Although this proviso relates specifically to reviews under s 145, the court has held that it is applicable to reviews such as the present, brought under s 158 (1) (g).[21] The court ordinarily takes into account whether the result is a foregone conclusion, whether any prejudice would be caused to the applicant by any further delay, whether the decision-maker has exhibited bias, and

whether the court is in as good a position to make the decision itself. In Palluci Home Depot (Pty) ltd Heskowitz and others [2015] 5 BLLR 484 (LAC) the LAC said the following, at paragraph 58:

> Where all the facts required to make a determination on the disputed issues before a reviewing court in an unfair dismissal or unfair labour practice dispute such that the court is in as good a position as the administrative tribunal to make the determination, see no reason why a reviewing court should not decide the matter itself. Such an approach is consistent with the paths of the Labour Court under s 158 of the LRA, which primarily directed at remedying a wrong, and providing effective and speedy resolution of disputes. The need for bringing a speedy finality to labour dispute is thus an important consideration in the determination, by a court of review, of whether to remit the matter to the CCMA for reconsideration, or substitute its own decision for that of the commissioner.[22]

[100] The drivers submit that if the commissioner's ruling is set aside, the matter should be remitted since a 'new decision' can only be taken in the light of full and certain facts, many of which emerged shortly before the hearing of the present application. In particular, the drivers refer to the substitution during the pre-arbitration processes in the CCMA of Uber BV for Uber SA, and uncertainty as to whether Uber BV is a party to the dispute at least in respect of some of the drivers. Further, the drivers submit that it would be in the interests of justice to do so, because Uber SA 'cited itself' as the respondent after Uber BV 'reconsidered its initial decision to offer itself as the alleged employer party', and that Uber BV and Uber SA failed to bring this material history to the attention of the commissioner. They also allege that Uber SA failed to place all relevant documentation before the commissioner and that there may have been abuse of separate juristic personalities. There is no merit in these submissions. The papers do not disclose any impropriety on the part of Uber SA, Uber BV or their representatives. There is no basis for the insinuation that Uber

SA and its representatives acted del1berately to obfuscate the issues (especially the identity of the employer) and conceal documents. The drivers find themselves in the position they do largely on account of the manner in which they and their representative at the time conducted the proceedings in the CCMA, prior to the appointment of their legal representatives. In any event, as I have noted above, for so long as the commissioner's ruling dismissing the application to join Uber BV to the arbitration proceedings stands, it is not open to the court to interfere, whether by issuing directives on Uber BV's joinder or otherwise.

[101] While it might appear to the drivers that this application ultimately turns on a technicality, it is a technicality which given the history of this dispute is of some significance and of which their representatives at the time were fully aware. The fact that those representatives (and I refer specifically to SATAWU) conducted the matter in the way they did has materially contributed to the present outcome.

[102] The court has before it all of the material to be in as good a position as another commissioner to make the correct determination. Little point would be served by remitting the dispute for reconsideration. Further, the interests of expeditious dispute resolution would be best served by an order of substitution.

Costs

[103] Finally, in relation to costs, this court has a broad discretion in terms of s 162 to make orders for costs according to the requirements of the law and fairness. In my view, both interests are best served by there being no order as to costs. This court has conventionally been reluctant to make orders for costs where genuinely aggrieved employees pursue legitimately felt grievances. There is no good reason to make an exception in this instance.

I make the following order:

1. The application to strike out paragraphs 20 and 21 of the answering affidavit and annexure OP3 thereto is granted.

2. The application to join Uber BV to the application is dismissed.

3. The in limine ruling made by the twelfth respondent on 7 July 2017 under case number WECT 12537-16 and including case numbers WECT 102875-16, WECT 14948-16, WECT 875- 17, WECT 1503-17, WECT 12614 - 16, is reviewed and set aside.

4. The twelfth respondent's ruling is substituted by the following:

'1. The respondent's objection to the jurisdiction of the CCMA is upheld.

2. The applicants' referrals are dismissed'.

Andre van Niekerk

Judge

REPRESENTATION

For the applicant: Adv. A Freund SC, with him Adv. G Leslie, instructed by Cliff Dekker Hofmeyr

For the respondents: Adv. S Harvey, instructed by Bradley Conradie Halton Cheadle

[1] So called on account of the model in which those providing services (in the present case, a car journey) receive payment for each 'gig' or job performed on a freelance or short-term basis, usually structured so as to exclude any employment relationship or at least, any notion of permanent employment.

[2] The court was referred to a host of rulings and judgments by arb itrators and courts in other jurisdictions. For interest,

see Viacab v Societe Uber International BV (Tribune de Commerce de Paris, 15eme Chambre, 30 January 2017, Alatraqchi v Uber technologies Inc (11-42020 CT, 2 August 2012, Mc Gillis v Rasier LLC (Dept. of Economic Opportunity, Florida, 3 December 2015, Mc Gillis v Dept. of Economic Opportunity (Third District Court of Appeal, 1 February 2017, YE v Uber Technologies Inc. (ADRS Case no. 15-6 878 MOM, 23 November 2016, Agblevon v Uber Technologies Inc (Georgia Dept. of Labor 11 September 2014, Mohammed v Uber Technologies Inc. (Illinois Dept. of Human Rights 29 November 2015, Lowman v Uber Technologies Inc. (Dept. of Labor and Industry Pennsylvania 12 February 2016, Uber BV & others v Aslam & others (unreported, Appeal No UKEAT/0056/17/DA, 10 November 2017). For reasons that will become apparent, it is not necessary for me to consider any of these authorities.

[3] See South African Maritime Safety Authority v Mc Kenzie 2010 (3) SA 601 (SCA).

[4] See paragraph [77] below.

[5] At paragraphs [32] and [40].

[6] This much is apparent, for example, from the consolidation ruling made by commissioner Isaacs on 18 August 2016, in respect of the dispute referred by the second respondent (SATAWU), acting on behalf of the third respondent, Morekure. She records that a conciliation hearing was held on 17 August 2016 at which the union and Uber SA were represented. All of

the interlocutory applications in the matters respectively referred by the drivers reflected Uber SA as the employer party. In particular, in an application before commissioner Carlton on 22 September 2016 to have the dispute referred to this court, the applicant was clearly cited as Uber SA and the ruling made on that basis.

[7] There are additional issues raised in the affidavit relating to the invalid set down of the arbitration hearing, the governing law of the contract and an ouster (arbitration) clause, none of which are materially relevant to the present proceedings.

[8] Given that Uber BV was not a party to the proceedings under review, it is not necessary to determine whether Uber BV is in the business of supplying transportation services, or whether it acts as the agent of the drivers, or whether it does no more than provide a technological platform for use by drivers and riders.

[9] Sidumo & another v Rustenburg Platinum Mines Ltd & others [2007] 12 BLLR 1097 (CC) and amongst others, Goldfields Mining SA (Pty) Ltd v CCMA & others {2014] 1 BLLR 20 (LAC)).

[10] At paragraph [29]. As the LAC observed, the standard of review enunciated in Sidumo and another v Rustenburg Platinum Mines Ltd and others 2008 (2) SA 24 (CC), that of the reasonable decision-maker, applies only to the review of determinations of the fairness of a dismissal or labour practice.

[11] See Myburgh and Bosch Reviews in the Labour Court at 114-115.

[12] In any event, the LAC has recently held that the presence of a contract between the alleged employee and employer is a sine qua non for the presumption in s 200A to apply. It is not in dispute in the present proceedings that there is no contract of any nature between the drivers and Uber SA. See Universal Church of the Kingdom of God v Myeni [2015] 9 BLLR 918 (LAC).

[13] See Liberty Life Association of Africa Ltd v Niselow (1996) 17 ILJ 673 (LAC), SA

Broadcasting Corporation v McKenzie (1999) 20 ILJ 585 (LAC)., Borcherds v CW Pearce & J Sheward t/a Lubrite Distributors (1993) 14 ILJ 1262 (LAC)

[14] At 683 A-B.

[15] At paragraph [49] of the judgment.

[16] See SA Broadcasting Corporation v McKenzie (1999) 20 ILJ 585 (LAC) at paragraph [8].

[17] At paragraph 12.

[18] See ILO Recommendation Employment Relationship Recommendation (No 198) 2006.

[19] See paragraph 35 of the Code.

[20] This is not the case made out in the answering affidavit filed by the drivers in the CCMA. As I have noted, their case then was simply to conflate Uber BV and Uber SA and contend that 'Uber' was their employer.

[21] See Myburgh and Bosch Reviews in the Labour Court (Lexis Nexis) 2016 at 451-2 and the authorities referred to in fn 157.

[22] See Myburgh and Bosch (supra) at 452.